



***Mahkamah Konstitusi* Post Judicial Review of the 11/2020 Job Creation Law: Toward Politization of Judiciary?**

Andy Omara¹, Novira Maharani¹

¹ Universitas Gadjah Mada, Yogyakarta, Indonesia
andy.omara@mail.ugm.ac.id

Abstract. Since its inception in 2003, the Indonesian Constitutional Court is often seen as a strong court. This is because unlike some courts which can only declare the law inconsistent with the constitution, the Indonesian Constitutional Court can go further by invalidating the law produced by the legislature. This situation is often regarded as the judicialization of politics since the judiciary is involved in resolving political dispute. This situation, however, shifted significantly post judicial review of Job Creation Law. The Court declared Job Creation Law conditionally unconstitutional. The Court ordered the lawmakers to fix the lawmaking process by involving the public meaningfully in such process. The lawmakers' response however is way different from the Court order. Rather than fixing the law-making process, the lawmakers, specifically the government choose to enact government regulation in lieu of law (Perpu) to substitute Job Creation Law. This situation raises an important question what would be the lawmakers-judiciary relation after the judicial review of Law on Job Creation? Utilizing doctrinal approach as the research method, the paper argues that *post* judicial review of Job Creation Law, there is a tendency to shift from judicialization of politics to politization of judiciary. This can be seen how the lawmaker takes different approach (from the court decision) in following up the Court ruling concerning Job Creation Law even though the Court has provided some guidance for the lawmakers in fixing the lawmaking process. This situation somewhat reflects politization of judiciary as opposed to judicialization of politics.

Keywords: Indonesia, Job Creation Law, Politization of Judiciary

1. Introduction

The most recent constitutional amendments though were not an ideal process indicated significant advancement in terms of democracy and rule of law.[1] The introduction of three new institutions showed such commitment.[2] In its early operation, the Indonesian Constitutional Court showed its independence and commitment to uphold the norms of the constitution and protect human rights. The Court was successfully judicializing politics by settling political disputes in general elections and dispute among state organs.[3] The Court also invalidated a number of important laws produced by political bodies that were found inconsistent to the Constitution.[4] Unlike its early performance, many believe that the Court reputation

© The Author(s) 2023

A. A. Nassihudin et al. (eds.), *Proceedings of the 3rd International Conference on Law, Governance, and Social Justice (ICoLGaS 2023)*, Advances in Social Science, Education and Humanities Research 805,
https://doi.org/10.2991/978-2-38476-164-7_56

fluctuates over the years. The important question that will be answered in this paper is What would be the impact of judicial review of Job Creation Law toward judiciary? Is there politization of judiciary after the court ruling on job creation law? The paper argues that the Court-lawmakers relation has shifted from judicializing politics to politicizing judiciary. Two recent cases – the recall of Constitutional Justice Aswanto by the parliament and the issuance of Perpu (government regulation in lieu of law) to replace the invalidated Job Creation Law are two examples how politization of judiciary seems to be happening.

The paper begins by discussing two important terms namely judicialization of politics and politization of judiciary.[5] These two terms are important to illustrate the Court transformation from Judicialization of politics to politization of judiciary. The paper then provides an analysis on the Court performance in its early operation. It indicates that while the Court started with humble beginning, it significantly contributes in guarding the constitution, protecting constitutional rights and upholding constitutionalism. Professor Jimly Asshidiqie the first chief Justice of Constitutional Court brought the Court into a functioning one.[6] The Court rulings during the first generation of the constitutional court justices provided many academic discussion including theories and concept relevant to constitutional law.[7] Part II will analyze the performance of the second generation of the constitutional court justices. Similar to the first generation, the second generation of constitutional justices showed strong commitment to uphold substantive justice.[8] In its rulings, the Court did not always follow what the written rules said.[9] In some cases, the Court deviated from the written rules if the Court was of the opinion that such rules is believed contradictory against the substantive justice. The Court performance declined significantly in the third generation. It was marked by two corruption cases committed by two constitutional court justices- Patrialis Akbar and Akil Mochtar. Afterward, the Court seems to be more cautious and restrained in dealing with regional election disputes.[8] The Court ruled that settling regional election is beyond the Court's constitutional powers. The Court performance keep declining as some justices posed significant problems with ethics. Unfortunately, ethical violation did not have significant consequences. In most cases the consequences were in the form of warning. With that the Justices remained in their bench. Part III illustrates how the two recent cases concerning the recalling of Justice Aswanto by the DPR and the issuance of Perpu to replace Job Creation Law indicate the politization of judiciary is happening.

