

Justice Selection Process: Comparing The Experience in Indonesia and Japan

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Abstract

This article will attempt to explore about the practices of involving political body of the House of Representatives in the case of Indonesia, or in Japan, public involvement in monitoring justice(s) performances. After a short comparison on how the law regulates both procedures in Indonesia and Japan, an analysis on the effectiveness of both procedures will follow with a conclusion as the closing.

Keywords: supreme court, house of representative, Indonesia, Japan, judges.

1. Introduction

Indonesia and Japan have similarities in their judicial selection system. Unlike in the US, judges (or justices) in Japan and Indonesia went through their career as career judge and went through different judicial selection unlike in the US. Other similarities are, after the amendment of the constitution, both Japan and Indonesia Supreme Court went through significant changes. For Indonesia, after the constitution amendment in 2001, the justice selection process is involving the House of Representatives to have their final say. As for Japan, after being appointed as Supreme Court Justice, the people will evaluate the justice performance in the general election.

The initial intention involving both the people in the case of Japan, and the House of Representatives is to hold all the justices accountable by a check and balances system. The assumption is by having other branch of power to check the power vested in the judiciary; there will a balance. But after reflecting on how the practice being done for several years, could the assumption still hold?

This short writing will attempt to explore about the practices of involving political body of the House of Representatives in the case of Indonesia, or in Japan, public involvement in monitoring justice(s) performances. After a short comparison on how the law regulates both procedures in Indonesia and Japan, an analysis on the effectiveness of both procedures will follow with a conclusion as the closing.

2. Basis of Rules

According to the Indonesian constitution, the Judicial Commission should select the nomination for the future Supreme Court Justices.¹ After the Judicial Commission underwent their selection process, they gave their nomination to the Judiciary Committee within the House of Representatives for them to select.²

The authority for the Judicial Commission to select the Supreme Court Justices is regulated in Chapter III on article 13, which are; (1) proposing the appointment of Supreme Court Justices to the House of Representatives; (2) uphold the honor and dignity of judges and control their attitudes. The Judiciary Commission should undergo several steps before nominating Supreme Court Justices. *First*, the Supreme Court should send a formal notification to the Judiciary Commission about the vacancy in the Justices' position. *Second*, in no later than fifteen days, the Judicial Commission shall announce a plan to register new Supreme Court Justices. *Third*, The Supreme Court, the Government and the public are able to nominate their candidates to the Judiciary Commission. *Fourth*, the Judicial Commission should announce the candidates who passed the administrative process no later than 15 days after the closing date.³

After the administration steps are passed, the Judiciary Commission will have the candidates to write an academic paper with a given topic for ten days. Twenty-days after the submitting the academic paper, the Judiciary Commission have all the candidates undergo a selection process where they hold the session open to public.⁴ The Judicial Commission should select three nominees and send the list to the House of Representatives, where the Judiciary Commission⁵ in the House will decide any of the candidate they see fit and sending

1 Article 24A, Indonesia Constitution Third Amendment.

2 *Id.*

3 Article 17, Law no. 22 Year 2004 on The Judiciary Commission

4 Article 18, *Id.*

5 To avoid confusion, from here on I will use 'House' instead Judiciary Commission to avoid confusion with the Judicial Commission.

their decision to the President. The President will issue a decree on the name(s) selected by the House as Justices.

The selection process for the Supreme Court Justices is also regulated in the Revision of The Supreme Court Law No. 4/2009. The latter law distinguished the procedures in the Judicial Commission Law and the Supreme Court Law; which mention that the House will choose one out three candidates proposed by the Judicial Commission.

What about Japan? For Japan, it is the Cabinet (Diet) who appointed the Supreme Court Justices and the Emperor himself will appoint the Supreme Court Chief of Justices.⁶ The Justices appointed by the cabinet will be review by the people during the general election using the law related to national referendum. The practice itself is based that if there's vacancy in the Supreme Court bench, the Diet will consult the Chief of Justice and the Secretary General of the Supreme Court.⁷ This means that formally the appointment is being made by the Diet but based on the recommendation of the Supreme Court. Unlike in Indonesia, the Court Organizational Act is the only law that regulates how to conduct selection for Supreme Court Justices.

