



Constitutionality of Replacing Judges Mid-Term and Its Implications on the Independence of the Constitutional Court, Indonesia

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Abstract

This research examines the legal problems surrounding the dismissal of Aswanto as a judge of the Constitutional Court of the Republic of Indonesia (MKRI), where the dismissal is deemed inconsistent with the prevailing laws and regulations. This study employs a doctrinal research type with a normative juridical approach by examining legislation and conceptual understanding to scrutinize the constitutionality of the replacement of constitutional judge Aswanto by the People's Representative Council (DPR) and its implications on the independence of the Constitutional Court. The findings suggest that the replacement of Judge Aswanto by the DPR during his tenure is an unconstitutional act as it does not align with the constitution. Secondly, this replacement has implications for weakening the Constitutional Court's independence, including constitutional, functional, personal, and evident practical independence. Therefore, the President needs to annul Presidential Decree Number 114/P/2022 and restore Judge Aswanto to his original position. Additionally, to prevent the misuse of power, further limitations and elaborations are required regarding the DPR's supervisory function over the judiciary, in this case, the Constitutional Court, by the system of checks and balances.

Keywords: Constitutionality, Independence, Substitution of Constitutional Judges, and *Check and balances*



Introduction

Indonesia has established itself as a rule-of-law nation, adhering to a system of separation of powers with the principle of checks and balances to execute state functions. This separation of powers arises due to the adoption of Montesquieu's doctrine of *trias politica*, which necessitates dividing state power into three branches: the executive, legislative, and judiciary.¹ In both their formation and function, these three institutions are interrelated with each other, either directly or indirectly. However, this relationship does not impair the equality of their status and positions, nor does it diminish their independence in executing their functions as prescribed in the constitution, particularly concerning the judicial institution, which plays a vital role in upholding law and justice in all matters and disputes.

The Constitutional Court (MK) is one of the judicial powers alongside the Supreme Court (MA), formed as a judicial institution as a result of the third amendment to the Constitution of the Republic of Indonesia of 1945, known for its independent nature. The existence of the MK within the framework of state institutions is, among other things, intended to ensure that the enactment of state policies, both formally and materially, does not conflict with the Constitution of the Republic of Indonesia of 1945 (UUD NRI 1945), also known as being constitutional. Through the authority of judicial review, the MK can issue rulings that annul or repeal laws previously established and ratified by the People's Representative Council (DPR). The President of the formation process and its content are deemed contrary to the constitution. The MK exercises this authority to maintain the constitutionality of laws against the UUD NRI 1945.²

It is important to note that 'constitutionality' in Black's Law Dictionary is defined as conformity with the constitution, sanctioned by the constitution, not in conflict with the constitution, dependent on a constitution, or guaranteed or regulated by the constitution either wholly or partially. Furthermore, the test of

¹ Munir Fuady, *Teori Negara Hukum Modern (Rechtstaat)* (Bandung: Refika Aditama, 2009). 34

² Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006).56

constitutionality in Indonesia uses the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945) and everything related to its formulation as a benchmark. Therefore, a statement is deemed constitutional when it conforms with the UUD NRI of 1945 and unconstitutional when it conflicts with the UUD NRI of 1945.

Under Article 24C of the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945), the Constitutional Court (MK), in carrying out its functions and authority, is operated by 9 (nine) judges, including the Chairperson and the Vice Chairperson, who are also members. The composition of constitutional judges is derived from the nomination of 3 (three) individuals each by the President, the Supreme Court (MA), and the People's Representative Council (DPR). The selection of this institution serves as a representative and an embodiment of the principle of checks and balances from the executive, judiciary, and legislative powers.³ However, this situation does not imply that the nominated judges are bound and accountable to the interests of the proposing institutions.

The independence of the Constitutional Court (MK) is assured through regulations that include the procedures for proposing and dismissing constitutional judges, as stipulated in Law Number 24 of 2003 concerning the Constitutional Court, which has been amended several times, most recently by Law Number 7 of 2020 on the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court (UU MK). The nomination of constitutional judges begins with recruitment by the proposing institutions through a selection and election process, following the procedural rules set by each institution. Subsequently, the nominated judges are appointed by a Presidential Decree (Keppres) within a maximum of 7 (seven) working days from when the President receives the candidate nomination.⁴

³ Article 24C paragraph (3) of the 1945 Constitution of the Republic of Indonesia stipulates that the Constitutional Court shall have nine constitutional judges, appointed by the President, with three nominees each proposed by the Supreme Court, the People's Representative Council, and the President.