2. Problems

The important questions that will be answered in this paper are (1) What would be the impact of judicial review of Job Creation Law toward judiciary? (2) Is there an indication toward politization of judiciary after the Court ruling on Job Creation Law?

3. Method

To comprehensively respond the two research questions abovementioned, the paper utilizes doctrinal approach. It studies the relevant court decisions, the response from the lawmakers as can be found from media coverage and relevant official websites of relevant state institutions including the DPR website and the government/ministries websites. Literatures on judicialization of politics and politicization of judiciary is also studied to enhance the understanding regarding these two important concepts. Academic papers from scholars which discuss the follow up of the court ruling on Job Creation Law will also be used to as a reference to understand the government attitude toward the Court decision.

4. Discussion

4.1. Judicialization of politics v. Politization of judiciary

In general, judiciary is an institution meant to be independent and apolitical. The independence of judiciary in most jurisdictions are constitutionally guaranteed.[7] This is because the main function of judiciary is to settle disputes. Unfortunately, it is not easy to properly define judicial independence. In most cases, judicial independence is seen as structural, functional, and personal independence.[10] These mean institutionally the Court is designed to be independent from the influence and inducement of other entities including other state institutions. In addition, the Court should function independently when carrying out its constitutional mandate to settle dispute. Last, personal independence means judges should be independent and far from the influence or pressure internally and externally.

While the Court is supposed to be independent, it is unlikely in real world situation the Court is absolutely independent. The fact is the Courts operate and carry out its constitutional powers together with other state institutions. It is therefore likely that the Court receives influence from other entities. There are at least three areas that may influence the Court performance in the real-world situation. They are: the position of judiciary in the state institutional structure, the recruitment method, and the budgeting policy for judiciary.

With such situation, in the past two decades there is a tendency more countries adopt constitutional review. Unlike the existing mechanism where the Supreme Court review the regulation beneath the Law, constitutional review is carried out by a separate special Court namely Constitutional Court. The Court reviews the laws against the constitution. The primary aim of constitutional review is to ensure that constitutionalism is upheld by all state institutions including the lawmakers.[11]

Indonesia experience similar tendency. The 1999-2002 constitutional amendments inserted a new separate special court namely the constitutional court.[6] This new court is intended to guard the constitution and protect human rights. This is in line with the general tendency worldwide where judicial mechanism is used to settle political disputes.[12] In the past, when political dispute arose, political mechanism addressed such disputes. However, such tendency changes because of the

belief that judicial mechanism provide better mechanism in the sense that such proceeding deemed to be apolitical or at very least less political. This provides a fairer result for the disputing parties as there will be less indication that political motive will involve in settling the disputes. Such tendency is commonly called judicialization of politics or juristocracy.[5]

As time goes by, such tendency gradually changed in some jurisdictions including Indonesia. The interaction between the Court and the lawmakers specifically on judicial review are dynamic. When the Court invalidated an important law, it often creates tension between the court and the legislature.[13] As a result, the lawmakers try to restrict the Court authority. These can be in the form of amending the relevant law concerning the Court authority or through budgetary policies. If the lawmakers turn its roles into a more dominant one compared to the Court, and it aims to control the Court theoretically such tendency commonly called politization judiciary.

4.2. The Strong Court at the Very Beginning: Judicialization of Politics

In the beginning, the Indonesian Constitutional Court was equipped by minimal infrastructure. The Court did not have its own building, it did not have adequate staff. [6] Yet the Court showed it strong commitment to protect both the constitution and the human rights. Such commitment can be seen how the Court was dealing with many important laws.[8] The Court showed its authority to test the constitutionality of law against constitution. The Court frequently invalidated the Law that were enacted by the lawmakers (the president and the DPR) in some cases the lawmakers retaliated by revising the law to limit the Court authority in dealing with the government policy. Stefanus Hendrianto explains the strong roles of the first chief constitutional justice in bringing the Court from humble beginning to a functioning court. To name few, in the 1st generation, the Court invalidated some important laws including the Law on Electricity, Law on Mining and Law on Truth and Reconciliation Commission (KKR) Law. Sometime such rulings invited tension between the Court and the lawmakers.

The 2nd generation when the Court was headed by Prof Mahfud MD, the Court showed similar tendency where the Court broaden its authority in settling general election disputes. The 1st generation the Court checked the final result of the election. In the 2nd generation, the Court checked the process when the election was carried out. During Mahfud leadership, the Court was popular with its jargon “upholding the substantive justice” which essentially mean that the Court will not merely depend on the written formal laws but it also emphasis whether it provides justice.

