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Quo Vadis the Legal Politics of Filling Constitutional Judge Positions in Indonesia

Abstract
The unconstitutional dismissal of Aswanto as a constitutional judge by the DPR has faced much opposition from legal scholars. The actions of the DPR stem from its inherent authority as an institution that can propose three constitutional judges. Therefore, the DPR believes that as a proposing institution, it can oversee and dismiss constitutional judges during their term, which is not part of its authority. The mechanism of selecting constitutional judges with the three-branch model of government has caused problems and confusion in the constitutional law. This article will focus on discussing the Quo Vadis of the legal politics of filling the position of constitutional judges, which comes from the three branches of government and the reconstruction of the mechanism for filling the position of constitutional judges in the future. This research has produced several discussion points, including: (1) the legal politics of filling the position of constitutional judges by the three branches of judicial power, which is a reflection of the checks and balances, has been misused by the DPR as an instrument to weaken the body of the Constitutional Court, especially the independence of constitutional judges. (2) The reconstruction of the institution proposing constitutional judges can be carried out by the Judicial Commission by aligning the proposing institutions of the Supreme Court and the Constitutional Court.
Keywords: *reconstruction, filling the position of constitutional judges, independence of constitutional judges.*

Abstrak
Pemecatan inkonstitusional Aswanto sebagai hakim konstitusi oleh DPR mendapat banyak tentangan dari kalangan sarjana hukum. Tindakan DPR tersebut bersumber dari kewenangannya yang melekat sebagai lembaga yang dapat mengajukan tiga hakim konstitusi. Oleh karena itu, DPR berkeyakinan sebagai lembaga pengusul dapat mengawasi dan memberhentikan hakim konstitusi selama menjabat, yang bukan merupakan kewenangannya. Mekanisme pemilihan hakim konstitusi dengan model pemerintahan tiga cabang telah menimbulkan masalah dan kerancuan dalam hukum tata negara. Artikel ini akan fokus membahas Quo Vadis politik hukum pengisian jabatan hakim konstitusi yang berasal dari tiga cabang pemerintahan dan rekonstruksi mekanisme pengisian jabatan hakim konstitusi ke depan. Penelitian ini menghasilkan beberapa pokok bahasan, antara lain: (1) politik hukum pengisian jabatan hakim konstitusi oleh

ketiga cabang kekuasaan kehakiman yang merupakan cerminan dari check and balances, telah disalahgunakan oleh DPR sebagai instrumennya. melemahkan tubuh Mahkamah Konstitusi, khususnya independensi hakim konstitusi. (2) Rekonstruksi lembaga pengusul hakim konstitusi dapat dilakukan oleh Komisi Yudisial dengan menyelaraskan lembaga pengusul Mahkamah Agung dan Mahkamah Konstitusi.
Kata kunci: rekonstruksi, pengisian jabatan hakim konstitusi, independensi hakim konstitusi.

Introduction

We have reached a point in the legal civilization where the law can no longer be considered esoteric or autonomous but integrated (consilience) into a holistic view (Susanto, 2017). This is in line with the dynamics of law in Indonesia after the 1998 reformation. One of the demands of the reformation was to desacralize the Constitution through an amendment process (Golap, 2017). Between 1999-2002, four amendments to the Constitution were made to improve Indonesia's state system, including its institutional system. This was intended to provide limitations on state institutions' power by applying the principle of the separation of powers (distribution of power) (Marzuki, Heryansyah, & Hadi, 2023). The logical consequence is that there is no longer a superpower institution because the formulation of the distribution of power is based on a mechanism of mutual supervision and balance (checks and balances system) (Novreza, 2022). This is an implementation of the separation of powers proposed by Montesquieu, where deviations in absolutism practice can be prevented through limitations on power by using constitutional principles. The implementation of the separation of powers is also reflected in the mechanism for recruiting Constitutional judges, where three candidates for Constitutional judge are proposed by the Supreme Court, the House of Representatives (DPR), and the President. The appointment mechanism is left to the subjective evaluation of each supporting institution.

The dynamics and shifting needs for law have brought about the need to make changes to the Constitutional Court Law (Mochtar & Hiariej, 2021). For the third time, changes were made to the Constitutional Court Law by amending and adding several important things. These changes included adding the tenure of Constitutional judges, which was initially only allowed for two consecutive terms or a maximum of 10 years as a Constitutional judge. Through the third amendment, the tenure of Constitutional judges was extended to the age of 70 or no more than 15 years as a Constitutional judge.