⁴ Pasal 26 ayat (4) “Undang-Undang Nomor 7 Tahun 2020 tentang Perubahan Ketiga atas Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi.”

The dismissal of constitutional judges is divided into honorable dismissal and dishonorable dismissal, which are determined by a Presidential Decree (Keppres) upon request from the Chairperson of the Constitutional Court. Subsequently, a vacancy in the position of constitutional judge will be filled through the appointment of a replacement constitutional judge, which takes place after the issuance of the Keppres and a notification letter from the Constitutional Court about the dismissal of the previous judge. This process is regulated in Articles 23 and 26 of Law Number 7 of 2020 concerning the Constitutional Court.

Subsequently, the DPR (People's Representative Council), through Commission III, proposed the dismissal of Aswanto, a constitutional judge previously nominated by the DPR, and appointed Guntur Hamzah as his replacement, even though Aswanto's term of office, according to Article 87 paragraph (b) of Law Number 7 of 2020, would have lasted until 2029. This dismissal was officially agreed upon in a plenary meeting of the DPR on Thursday, 29 September 2022, due to dissatisfaction and disappointment with Aswanto's performance, as he often annulled legal products of the DPR and was deemed to have failed in fulfilling his commitment as a constitutional judge nominated by the DPR. This replacement culminated in the inauguration of Guntur Hamzah as a constitutional judge on 23 November 2022 at the Presidential Palace in Jakarta, formalized in Presidential Decree Number 114/P/2022 concerning the Dismissal and Appointment of a Constitutional Judge. This action was taken based on the supervisory function possessed by the DPR.⁵

The act of replacing a constitutional judge by the DPR on the grounds of executing its supervisory function could be suspected as not being by the 1945 constitution of the Republic of Indonesia (UUD NRI Tahun 1945) and procedurally flawed and not based on the authority the DPR holds over the MK. This situation can be interpreted as a form of intervention potentially paralyzing the independence of the MK as an independent judicial authority, which is established within the

⁵ "Jokowi Resmi Lantik Guntur Hamzah Jadi Hakim MK Pengganti Aswanto," Kompas.Com, 2022, <https://nasional.kompas.com/read/2022/11/23/09455801/jokowi-resmi-lantik-guntur-hamzah-jadi-hakim-mk-pengganti-aswanto>.

constitutional system in Indonesia.

Several previous studies relevant and related to this paper include Muhammad Reza Baihaki's⁶ Work discussing the application of an open legal policy in the periodization of constitutional judges' tenure, viewed from the perspective of the Judiciary's Independence and the ideal concept of the tenure of constitutional judges based on the principle of a free and independent judicial institution. Next, Diah Ayu Fernanda and Ernawati Huroiroh⁷ Examined the contradiction in the DPR's actions in dismissing and replacing constitutional judges against the applicable laws. Furthermore, Fuad Abdul Aziz⁸ Studied the DPR's decisions in dismissing MK judges based on authority and the principle of separation of power. Agung Tri Wicaksono and colleagues⁹ analyzed the unconstitutional practices of dismissing constitutional judges under the applicable laws. Additionally, M. F. Farhan Farabi and Tanaya¹⁰ discussed the legal polemics of the dismissal of Judge Aswanto and its implications for the independence of the judiciary in Indonesia. Sarah Sabrina and Khalid¹¹ examined the dismissal of Constitutional Court Judge Aswanto in Indonesia from a constitutional perspective. This paper, however, will examine the conformity of replacing constitutional judges during their tenure with the constitution and the consequences arising from the MK's independence. Based on the above background, it is important to conduct this

⁶ Muhammad Reza Baihaki, "Problematika Open Legal Policy Dalam Periodisasi Masa Jabatan Hakim Konstitusi" (Universitas Islam Negeri Syarif Hidayatullah, 2019).

⁷ Diah Ayu Fernanda dan Ernawati Huroiroh, "JURIDICAL ANALYSIS OF THE DECISIONS OF THE DPR IN TERMINATION AND REPLACEMENT OF CONSTITUTIONAL JUDGES," *Jurnal Lawnesia* 2, no. 1 (2023): 322–39.

