



Legal Certainty in Tourism: How Does Judicial Review of Job Creation Omnibus Law Change Legislative-Judiciary Relation?

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Abstract. The issuance of Job Creation Law in 2020 raised so many controversies both the process and the content of the Law. Substantively, of the law consists of multiple topics which are not related each other. In addition, the law-making process contains serious problems such as lack of public participation. The Court ruled that Job Creation Law conditionally unconstitutional. The Court requires the lawmakers to fix the law-making process by involving public meaningfully. It means during the lawmaking process the legislator should satisfy 3 important elements. They are: the right of the public to be heard, to be considered, and to be explained. The lawmaker was not really happy with the Court decision because the Job Creation law is very important as the foundation for the government to invite more investors in Indonesia. This result in the parliament retaliates the Court by recalling one of the constitutional justices. Since then the relation between the Court and the Lawmaker change significantly. The paper will analyze how significant is the court ruling on Job Creation law change the relation between the judiciary and the legislator? The paper tentatively argues that post court ruling on Job Creation Law, there is a tendency that the lawmakers play more dominant roles compared to the Court. This can be seen on how the legislature determine the substitute Constitutional Court Justice and the reluctant of the legislature to properly follow up the Court ruling.

Keywords: Judicial review- Job creation omnibus law- Judiciary-legislator relation.

1 Introduction

Indonesia main sources of law are laws and regulations. This is one of the consequences of adopting civil law tradition. The existence of many laws and regulations potentially create disharmony and hyper regulation. The Directorate General of Legislation indicates that per July 12, 2023 Indonesia has issued 58,058 regulations. These numbers consist of 1,734 laws, 4,833 government regulations, 2,299 presidential regulations, and 18,532 ministerial regulations. The increasing number of regulations is often perceived as make things more complicated and not facilitating doing business and supporting the investment climate. This situation hinders the development and the improvement of people's welfare.

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Simplifying regulations through the concept of the omnibus law is certainly one option that may be adopted. This is because the omnibus law is possible to revise and revoke many laws at once. The presence of the first omnibus law namely Law Number 11 of 2020 concerning Job Creation (UU Cipta Kerja), had a major impact on regulatory reform in Indonesia. Many laws and regulations, may be amended, readjusted, or revoked with the existing Job Creation Law.

The 2020 Job Creation Law, however, has caused polemics in various circles. Substantively, the law consists of several topics that are not related to one another. In addition, the law-making process contains serious problems such as a lack of public participation. This situation triggered some groups and individuals to submit a petition to the Constitutional Court to review the constitutionality of the 11/2020 Job Creation Law.

The Constitutional Court (MK) in its ruling Number 91/PUU-XVIII/2020, decided that the Job Creation Law was conditionally unconstitutional. The Constitutional Court asked the House of Representatives (DPR) to improve the law-making process by involving the public in a meaningful way. That is, in the process of forming laws, lawmakers must fulfill 3 (three) important elements, namely the public's right to be heard, to be considered, and to be finalized.

One of the 5 (five) MK judges who argued that deciding on the Job Creation Law was formally flawed is Justice Aswanto. Justice Aswanto was nominated by the DPR. Not long after the Court ruling on Job Creation Law, Justice Aswanto was dismissed by the DPR. The House of Representatives decided "It will not extend the term of office of the constitutional judges who came from the proposal of the DPR on behalf of Aswanto, and subsequently appointed Guntur Hamzah as a constitutional judge," said Deputy Speaker of the DPR Sufmi Dasco Ahmad's statement.

Chairman of Commission III of the DPR, Bambang Wuryantoro, explained the reason that Aswanto had not had his term extended because he had not carried out his commitment as a constitutional judge proposed by the DPR. What is meant by "not carrying out commitments" is that Aswanto annulled many laws made by the DPR, even though Aswanto was a representative of the DPR. This is analogous to the relationship between the DPR and Aswanto as the relationship between a company owner and its directors. As the owner of the company, the DPR has the right to dismiss it.

Some said that the DPR's treatment was an attempt to undermine judicial power for short-term interests. Bivitri Susanti is of the view that the true pillars of the rule of law state have collapsed, as soon as a judge was removed because his decision was not liked. However, Deputy Chairman of the DPR RI, Sufmi Dasco Ahmad, emphasized that the replacement of one of the Constitutional Court (MK) Judges, Aswanto, was in accordance with the applicable mechanism. This is because the statutory regulations state that the DPR has the authority to conduct evaluations.

