



The Authority of The DPR on The Appointment and Dismissal of Constitutional Judges

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ABSTRACT

Based on the 1945 Constitution, 3 institutions are authorized to appoint constitutional judges, including the Representative Council, Supreme Court, and the President. In the event that the dismissal of constitutional judges can be carried out if they have fulfilled the criteria contained in article 23 of Law No.7/2020. Paragraph (4) of the same article confirms that those with authority to dismiss a constitutional judge are the Chief Justices of the Constitutional Court and the President. However, in 2022 there is a polemic, namely the form of intervention against the dismissal of constitutional judges carried out by one of the legislative bodies, namely the Representative Council of Indonesia, which is a big question mark. What kind of authority does the Representative Council have as a legislature over the CC? Is this action justifiable and in accordance with applicable law? This legal research with a normative juridical approach examines secondary data in books, journals, and legislation as a reference. The result of this study indicates that the Representative Council's over CC as contained in the 1945 Constitutions is very limited in proposing 3 candidates for constitutional judges and has no authority at all to dismiss them.

1. Introduction

The Constitutional Court was born with an amendment to the 1945 Constitution by the People's Consultative Assembly in 2001. In the Third Amendment to the 1945 Constitution, Article 24 paragraph (2) states: "A Supreme Court and judicial bodies exercise judicial power under it within the general court environment. , religious court environment, military court environment, state administrative court environment, and by a Constitutional Court".

The Constitutional Court (MK) is an institution established and formed to assume the role of the guardian and protector of the Constitution³. The Constitutional Court, as a judicial power-executing institution, has the function of examining, adjudicating, and deciding cases under its authority based on Article 24C Paragraph (1) of the 1945 Constitution, namely examining laws against the Constitution, deciding disputes over the authority of state institutions whose authority is granted by the Constitution, deciding on the dissolution of political parties, deciding disputes over the results of general elections, and the obligations stated in Paragraph (2) The Constitutional Court is obliged to give a decision on the opinion of the DPR regarding violations by the President and/or Vice President. In terms of the number of constitutional judges, as stated in Article 24C paragraph (3), that is nine members of the constitutional judges.

A constitutional judge is one of the state officials elected to carry out the primary function of the Constitutional Court, namely ensuring legal products such as the Constitution or the 1945 Constitution as the supreme law of the land. In this case, filling the position of Constitutional Justice becomes very important because the position of a Constitutional Justice must be filled by a judge who is independent, professional, and has high integrity. Provisions regarding filling the position of Constitutional Justice in statutory regulations culminate in the 1945 Constitution as the Constitution of the Republic of Indonesia. The 1945 Constitution emphasizes that the positions of Constitutional Justices are filled by three state institutions, namely the President, the DPR, and the Supreme Court⁴. The filling process proposed by the three state institutions reflects the three centers of power according to the Trias politica theory: the legislature, executive, and judiciary⁵.

Unlike the appointment, the dismissal of a Constitutional Justice can only be stipulated by a Presidential Decree based on a request from the Chief Justice of the Constitutional Court. This provision is regulated in Article 23 of Law No. 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. Constitutional Justices can only be dismissed in three ways: honorable discharge,

³ Achmad Edi Subiyanto, 2019. *Hakim Konstitusi : Kekuasaan Kehakiman dan Pengisian Jabatan* , Depok : Rajawali Pers, hlm. 5

⁴ Ibid, hlm. 127

⁵ Fence Wantu and others, 'Proses Seleksi Hakim Konstitusi: Problematika Dan Model Ke Depan', *Jurnal Konstitusi*, 18.2 (2021), 241 <<https://doi.org/10.31078/jk1820>>.

dishonorable discharge, and temporary dismissal⁶. A Constitutional Justice is honorably dismissed if the judge concerned fulfills one of the conditions for honorable discharge, such as: dying, resigning of his own volition, being 70 years old, being physically or mentally ill continuously for 3 (three) months so that he is unable to carry out their duties. Dishonorably dismissed if the Constitutional Justice concerned is proven to have committed a crime, committed a disgraceful thing, violated an oath or promise, failed to attend five sessions in a row without a valid reason, or violated the code of ethics. Suspended temporarily if a Constitutional Justice is prosecuted in court to defend himself at trial and because of a detention order.