⁸ Fuaf Abdul Aziz, Irham Ramur, dan Sri Jumiarti Risno, "ANALISIS KEWENANGAN DPR TERHADAP POLEMIC PENGGANTIAN HAKIM MAHKAMAH KONSTITUSI," *Jurnal Studi Islam dan Sosial* 4, no. 1 (2023): 71–83.

⁹ Agung Tri Wicaksono dkk., "Praktik Inkonstitusional Pemberhentian Hakim Konstitusi pada Mahkamah Konstitusi Republik Indonesia," *Verfassung: Jurnal Hukum Tata Negara* 2, no. 1 (2023): 1–24, <https://doi.org/10.30762/vjhtn.v2i1.217>.

¹⁰ Muhammad Fawwaz Farhan Farabi dan Tanaya, "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, <https://doi.org/10.58812/jhhws.v2i04.291>.

¹¹ Sarah Sabrina dan Khalid Khalid, "Analisis pemberhentian hakim mahkamah konstitusi Aswanto oleh dewan perwakilan rakyat ditinjau dari ketatanegaraan di Indonesia," *Jurnal EDUCATIO: Jurnal Pendidikan Indonesia* 9, no. 2 (2023): 815, <https://doi.org/10.29210/1202323214>.

research to understand and examine the constitutionality of the replacement of constitutional judges during their tenure by the DPR and to analyze its implications on the independence of the Constitutional Court.

Research Method

This research is a normative legal study. The approaches employed in this research are legislative and conceptual. The data sources used are secondary data, comprising primary legal materials, including the 1945 Constitution of the Republic of Indonesia and various legislative regulations; secondary legal materials, including books, journals, and scholarly articles; and tertiary legal materials, such as legal dictionaries, the KBBI (Indonesian Language Dictionary), and English language dictionaries. The collection of legal materials is conducted through the library research method. The technique of collecting legal materials using the library research method is carried out by gathering various literature (library resources), including books, scientific journals, mass media and internet sources, as well as other relevant references to address various formulated issues.¹² The legal materials from this centralized study are analyzed using descriptive qualitative methods.

Constitutionality of the Replacement of Constitutional Judges by the DPR during Their Tenure

Constitutionality regards an event or action based on its conformity with the 1945 Constitution of the Republic of Indonesia or the Constitution. If an event follows the constitution's mandate, it is termed "constitutional," whereas events that do not conform to the constitution are termed "unconstitutional." It should be noted that the rules written in the constitution are not very detailed because the constitution itself is a basic regulation, both written and unwritten, containing only the principal provisions for the administration of the state in a society. Therefore, derivative regulations are needed to regulate various legal events further, provided

¹² Iqbal Hasan, *Pokok-Pokok Materi Metodologi Penelitian dan Aplikasinya* (Jakarta: Ghalia Indonesia, 2002), 11.

that the substance of these derivative regulations does not conflict with the constitution.

The Constitutional Court Law (UU MK) is a constitutional provision because its content is a mandate or further regulation regarding Article 24C paragraph (6) of the 1945 Constitution of the Republic of Indonesia, which states that the appointment and dismissal of constitutional judges, procedural law, and other provisions about the Constitutional Court are regulated by law. Susi Dwi Harijanti opines that a law that originates from a command of the constitution is qualified as a constitution in the broader sense.¹³ Therefore, if there is a violation of the procedural provisions for the dismissal of constitutional judges found in the UU MK, it indirectly also constitutes a violation of the constitution, specifically Article 24C paragraph (6) of the 1945 Constitution of the Republic of Indonesia.

The replacement of a constitutional judge by the DPR during their tenure is unconstitutional as it does not align with the principles in the constitution. Firstly, the meaning of the DPR's supervisory function, which the DPR claimed as the basis for replacing Judge Aswanto, found in Article 20A paragraph (1) of the 1945 Constitution of the Republic of Indonesia, needs further interpretation based on systematic (logical) interpretation, a method of interpretation that connects various legislative regulations. This interpretation is based on the notion that law is always linked to other legislation, and no law stands completely separate from the overall legislative system.¹⁴

In this case, the Constitutional Court Law (UU MK) and the MD3 Law contain substantive regulations regarding the relationship between the DPR and the MK. To ascertain the extent of authority's application in the DPR's supervisory function towards the MK, a systematic exploration related to this matter in the MD3 Law and the UU MK is necessary. In Article 71 letter n of the MD3 Law, the DPR's

¹³ Lihat, "Keterangan Ahli Susi Dwi Harijanti, dalam Risalah sidang Mahkamah Konstitusi Nomor 79/PUU-XVII/2019, Sidang Perkara Pengujian Formil-Materil Undang-Undang Nomor 19 Tahun 2019 Tentang Perubahan Kedua Atas Undang-Undang Nomor 30 Tahun 2002 Tentang Komisi Pemberantasan Tindak Pidana Korupsi, (Jakarta, 4 Maret 2020), 106.