3. Political Institution Involvement in the Judiciary

During the selection process in nominee in Indonesia, the Judicial Commission has all the candidates went through a public interview. The media covers the interview and Indonesia's online media update anything they found interesting in their feed to the public. The Judicial Commission use the public interview to probe each of the candidate, from their submitted paper for the nomination and their knowledge in various area of law. During the interview, the public aware that there candidate who apparently seems to have limited knowledge on the anti-corruption law⁸, or another candidate broke down into tears while the Judicial Commission asked him to sign the pact of integrity.⁹

After the Judicial Commission shortlisted the nominees to be sent out to the House to be selected, the practice is the House also conducted another public interview, which casually being called as "fit and proper test" by the Indonesian press. Still fresh in the public's mind during one of the fit and proper test sessions that a candidate made an offensive remark about rape cases might involve consensual sex and House's member are laughing at the insensitive remark.¹⁰

6 Art.39 (1), Court Organizational Act No. 46/1947.

7 Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World, Kate Malleson, Peter H. Russel.

8 <http://news.detik.com/berita/1899566/duh-calon-hakim-agung-tidak-tahu-uu-korupsi> (Supreme Court Candidate Shed A Tear During Fit and Proper Test)

9 <http://news.detik.com/berita/2923352/calon-hakim-agung-sunarto-menangis-saat-tanda-tangani-pakta-integritas> (Supreme Court Candidate Caught Crying While Signing Integrity Pact)

10 <http://www.thejakartapost.com/news/2013/01/15/judicial-commission-slams-daming-s-rape-joke.html>

Usually during the fit and proper test by the House rumors of the “charge” for each vote for the House member to select a particular nominee began to circulate in public¹¹. For the 2010 election, six out of fourteen candidates receive votes from House member and the rest didn’t get any vote at all. Even one candidate, Salman Luthan, receive full vote from all House member.¹²

One House member admitted that for selecting Supreme Court justices, they receive directive from their party that they should cast their vote for a certain candidate. And by one candidate receiving full House’ vote it means that the party’s directive is the most significant in selecting Supreme Court Justice.¹³ Admittedly, another member from a different party do not share the same view and state that his party give freedom to their member to choose whoever they think fit to become Supreme Court Justice.

Political party has a lot of stake in Supreme Court Justices. A dispute between party members is common. Just this October, a dispute over the chairmanship of one of the largest party, Golkar and an Islamic party, the United Development Party (Partai Persatuan Pembangunan/PPP) have their disputes settled in the Supreme Court.¹⁴ And after the decision from the Constitutional Court to overturn the Law on Regional Election, it is the Supreme Court who has the mandate over regional election dispute which used to be under the Constitutional Court.¹⁵ It is clear that Indonesian political party has an interest of whoever will be the Supreme Court Justices. In facts one member of the ruling party now is a Justice in the Supreme Court.¹⁶

But the assumption is best to leave it as it is since what on display here is just the connection but not the causation about any wrongdoing when House members exercising their mandate to select the Supreme Court Justices. The main critique would be, is it necessary for the House to conduct another public interview or the fit and proper test for Supreme Court nominees? Perhaps the House member would argue that by doing the fit and proper test they merely attest the nominees’ knowledge on law, but the fact is the process already being done beforehand by the institution whose mandate is to select Supreme Court Justices. The mandate for the House is just to select one out of every three nominees proposed by the Judicial Commission, not by conducting another fit and proper test.¹⁷

The fact is, the Indonesian Supreme Court has a list of forward-looking positive steps. In less than five years, the Supreme Court has taken promising initiatives such as issuing

11 <https://sg.news.yahoo.com/indonesias-court-election-plagued-money-politics-055003470.html>

12 In the Indonesia House of Representative, for all matters related to the judiciary and Ministry of Law and Human Rights, a specific committee assigned by the House’ to discuss bills and selecting nominees for various law-related institutions such as the Corruption Eradication Commission, Supreme Court; which the press casually refer to as ‘House Law Committee’.

