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DISMISSAL OF CONSTITUTION JUDGES IN TENURE: INTERVENTION EFFORT AGAINST JUDICIAL INSTITUTIONS

Sahida Ayu Fajjari¹, Mirza Nasution², Eka N A M Sihombing³

^{1,2,3} Program Studi Ilmu Hukum, Fakultas Hukum Universitas Sumatera Utara, Indonesia
sahida.ayu311@gmail.com

ABSTRACT

Proposing the position of Constitutional judge from 3 (three) branches of power to guarantee the independence of the Constitutional Court as a Defender of Constitution On September 29 2022, the DPR RI proposed dismissing MK judge Aswanto in the middle of his term of office on the grounds that he often disappointed the DPR. Aswanto, who was elected by the DPR, was the subject of dismissal which raised questions regarding the independence and impartiality of the Constitutional Court (MK). This article aims to discuss how proposals for the dismissal of Constitutional Judges should be carried out in accordance with the mandate of Law Number 7 of 2020, and to emphasize that the Constitutional Court has no obligation to be responsible for the proposing institution. As a result, there is no place for the removal process of judges while they are still in tenure due to political considerations in implementing judicial policies.

Keywords: Dismissal of Judges, Intervention, Judicial Institutions

ABSTRAK

Hakim konstitusi yang diusulkan oleh 3 lembaga yang bertujuan untuk terjaganya kebebasan Mahkamah Konstitusi sebagai pengawal Konstitusi Indonesia, namun pada 29 September 2022 DPR membahas untuk memberhentikan salah satu Hakim Konstitusi yakni Aswanto dengan alasan sering membatalkan produk hukum yang dibuat oleh DPR, sebagaimana Aswanto diusul oleh DPR maka DPR menganggap berhak untuk memberhentikanannya, akan tetapi hal ini justru menimbulkan persoalan atas kebebasan dari Hakim Konstitusi dan Mahkamah Konstitusi. Pembahasan pada tulisan ini adalah mengkaji pengusulan pemberhentian Hakim Konstitusi apakah sesuai dengan amanat UU Nomor 7 Tahun 2020, sekaligus menjelaskan bahwa MK tidak memiliki beban atas tanggungjawab dari lembaga yang mengusulkan hakim konstitusi. Maka dari itu hal ini pemberhentian Hakim pada saat menjalankan jabatannya saat berbau politis.

Kata Kunci : Pemberhentian Hakim, Intervensi, Lembaga Kehakiman

INTRODUCTION

The constitution as the basis of a state of law has a judicial power institution that plays a role in supporting its existence and implementation. The Constitutional Court as one of the branches of the judicial power in Indonesia whose existence was established after the 3rd Amendment to the 1945 Constitution which is expressly regulated in Article 24 paragraph 2, Article 24 C and Article 7 B which has judicial

power, then further regulations regarding the existence of the Constitutional Court are regulated in Law No. 24 of 2003 concerning the Constitutional Court.

The authority of the Constitutional Court is to test laws against the 1945 Constitution, adjudicate conflicts between state institutions, dissolve political parties, examine and decide on disputes over regional and general election results, and dismiss the President or Vice President who violates the Constitution.¹ As is known, the Constitutional Judge consists of 9 people whose origins are proposed by 3 institutions, namely the Supreme Court, the President and the DPR. Judges selected by these institutions are given a special mandate and act independently in their positions. The term of office of the Constitutional Judge, if we look at the Constitutional Court Decision Number 53/PUUXIV/2016, is 5 years and can serve again for 1 subsequent period. However, this provision is no longer valid.² Therefore, a Constitutional Judge can resign from the position he holds before the age of 70 or for a maximum of 15 years in accordance with existing provisions.

Constitutional Judges are proposed from 3 (three) types of power with the aim of ensuring independence. The existence of the Constitutional Court is often referred to as the guardian of the constitution or in English known as the guardian of constitution. If referring to the teachings of the French legal expert Montesquieu regarding the separation of powers, the institution conveyed by Montesquieu has separate powers, including the institutions or bodies that carry them out.³ The judicial power in Indonesia has been independent in the provisions of the 1945 Constitution which is the basis for an independent judicial system.