¹⁴ Sudikno Mertokusumo dan A. Pittlo, *Bab-bab Tentang Penemuan Hukum* (Bandung: Citra Aditya Bakti, 1993), 16.

supervisory function is articulated in the authority to select and propose 3 (three) constitutional judges to the President. Similarly, under Article 18 of the UU MK, the DPR has the authority to propose 3 (three) constitutional judges to be appointed by a Presidential Decree (Keppres). Thus far, the supervisory function held by the DPR over the MK is only manifested as an institution proposing constitutional judges. Regarding the authority to dismiss constitutional judges, neither the MD3 Law nor the UU MK grants this authority to the DPR; rather, it is the prerogative of the Chair of the MK, which a Presidential Decree then formalizes.

Moreover, the supervisory function of the DPR cannot be used as a tool to dismiss and replace constitutional judge Aswanto due to his decisions, as supervision is merely an observational role to ascertain, assess, and ensure that the predetermined plan conducts all activities.¹⁵ In case of non-compliance with the plan, follow-up actions such as dismissal, dissolution, imposition of sanctions, etc., are carried out by parties vested with authority by legislative regulations. As for the exercise of parliamentary rights such as interpellation, inquiry, and ultimately, the right to express opinions, these are executed in stages as the driving force of the DPR's supervisory function but do not extend to the realm of taking actions like dismissal or replacement, as the exercise of these rights only reaches as far as the "right to express opinions." In line with this is the view of Bivitri Susanti, a constitutional law expert and founder of the Center for Law and Policy Studies (Pusat Studi Hukum dan Kebijakan - PSHK), in a discussion themed 'Revisiting the Urgency of the Independence of the MK as the Guardian of the Constitution Post Dismissal of a Constitutional Judge by the DPR.' She stated that while judges' conduct may be monitored, such oversight should not threaten constitutional judges due to their decisions, as the essence of judicial power is to ensure that no judge faces the threat of removal regardless of their decisions. The supervision of judges must be conducted within ethical and legal boundaries. It must respect the principles of the universally established judicial code of conduct, the "Bangalore

¹⁵ Muchsan, *Sistem Pengawasan Terhadap Perbuatan Aparat Pemerintah dan Peradilan Tata Usaha Negara di Indonesia* (Yogyakarta: Liberty, 2000), 37.

Principles of Judicial Conduct," which means "judges should not be evaluated (affecting their tenure) based on the content of their decisions."¹⁶

Secondly, the DPR's initiative to submit a dismissal request to the President and the nomination of a replacement constitutional judge is unconstitutional as it does not comply with the formal requirements set out in the Constitutional Court Law (UU MK). Article 23, paragraph (4) of the UU MK stipulates that the dismissal of a constitutional judge must be requested by the chair of the MK, not at the request of the DPR. The DPR's involvement in the organization of the MK is limited to nominating constitutional judges as part of the "function of appointing and considering public officials." However, the DPR violated this provision by directly requesting the President to decree the dismissal of Judge Aswanto without going through the MK.

Similarly, the DPR's nomination of Guntur Hamzah as a replacement constitutional judge to the President in this case also does not align with the legislative provisions of Article 26 of the Constitutional Court Law (UU MK). According to the law, the nomination of a replacement constitutional judge should occur after the issuance of the Presidential Decree (Keppres) concerning the dismissal of the previous constitutional judge, followed by the MK sending a notification to the nominating body about this dismissal, and only then can the nominating institution propose a replacement constitutional judge.