The decision to fire Judge Aswanto midway eventually led to legal problems. Judge Aswanto, who should have finished his term as a Constitutional Justice in March 2029, had to leave his profession earlier because of the policies taken by the DPR. The problem that arises is how significant after the Constitutional Court's decision regarding the Job Creation Law has changed the relationship between the Consti-

tutional Court and the DPR regarding the independence of judges and the institution of the Constitutional Court?

2 Evaluation of Constitutional Court Judges

The DPR did not extend the term of office of judge Aswanto. The DPR dismissed constitutional judge Aswanto at the DPR Plenary Meeting, 29 September 2022. The DPR then appointed Guntur Hamzah as a constitutional judge to replace Justice Aswanto.

According to the provisions of the 1945 Constitution, the Constitutional Court is comprised of a total of nine members who serve as constitutional judges. These individuals are appointed by the President, with three of them being nominated by the Supreme Court, three by the People's Representative Council, and the remaining three by the President himself. In this case, DPR has the right to propose a candidate for constitutional justices. Jimly Asshiddiqie reminded that the Constitutional Court Law regulates MK judges who are only "submitted" by the DPR, submitted by, not submitted from. There is a fundamental difference according to the diction "by" and "from", therefore it is only limited to recruiting, so not the authority to remove.

Judge Aswanto was first appointed as a constitutional judge on March 21, 2014. The term of office for a constitutional judge at that time is 5 years. Justice Aswanto served as a constitutional judge in his first period until March 21 2019. The DPR extended the term of office of justice Aswanto for a second term of office. However, in September 2020, the Constitutional Court Law was amended, Article 87 letter b of changed the term of office of constitutional judges from 5 years to a term of office of 15 years or 70 years old.

The amendment to the Constitutional Court Law has an impact on changing the term of office of justice Aswanto. He will end his term as a constitutional judge on March 21, 2029. Therefore, it becomes a problem when the DPR suddenly replaces constitutional judges with the judges who will be replaced who are still serving their term of office.

The story began with a letter from the Constitutional Court to the DPR dated July 22, 2022. The letter explained the Constitutional Court Decision Number 96/PUU-XVIII/2020 concerning the Review of Article 87 letters a and b of Law Number 7 of 2020 concerning Amendments to the Three Laws Law Number 24 of 2003 concerning the Constitutional Court (UU MK).

In the Constitutional Court letter, the reasons for legal considerations regarding the rejection of the request for review of the constitutionality of Article 87 letter b of the Constitutional Court Law were cited, as stated in paragraph (3.22) of the said decision which stated, among other things, "Considering that after it was clear to the Court the original intent, from the legislators in forming Law 7/2020, the Court is of the opinion that the provisions of Article 87 letter b are not contradictory to Article 28D paragraph (1) of the 1945 Constitution".

The reading of the formulation of Article 87 letter b of Law 7/2020, according to the Court, must be understood solely as a transitional rule, connecting so that the new

rule can apply in harmony with the old rule, that in order to emphasize the transitional provision, it is not made to give hidden privileges to a certain person who is currently serving as a constitutional judge, the Court is of the opinion that legal action is necessary to confirm this meaning.

The legal action taken by the Constitutional Court is to confirm to the institution that filed the constitutional justices who are currently serving. The confirmation referred to means that the constitutional judges through the Constitutional Court deliver a notification regarding the continuation of their term of office which no longer recognizes periodization to each proposing institution (DPR, President and Supreme Court).

From the point of view of the editorial view of the Constitutional Court letter, it is worth asking where did the reasoning that provided the basis for the argument come from, that the letter was a letter asking the DPR to provide confirmation? The editorial of the Constitutional Court letter above clearly states that the Constitutional Court does not request, but conveys confirmation to the institutions authorized to nominate candidates for constitutional judges (DPR, President and Supreme Court).

Confirmation by the Constitutional Court to institutions authorized to nominate candidates for constitutional judges was carried out because, according to the provisions of the old law, several judges would end their terms of office so that if they followed the old provisions, the proposing institutions had to immediately make preparations to fill the positions of judges who will end it.

Nevertheless, due to the elimination of the tenure system for judges as stipulated in the new law, and the rejection of the review of Article 87 letter b of the Constitutional Court Law, it has been determined that Article 87 letter b of the Constitutional Court Law does not conflict with the 1945 Constitution. In light of this, the Constitutional Court aims to communicate to the DPR, the President, and the Supreme Court that the judges nominated by these institutions possess the necessary qualifications to fulfill their roles as constitutional judges, thereby obviating the need for any replacements.