These changes have led to a movement to challenge the third amendment of the Constitutional Court Law (UU MK Perubahan Ketiga) through judicial review. The Constitutional Court, through decision No. 96/PUU-XVIII/2020, rejected the material review petition, stating that the petition was not legally reasonable. Therefore, the extended tenure of Constitutional judges through the third amendment of the Constitutional Court Law was declared constitutional (Akbar, 2019).

Based on this, the Chief Justice of the Constitutional Court took further steps to remind the House of Representatives (DPR) through a confirmation letter of the implications of the

Constitutional Court's decision No. 96/PUU-XVIII/2020. However, the confirmation letter sent by the Chief Justice was misinterpreted by the DPR, which led to the dismissal of Constitutional judge Aswanto, who was then replaced by Guntur Hamzah, proposed by the DPR and approved by the President. However, the replacement of Constitutional judge Aswanto has shown a bumpy road and disrupted the institution of constitutional justice as the highest constitutional court. This replacement has created chaos and disorder in Indonesia's state system (Chairunissa & Hendrawati, 2022).

Of course, if we look at the root of the problem that arises here, it is the issue that arises from changes in the retirement age limit and the term of office of constitutional judges, which was added through regulations amended by the DPR. This is closely related to the DPR as a political institution that proposes constitutional judges, which can affect the process of selecting and proposing constitutional judges, especially judges proposed by the DPR.

In addition, another problem arises from the political intervention in the recruitment of constitutional judges, especially in relation to the recruitment of judges proposed by the President and those proposed by the DPR (Faiz, 2016). This makes the selection process no longer pure, but becomes a selection process that is filled with political interests from each proposer, as seen in the recent dismissal of constitutional judge Aswanto.

If we look at it in the context of the law-making process of the third amendment to the Constitutional Court Law and the political configuration within the legislative body, we should not attack and undermine the spirit of other state institutions by creating regulations that have a negative impact on other state institutions. Especially in the context of the recruitment of constitutional judges, which affects the independence of the judiciary that should be free and independent (Chairunissa & Hendrawati, 2022).

This paper will focus on the *Quo Vadis* of the legal politics of filling the position of constitutional judges, which originates from the three branches of state power and the reconstruction of the mechanism for filling the position of constitutional judges in the future.

Research Methods

This research uses a normative legal research method. This research focuses on examining forms of political intervention in the independence of MK judges in terms of appointment and term of office, by looking at several cases that have occurred, analyzing and observing the tendency of supporting institutions to intervene in judges, and reconstructing the ideal arrangement for filling the position of MK judges. The approach used in this research is a legislative approach, case approach, conceptual approach, and comparative approach that is tailored to the research problem and objectives. This approach is done by examining all legal regulations related to legal issues and evaluating their implementation (Tongat, Prasetyo, Aunuh, & Fajrin, 2020).

Results and Discussion

Quo Vadis of the Legal Politics of Filling the Position of Constitutional Judges

It cannot be denied that the regulation of the recruitment or appointment of constitutional judges in Indonesia, as regulated in Article 4 of Law No. 24 of 2003 concerning the Constitutional Court, is a derivative regulation of the constitutional norm, which clearly

states in Article 24C paragraph (3) of the 1945 Constitution that the Constitutional Court has 9 (nine) constitutional judges appointed by the President, each proposed by three persons from the Supreme Court, three persons from the House of Representatives, and three persons from the President (Chairunissa & Hendrawati, 2022).

The appointment of constitutional judges using such a scheme is inseparable from the spirit of constitutional change, which has the main goal of making changes with five basic agreements (Mahdi, 2022): (1) not making changes to the opening of the 1945 Constitution (2) maintaining the unitary state form (3) strengthening the presidential system of government (4) eliminating explanations of the Constitution and its normative content, which are included in the body of changes to the 1945 Constitution (5) changes are made through an addendum. The appointment of constitutional judges using a scheme proposed by three branches of government reflects the strengthening of the check and balances system in enhancing the presidential system in the amendment to the 1945 Constitution (Primadigantari & Bagiastra, 2022).

However, in the end, the legal politics of appointing constitutional judges, which was built on the spirit of reform and strengthening of the presidential system through the manifestation of the check and balances system, has brought several implications for independence, selection and selection processes that are not uniform. The implications are explained as follows (Satriawan, Shuaib, Lailam, Rahman, & Seviyana, 2022):