However, in this case, the DPR nominated Guntur Hamzah as a replacement judge without a Presidential Decree (Keppres) concerning the dismissal of Judge Aswanto, nor was there a notification letter from the MK regarding Aswanto's dismissal. Instead, the MK sent a notification resulting from Decision Number 96/PUU-XIII/2020 on the judicial review of Article 87 letter b of Law Number 7 of 2020 concerning the Constitutional Court, which altered the tenure periodization of MK judges from a five-year cycle to one based on age. The DPR misinterpreted this letter from the Chair of the MK, using it as a basis to dismiss Judge Aswanto.

¹⁶ Bivitri Susanti "Membaca Kembali Urgensi Kemandirian MK sebagai Penjaga Konstitusi Pasca Pemberhentian Hakim Konstitusi oleh DPR" (Seminar Online MHBK UGM&CALs, 8 November 2022)

The DPR's misinterpretation of the notification from the MK is not a sufficiently strong reason to violate the constitutional provisions related to the formal requirements for the dismissal and appointment of replacement constitutional judges contained in the UU MK. Laws are binding for all, including state institutions like the DPR. Therefore, normalizing such violations is unjustifiable, especially since the DPR is empowered to draft such laws.

Thirdly, the dismissal of Judge Aswanto by the DPR on the grounds of dissatisfaction with his frequent nullification of DPR products is not a legally founded reason as it does not meet the criteria specified for either an honorable or dishonorable dismissal. Consequently, the status of Judge Aswanto's dismissal becomes problematic because it falls into neither an honorable nor a dishonorable dismissal.

Constitutional judges, as guardians of the constitution and its official interpreters, are indeed afforded the latitude to ensure, encourage, direct, guide, and ascertain that the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) is implemented effectively by the constitutional legal entities so that its values are realized accurately and responsibly.¹⁷ Therefore, if the substance of legal products from the DPR contradicts the UUD NRI 1945, constitutional judges can annul such legal products by granting judicial reviews submitted by parties with legal standing. There must be no interference from other institutions in the decisions to be made or made by constitutional judges, especially interference from the DPR, which is laden with political interests. The Constitutional Court (MK), as an independent institution, has judges who are also independent. The role of the DPR is only to select candidate judges, and once selected, they become part of the MK, whose duty is to safeguard the constitution. Therefore, in Article 24C paragraph (3), the phrase "proposed by" rather than "proposed from" implies that judges proposed by the DPR are not individuals from the DPR but merely selected by the DPR. Hence, the DPR no longer has the right to meddle with these judges once appointed to the MK.

¹⁷ Soimin & Mashuriyanto, *Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Indonesia*, UII Press (Yogyakarta, 2013). 12

Fourthly, the DPR's selection process for the substitute judge, Guntur Hamzah, did not fulfill the elements of transparency and openness as emphasized in Article 20 of the Constitutional Court Law (UU MK). Although the provisions for the recruitment mechanism of constitutional judge candidates represent an open legal policy for each proposing institution, as a proposing body and also a representative institution of the people embodying popular sovereignty, the DPR is expected by the public to produce the best constitutional judges through a democratic selection process. This process should be open to receive and consider input from the public. Transparency can only be achieved by publicizing the entire selection process from start to finish, including information on the number of constitutional judge candidates participating in recruitment across various media accessible to the public. The community must be given adequate opportunity and time to propose candidates, lodge complaints about candidates' track records, and provide input and suggestions.¹⁸

Moreover, the principles of transparency and openness in the selection of constitutional judge candidates by the DPR are crucial for building public trust, given the potential for politically motivated deviations, as the DPR is heavily laden with political elements. It also serves as a counterbalance in the execution of people's control through their representation. However, the DPR failed to adhere to the obligation of implementing these principles of transparency and openness in recruiting substitute constitutional judges. This is evidenced by the nomination of Guntur Hamzah, which was conducted secretly and abruptly, involving only the internal members of the DPR, with no public disclosure of information regarding the judge selection process or the number of candidates participating. The absence of such transparency means that openness to public aspirations is also lost. The actions of the DPR have violated the provisions of Article 20 of the Constitutional Court Law (UU MK), as there was no selection process, let alone the application of transparent and open principles.

¹⁸ Winda Wijayanti, Nuzul Quraini M, dan Siswantana Putri R, "Transparansi dan Partisipasi Publik dalam Rekrutmen Calon Hakim Konstitusi," *Jurnal Konstitusi* 12, no. 4 (2016): 670, <https://doi.org/10.31078/jk1241>.

