

## Conference Paper

# Analysis of the Mechanism for Dismissal of Judges of the Constitutional Court by the House of Representatives of the Republic of Indonesia

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**Abstract.**

The Constitutional Court Law has regulated mechanisms related to the dismissal of constitutional judges. However, in practice, Constitutional Court judges can be dismissed unilaterally by the House of Representatives. This is not based on existing legal provisions regarding the dismissal of Constitutional Court judges. The formulation of the problem in this study is to analyze the mechanism for dismissing judges of the Constitutional Court of the Republic of Indonesia by the House of Representatives and the juridical implications. This research aimed to find out and analyze the mechanism of dismissal of constitutional judges by the DPR RI and find out its juridical implications. The research method used is normative juridical research method. The results of this study are first, the mechanism for dismissing judge Aswanto carried out by the DPR that has violated the mechanism for dismissing judges contained in the Constitutional Court law. Therefore, the dismissal carried out by the DPR is contrary to the law. Second, the juridical implications, among others, will become a precedent for other proposing institutions to carry out the dismissal of Constitutional Court judges, reducing the independence of the Constitutional Court. The Honorary Council of the Constitutional Court cannot play a major role in the mechanism for dismissing MK judges.

**Keywords:** mechanism, dismissal, constitutional judge, constitutional court

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## 1. INTRODUCTION

The House of Representatives (DPR) issued a policy to dismiss judge Aswanto and appoint Guntur Hamzah as a replacement during his term of office. The position of the DPR as the proposing institution feels that it has the right to remove Constitutional judges who it feels do not represent the direction of the institution. The establishment of the Constitutional Court was based on constitutional amendments in the People's Consultative Assembly. In 2001, the People's Consultative Assembly (MPR) formulated the provisions of Article 24 paragraph (2), Article 24C and Article 7B of the 1945 Constitution as a result of the third amendment which was passed in 2001.

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Based on the provisions of the article, the Constitutional Court is one of the institutions of judicial power other than the Supreme Court. The judicial power is a free institution to uphold justice and law in Indonesia. Thus, the Constitutional Court is a judicial institution, as one of the judicial powers, that adjudicates certain cases under its authority under the provisions of the NRI Constitution of 1945. In 2003, the House of Representatives (DPR) together with the government discussed the Constitutional Court Law. Precisely on August 13, 2003 the enactment of Law Number 24 of 2003 concerning the Constitutional Court.

The principle of checks and balances is the principle of mutual control and supervision in order for balance between institutions to occur. The principle of supervision aims to allow the institution to perform its duties on track so as not to exceed the limits of its authority. After the amendment of the NRI Constitution in 1945, there was no highest institution in Indonesia. Before the amendment, the highest institution was in the People's Consultative Assembly (MPR) but after the amendment it shifted from the highest state institution to a high state institution equivalent to other institutions. However, the rules related to supervision of judges are contained in Article 24B paragraph (1) of the 1945 NRI Constitution states that :

“The Judicial Commission is independent with the authority to propose the appointment of Supreme Court Justices and has other duties in order to maintain and uphold the honor, dignity and conduct of judges.”

However, the authority of the Judicial Commission to supervise Constitutional Judges was overturned through Constitutional Court Decision Number 005/PUU-IV/2006. Then a rule was formed for the formation of an Honorary Assembly of the Constitutional Court, namely based on Article 27A paragraph (2) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court. Therefore, internally the Constitutional Court established Constitutional Court Regulations Number 1 of 2013 and Number 2 of 2013 to uphold honor and dignity and maintain the behavior of Constitutional Judges.

On September 29, 2022, the House of Representatives held a plenary meeting to remove the constitutional judge, Aswanto. The House of Representatives reasoned that judge Aswanto had disappointed the House of Representatives which too often annulled the products of the House of Representatives. One of the products disallowed by Judge Aswanto is the Job Creation Law. Justice Aswanto along with four other judges considered that the law was formally flawed. Such a lot of typos and lack of absorbing aspirations from the public/society.

