

CHAPTER ONE

INTRODUCTION

A. Background

Indonesian Corruption Watch (ICW) revealed that throughout 2020, 444 corruption cases had been acted upon by law enforcement. ICW noted that hundreds of these cases had cost the state Rp. 18.6 trillion. Throughout 2020, there were also cases of bribes worth a total of Rp. 86.5 billion and levies of liars worth Rp. 5.2 billion. The corruption suspects had a significant impact and were self-defeating.¹

A judicial ruling may also use weak legal reasons, which is common in Indonesia. However, this could be due to judicial ineptitude rather than corruption. Even though they are frequently encountered together, they are not the same entity.²

The Judge's decision was considered controversial some time ago in the case of the acquittal of the convict Tomy Suharto in the case of swapping land owned by Bulog with PT. Goro Batara Sakti. The Supreme Court's Chief Justice, Taufiq S.H, decided that the convict was innocent and free. However, he was found guilty and condemned to 18 months in prison by the cassation court. Tomy admitted and asked for a pardon from president Abdurrahman Wahid but was refused. At that time, he was acquitted of charges at the last stage of the legal process in this country, where a review cannot be reviewed.

This case demonstrates that when we diminish the law understood by conservative schools, the rule of law opens the door to destroying society's sense of fairness. In this

¹ Athika Rahma, 2021, *ICW ungkap ada 444 kasus korupsi di 2020, kerugian negara Rp 18,6 T*, retrieved from <https://news.detik.com/berita/d-5682891/icw-ungkap-ada-444-kasus-korupsi-di-2020-kerugian-negara-rp-186-t>, (Accessed on June 8, 2022 at 17.30 P.M).

² Simon Butt and Tim Lindsey, 2021, *Judicial Mafia: The Courts and State Illegality in Indonesia*, Oxford University Press, p. 189-213

scenario, the law is merely one method of constructing the law, and judges must seek completeness when considering cases.³

Judges' lack of capacity and integrity in formulating decisions is the most significant cause of the increasing contentious Supreme Court decisions. In Indonesia, supreme court justices rely solely on the law. It must be supported by a judge's legal understanding and practical experience.

The integrity of judges is deteriorating, as indicated by the Judicial Commission's final report in 2016. According to the Judicial Commission report, there were 1,682 reports and 1,899 copies of public statements relating to code of ethics infractions committed by Indonesian judges in 2016. The amount of data is not much different from past years. As a result, there has been no dramatic improvement in the behavior of this country's law enforcers thus far.⁴

This survey is conducted annually at year's end. The study was done for the third time in 2018. The purpose of integrity measurement is to determine the impact of the Judicial Commission of the Republic of Indonesia's integrity improvement programs on judges.⁵

Judges should also be required to create laws (*rechtschepping*) through the creativity of judges through the intermediary of their decisions to form rules (judge-made law). Therefore, legislators are lawmakers with abstract objectives, and judges are lawmakers with concrete goals.⁶

³ Josef M Monteiro, "Putusan Hakim dalam Penegakan Hukum di Indonesia", *Jurnal Hukum Pro Justisia*, Vol. 25, no. 2 (2007), p. 130-139.

⁴ Siti Nurhalimah, "Integritas Hakim Indonesia", *Adalah*, Vol. 1, no. 2, (2018), p. 15–16.

⁵ H. Abid and Edi Rohaedi, "The Urgency of Judge Integrity in Implementation of Law Enforcement and Justice in Indonesia", *International Journal of Multicultural and Multireligious Understanding*, Vol. 7, no. 1, (2020), p. 379–384.

⁶ A Salman Maggalatung, "Hubungan antara Fakta, Norma, Moral, dan Doktrin Hukum dalam Pertimbangan Putusan Hakim", *Jurnal Cita Hukum*, Vol. 2, no. 2 (2014).

In India, Judges do not only focus on legal references. But Judges in India have the capacity, integrity, and openness to deal with lawsuits filed by the public. When a law is not appropriate in responding to an issue in society, in this case, the judge must be able to make the law itself.

According to Article 27 of Law Number 14 of 1970, "Judges are expected to study and obey legal ideals who live in society," Indonesian judges have the extensive latitude to establish laws if they cannot discover laws that apply to a matter in the written law.⁷

The Supreme Court of India took a crucial step toward women's emancipation in the Vishaka Case by releasing recommendations to address sexual harassment in the workplace. In the lack of domestic legislation, the Supreme Court drew on various international agreements and statutes, then tied them to domestic law, giving rise to an altogether new law. The Indian judiciary's attempts to protect women, in this case, are admirable. The Supreme Court's Vishaka Guidelines created a robust legal platform for all women to confront sexual harassment. The Vishaka case changed people's perceptions of sexual harassment claims which were previously dismissed as insignificant.