The structured violations by the DPR against the Constitutional Court Law (UU MK) in the replacement of constitutional judge Aswanto with Guntur Hamzah, ranging from overstepping authority, inconsistency in applying dismissal requirements, contradicting the mechanisms for dismissal and appointment of a substitute constitutional judge, to disregarding the principles of transparency and openness as stipulated in the UU MK, constitute unconstitutional actions. This is because the creation of the Constitutional Court Law is a follow-up to the mandate of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), particularly Article 24C paragraph (6). Therefore, all provisions outlined in the UU MK, derived from the command of the UUD NRI 1945, are interpreted as part of the constitution in a broader sense.

Implications of the Replacement of a Constitutional Judge Mid-Term by the DPR on the Independence of the Constitutional Court

One of the fundamental principles that must exist in a rule of law state is the presence of an independent judiciary, which means being free from any interference of power and impartial (independent and impartial judiciary).¹⁹ Therefore, as a judicial authority, the Constitutional Court (MK) administers justice to uphold law and order independently. The principle of independence is a derivative of the concept of "freedom" enshrined in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), which has been extended to embody the principles of autonomy, impartiality, and independence.²⁰

Independence encompasses a broader spectrum, encompassing both institutional and individual components of autonomy and impartiality, meaning independence from certain powers (institutionally) and the administration of impartial justice (on a personal judge basis). As per constitutional law expert Anwar

¹⁹ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Jakarta: Sinar Grafika, 2017), 123-.

²⁰ Novianto Murti Hantoro, "Periode Masa Jabatan Hakim Konstitusi dan Implikasinya terhadap Kemandirian Kekuasaan Kehakiman (Term of Office for Constitutional Justices and Its Implications against Judicial Independence)," *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan* 11, no. 2 (2020): 191–210, <https://doi.org/10.22212/jnh.v11i2.1705>.

Usman, the independence of the judiciary refers to the state power that is free from all forms of intervention, whether internal or external to the judiciary, except based on the philosophy of Pancasila and the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Independence aims to make judges and judicial institutions autonomous in the context of realizing an autonomous judiciary. Organisationally, judicial institutions must be made autonomous and freed from any intervention and influence of other state powers. Within this framework, judges, as executors of judicial power, must be distinctly separated from the other branches of state power, namely the executive and legislative, to create a system of mutual checks and balances within the political system.

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Based on the explanation above, it can be concluded that independence constitutes the freedom of the judiciary and individual judges from influence,

²¹ Ananthia Ayu Devitasari, "Menakar Independensi Hakim Pengadilan Pajak Pasca Putusan MK Nomor 10/PUU-XVIII/2020," *Jurnal Konstitusi* 17, no. 4 (2021): 879–98, <https://doi.org/10.31078/jk1748>.

²² "Ketua MK Paparkan Independensi Kekuasaan Kehakiman kepada Mahasiswa FH Universitas Riau," *MKRI.id*, 2021, <https://www.mkri.id/index.php?page=web.Berita&id=17392&menu=2>.

pressure, and intervention from parties, both external and internal, which could affect the judicial process. Generally, independence, as per the Dutch legal expert Frannken, states that the independence of the judiciary is distinguished into four forms:²³

- a. Constitutional independence (*'constitusionele onafhankelijk-kheid'*) refers to the independence linked with the trias politica doctrine and the system of separation of powers, according to Montesquieu. The judicial authority must be independent because its institutional position should be free from political influence.
- b. Functional independence (*'zakleijke of functionele onafhankelijk-kheid'*) relates to the work carried out by judges, meaning that each judge is free to interpret the law when the law does not provide a clear meaning, as judges have the freedom to apply the content of the law to ongoing cases or disputes.
- c. Personal Independence of Judges (*'persoonlijke of rechtspositionele onafhankelijk-kheid'*) implies that judges as individuals have freedom when dealing with a dispute.
- d. Evident Practical Independence (*'constitusionele onafhankelijk-kheid'*) is the independence of judges to remain impartial.

In the relationship between the three branches of power in Indonesia – legislative, executive, and judiciary – the principle of checks and balances is recognized for mutual oversight and balancing the exercise of authority among these powers. The legitimacy of checks and balances is enshrined through the allocation of rights or powers of one institution over another in the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) and its derivative regulations. However, there will always be limitations to how one institution can reach into the domain of another in implementing this principle. These limitations are set out in legislation to realize Indonesia as a rule-of-law state, meaning that all actions must be based on law.