The dismissal of Judge Aswanto, which the DPR carried out at the end of 2022, triggered many problems regarding the legislature's authority over the MK. Does the power of the legislature have the authority to be able to dismiss a Constitutional Justice in the middle of his term of office, bearing in mind that Aswanto, who was dismissed at the will of the DPR through Presidential Decree Number 114/P of 2022 concerning Dismissal and Appointment of Constitutional Judges, does not fulfill one of the conditions for being dismissed in the middle of tenure. The DPR argued that, as stated by the Chairman of Commission III of the DPR, Bambang Wuryanto, Judge Aswanto often annulled laws made by the DPR so that Judge Aswanto was not committed to the DPR. Then this removal becomes a bad precedent because the removal is only carried out for political purposes.

Considering that it is crucial to know what the authority of the DPR as a legislative body has to do with the Constitutional Court and how the dismissal of Constitutional Judges should be carried out, the author decides it is necessary to compile a comprehensive study in the form of a research journal with the title "DPR Authority Against the Appointment and Dismissal of Constitutional Judges."

Based on the background mentioned, this study focuses on two things that are the subject of discussion: first, how is the authority of the DPR as a legislative institution against the Constitutional Court? And secondly, are the actions taken by the DPR in dismissing Constitutional Judges under the applicable regulations?

2. Method

This is legal research with normative juridical research methods sharpened by a comparative approach and supplemented by secondary data. Legal research aims to study certain legal phenomena and seek solutions to problems. In compiling scientific research, it is crucial to determine the type of method to be used so that research is carried out with definite steps.

⁶ Article 23 of Law No.7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court.

Therefore, the author uses a normative juridical approach research method. A normative juridical approach is an approach that examines library materials, examining theories, and concepts related to the issues discussed in this paper. Secondary data is obtained from official documents, books related to research objects, and research results in reports, theses, dissertations, and laws and regulations. Secondary data can be obtained from primary legal materials and secondary legal materials. Secondary data compiling this paper include books, journals, laws and regulations, and related publications. In terms of the type of analysis, it is a qualitative analysis that provides an explanation and description of a phenomenon which will later construct a theory related to the problems discussed in this paper.

3. The Authority of the DPR as a Legislative Institution Against the Constitutional Court

In the Big Indonesian Dictionary (KBBI), authority means legal power given to institutions in society that enable officials to carry out their functions⁷. In Indonesia, the legislature holds power and authority in all matters relating to legislation. The legislature is an institution that has the authority to make laws. Based on the 1945 Constitution, legislative power is vested in three institutions, namely the People's Consultative Assembly (MPR), the People's Consultative Council (DPR), and the Regional Consultative Council (DPD).

John Locke stated that the legislature is a representative body of the people with authority to formulate regulations made by the government as the highest form of sovereignty in the hands of the people⁸. That way, the legislature is an extension of the people and acts only in the interests of the people to achieve shared prosperity.

In the Indonesian constitutional system, which adheres to the principle of trias politica (executive, legislative and judicial), each institution has separate roles and functions but is interconnected. This is reflected in the limited authority of the legislature towards the Constitutional Court as a judicial institution. Miriam Budiardjo, in her book, states that the legislature has two functions⁹. The first function is to determine a policy and make laws so that the legislature is given the right of initiative, namely the right to make amendments to draft laws, especially in the field of budget, and the second function, control the executive body, that the legislature functions to keep the executive body under the policies that have been set.