Aswanto's dismissal as a constitutional judge by the House of Representatives legally and constitutionally is certainly unwarranted and unfounded. The mechanism for dismissing constitutional judges has been regulated in Law Number 7 of 2020 Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. According to the author, the dismissal of Justice Aswanto has contradicted the dismissal mechanism contained in the Constitutional Court Law. Where the House of Representatives dismisses constitutional judges on the grounds that they do not obey the wishes of the proposing institution. This is contrary to Article 24 paragraph 1 of the NRI Constitution of 1945 which reads:

“The judicial power is the power of an independent state to administer justice in order to uphold law and justice” (Under the author's line)

In this regard, the House of Representatives has made decisions that threaten the independence of the judiciary which should be free from interference by any institution and in any form. The legal issue that occurs is the blurring of norms, in this case the Constitutional Court as an independent institution has mechanisms and rules related to the dismissal of constitutional judges that have been regulated in law.

## 2. METHODOLOGY/ MATERIALS

The approach method used in this study is normative juridical, which examines legal provisions contained in various laws and regulations to legal journals. Legal research involving laws for establishing principles is called normative legal research the guidelines in question concern concepts, agreements, court rulings, legislation, and rules of procedure[1]. The types of legal materials that are used as objects or focuses in this study can be divided into three legal materials, namely primary legal materials, Legal Materials and Tertiary legal materials are materials that provide instructions and explanations to primary and secondary legal materials, researchers use legal dictionaries and Objects in this study will be discussed using three approaches: the statutory (or “statute”) method, the analytical (or “analytical”) approach, and the case (or “case”) approach. Through document studies and library research, research is carried out.

## 3. RESULTS AND DISCUSSIONS

**Analysis of the mechanism for dismissing judges of the Constitutional by the House of Representatives of the Republic of Indonesia.**

Aswanto will retire in 2029, when referring to the Constitutional Court Law before the amendment. Article 22 of Law Number 24 of 2003 concerning the Constitutional Court reads:

”The term of office of constitutional judges is for 5 (five) years and can be re-elected only for the next 1 (one) term”.

Justice Aswanto is supposed to retire in 2024. However, due to changes in the article related to tenure in the third amendment law on the constitutional court, Justice Aswanto should retire in 2029 [2]. The Constitutional Court Law’s Article 23 Paragraph 1 Number 7 of 2020 outlines the circumstances under which a judge may be honorably removed. The following conditions must be met: a. He must pass away; b. He must resign at his own request to the president of the Constitutional Court; c. He must be 70 years old; and d. He must be in constant physical and spiritual anguish for three (three) months as documented by a doctor’s letter. Based on the above considerations, Aswanto’s case does not fulfill one of the several provisions above. The person within the issue additionally has never submitted an official letter of resignation from the Constitutional Court.[3],

#### **1. Reviewed based on the reason for dismissal**

Article 23 paragraph 2 Number 7 of 2020 of the Law on the Constitutional Court explains what matters the relevant judge can be dishonorably dismissed. As follows;

1. (a)
  - (b) deliberately hindering the Constitutional Court from giving a ruling in
  - (c) violate the prohibition of concurrent positions as referred to in Article 17;
  - (d) no longer qualified as a constitutional judge; and/or
  - (e) violates the Code of Ethics and Code of Conduct of Constitutional Judges.

The Constitutional Court Law’s Article 23 Paragraph 2 Number 7 of 2020 outlines the circumstances in which a judge may be dishonorably removed. As follows: a) being sentenced to incarceration based on a court decision that has obtained permanent legal force for committing a crime that is punishable by imprisonment; b) engaging in reprehensible acts; c) failing to appear at the trial, which is his duty and obligation, for 5 (five) consecutive times without a valid excuse; d) breaking oaths or promises of office; e) purposefully preventing the Constitutional Court from rendering a decision in ; f) violate the Article 17 enacting on holding concurrent positions; d) no longer be eligible to serve as a constitutional judge; and/or; g) contravenes the Constitutional Judges’ Code of Ethics and Conduct.

Based on the reasons for dismissal of the above constitutional court judges or dishonorably, none of Aswanto was proven to have committed acts that could be dishonorably dismissed.

Aswanto was never sentenced to prison. There was no court verdict that found him guilty of the legal case.

If he commits a despicable act, but the reprehensible act in this case is also still subjective, there is no clear benchmark that can be said that the act is reprehensible can be dismissed[4].

**1. Reviewed based on the dismissal mechanism (Article 23 paragraph 3 of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court).**

Article 23 paragraph 3 of Law Number 7 of 2020 concerning the Constitutional Court reads:

“The request for dismissal is not honorable as referred to in paragraph (2) letter b, letter c, letter d, letter e, letter f, letter g, and/or letter h is made after the person concerned is given the opportunity to defend himself before the Honorary Assembly of the Constitutional Court”.