The Supreme Court of India highlighted the need for a statute to prevent sexual harassment and provide a safe working environment for women. Sections 354 and 354A of the Indian Penal Code 1860 were to be referred to in any case of sexual harassment. The Supreme Court recognized the significance of implementing adequate and effective legislation to prevent sexual harassment. As a result, even without legislation, everyone is responsible for safeguarding women's safety and dignity.⁸

⁷ Article 27 number 1 of Law no 14 of 1970 concerning Principal Provisions of Judicial Power

⁸ Lawsphere, 2021, *Vishaka & Ors. v State of Rajasthan & Ors Case Analysis* retrieved from <https://www.lawsphere.in/landmark-judgements/vishaka-ors-v-state-of-rajasthan-ors-case-analysis/>, (accessed on June 8, 2022 at 21.30. P.M).

One of the reasons Indian courts are so powerful is because of a particular component of the Court's original jurisdiction known as Public Interest Litigation (PIL). It is the 1970s judicially developed innovation. The Court re-formulated standing rules through PILs to allow any member of the public to seek relief from the Court on behalf of a person or people whose fundamental rights had been violated but who could not come before the Court for comfort due to poverty, helplessness, disability, or socially or economically disadvantaged position.⁹ The increase of PIL corresponds to the breadth and level of judicial activism demonstrated by the Indian Supreme Court and High Courts throughout the years.¹⁰

For example, if there are many offenders, the court may treat a particular case as a representative action and impose orders binding on the entire class. In one instance involving extensive contamination of the Ganga, the court issued newspaper notices drawing the litigation to the attention of all interested industries and municipal authorities and inviting them to appear. The final decision, which closed many factories and prohibited the release of untreated wastewater, was issued *ex parte* to several businesses.¹¹

The Supreme Court ruled in *S.P Gupta v. Union of India* that the concept of judicial independence is a significant concept that inspires the constitutional system and serves as the cornerstone for our democratic politics. The judiciary is tasked with keeping all state organs within the bounds of the law, thereby making the rule of law meaningful and effective.”¹² It demonstrates that India has a formidable court system. When a complaint is filed or a fundamental right is allegedly violated, a remedy may be sought from the High

⁹ Chandra, Hubbard and Kalantry, *Op. Cit.*, p. 152

¹⁰ Surya Deva, *Op. Cit.*, p. 13

¹¹ Jamie Cassels, “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?”, *The American Journal of Comparative Law*, Vol. 37, no. 3 (2013), p. 495.

¹² Lord Baron Woolf, 2015, “*Judicial Accountability & Judicial Independence : Touchstone of Indian Democracy*”, Oxford University Press, p. 151–182.

Court or the Supreme Court since direct constitutional protections ensure that aggrieved people or groups can assert their rights through the courts.

The concept of the rule of law is used in Indonesia. The image or idea of the rule of law is often designed to prevent the state or government from acting arbitrarily. After all, a government not governed by complex and definite legal tools is prone to deviation and abuse of authority.¹³

Judicial authority is an autonomous state's ability to administer justice to enforce law and justice based on Pancasila and the Republic of Indonesia's 1945 Constitution to implement the Republic of Indonesia's State of Law.¹⁴ A Supreme Court and judicial entities subordinate to it wield judicial power in the general court environment, religious court environment, military court environment, state administrative court environment, and Constitutional Court environment.¹⁵

Constitutionally, judicial power plays a vital function and is critical in preserving the rule of law and justice. The judiciary implements and supervises the implementation of legal rules in the form of state laws. Furthermore, every citizen hopes the court will provide legal certainty, truth, and justice and benefit from applying these legal norms to themselves.¹⁶

The continuity of judicial power is heavily reliant on executive and legislative authorities. According to Alexander Hamilton, the judicial department is the most innocuous

¹³ Dachran Busthami, "Kekuasaan Kehakiman dalam Perspektif Negara Hukum di Indonesia", *Masalah-Masalah Hukum*, Vol. 46, Issue 4, (2017) p. 336.