After Mahfud leadership the Court reputation starts ruining. The corruption cases by two justices -Akhil Mochtar and Patrialis Akbar- were red handedly caught by the Anti-Corruption Commission.[8] These two incidents made the Court changed its attitude from activist to a more restrained Court. Under Hamdan Zoelva leadership, the Court excluded its authority to settle disputes concerning local head election result. It is likely that Court do so because the two corruption cases committed by two constitutional justices was when they settle dispute on legal head election result.[14]

After Zoelva leadership, the Court performance was not as impressive as the first and the second generation. The fact that there was no corruption case involved again this era was true.[15] However, it does not mean that the Court was fine. Some of constitutional court justices had problem with ethic. Based on the Supervisory body report, Prof Arif Hidayat and Guntur Hamzah are two justices who had problems with ethic because they used their authority to gain benefit.

It can be said that the Court performance was very convincing at the very beginning (1st and 2nd generations). However, it started declining especially after the corruption case and ethical problems involved. And the court performance tended to be stagnant afterwards.[16]

4.3. Toward Politization of Judiciary?

The Recall of Justice Aswanto by the Legislature: Politization of Judiciary?

Politization of judiciary means that there are political acts from political institutions toward the judiciary with the intention to influence or to domesticate the Court.[8] This can be in the form of influencing the court on matters such as the term of office, remuneration, judicial budget, or recruitment process.[17] In the case of Indonesian Constitutional Court, politization of judiciary occurred especially after the issuance of Creation Law. These include (1) the recall of Justice Aswanto by the DPR and (2) the Issuance of Perpu Job Creation to follow up the Court ruling on Job Creation Law.

The story begins when the lawmakers enacted Job Creation Law, unlike the ordinary law which often regulate very specific topic, the Job Creation Law contains various themes which are not always connected each other. The reason why the lawmakers adopted omnibus law is because many existing laws and regulation are not harmonious, inconsistent, and some time overlapping. Omnibus law model is believed capable to revise and revoke various legislation at once, because it contains several laws with different topics. With that approach, the regulatory reform may be achieved through the enactment of a single law namely the 2020 Job Creation Law. The omnibus law model, however, was not recognized in the 12/2011 Law on the Formulation of legislation. This leads to a question whether Omnibus law Job Creation Law is constitutional. Some societal groups and individuals submitted a petition to the Constitutional Court to review the validity of the 11/2020 Job Creation Law. In its ruling Number 91/PUU-XVIII/2020, The Constitutional Court (MK) declared that the Job Creation Law was conditionally unconstitutional. The Court was of the opinion that the Omnibus Job Creation Law is not consistent with Law 12/2011 because Omnibus law model is not recognized by the 12/2011 law. In addition, the Court ordered the lawmakers to improve the law-making process by involving the public participation in a meaningful way. The lawmakers, according to the Court declaration, must fulfill 3 (three) important elements during the process, i.e. the public's right to be heard, to be considered, and to be explained.

5 (five) out of 9 constitutional court justices were of the opinion that Job Creation Law was formally in consistent to the Constitution as elaborated in the 12/2011 Law. Among the five Justices is Justice Aswanto. Justice Aswanto was

nominated by the DPR. Not long after the court declaration that Job Creation Law conditionally unconstitutional, Justice Aswanto was recalled by the DPR. The House of Representatives said "not to prolong the term of office of the constitutional justice from the DPR i.e. Aswanto. The DPR then appointed Guntur Hamzah as a constitutional judge," to replace Aswanto as stated by Deputy Speaker of the House of Representative Sufmi Dasco Ahmad as appeared in Media Indonesia (newspaper), on October 3, 2022 in an article written by Palguna on "Pengadilan Kita Diserang" (Our Court Was Under Attack).

One Member of Parliament explained the reason why the DPR had not extended Aswanto term. Justice Aswanto had not held his commitment as a constitutional judge nominated by the DPR. This is because Aswanto invalidated some important laws established by the DPR. The fact is Justice Aswanto was the "representative" of the DPR as Justice Aswanto is nominated by the DPR. For that reason Justice Aswanto should be consistent with the DPR position and not the other way around.