In its implementation, an independent judicial system is still a challenge and causes controversy. One of the events in 2022 that became controversial was regarding the legality of the dismissal of Aswanto as a Constitutional Court judge which was not in accordance with the mechanism as stipulated in Constitutional Court Regulation No. 4 of 2012 concerning Procedures for the Dismissal of Constitutional Court Judges. Aswanto's dismissal as a Constitutional Court judge was carried out in the middle of his term of office on the grounds of committing actions that disappointed the DPR. Judge Aswanto came from the DPR's choice where his dismissal raised questions regarding the MK's immunity. With the involvement of the DPR in the dismissal of the Constitutional Court judge, concerns will arise regarding the independence of the Constitutional Court. On the other hand, such intervention cannot be explained in detail.

¹M. Siahaan. Peran Mahkamah Konstitusi dalam Penegakan Hukum Konstitusi. Jurnal Hukum Ius Quia Iustum, No.3, Vol. 16, 2009, hlm. 357-378.

²Dedy Syahputra, Joelman Subaidi. Kedudukan Dari Mekanisme Pengisian Hakim Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Indonesia, Jurnal Ilmu Hukum Reusam, No.1, Volume IX, 2021.

³ Moh. Kusnardi dan Harmaily Ibrahim, *Pengantar Hukum Tata Negara Indonesia*, (Jakarta: Pusat studi Hukum Tata Negara Fakultas Hukum UI, 1983), hlm.141.

Judge Aswanto who experienced a recall is a phenomenon that challenges the principle of judicial independence where there is no provision for the removal of judges during the tenure period. Thus, it will be worrying that there will be a constitutional injury because the judiciary is essentially not biased towards anyone.⁴ Referring to the description that has been explained in this background, the author will discuss the implications of the dismissal of Constitutional Judges during tenure carried out by the DPR as well as the influence of the independence and impartiality of Constitutional Judges when carrying out their authority and functions as an institution that guards the Constitution.

RESEARCH METHODOLOGY

This study uses doctrinal research or commonly called normative research, and the approach used is the legislative approach. In accordance with the research used, the legal materials used in this study are materials derived from the literature. The nature of this research is prescriptive, namely to analyze, study, and assess whether it is optimal between legal rules and legal norms and government policies with legal norms in this case the provision of the position of Constitutional Judge carried out by the legislative institution.

RESULT AND DISCUSSION

Implications of the dismissal of Constitutional Judges during tenure carried out by the People's Representative Council

Judges can be dismissed from their positions due to several basic principles, including committing a crime, repeatedly neglecting their duties, being physically and/or mentally unfit to hold the position of judge or being called "A convicted individual clearly unsuitable for serving as a judge", which means a criminal is clearly unfit to hold the position of judge.⁵ and committing bad acts or acts that cause them to be considered unfit to serve as judges or in other words "an evident inability or misbehavior that undermines their capacity to perform their role".⁶

In connection with the incident of the dismissal of Judge Aswanto by the DPR, which was deemed not to fulfill basic principles in law, it has been shown that the Constitutional Court Judge proposed by the DPR will then be easily interfered with

⁴ Fitri Atur Arum dkk, *Analisis Kasus Pemberhentian Hakim Mahkamah Konstitusi Oleh Dewan Perwakilan Rakyat*, Humani (Hukum dan Masyarakat Madani), No.2, Vol.13, 2023.

⁵ International Commission of Jurist Contitution, *The International Bar Association's Minimum Standards of Judicial Independence*.

⁶ Elliot Bulmer, *Judicial Tenure, Removal, Immunity and Accountability*, Stockholm: International IDEA, 2014, hal. 6

by political interests and become a protector for the DPR when making regulations.⁷ So if this is continued, it can cause a regression to democracy and nomocracy. If the DPR's political policies are examined carefully, it will show an alleged causal relationship from a political interest between institutions, namely the legislative and judiciary. One example of a DPR legislative product that is currently controversial is the testing of the Job Creation Law against the 1945 Constitution, which the Constitutional Court ruled that the law was conditionally unconstitutional.