¹⁴ Article 1 Number 1 of Law Number 48 of 2009 concerning Judicial Power

¹⁵ Article 23 Number 2 of Law Number 48 of 2009 concerning Judicial Power

¹⁶ Andi Samsuduha, Ibrahim, "Perluasan Kewenangan Komisi Yudisial", *Legalitas: Jurnal Hukum*, Vol. 10, No. 2, (2018), p. 247–274.

and weakest of the three parts of government power. Judicial power is considered harmless because its capacity to carry out its functions is constrained.¹⁷

The loss of the judiciary's independence from the political influence of other branches of power can occur due to external and internal issues that must be examined. At the moment, the judiciary needs special attention. Specifically, judges' trustworthiness is essential because judges play a strategic role in producing justice for the community. As a result, each judge must have specialized knowledge to address all issues arising from legal advancements in Indonesia.¹⁸

Article 24B of the 1945 Constitution contains four paragraphs, namely:

- 1) The Judicial Commission is an independent body with the jurisdiction to suggest Supreme Court Justice appointments, and other powers to protect and uphold judges' honor, dignity, and behavior.
- 2) Members of the Judicial Commission must have legal knowledge and expertise, as well as unblemished integrity and personality.
- 3) The President appoints and dismisses members of the Judicial Commission with the agreement of the DPR, and
- 4) The composition, status, and membership of the Judicial Commission are further governed by legislation.¹⁹

A judicial recruitment process is necessary for producing judges of integrity and capability. According to Oddete Buittendam, good judges are created rather than born. This

¹⁷ Taufik Giri Ahmad, "Pembatasan dan Penguatan Kekuasaan Kehakiman Pemilihan Hakim Agung", *Jurnal Yudisial*, Vol. 7, no. 3, (2014), p. 295–310.

¹⁸ Dedi Alnando, "Politik Hukum Pengisian Jabatan Hakim Agung melalui Jalur Hakim Non Karier berdasarkan Undang-Undang Nomor 48 tahun 2009 tentang Kekuasaan Kehakiman", *Jurnal Ilmu Hukum*, Vol. 7, No. 1, (2018).

¹⁹ Article 24 letter B of 1945 Constitution

indicates that a good system can only make a good judge. As justification for historical records, it has been demonstrated that the judge recruitment mechanism in both the old and new orders was highly political. No surprise that the honorific position of the judge as guardian of justice is for sale and must yield to corrupt desires or dictators' desires.²⁰

The difficulty in finding candidates who meet the ideal criteria is motivated by several factors, including: first, the practice of judicial corruption, which is so acute in Indonesia, destroys the care process of judges. This causes the image of judges in the eyes of the public to tend to have a negative connotation. Second, the recruitment and education system of judges in the past. This factor is not only experienced by the judiciary, but the poor recruitment and education system has also plagued almost all sectors in the past government. As a result, the quality and competence possessed are not by the duties, functions, and professionalism.²¹

The Constitutional Court has nine constitutional justices nominated by the president, the People Representative Council (DPR), and the Supreme Court according to Article 24C (3) of the Indonesian Constitution (MA). The number of constitutional justices and the method of selection are the same as in South Korea. This concept creates an ideal check and balance mechanism among constitutional judges by having the executive, legislative, and judicial arms of government choose nine constitutional justices.²²

However, it is difficult in India to let the administration decide solely on the nomination of Judges, as this would result in the appointment being based on political

²⁰ Idul Rishan, "Redesain Sistem Pengangkatan dan Pemberhentian Hakim di Indonesia", *Jurnal Hukum IUS Quia Iustum*, Vol. 23, no. 2, (2016), p. 165–185.

²¹ Arfan Muhlizi, 2014, "The Supreme Court Judge Reposition as Pioneer of Judicial Reform", Jakarta, Majalah Hukum Nasional.

²² Pan Mohamad Faiz, "A Critical Analysis of Judicial Appointment Process and Tenure of Constitutional Justice in Indonesia", *Hasanuddin Law Review*, Vol. 2, Issue 2, (2016), p. 152.

prejudice. Thus, the executive should advise on such a matter after consulting with people who are well qualified. It also does not give the Chief Justice of India sole power to make decisions for his colleagues. Giving sole authority may result in decisions based on a single person's prejudices.