For many, the Parliament initiative to recall constitutional justice certainly undermines the independence of judiciary. Not only reflecting direct intervention of the political body toward the court, it is also showing the violation of the *Mahkamah Konstitusi* Law (MK Law). The MK Law stipulates the recall of a constitutional justice should be based on the letter from the Chief of Justice of the MK. In this case there is no letter from the Chief of Justice of Constitutional Court. In can be said that the Rule of Law principle which uphold judicial independence have been violated, as a Constitutional Justice can be recalled based on his judicial decision.[18] Other member of parliament believed that the recall of justice Aswanto, was in line with the existing procedures since the DPR has the authority to conduct evaluations.[19]

Based on the updated MK Law and MK decision, Justice Aswanto shall be in the office up to March 2029. The DPR decision make him had to leave office earlier. [20] This situation proves that the judicial review of Job Creation Law has significantly changed the relationship between the Constitutional Court and the DPR in a way the DPR tends to play more dominant roles compared to that of the Constitutional Court. It aims to control the Court through recalling a Justice to whomever the DPR does not like. In other words, politization of judiciary is just happening through the DPR recalled toward the Constitutional Court Justice.

The Enactment of Perpu on Job Creation to Replace the Invalidated Job Creation Law: Another Form of Politization of Judiciary?

The controversy after the judicial review of Job Creation Law does not end by the recall of the DPR toward Justice Aswanto. When the Court declared that the Job Creation was conditionally unconstitutional, the Court in its decision also requested the lawmakers to fix the lawmaking process by involving the public in a meaningful way. This means the lawmaking process should satisfy three important elements. They are: the right to be heard, the right to be considered, and the right to be explained.

The Court message in this judicial review case is clear. There is a problem of lack of public participation in the lawmaking process. And to address that problem, the lawmaking process need to be improved by inviting significant public participation in a meaningful way. Once such process is improved, there will be a big possibility that the Court will declare the Law constitutional if the Court was of the opinion that the lawmaker satisfies the three important elements of meaningful participation. The Court ruling grants 2 years for the lawmakers to fix the lawmaking process so that it reflects meaningful participation. If the 2 years are lapsed and the lawmakers does not fulfill the Court ruling, the Job Creation law will be declared unconstitutional permanently. It is important to understand that judicial review of Job Creation Law was 5: 4 decision. It is a tight decision. The Court ruling in this case also reflects how difficult to formulate a solid decision. From the wordings of the Court decision, it seems that it is a result from compromise among justices. Some important points from the Court decision are not really clear. On the one hand, the Court declare the Law conditionally unconstitutional. However, the ruling also states that the Law remains valid until the 2 years (the time to fix the Job Creation Law) lapsed. Yet, the Court also declared that the lawmakers cannot take important and strategic policies based on the Job Creation Law within the 2 years.

The Court ruling invited another controversy. Some say that Job Creation Law remains valid. Others say the Law should be fixed first in order to be valid. The Government decides that the Job Creation Law remains valid. In the 68/2021 Minister of Home Affairs Instruction, local governments must go hand in hand with the central government to implement the Job Creation Law even though the Law ruled conditionally unconstitutional by the Court.

As the 2 years' time is approaching, the Government suddenly issued a Government Regulation in Lieu of Law (Perpu) on Job Creation. The government constitutionally has the right to issue Perpu. However, it should fulfill necessary condition i.e. the emergency situation. The Government said that the geopolitical situation such as Russia Ukraine war, and the declining of world economic situation are the emergency situation so that the issuance of the Perpu is in line with the Constitution.

It is a bit confusing if the Government declared the situation as an emergency because at the same time the lawmakers is capable to produce Law, including the establishment of Job Creation Law. It means the normal lawmaking process is still happening in the Parliament. In addition, the issuance of the Perpu showed the reluctance of the government to properly follow up the Court ruling on Job Creation Law specifically inviting the public meaningfully in the lawmaking process. Rather than inviting the public, the government chose to exclusively made the Perpu without any meaningful public participation. The issuance of Perpu on Job Creation showed the Government's disobedience from the government toward the Court ruling. In other words, the politization of judiciary is likely happening.

5. Conclusion

The present paper has explained there is a shift from judicialization of politics to politization of judiciary *post* judicial review of Job Creation Law. This situation is significantly different from the first and the second generation of the Court where the Court seen as a strong court because it is involved in settling mega political disputes. However, the judicial review of Job Creation Law and the issuance of Perpu on Job Creation showed different tendency that the politization of judiciary is happening. This is because after the Court declared the Job Creation Law conditionally unconstitutional, the political institutions i.e. the legislature and the government find their own way to follow up the Court ruling. While the Court ruling ordered the lawmakers to fix the lawmaking process (involving the public in the lawmaking process meaningfully), the lawmakers specifically the government chose to enact government regulation in lieu of law (Perpu) and not to fix the lawmaking process. The recall of Constitutional Court Justice Aswanto by the DPR because of his ruling was in opposition with the DPR indicates the DPR intervention against the Court. With these two examples abovementioned, it is safe to say that there is a shift from judicialization of politics to politization of judiciary.