Legal experts see the DPR's actions towards the dismissal of Judge Aswanto as being motivated by a difference of opinion from the judges in the decision, resulting in problems within the Constitutional Judges that are not in line with the political interests of legislative members. According to Bivitri Susanti, the existence of arbitrary practices shows symptoms of Autocratic Legalism, which is a perspective that prioritizes everything that is based on state law or is called legalism, but this perspective also has an autocratic character.⁸ This is implemented in Pakistan where Supreme Court judges have been dismissed and even placed under house arrest because they refused to take the oath of office under the interim constitution currently issued by the President of Pakistan, General Pervez Musharraf.⁹

Behind the implementation of Autocratic Legalism, the concept is actually contradictory when applied to a state of law. A state of law upholds democratic justice by achieving something with the will of the people, not supporting a certain group of people. However, the dismissal of Constitutional Court judge Prof. Aswanto shows an attack on the independence of the judiciary. In addition, the DPR's steps against the Constitutional Court show an attitude of authoritarianism and legal defiance.¹⁰

Referring to the urgency of establishing a Constitutional Court in various countries which aims to maintain the principle of democracy in a state of law and prevent the entry of authoritarian principles. Based on the supremacy of the constitution, the Constitutional Court plays a role in preventing the state from acting unconstitutionally. The Constitutional Court is an independent judicial body and cannot be intervened by other institutions when carrying out its duties.

The concept of the division of power of Montesquieu's idea has the characteristics of checks and balances, which means the existence of state institutions that supervise each other between institutions based on the authority regulated in the 1945 Constitution. If referring to the Constitutional Court Law which explains

⁷ Veron Adhyaksa Walujan, Lendy Siar, Audy H. Pondaag, IMPLIKASI KONSTITUSIONAL PENGANTIAN HAKIM KONSTITUSI OLEH DEWAN PERWAKILAN RAKYAT REPUBLIK INDONESIA, *Lex Administratum*, Vo. 12 No.1, 2023.

⁸<https://www.hukumonline.com/berita/a/3-indikator-autocratic-legalism-dalamkebijakan-negara->, pada tanggal 15 Juni 2024

⁹ *Ibid*

¹⁰<https://www.hukumonline.com/berita/a/pemberhentian-hakim-konstitusi-aswanto-upaya-sistematis-mengendalikan-mahkamah-lt633bf7956c4ee/> diakses pada tanggal 19 Juni 2024

the very crucial content of the amendment to the 1945 Constitution is to give birth to the Constitutional Court. Namely "a state institution that functions to handle certain cases in the field of state administration, in order to maintain the constitution so that it is implemented responsibly according to the will of the people and the ideals of democracy.

The Constitutional Court also plays a role in maintaining stability between state institutions and is a correction to past experiences in state life which gave rise to multiple interpretations of the constitution".¹¹ As conveyed by Prof. Jimly Asshiddiqie, the existence of the Constitutional Court is designed to act as a guardian of the constitution in this case to uphold constitutional justice and provide support so that the constitution is respected and at the same time used as a guideline for society and all components of the state so that the constitution can live in the midst of national and social life.¹² Highlighting the dismissal of Judge Aswanto, Prof. Jimly Asshiddiqie advised the government to discuss the replacement of Judge Aswanto through an open forum between the DPR, the President, and the Chief Justice of the Constitutional Court. The response in the form of Presidential Decree No. 114/P/2-22 concerning the Dismissal and Appointment of Constitutional Court Judges indicates approval of the DPR's request to replace Judge Aswanto.

MK's steps in independence require the role of the Government to ensure that the actions taken by the MK are based on applicable legal provisions and the Constitution. Without any intervention from political elites or rulers.¹³ The replacement of constitutional judges is carried out according to the mechanisms regulated in the constitution and related regulations, as well as in the procedures and processes starting from nomination, election, and submission to the relevant institution. In the entire series of processes, it is mandatory to uphold the existing principles, namely: open, accountable, transparent and objective. Judges who have been determined in the Presidential Decree must be determined immediately no later than 7 days after the submission is received. Therefore, in the determination of the Judge, he can serve until he is 70 years old and the term of office that can be occupied is a maximum of 15 years.