According to Articles 124 (2) and 217 (1) of the Indian Constitution, the President appoints the Chief Justice of India and other Supreme Court Judges after consultation with such of the Judges of the Supreme Court and High Courts in the States as the President may deem necessary for the purpose, and the Judges of the High Court, after consultation with the Chief Justice of India, the Governor of the State, and the Chief Justice of the High Court (except when the Chief Justice of the High Court himself is to be appointed). Furthermore, while appointing judges other than the Chief Justice of India, the President is always required to consult with the Chief Justice.²³

India's judiciary is among the most solid in the world. One of the reasons for this is that our constitution is constituted in a way that keeps checking and balances on each organ of government. The amendment bill 121st has respected this regard of checks and balances is one of the critical features of our constitution. Now that executive shall have its hand in appointing judges, a statement on the appointment of judges, which was a function of the judiciary, will be there.²⁴

The Indian Constitution, in its original text and as modified subsequently by various constitutional amendments, does not provide for a 'Collegium System.' The Collegium is

²³ Dr. Harunrashid, A. Kadri, "Judicial Appointments Mechanism in India and Independence of Judiciary-A Critical Analysis", *National Capital Law Journal*, Vol. 16, (2017).

²⁴ Deepika Kulhari, "Judging of the Judges", *India Journal of Law and Public Policy*, Vol. 1, (2014), p. 77–85.

the creation of the judiciary through various precedents by Constitutional Benches of the Supreme Court.

The decision of the Nine-Judge Constitutional Bench in the Second Judges Case gave the Supreme Court superiority over the Executive in judicial appointments. The decision of the Nine-Judge Constitutional Bench in the Third Judges Case outlined and created the Collegium System. Three constitutional prerequisites must be met to make a judicial appointment to the Supreme Court, they are:

1. First, the Supreme Court Collegium, led by the Chief Justice of India, must suggest candidates for elevation to the position of President of India. In practice, before recommending these names, the Supreme Court Collegium meets with the Collegiums of the High Courts, which are comprised of the three senior-most Judges. This Collegium of the Supreme Court of India will consist of the Chief Justice of India and four senior-most serving Supreme Court Justices. It must also include a successor if the President confirms their appointment and if the exiting CJI later requests a Collegium meeting before retiring.
2. Second, the President has to give their consent, sign, and issue a notification confirming the appointment of the candidates recommended by the Supreme Court Collegium.
3. Third, in exceptional cases, the President can return the recommendations for reconsideration by the Collegium stating compelling reasons for rejecting the recommended candidate. However, when there is a unanimous reiteration of the

recommended candidate's appointment by the CJI and the Collegium, the President shall be bound by the Collegium's decision and give effect to the recommendation²⁵

This problem has made many parties enact reforms to form a clean and independent judiciary. In this case, the author uses a comparative study with India on how to create an ideal recruitment system. The mechanism for recruiting judges is a new solution needed to develop new judges with the capacity and integrity to create an independent, clean, and vital judiciary institution in Indonesia.

B. Research Problems

Given the research context described above, the research posed two issues to be answered:

1. How is the selection mechanism for Supreme Court Justice in Indonesia and India?
2. What are the similarities and differences of the Supreme Court Justice Selection mechanism in Indonesia and India?
3. What are the problems with the selection mechanism of Supreme Court Justice in Indonesia and India?

C. Objectives of Research

The objectives of this research are:

1. To understand the current selection mechanism of Supreme Court Justice in Indonesia and India.
2. To analyze the similarities and differences in the Supreme Court Justice selection mechanism in Indonesia and India.

²⁵ Abhijeet Shrivastava, Anujay Shrivastava, "Judicial Appointments , Collegium System , and Unresolved Constitutional Enigmas in India : Proposing an ' Emergency Collegium ' and the ' Automatic Elevation Alternative", *Jus Copus Law Journal*, Vol. 1, no. 4, (2021), p. 290–304.

3. To evaluate the problems of the Supreme Court Justice selection mechanism in Indonesia and India.

D. Benefit of Research

1. Theoretical Aspect

The research is expected to give a contribution to the development of legal science in the Constitutional law area, particularly in comparing the selection mechanism of Supreme Court Justice between Indonesia and India, analyzing the similarities and differences in the selection mechanism of Supreme Court Justice in Indonesia and evaluating the problems of selection mechanism of Supreme Court Justice.

2. Practical Aspect

The research will propose recommendations to the relevant state organs related to the selection mechanism of Supreme Court Justices between Indonesia and India, i.e., the Judicial Commission (KY), The House of Representative (DPR), and the President. The research will provide recommendations to the relevant state organs related to the process selection mechanism of Supreme Court Justice between Indonesia and India.