The Constitutional Court handles all cases in maintaining state administration as a judicial power. The Constitutional Court was formed to ensure that the constitution,

⁷ Kamus Besar Bahasa Indonesia (KBBI), <https://kbbi.web.id/otoritas> (diakses tanggal 12 maret 2023)

⁸ Op Cit, hal. 136

⁹ Miriam Budiardjo. *Dasar-Dasar Ilmu Politik*, 2008, Edisi Revisi. Jakarta: Gramedia. hlm 322-323

as the highest law, can be adequately upheld. MK is commonly called the guardian of the constitution (protector of the constitution). According to Prof. Dr. Jimly Asshiddiqie, the Constitutional Court of the Republic of Indonesia is a new (high) state institution that is equal and has the same high position as the Supreme Court (MA)¹⁰.

The DPR's authority over the MK is regulated in the 1945 Constitution, namely in nominating prospective constitutional judges as stipulated in Article 24C paragraph (3) of the 1945 Constitution, which states that the DPR has the authority to nominate three prospective judges to the President to be then designated as Constitutional Judges. The process for filling out candidates for constitutional judges is regulated in Law no. 24 of 2003 concerning the Constitutional Court, amended by Law Number 7 of 2020.

Judging from the Constitutional Court Law, PMK, and the 1945 Constitution, there are no rules regarding the authority of other legislative bodies, such as the MPR and DPD, over the Constitutional Court, except for the DPR. Thus the form of independence of the Constitutional Court can be maintained because there are no rules governing the involvement of the legislature in all forms of constitutional judges' authority except only in the appointment of prospective judges, thus eliminating forms of intervention, especially those related to political interests by the legislature in the Constitutional Court as a place testing of legislative products, namely laws.

4. The DPR's Jurisdiction Regarding the Appointment and Dismissal of Constitutional Judges

As an organ of judicial power, the Constitutional Court, in its functions, is independent, structurally, and functionally. Independent here means that the Constitutional Court is independent of the influence of other branches of institutions, both government (executive) and people's representative institutions (legislative). The principles and principles of the independence of the judiciary are reaffirmed in Law no. 48 of 2009 concerning Judicial Power.

In carrying out their duties and functions, there are nine Constitutional Justices proposed and elected by three institutions, namely 3 (three) persons by the DPR, 3 (three) persons by the President, and 3 (three) persons by the Supreme Court. The authority of the DPR in filling the position of judge is under the mandate contained in the 1945 Constitution. Judges proposed by the three institutions above, which are representatives of the executive, legislative and judicial branches, are expected to create a balance of power between the branches of state power and, at the same time,

¹⁰ Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi* Jakarta: Konstitusi Press, hlm. 158

ensure the neutrality and impartiality of the Constitutional Court in relations between state institutions¹¹.

The mechanism for appointing Constitutional Justices is based on Law no. 24 of 2003 concerning the Constitutional Court as amended by Law no. 7 of 2020 concerning the Constitutional Court. Of the nine Constitutional Justices, there is one Chief Justice and Deputy Chief Justice. The appointment of Chief Justice and Deputy Chief Justice of the Constitutional Court has been regulated in Constitutional Court Regulation No. 3/PMK/2012 by forming a plenary meeting of judges to reach judge acclamation.

In the case of filling the position of a Constitutional Justice, which is one of the powers of the DPR, the dismissal of a constitutional judge is carried out based on the provisions of the law that regulates this matter. The dismissal of Constitutional Justices during their term of office is carried out if they are proven to have committed severe ethics or law violations, which could be the reason for their dismissal.

Discussing the dismissal of Constitutional Justices has been spelled out in Law Number 24 of 2003, as amended by Law Number 7 of 2020 concerning the Constitutional Court. The Constitutional Court Law classifies three forms of dismissal of constitutional judges with different conditions. The three forms of dismissal are dismissal with respect, dismissal without respect, and temporary dismissal.