First, even though it is explicitly stated that the appointment of constitutional judges proposed by the three state institutions, namely the President, the DPR, and the Supreme Court, does not make the Constitutional Court a subordinate of the supporting institutions. However, this is the form of check and balance that the drafters of the amendment to the 1945 Constitution intended by involving three institutions from three different branches of power in appointing constitutional judges. The idea that the Constitutional Court will not become a subordinate institution of the three relevant institutions is based on the spiritual atmosphere of the drafters of the amendment to the 1945 Constitution, which coincides with the spirit of changing the position of the MPR at that time, which was originally the highest state institution, into a state institution with the same position as other state institutions. Thus, there is no longer a phrase or system of the highest state institution in Indonesia. This closes the possibility of the position of the Constitutional Court, even though there is a mix of the three other branches of power in appointing constitutional judges. In the view of the drafters of the amendment to the 1945 Constitution, the role of the three state institutions is only to escort the selected constitutional judge candidates to the door of the Constitutional Court and then give them the opportunity to work freely and independently under the principle of a free and independent judiciary. However, in its development, the Constitutional Court has again been disrupted by tweaking regulations, in this case the Constitutional Court Law, which has undergone three changes, the latest of which is a crucial change regarding the term of office of constitutional judges and has become the center of attention.

This change is the root cause of the chaos in the dismissal of constitutional judge Aswanto and the appointment of Guntur Hamzah, which was full of controversy in its process. Aswanto's dismissal as a constitutional judge was done in a way that was not obligatory. The dismissal was carried out by the DPR, which actually does not have the

authority to dismiss constitutional judges. This is as stated in Article 23 of Law No. 7 of 2020, which explains that the dismissal of Constitutional Court judges can be carried out through two mechanisms, namely honorable dismissal and dishonorable dismissal. Furthermore, in the case of the dismissal of a constitutional judge, it can only be done with the President's decision at the request of the Chairman of the Constitutional Court.

Further on the termination of Constitutional Court judges, it can only be done by the President's Decision upon the request of the Chief Justice of the Constitutional Court. In the case of an improper termination, an ethics hearing must be held by the Ethics Council of the Constitutional Court, and the concerned judge is given the right to defend themselves (de Saint Felix & Corrigan, 2022). However, this process was not followed in the termination of Aswanto as a Constitutional Court judge, and there was never a request for termination of a Constitutional Court judge from the Chief Justice of the Constitutional Court.

The reason for the termination of this Constitutional Court judge is beyond reason and logical constitutional principles, as the Parliament claimed that Aswanto, who was proposed by the Parliament as a Constitutional Court judge, had criticized and nullified many legal products issued by the Parliament. It seemed as if the Parliament was building and gathering loyalty from the Constitutional Court judges they proposed, to obey the orders of the Parliament. After being terminated by the Parliament, an unwise step was taken by the President in appointing Guntur Hamzah, who had been constitutionally selected and recruited as a Constitutional Court judge, to fill the unconstitutional vacancy of the Constitutional Court judge position left by the Parliament.

This is what has become an anomaly in the appointment of Constitutional Court judges by the three branches of government. The Parliament's action of replacing Aswanto as a Constitutional Court judge in the middle of his term could set a bad precedent for other branches of government. This can affect the independence and constitutional nature of Constitutional Court judges. As judges tend to obey the institution that nominated them to maintain their careers as Constitutional Court judges, this is in line with one of the Judiciary Reform Index parameters that attempt to measure the independence of the judiciary by using several parameters, one of which is the continuity of the organization, which can be one of the independent factors of the judiciary, including the Constitutional Court.

It is not without reason that the Parliament's action appears to place the Constitutional Court under its influence, as the new function attached to it is the appointment of public officials, including the appointment of actors who are nominated as Constitutional Court judges. The broadening of the Parliament's authority, which is sourced from the appointment of public officials, is a reflection of the shift from an executive-heavy paradigm to a legislative-heavy one after the amendment to the 1945 Constitution.

Secondly, the appointment of constitutional judges by three different state institutions representing three different branches of government also implies different selection mechanisms, which are not synchronized. As a result, there is often no uniformity in the mechanisms and stages of selecting constitutional judges, which can lead to violations of the principles of openness and participation. In fact, the selection and selection mechanisms of each branch of government are not explained in the Constitutional Court Law, leaving it to the respective rules of the state institutions concerned. Even the selection of Constitutional Court judges tends to be used as an experimental platform by state institutions in terms of

changing appointment mechanisms in each selection and appointment of constitutional judges.

Thirdly, the next problem is the process of recruiting constitutional judges by three different state institutions, which creates problems in the selection of candidates and the proposed constitutional judges are not selected transparently and participatively. One example is the appointment of Patrialis Akbar, who was proposed by the President. The appointment did not show transparent and participatory selection of judges and closed the public participation. Even the appointment of Constitutional Judge Patrialis Akbar through Presidential Decree Number 87/P of 2013 was sued by the Indonesia Corruption Watch and the Indonesian Legal Aid Foundation to the Central Jakarta State Administrative Court. Although later the State Administrative Court rejected the plaintiffs' lawsuit. This shows that the selection of constitutional judges through the Presidential institution also shows a lack of public trust because of the minimal participation of the people involved.