As for the sentence at the end of the letter from the Constitutional Court which reads, among other things, "...a constitutional judge who came from the proposal of the House of Representatives who is currently serving for confirmation is..." cannot be interpreted out of the context of the above understanding. If the words "to be confirmed" are interpreted as a confirmation request to the DPR, the Constitutional Court's letter will lose its coherence. Moreover, according to Article 23 of the Constitutional Court Law, the reason "because it was not renewed by the proposing institution" is not mentioned as part of the conditions for dismissal of constitutional judges, both honorable and dishonorable discharges.

Besides that, let's say DPR has the authority to dismiss constitutional judges, *quod non* (even though it isn't), it cannot submit a request for such dismissal to the President because according to Article 23 paragraph (4) of the Constitutional Court Law, a request for such dismissal must be submitted by the Chief Justice of the Constitutional Court. Meanwhile, it would be strange if the Chief Justice of the Constitutional Court submits a request for the dismissal of constitutional judges to the President, because there is no reason for requesting such dismissal, whether honorable or dishonorable, as stipulated in Article 23 paragraphs (1) and (2) of the Law MK.

The Independence of Judges and the Institution of the Constitutional Court.

The independence of the MK institution is explicitly articulated in Article 24 of the 1945 Constitution, which affirms that the judicial power is endowed with safeguards to ensure the institution's autonomy in the administration of justice and the enforcement of the law. The constitutional provisions are further expounded upon in Law Number 4 of 2004, which pertains to Judicial Power, in the subsequent manner: Judicial power refers to the authority of a sovereign state to dispense justice and uphold the principles of law and justice as enshrined in Pancasila, with the objective of ensuring the effective implementation of the Republic of Indonesia.

According to this perspective, it is argued that the Constitutional Court should be devoid of any form of interference, including from institutions vested with the power to nominate constitutional justices, such as the DPR, the president, and the supreme court. Feri Amsari criticized the removal of Judge Aswanto as a violation of the values of autonomy and impartiality upheld by the Constitutional Court, as enshrined in the Constitution.

The concept of judicial independence encompasses fundamental principles, namely justice, impartiality, and good faith. An impartial adjudicator will afford equitable and transparent opportunities for each party to present their case, without any consideration of their identity or socioeconomic status. An independent judge is characterized by impartiality, since they are devoid of any extraneous influences and resistant to external pressures. An impartial adjudicator renders decisions predicated on the principles of integrity and good faith, relying on their understanding of the law, while remaining unaffected by personal, political, or financial ramifications.

In its capacity as the custodian of the constitution, the Constitutional Court assumes the role of the exclusive arbiter in matters of constitutional interpretation. It serves as the guardian of democratic principles, ensuring the preservation of citizens' constitutional rights and the protection of human rights.

The principle of independence and impartial judiciary (free and impartial judiciary) is the foundation for the Constitutional Court in carrying out its duties and authorities for the implementation of the functions of the Constitutional Court as a state administrative court institution.

The efforts of the DPR should be suspected of being an attempt to interfere in matters of judicial power with political content (unilateral interests). Moreover, hearing the reasons presented by the Chairman of Commission III of the DPR, Bambang Wuryanto, who said that constitutional judge Aswanto often annulled legal products made by the DPR.

Patterns like this can be a bad precedent in the future. It is very possible that what the DPR is doing today will be emulated by other institutions that have the authority to "propose" MK judges. Another reason that the DPR put forward when replacing Pak Aswanto and appointing Guntur Hamzah, was because Judge Aswanto annulled many legal products of the DPR, one example is the Job Creation Law. There is no logical-objective reason and also no legal basis for carrying out such an act. A court of law, does not deserve such unethical treatment.

The Constitutional Court as the guardian of the constitution is normally not disturbed by external forces that are political in nature, such as the steps taken by the DPR. The effect of these events will reduce the impartiality of the institution.

3 Conclusion

The House of Representatives' decision to dismiss Judge Aswanto as a Constitutional Justice lacks a legal foundation. This decision is more visible in the efforts of the legislature to intervene in the judiciary. The DPR's reason for dismissing Aswanto, using the analogy of being a company and a board of directors, is a political reason, not a reason that can be legally accepted. Moreover, this policy has diminished the standing of the Constitutional Court as the custodian of the constitution. After the Constitutional Court's decision on the Job Creation Law, there is a tendency for the role of legislators to be more dominant compared to the Court. This can be seen from how the legislature determines a substitute for a Constitutional Justice and the reluctance of the legislature to properly follow up on the Constitutional Court's decision.

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