This provision is regulated in Article 23 of Law No. 7 of 2020, which states that¹²;

1. Constitutional Justices are honorably dismissed on the grounds of:
 - a. die;
 - b. resign upon submission to the Constitution;
 - c. is 70 (seventy) years old;
 - d. deleted; or
 - e. being physically or mentally ill continuously for 3 (three) months so that they cannot carry out their duties as evidenced by a doctor's certificate.
2. Constitutional judges are dishonorably discharged if:
 - a. sentenced to imprisonment based on a court decision that has obtained permanent legal force because of committing a crime that is punishable by imprisonment;
 - b. commit a disgraceful act;
 - c. does not attend the trial, which is his duty and obligation for 5 (five) consecutive times without a valid reason;
 - d. violate the oath or promise of office;

¹¹ <http://www.jimlyschool.com/read/analisis/238/kedudukan-mahkamah-konstitusi-dalam-struktur-ketatanegaraan-indonesia>.

¹² Law No. 7 of 2020 concerning the Constitutional Court.

- e. intentionally hindering the Constitutional Court from rendering a decision within the time frame referred to in Article 7B paragraph (4) of the 1945 Constitution of the Republic of Indonesia;
- f. violates the prohibition of multiple positions as referred to in Article 17;
- g. no longer fulfills the requirements as a constitutional judge; and/or
- h. violating the Code of Ethics and Code of Conduct of Constitutional Judges.

Meanwhile, provisions regarding temporary dismissal are regulated in article 24 of Law No. 24 of 2003, which states that before being dishonorably dismissed, Constitutional Justices are temporarily dismissed by Presidential Decree at the request of the Chief Justice of the Constitutional Court. A new Constitutional Justice can be dismissed in the middle of his term of office if he commits the things contained in the provisions of the article above, also if he is proven to have committed a severe violation in the field of ethics or a violation of the law which could be the reason for his dismissal¹³. Paragraph 4 in the same article states, "A Presidential Decree shall stipulate the dismissal of a Constitutional Judge at the request of the Chief Justice of the Constitutional Court." This law explicitly gives the authority to dismiss Constitutional Justices only to the President based on a request from the Chief Justice of the Constitutional Court. The President's decision is stipulated within a maximum period of 14 (fourteen) working days from the date of receipt of the request for dismissal by the President from the Chief Justice of the Constitutional Court.

The events at the end of 2022, namely the actions of the DPR as a legislative body to dismiss a Constitutional Justice, have caused polemics. This is because no single regulation authorizes the dismissal of Constitutional Justices to the legislature. Referring to the DPR's oversight function, the DPR supervises the implementation of laws, the state budget, and government policies¹⁴. In other words, the supervisory function of the DPR is not to oversee the judiciary, which in this case is the Constitutional Court.

Supervision of Constitutional Justices is only carried out internally. This supervision is carried out by two institutions, namely the Ethics Council of Constitutional Justices and the Honorary Council of the Constitutional Court ("MKMK"). The Constitutional Court Ethics Council is an instrument established by the Constitutional Court to safeguard and uphold the honor, nobility, and Code of Ethics of Constitutional Judges about reports and information regarding alleged violations committed by the reported judge or suspected judge submitted by the public¹⁵. Meanwhile, the MKMK is an instrument established by the Constitutional Court to safeguard and uphold the honor, nobility,

¹³ Idul Rishan, 'Redesain Sistem Pengangkatan Dan Pemberhentian Hakim Di Indonesia', *Jurnal Hukum IUS QUIA IUSTUM*, 23.2 (2016), 165–85 <<https://doi.org/10.20885/iustum.vol23.iss2.art1>>.

¹⁴ Implementation of the Oversight Function of the DPR RI. Secretariat General of the People's Representative Council of the Republic of Indonesia. 2014. things: 1-2

¹⁵ Article 1 point 3 of the Constitutional Court Regulation Number 2 of 2014 concerning the Honorary Council of the Constitutional Court.

and Code of Ethics of Constitutional Judges about reports regarding alleged serious violations committed by the reported judge or suspected judge submitted by the Constitutional Court Ethics Council¹⁶.