A hearing with an honorary assembly is a right of responsibility owned by Aswanto if he is suspected of committing a violation. Of course, this right of responsibility is very important in its implementation as a place for Aswanto to defend himself against allegations and reports that point to him.

On the removal of Aswanto as a Constitutional Judge from the Constitutional Court, an Honorary Assembly of the Constitutional Court should have been formed to hold a session. However, because the dismissal mechanism carried out by the House of Representatives was not in accordance with the rules, the Honorary Assembly was not formed.

An Honorary Council will be formed if a report is submitted to the Ethics Council. After the ethics board conducts the summons and preliminary examination. Therefore, if the initial evidence has been stated to be sufficient to say that there is a violation, the Ethics Board will forward it to the Chief Justice of the Constitutional Court after which an Honorary Panel is formed. After the establishment of the Honorary Council, it will proceed to the next process, namely the trial that will produce a decision. The decision is in the form of sanctions or rehabilitation.

**1. Reviewed based on the dismissal mechanism (Article 23 paragraph 4 of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court).**

The dismissal of constitutional judges is determined by Presidential Decree at the request of the Chief Justice of the Constitutional Court, as stated in Article 23 paragraph 4 of Law Number 7 of 2020 regarding the Constitutional Court. The article clearly states that the dismissal of constitutional judges can only be done at the request of the Chief Justice of the Constitutional Court. In Aswanto's case, the House of Representatives has terminated without going through the correct mechanism or the process carried out is not in accordance with the dismissal rules, namely sending a letter from the Chief Justice to the President for further issuance of a Presidential Decree (Keppres) dismissing constitutional judges.

In this dismissal case, the House of Representatives immediately sent a letter to the president without going through the Chief Justice of the Constitutional Court. So it can be said that the request for dismissal violates the rules and must be declared legally defective.

It can be concluded that the mechanism carried out by the House of Representatives must be declared unlawful. So the letter sent by the House of Representatives to the President must be declared contrary to the rules. The President must not follow up by not issuing a Presidential Decree regarding the dismissal of judge Aswanto.

The mechanism carried out by the House of Representatives has violated the rules of the Constitutional Court Law passed by the House of Representatives itself. The decision of the House of Representatives to dismiss Aswanto shows that the legislature does not trust the products of its own laws. This is because the odd mechanism is clearly contrary to Article 23 of Law Number 7 of 2020 concerning the Third Amendment to No. 24 of 2003 concerning the Court Constitution.

**1. Juridical implications of the dismissal of Constitutional Court Judges by the House of Representatives of the Republic of Indonesia**

Implications have the meaning of circumstances or involvement involved and include, suggested, but not stated. While juridical itself has a legal meaning [5]. Thus, juridical implications can be interpreted as the impact that will occur in the future from an act seen from the field of law. To be clear, the author can say the juridical implication is the legal effect. [6]

Juridical implication or legal effect is a legal act that has an effect on the legal act that has been done. The legal consequences arising from these legal acts have an impact on a legal rule or existing legal act.

The dismissal of Judge Aswanto that is carried out not according to the procedure is allowed to have the following implications:

- 1. Institutionally it will be imitated to dismiss its proposed Constitutional Judges by the wrong mechanism.**

The case of Aswanto's removal by the House of Representatives should not be allowed. If the institution that has the authority to stop the dismissal process is silent, let alone approve the removal decision, it will potentially set a bad example for other government institutions in the future. [7]

It does not rule out the possibility that other proposing institutions such as the Supreme Court and the President can dismiss constitutional judges unilaterally or not according to the rules. They will make dismissals that are not in accordance with the material (reason for dismissal) or formal (dismissal procedure) from the removal of constitutional judges as stipulated in the Constitutional Court Law.

- 1. Loss of Independence of the Constitutional Court.**

Regarding the independence of the judiciary, it has been regulated in the NRI Constitution of 1945. Precisely in Article 24 paragraph (1) of the NRI Constitution of 1945 states that

“The judicial power is an independent power to administer justice in order to uphold law and justice”. (underlined by author)

In the case of the dismissal of Justice Aswanto by the House of Representatives described above, there is no clear reason and seems political. Only for the reason that Aswanto too often annulled legal products from the House of Representatives, especially the Omnibus Law / Job Creation, Aswanto, including Judges who declared the Law formally flawed.