The same thing happened in the recent selection of constitutional judge Guntur Hamzah, who was proposed by the DPR to replace Judge Aswanto, who was dismissed halfway. The process of selecting and appointing Guntur Hamzah as a constitutional judge did not show adequate selection processes, and the selection process was not properly done. As a result, Guntur Hamzah's appointment was rushed and not transparent or participatory, and even tended to be done within a short period of time and was loaded with political interests.

Reconstructing the Appointment of Constitutional Judges in the Future

Certainly, the appointment of constitutional judges using the a quo selection scheme proposed by the three relevant institutions as a form of representation of the three branches of state power needs to be evaluated to find a middle ground for the balance between state powers and the absolute independence and freedom of the judiciary in carrying out justice to uphold the law and justice. The problem of disrupting the independence and freedom of constitutional judges will still exist as long as the selection mechanism involves the three branches of state power, and the new DPR, through the dismissal of Aswanto as a constitutional judge, seems to show a tendency for political oversight over law enforcement agencies, especially regarding the testing of laws that are products of the DPR.

In the same context, we need to compare and take the mechanism of selecting Supreme Court judges as one of the branches of judicial power that has the same position as the Constitutional Court but whose judges are selected by an independent institution called the Judicial Commission. This is clearly different from the appointment of constitutional judges, which is done through the three branches of state power.

However, in terms of the selection of Supreme Court judges by the Judicial Commission, it still involves political institutions, such as the involvement of the DPR as regulated in Article 24A paragraph (3), which stipulates that candidates for Supreme Court judges are proposed by the Judicial Commission to the DPR for approval, and then appointed as judges by the President. This provision still shows the large role of the DPR in appointing Supreme Court judges (Satriawan et al., 2022). The position of the DPR as an institution that gives approval holds great importance in determining who is chosen and can

be influenced by political interests within it, considering that the DPR is both a representative of the people and a political representative of the parties that support it.

Thus, there is still a possibility that this mechanism can influence the independence and freedom of Supreme Court judges. Therefore, it is necessary to standardize the mechanism for selecting Supreme Court and constitutional judges as institutions under the judiciary whose selection mechanism is entrusted to the Judicial Commission. The main consideration for delegating the authority to appoint constitutional judges to the Judicial Commission is to improve the formula for filling constitutional judge positions in a coordinated and simultaneous manner by an independent institution that is free from political interests (Beermann & Cass, 2022). This will ensure the recruitment of constitutional and Supreme Court judges in an open, transparent, and participatory manner. This will also avoid disturbing the independence of constitutional judges, as the Judicial Commission has no direct interest in the Constitutional Court, unlike the appointment of Constitutional Court judges through the DPR and President, who are the parties being tested in the examination of laws, which is part of the authority of the Constitutional Court itself.

The selection of constitutional and Supreme Court judges by the Judicial Commission must be given a large portion that can be carried out by the Judicial Commission itself and reduce the approval stages carried out by the DPR. The results of the selection and appointment by the Judicial Commission should be followed by the President's appointment as a constitutional or Supreme Court judge. This can be done through a limited amendment to the 1945 Constitution, especially in Article 24A, 24B, and 24C.

Conclusion

In conclusion, the problem of filling constitutional judge positions in Indonesia, which originated from the spirit of the check and balances system and the limitation of state power after the amendment to the 1945 Constitution, has shifted the legal-political paradigm that underlies the changes in the 1945 Constitution. The belief of the drafters of the amendment to the 1945 Constitution regarding the equality of the Constitutional Court's position with the proposing institutions of constitutional judges has shifted and made the Constitutional Court subordinate to the DPR and the President, especially regarding the nomination of constitutional judges. This even led to taking steps beyond its authority to intervene by unconstitutionally dismissing constitutional judges. This kind of constitutional selection mechanism has several problems, namely: (1) disturbing the independence of the Constitutional Court; (2) a non-simultaneous and non-standardized mechanism for selecting constitutional judges; and (3) the selection of constitutional judges tends to be done in a closed manner and against the principles of transparency and participation.

Secondly, the appointment of constitutional judges is carried out by an independent institution that is equal to the appointment of supreme court judges. The appointment is carried out by a Judicial Commission and streamlines the stages and approval process of the DPR towards the nomination of constitutional and supreme court judges, so that after the selection process carried out by the Judicial Commission is completed, the President can directly appoint them as constitutional and supreme court judges. The reconstruction of the institutional support for constitutional judges can be carried out through a limited

amendment to the 1945 Constitution, especially in the provisions of articles 24A, 24B, and 24C.

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