The concept of checks and balances in state governance is a fundamental basis of constitutional practice, particularly in the exercise of authority by state institutions, aimed at dismantling dimensions of authority misuse and sectoral ego. Thus, the principle requires the amalgamation of two elements: control (the effort

²³ Imam Anshori Saleh, *Konsep Pengawasan Kehakiman* (Malang: Setara Press, 2014), 131.

of oversight among state institutions) and balance (the execution of each institution's duties and powers must be aligned with the limits of its authority).²⁴

The constitution, along with the Constitutional Court Law (UU MK) and the MD3 Law as its derivatives, has set limitations on authority in the context of checks and balances. These regulations serve as tools to maintain the dignity of the legislative institution as a representation of the people and the independence of the judicial institution of the MK as a pillar of justice entrusted with adjudicating fairly based on the constitution. The mechanism of reciprocal checks and balances between the DPR as the legislative power institution and the MK as the judicial power institution, as stipulated in the UU MK and UU MD3, is as follows

a. People's Representative Council to the Constitutional Court

The system of oversight and balancing established from the DPR to the MK relates to filling the position of constitutional judges. As the legislature, the DPR is given constitutional authority to propose 3 (three) constitutional judges who have undergone a selection and election process with procedures regulated by the DPR itself. These judges will then fill the positions in the constitutional judge membership after being appointed by a Presidential Decree regarding the appointment of constitutional judges.

b. Constitutional Court to the People's Representative Council

The implementation of checks and balances by the MK towards the DPR is executed through judicial reviews of laws as legal products of the DPR; deciding disputes over the authority of state institutions, where the DPR can be one of the disputing parties; and examining, adjudicating, and deciding on the DPR's opinion regarding alleged violations by the President and/or Vice President.

c. People's Representative Council to the Constitutional Court

²⁴ Hanif Fudin, "Checks and Balances Actualization of State Institutions : Between The People's Consultative Assembly and The Constitutional Court," *Jurnal Konstitusi* 19, no. 1 (2022): 203–24, <https://doi.org/10.31078/jk1919>.

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d. Constitutional Court to the People's Representative Council

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From both of these regulations, the form of checks and balances that the DPR can exercise towards the MK is only established in the nomination of constitutional judge candidates, and there is not a single article that grants the DPR the authority to dismiss MK judges. Instead, their dismissal is carried out entirely by the Chair of the MK and formalized by a Presidential Decree.

The DPR's action in replacing constitutional judge Aswanto with Guntur Hamzah, which did not follow the procedures and reasons as stipulated by the Constitutional Court Law (UU MK), does not reflect the execution of the checks and balances mechanism that requires all state powers to be limited to prevent arbitrariness. It is also noteworthy that the emergence of checks and balances was to limit one powerful state institution at the time. Hence, the expectation with the introduction of this system in the 1945 Constitution amendment is that no state

²⁵ Article 24C paragraph (3) of the 1945 Constitution of the Republic of Indonesia stipulates that the Constitutional Court shall have nine constitutional judges appointed by the President, with three nominees each proposed by the Supreme Court, the People's Representative Council, and the President.

institution would act with excessive power, thereby diminishing the functions of other state powers.

The transgressions committed by the DPR can be interpreted as a form of intervention that potentially weakens the independence of the MK. Firstly, in terms of constitutional independence ('*constitusionele onafhankelijk-kheid*'), following the amendment of the 1945 Constitution, the DPR and the MK are two institutions with equal standing as high state bodies, each with distinct authority and responsibilities as an embodiment of the checks and balances mechanism. As an independent institution, the MK should be free from political influence or power. On the other hand, the DPR represents political parties. Hence, its intervention that oversteps its authority towards the MK by replacing constitutional judges not aligned with its interests is prone to be used as a vessel for legitimizing public policies whose partiality towards the people's true interests is questionable.