The functions of a Constitutional Court should be known to the House of Representatives. The NRI Constitution of 1945's Article 24C. Based on the above article, it is clear that it is the authority of the Constitutional Court to test laws against the NRI Constitution of 1945. Constitutional judges should be objective rather than subjective. If the law contradicts the NRI Constitution of 1945, it will be said to be unconstitutional, if it does not contradict, it will be said to be constitutional. [8]

- 1. Loss of checks and balances between institutions of state power.**

The principle of checks and balances is a principle in the constitution that has the aim that the judicial, executive and legislative powers have the same degree and control between the powers of state institutions. It is proposed that by adhering to this principle, abuse of power by governmental institutions can be avoided and defeated [9],

When viewed from the principle of checks and balances, the Constitutional Court has the authority to control, one of which is to test the constitutionality of laws and regulations against the NRI Constitution of 1945. In this case, the legislator is the House of Representatives.

In 2022 alone, the Constitutional Court has decided 120 cases related to the test of laws and regulations against the NRI Constitution of 1945. And 23 are still in progress. With 15 verdicts granted, 45 rejected, 41 not accepted, 18 retracted and 1 void. The law that is often tested is Law Number 7 of 2017 concerning General Elections with 92 test applications. [10]

When connected with the case of dismissal of Justice Aswanto by the House of Representatives with the principle of checks and balances. The House of Representatives should know that the mechanism of checks and balances in an institution in a democratic country is natural and important. The existence of this principle is to prevent abuse of power from an institution (abuse of power) or a person or institution.

Also to avoid the centralization of power that can make the institution a super power because with the mechanism of checks and balances between institutions one with another will control or supervise each other.

Justice Aswanto has become his authority to examine legal products, namely legislation because it has become the authority of the Constitutional Court. Agree or reject the test claim by the applicant is the right of Judge Aswanto based on his consideration with 8 other judges. The judgment of Justice Aswanto must be free from the intervention of other institutions and people.

### **1. The Honorary Panel of the Constitutional Court no longer has authority in the mechanism of dismissing constitutional judges.**

With dismissal cases carried out by the House of Representatives without going through the proper mechanism of dismissal of judges, it makes the Honorary Panel of the Constitutional Court unnecessary.

The existence of an Honorary Panel in the dismissal process as a forum for Constitutional Judges who are suspected of committing acts that have been regulated in Article 23 paragraph 2 of Law Number 7 of 2020 concerning the third amendment to Law Number 24 of 2003 concerning the Constitutional Court to conduct defenses.



After the procedure for the formation of an honorary panel, the judge can no longer defend the alleged offense directed at him. So that from the beginning of allegations and reports, the collection of evidence by the Ethics Board without going through a hearing by an honorary panel, the Chief Justice of the Constitutional Court immediately submits a request for dismissal of members of the Constitutional Judge to the President. This leaves the Constitutional Judge without the right to defend himself against the allegations that lead to him.[11]

According to the author, Aswanto did not get his right to defend before the honorary assembly. The dismissal carried out by the House of Representatives is carried out unilaterally without looking at the mechanism for dismissing constitutional judges and without notifying the Chief Justice of the Constitutional Court.

#### 4. CONCLUSION AND RECOMMENDATION

The mechanism carried out by the House of Representatives for the dismissal of Aswanto judges has violated the rules for dismissing judges in Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. The dismissal carried out by the House of Representatives has violated the rules formally (dismissal mechanism) and also materially (the reason for dismissal) so that the dismissal carried out by the House of Representatives has contradicted Article 23 of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. Such termination may be declared legally defective and must be cancelled.

The removal of Constitutional Judge Aswanto by the House of Representatives has legal ramifications, such as creating a negative precedent because other institutions might imitate it, losing the independence of the Constitutional Court because other institutions interfere with its authority, doing away with the need for the Honorary Pane, and doing away with the idea of checks and balances between institutions.

The President must take a firm stance regarding the case of the dismissal of Justice Aswanto by the House of Representatives as head of state. As a high state institution and legislative institution, the House of Representatives should be an example to carry out all legal mechanisms must be based on applicable legislation. Aswanto or can file a lawsuit with the State Administrative Court to overturn the Presidential Decree regarding his dismissal and the appointment of Guntur Hamzah as his successor constitutional judge.

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