The provisions regarding "the dismissal of Constitutional Judges have been regulated in Article 23 of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, consisting of two types of dismissal, namely honorable dismissal and dishonorable dismissal." Honorable dismissal when a Constitutional Court judge, among others: has died,

¹¹ Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi

¹²AD. Basniwati, Kedudukan Dan Wewenang Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Republik Indonesia, Jurnal IUS Vol. II No. 5, 2014, hlm. 252-264

¹³ Farabi, Muhammad Fawwaz Farhan. "Polemik Legalitas Pemecatan Hakim Konstitusi oleh Lembaga Pengusul: Tinjauan Kasus Pemecatan Hakim Aswanto dan Implikasinya Terhadap Kemandirian Kekuasaan Kehakiman." Jurnal Hukum dan HAM Wara Sains 2, no. 04 (2023): 294-303

resigned or is 70 years old. Meanwhile, dishonorable dismissal of a Constitutional Judge is carried out on the condition that the following acts have been committed: committing a disgraceful act, violating the oath of office, or violating the code of ethics of constitutional judges". Whatever the reason, in dismissing a constitutional judge, it must be based on the Presidential Decree concerning the dismissal of constitutional judges and this is input from the Chief Justice of the Constitutional Court.

Independence and impartiality of Constitutional Judges as an institution that guards the Constitution

Independence of the Judicial Institution or called collective independence of judges which means the independence of the judiciary as an institution. This is based on our ideology, namely Pancasila and our Constitution, namely the 1945 Constitution, which is regulated in Article 24 paragraph (2) of the 3rd amendment to the 1945 Constitution, while the authority to exercise judicial power is held by the MA and MK. In exercising its authority, the Constitutional Court has a code with the aim of maintaining and upholding justice.

The code of ethics of the Constitutional Court Judges has integrity and professionalism in carrying out judicial power. The ethics of a constitutional judge refers to the Code of Ethics in the behavior of Constitutional Judges referring to the principles of judge ethics 2002 and values that have developed in society. The ethics of constitutional judges were announced and determined with the title "Sapta Karsa Utama on October 17, 2005. The code of ethics was perfected in the Constitutional Court Regulation Number 09/PMK/2006 concerning the Enforcement of the Declaration of the Code of Ethics and Behavior of Constitutional Judges".

Improvement of the code of ethics in the regulations to provide legal protection, so as not to violate other provisions or regulations. So that the existence of a code of ethics, either in general or based on values that develop in society, has a direction to see whether an act is in accordance with good or not among community groups. Therefore, as an effort to supervise Constitutional Judges, an internal body was formed called the Constitutional Judge Ethics Council which was formed through the Constitutional Court Regulation in 2013 which later changed to PMK No. 2 of 2014 concerning the Honorary Council of the Constitutional Court, the existence of this internal organ is permanent and has the task of maintaining the honor and dignity of Constitutional judges.

The code of ethics regulations, both in general and the values and norms of society, have the purpose of assessing good and bad behavior among fellow members of a group. Therefore, in order to supervise Constitutional Judges, the Constitutional Judges Ethics Council (DE-HK) was formed based on "PMK Number 2 of 2013 which has been amended by Constitutional Court Regulation Number 2 of 2014 concerning the Constitutional Court Honorary Council". DE-HK is permanent

in nature with the task of maintaining and upholding the honor, dignity, and behavior of Constitutional Judges.