Secondly, in terms of functional independence ('*zakleijke of functionele onafhankelijk-kheid*'), constitutional judges are free to interpret and apply the constitution to ongoing cases, which are then reflected in their decisions. However, the DPR stifled Judge Aswanto's freedom to carry out his duties by proposing his dismissal to the President. This was because the DPR deemed that Aswanto's decisions often annulled legislative products created by the DPR, even though Aswanto, as a constitutional judge, had the freedom to examine, adjudicate, and decide cases based on his considerations grounded in the constitution. An indispensable condition of a rule of law state is the presence of a court that is free and impartial (free and impartial judiciary), meaning no intervention by other powers, either legislative or executive, in the judiciary's execution of its duties. However, this does not imply that the judiciary can act arbitrarily in performing its duties and obligations; in other words, the judiciary is subordinated and bound by law.²⁶

Thirdly, regarding the personal independence of judges ('*persoonlijke of rechtpositionale onafhankelijk-kheid*'), Judge Aswanto, as an individual, possesses

²⁶ Seno Adji Oemar, *Peradilan Bebas Negara Hukum* (Jakarta: Erlangga, 1987), 46.

the freedom to act impartially in the face of any dispute, meaning he is not obliged to prioritize the interests of any particular group, in this case, the DPR. Although the DPR nominated Judge Aswanto, he is not intended to be a judge representing the DPR's membership or the DPR's interests in the MK. Instead, he is a judge selected and proposed by the DPR to the MK; hence, he has no obligation to represent the DPR's interests. Therefore, the DPR has no right to demand that Judge Aswanto align with its interests, especially as the party responsible for creating laws. It must be understood that although each judge or bench of judges may have their views on a case when the gavel is struck to signify a decision, the individual opinions of judges become the court's decision and belong to the public.²⁷

Fourthly, regarding evident practical independence ('constitusionele onafhankelijk-kheid'), the DPR also impeded the constitutional judge's freedom to remain impartial. The DPR's coercion was manifested in the dismissal of Judge Aswanto because he was deemed not to side with the DPR as the institution that nominated him. The DPR's reasoning is unfounded due to the error in expanding the meaning and implementation of its authority in appointing public officials (constitutional judges) by attempting to impose its interests in the judicial realm, thereby directing the judges to favor them in their cases.

Constitutional judges and the Constitutional Court form a unified entity, and both are characterized by independence. In any dispute or petition, they are free to decide according to what they believe is right based on their interpretation of the law. Their opinions may contradict external parties, including those with political and administrative power, through the legitimacy of their position, authority, and duties, which are inherent and inseparable aspects of their accountability.²⁸

If the DPR's intervention in the MK regarding the dismissal of constitutional judge Aswanto's mid-term continues to be overlooked, it could set a negative precedent for the future governance of the state. This neglect could justify

²⁷ Firman Floranta Adonara, "Prinsip Kebebasan Hakim dalam Memutus Perkara Sebagai Amanat Konstitusi," *Jurnal Konstitusi* 12, no. 2 (2016): 217, <https://doi.org/10.31078/jk1222>.

²⁸ Mira Fajriyah, "The Refraction and Alignment of The Constitutional Court's Justice Appointment," *Jurnal Konstitusi* 12, no. 2 (2015): 238–63.

unconstitutional actions undertaken at any time by other institutions also involved in nominating constitutional judges. However, following this case, changes in the Constitutional Court Law, namely Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 about the Constitutional Court, have explicitly stated that constitutional judges cannot be dismissed mid-term without fulfilling the reasons mentioned in Article 23 of the UU MK, namely reasons for honorable or dishonorable dismissal.

Conclusion

Based on the above discussion, it can be concluded that firstly, the replacement of Judge Aswanto with Guntur Hamzah mid-term by the DPR is unconstitutional as it does not align with Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945) and contravenes various provisions of the Constitutional Court Law (UU MK) which is a mandate of the UUD NRI 1945. Moreover, the dismissal can also be viewed as an abuse of power by the DPR, not complying with the material (reasons) and formal (mechanism) requirements for dismissal, as well as the appointment of Guntur Hamzah as a substitute constitutional judge, which did not undergo a transparent and open selection process. Secondly, the dismissal of a Constitutional Judge mid-term, as mentioned, weakens the independence of the MK, affecting constitutional independence, functional independence, personal independence of the judge, and evident practical independence, and is not in line with the principle of checks and balances. If such an event is deemed correct, it could set a negative precedent for future state governance.

Authors' Contributions

NMH, as the main author of this article, was responsible for research activities, such as data collection, presentation, and writing the report and manuscript. R.M.I. and H.S.H. are co-authors of this article. They contributed to this research by collecting data and writing the report with the main author.

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