References

- [1] D. Indrayana, *Indonesian Constitutional Reform, 1999-2002: An Evaluation of Constitution-Making in Transition*. Penerbit Buku Kompas, 2008.
- [2] S. Butt and T. Lindsey, *The constitution of Indonesia: a contextual analysis*. Bloomsbury Publishing, 2012.
- [3] P. Stockmann, W. I. Hanns-Seidel-Stiftung, and others, "The New Indonesian Constitutional Court: A study into its beginnings and first years of work," (*No Title*), 2007.
- [4] V. Junaidi, A. Syahda, and A. M. B. Mayang, *Konstitusi Dan Demokrasi (Kode) Inisiatif, Tiga Belas Tahun Kinerja Mahkamah Konstitusi Dalam Memutus Pengujian Undang-Undang "Thirteen Years of the Constitutional Court' Work in Judicial Review"*. 2016, p. 28.
- [5] R. Hirschl, *Towards juristocracy: the origins and consequences of the new constitutionalism*. Harvard University Press, 2009.
- [6] Hendrianto, "From Humble Beginnings to a Functioning Court: The Indonesian Constitutional Court, 2003-2008," University of Washington, 2008.
- [7] S. A. Butt, "Judicial Review in Indonesia: Between Civil Law and Accountability: a Study of Constitutional Court Decisions 2003-2005," University of Melbourne, Department of Law, 2006.
- [8] T. R. Roux and F. E. Siregar, "Trajectories of Curial Power: The Rise, Fall and Partial Rehabilitation of the Indonesian Constitutional Court," *Aust. J. Asian Law*, vol. 16, no. 2, pp. 121-141, 2016.
- [9] Martitah, *Mahkamah Konstitusi, dari negative legislature ke positive legislature?* Konstitusi Press, 2013.
- [10] O. M. Fiss, "The limits of judicial independence," *U. Miami Inter-Am. L.*

- Rev.*, vol. 25, p. 57, 1993.
- [11] D. Landau, “The two discourses in Colombian constitutional jurisprudence: a new approach to modeling judicial behavior in Latin America,” *Geo. Wash. Int’l L. Rev.*, vol. 37, p. 687, 2005.
- [12] C.-C. Lin, “The judicialization of politics in new democracies,” 2015.
- [13] A. Omara, “The Indonesian Constitutional Court and the Democratic Institutions in Judicial Review,” *Const. Rev.*, vol. 3, p. 189, 2017.
- [14] A. Omara, “Assessing The Indonesian Constitutional Court Consistency in Determining Its Authority to Settle Dispute on Regional Head Election,” *Yustisia*, vol. 9, no. 2, pp. 184–199, 2020, doi: <https://doi.org/10.20961/yustisia.v9i2.40906>.
- [15] T. H. Sitabuana, “Upaya Memulihkan Kewibawaan Mahkamah Konstitusi Pasca Tertangkapnya Akil Mochtar,” *J. Huk. IUS QUIA IUSTUM*, vol. 21, no. 2, pp. 293–308, 2014, doi: <https://doi.org/10.20885/iustum.vol21.iss2.art7>.
- [16] S. Hendrianto, “The rise and fall of heroic chief justices: constitutional politics and judicial leadership in Indonesia,” *Wash. Int’l LJ*, vol. 25, p. 489, 2016.
- [17] J. Tenure and I. Removal, “Accountability, International IDEA Constitution-Building Primer 5 (Stockholm: International IDEA, 2014).” 2020.
- [18] B. Susanti, “Runtuhnya Pilar-Pilar Negara Hukum,” 2022.
- [19] Dewan Perwakilan Rakyat Republik Indonesia, “Penggantian Hakim MK Aswanto Telah Sesuai Mekanisme,” 2022.
- [20] D. Amnan, “Legalitas Pemecatan Hakim Aswanto Di Tengah Masa Jabatan Oleh Dewan Perwakilan Rakyat,” *Jatiswara*, vol. 38, no. 1, 2023, doi: <https://doi.org/10.29303/jtsw.v38i1.461>.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution-NonCommercial 4.0 International License (<http://creativecommons.org/licenses/by-nc/4.0/>), which permits any noncommercial use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.