13 <http://www.hukumonline.com/berita/baca/lt4b7eb924a6d37/lobi-politik-dalam-pemilihan-hakim-agung-di-dpr> (Political Lobby on Justice Selection in The House of Representatives)

14 <http://www.thejakartapost.com/news/2015/10/21/golkar-ppp-saga-takes-another-twist.html>

15 <http://www.thejakartapost.com/news/2015/01/10/supreme-court-ready-handle-local-election-disputes.html>

16 <http://www.thejakartapost.com/news/2011/09/30/gayus-among-6-newly-elected-justices.html>

17 Indonesian civil society already file a judicial review for article 8 of the Supreme Court Law in 2013 but the Constitutional Court rejected the review.

policy on small claim court for the first time in Indonesia.¹⁸ Another initiative introduced in 2011 is the chamber system in Supreme Court, where Justices assigned to different chambers in order for them to have a legal uniformity for their decision.¹⁹ All the decision from the Indonesia Supreme Court now also could be accessed online by the public since 2010; a very positive development since the Indonesia Supreme Court is known to be very inefficient and lack transparency. But does all the reform process within the Supreme Court is the effect of the Justices being selected by the House of Representative? To be able to answer that question, a more thorough research, perhaps a longitudinal one is required since this short paper only highlights some of problem by the way the House of Representatives conducting their selection process in selecting Supreme Court Justices.

Unlike in Indonesia, the Justice selection process in Japan is different. If in selection in Indonesia is very much covered by the press from the administrative process up until the swearing in ceremony, in Japan the process goes behind back door. The judicial selection process in Japan is never a politicized one; despite the Diet has the opportunity to do so.²⁰ In fact, the Diet from year to year diligently follows the recommendations given by the Secretariat General of the Supreme Court.²¹

But does the mechanism system the Court Organizational Act intended to do, to have the people literally ousted out the justices they consider unfit for the position, serve its purpose? In practice, those who got elected as Supreme Court Justices are those who already in the “pinnacle of their career.”²² The practice is the selected Justices are being review by the people in the next general election where voters mark an ‘X’ in the photos of the Justices to voted them out from the office.²³ The fact is, up until now there never been any justices who got voted out by this system. It should be noted also that the elected justices face the ‘popular review’ as it is most widely known, after being in office for ten years and most justices has to resign by the age of 70.²⁴

As for the popular review system itself in Japan, since none justices ever being ousted from office by this, should we consider the system is not working? Considering the system is basing itself on the level of popularity of the justices, despite Japan judiciary system is a “nameless, faceless judiciary”²⁵, anyone should not wonder why the national referendum never ousted any of the Justices.

18 http://kepaniteraan.mahkamahagung.go.id/images/peraturan/perma/PERMA_02_2015_FIX4.pdf (Indonesia Supreme Court Internal Regulation no.2/2015)

19 Since Indonesia is civil code country, the stare decisis doctrine do not apply, instead “legal uniformity” principal is being adopted to “avoid multi interpretation of law in the Supreme Court Decision.” <https://www.mahkamahagung.go.id/rbnews.asp?bid=4156>

20 Daniel Foote, *Restrictions on Political Activities By Judges*, 286 Washington University Global Law Review, 2007.

21 *Id.*

22 Malleon, *Supra.*

23 *Id.*

24 Article 70, Court Organizational Law.

25 Foote *Supra.*296

4. Conclusion

Both Japan and Indonesia Supreme Court selection process are involving the political institution, which are the House of Representatives and Diet. With similar intention, the involvement of the House of Representatives while selecting the justices is considered too intrusive and time wasting since similar process already conducted by the Judicial Commission. The fact that the House of Representative is perceived by the public as one of the most corrupt institution in the country and the political party has interest in the justices selected could taint the integrity of the selection process itself.

The fact that the selection process in Japan is considered apolitical one is widely known to the public. But the effectiveness of having the national referendum to control the justices has never proven. Moreover, the stance of the judiciary system in Japan itself that shies away from public does not make it easier to make the public aware of the justices.

It is too early to take a conclusion about the effectiveness of both systems, the one in Indonesia prior the justices work on their benches while in Japan while they are still on their benches. What one could conclude after the brief comparison between the two systems is to measure the effectiveness of a justice selection, there are two sides of the coin, where participatory could be a good idea on papers but when it executed in real life, it could leads to meaningless task.