According to MK Regulation 2/2014, the Ethics Council of Constitutional Justices consists of 3 people consisting of elements¹⁷:

- 1) Former Constitutional Justice;
- 2) Professor in the field of law; And
- 3) Community figure.

Meanwhile, the composition of the MK membership has undergone several changes under the amendments to the Constitutional Court Law, the last amendment consisting of the following¹⁸:

- 1) Constitutional judge;
- 2) Member of the KY; and
- 3) Academician with a background in law.

Judging from the description above, the authority to dismiss constitutional judges still belongs to the President with his decision. In a sense, the DPR and the Supreme Court as institutions proposing constitutional judges and the Ethics Council and MKMK as supervisory institutions are not involved in the process and mechanism for dismissing constitutional judges. Article 24C paragraph (6) and Article 25 of the 1945 Constitution provide open authority to the DPR as an institution that makes norms for drafting rules related to the Constitutional Court, both in appointing and dismissing Constitutional Justices and in proceedings before the Constitutional Court¹⁹. The decision of the DPR to dismiss Constitutional Judges violates the applicable regulations because there is no regulation of the DPR's authority in dismissing Constitutional Judges, and it is as if the DPR betrays the laws they regulate themselves, creating a bad precedent due to disharmony between *das sollen* and *das sein* an existing regulation.

Then that the absence of the DPR's authority over the dismissal of Constitutional Judges is also confirmed by the Constitutional Court Law, which states that only the Chief Justice of the Constitutional Court and the President have the right to remove or dismiss a Constitutional Justice, in the absence of a legal basis for the actions of the DPR which removed the term of office of Constitutional Justices, of course, this action

¹⁶ Article 1 point (2) PMK No 2/2014

¹⁷ Article 15 paragraph (1) PMK No 2/2014

¹⁸ Article 27A paragraph (2) Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court

¹⁹ Mochammad Arief Agus dan Muhammad Irfan A., "Studi Analisis : Tentang Intervensi Terhadap Legislatif Terhadap Mahkamah Konstitusi di Indonesia Dibandingkan Dengan Negara Berkembang"

is a form of intervention in the independence of the judicial domain of the Constitutional Court which contradicts and violates the rules that should be.

5. Conclusion

The Constitutional Court, as a judicial institution adjudicating all constitutional affairs, is independent and is not influenced by branches of other institutions such as the executive, legislative and judicial branches. In carrying out its duties and functions, the Constitutional Court has nine judges, two of whom are Chief Justices of the Constitutional Court and Deputy Chief Judges of the Constitutional Court. One of the legislative bodies, namely the DPR, has the authority to nominate three candidates for Constitutional Justices to have their appointments formalized by a presidential decree. This is based on the provisions in Article 24C of the 1945 Constitution. In practice, Constitutional Justices have an internal supervisory body. This supervision is carried out by two institutions, namely the Ethics Council of Constitutional Justices and the Honorary Council of the Constitutional Court ("MKMK"). However, this supervisory institution does not have the authority to dismiss a Constitutional Justice.

Regarding the party authorized to dismiss a Constitutional Justice stated in Article 1 paragraph 4 of Law no. 7 of 2020 concerning the Constitutional Court, "A Presidential Decree stipulates the dismissal of a Constitutional Judge at the request of the Chief Justice of the Constitutional Court." The provisions of this article limit the authority to dismiss a Constitutional Justice can only be carried out by a Presidential Decree based on a request from the Chief Justice of the Constitutional Court. Like the supervisory body for Constitutional Judges, the DPR, as the institution proposing three candidates for Constitutional Justices, also has no authority to dismiss a Constitutional Justice. The DPR's authority is limited only in terms of filing, not to dismissal. The actions of the DPR as a legislative institution that intervenes in the authority of the President and Chief Justice of the Constitutional Court are dictator's efforts which have sparked rejection by various experts and other institutions.

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