Constitutional Judges proposed by 3 institutions which have the authority as explained above can each propose 3 candidates for Judge.¹⁴ The proposals from various institutions are made in order to create diversity, which is from the Constitutional Court. Therefore, both the DPR and the President are institutions created from a political agreement, because in reality politics is an effort to gain power. As conveyed by Plato, power has the goal of achieving general welfare.¹⁵

The authority to make proposals currently creates a conflict of interest between the proposer and the proposed. However, in another position, the interpretation of the constitution should not be intervened by anyone. The attitude to reduce the freedom of constitutional judges from political interests can be clearly seen at this time with the attitude of one of the proposing institutions. This can be seen from the discussion in the DPR to replace one of the constitutional judges proposed by the DPR, namely Aswanto, which action has no clear basis. At the same time, the DPR has also determined his replacement, namely Guntur Hamzah, to replace the previous constitutional judge.¹⁶

The dismissal of Judge Aswanto from his position as a Constitutional Court Judge by the DPR with the condition that his term of office is still long. This has flowed into the Law which is a legislative product of the DPR itself at the Constitutional Court. Thus the reason for the dismissal has no legal basis and is not included in the right decision to dismiss a constitutional judge who is currently serving.

In line with this, the situation of law enforcement officers is now not trusted by the public, and this has caused a decline in public trust in the Constitutional Court which is considered an institution that protects the constitution. On the other hand, the DPR, the Government and the Constitutional Court itself must provide an example of a free and responsible value.¹⁷ If an action occurs that is outside of what has been regulated, then this will pollute the freedom of judges who are judges in a country of law. Which has been emphasized in the 1945 Constitution, precisely in Article 1 Paragraph 3 and Article 24 Paragraph 1. So in this case the dismissal carried out by the DPR against Aswanto can be said to be an act that is physically or

¹⁴ Priandita Koswara, Megawati, Analisis Prinsip Independensi Hakim Konstitusi di Indonesia, Ahmad Dahlan Legal Perspective, Vol 3, No1, 2023, hlm.47-62

¹⁵ Ibid

¹⁶ Indonesia Corruption Watch. (2022). Menyoal Pemberhentian Hakim Konstitusi oleh DPR: Tindakan Serampangan, Otoritarianisme, dan Upaya Sistematis Menundukkan Mahkamah. *Indonesia Corruption Watch*. <https://antikorupsi.org/id/menyoal-pemberhentian-hakim-konstitusi-oleh-dpr-tindakan-serampangan-otoritarianisme-dan-upaya>, diakses pada tanggal 20 Juni 2024

¹⁷ Suparto. (2020). Perlunya Amandemen Terhadap Pasal 24 B Ayat (1) UUD 1945 Dalam Rangka Pengawasan Terhadap Hakim Konstitusi. *Jurnal Borneo Law Review*, 4(01). <https://doi.org/10.35334/bolrev.v4i1.1396>

materially flawed and does not comply with the procedures that have been regulated in existing legal regulations.

Although it is still found that non-judicial institutions do not agree with the interference in the freedom of constitutional judges, however, this is only a political view that aims to protect the existence of honor and dignity. In fact, supervision of judges is needed so that it is in line with the provisions of the existing code of ethics, this is to achieve a judge's decision that remains based on justice that is sourced from Pancasila and the Constitution.¹⁸

CONCLUSION

1. The method of dismissing a Constitutional Court Judge is regulated in "Article 23 of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court which can be done honorably or dishonorably." When Prof. Aswanto, who was a Constitutional Court Judge, was dismissed from his position, it was considered unfounded by the general principles of law which should be the basis for dismissing a Constitutional Court Judge. The DPR's decision on the dismissal of Prof. Aswanto created public opinion that the Constitutional Court Judge proposed by the DPR was identical to being able to interfere with political interests and increasingly showed an authoritarian attitude and defiance of the law.
2. The independence of the Constitutional Court as a Judicial Institution is based on moral integrity and judicial professionalism. The Constitutional Court's Code of Ethics is called "Sapta Karsa Utama" which was initiated and ratified in 2005, precisely on October 17. Which over time has been changed with the existence of Constitutional Court Regulation No. 9 / PMK.2006 concerning the Enforcement of the Declaration of the Code of Ethics and Behavior of Constitutional Judges. The Constitutional Court is obliged to ensure that law enforcement, especially formal and material tests of laws against the 1945 Constitution, are carried out in accordance with applicable legal principles and norms in order to restore public trust..

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¹⁸ Muhtadi. (2015). Politik Hukum Pengawasan Hakim Konstitusi. *Jurnal Ilmu Hukum*, 9(03). <https://doi.org/10.25041/fiatjustisia.v9no3.602>

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