

# THE RELATIONSHIP BETWEEN THE CONSTITUTIONAL JUDGES' SELECTION BY THE HOUSE OF REPRESENTATIVES AND THE POSITION OF JUDGES IN JUDICIAL REVIEW DECISIONS

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## Abstract

The two issues raised in this study are the selection mechanism for constitutional judges nominated by the House of Representative (DPR) and the correlation between the selection of constitutional judges nominated by the DPR and the position of the judge in the decision to review the law. This research analyzes the position of the constitutional judges on 8 judicial review decision which correlated to the authority and interests of the DPR. Judges who are nominated through a highly transparent and participatory selection process or a transparent and participatory process may rule in favor of or against the interests of the DPR. However, judges who are nominated through a selection process that is not transparent and participatory will all make decisions in

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favor of the interests of the DPR. That finding show that the judge nominated through a highly transparent and participatory selection process tends to be more independent than the judge nominated through less transparent and participatory selection process.

**Keywords:** Constitutional Court; Independency of the Judiciary; Judges' election, Participatory Transparency

## I. INTRODUCTION

### 1.1. Background

Free and impartial judiciary is one of the rules of law elements. Article 24 paragraph (1) of the 1945 Constitution states that judicial power is an independent power to uphold law and justice. Independent means not affected and cannot be influenced by other branches of power or by other forces. Impartial means neutral and objective to uphold law and justice in exercising authority.

The independence of the Constitutional Court as a judicial institution is an absolute requirement to fulfill the nature of its presence based on the principles of the rule of law. Without independence, the Constitutional Court will only become an extension of political power. Article 24 C paragraphs (1) and (2) of the 1945 Constitution provides 5 authorities to the Constitutional Court, namely to hear at the first and final level whose decisions are final and binding for (1) review laws against the Constitution, (2) disputes over the authority of state institutions whose authority is granted by the Constitution (3) the dissolution of political parties, (4) disputes over general election results, and (5) deciding on the House of Representatives's (DPR) opinion regarding alleged violations of law by the President and/or Vice President.

One aspect that is argued to affect the independence of the Constitutional Court is the mechanism for appointment of Constitutional Court judges.<sup>1</sup> Article 19 of the Constitutional Court Act<sup>2</sup> only states that the nomination of constitutional judges is carried out in a transparent and participatory manner. Meanwhile, Article 20 paragraph (2) of the Constitutional Court Act states that the election of constitutional judges is carried out objectively and accountably.

<sup>1</sup> Andrew Harding, *The Fundamentals of Constitutional Courts* (London: International IDEA, 2017), 3.

<sup>2</sup> Indonesia, *Act Number 24 of 2003 on the Constitutional Court, as Amended by Act Number 7 of 2020*.

There are no detailed provisions on how the mechanism and by whom the selection is carried out.

There are differences in the recruitment practices of constitutional judges by the three institutions, even by the same institution at different times. Some conduct open selection with registration and a series of examinations. Some simply announce the candidates to be nominated but the decision is made by the institution itself. Some suddenly determine a person to be proposed as a constitutional judge.

These differences often lead to polemics and criticism. Closed mechanisms are suspected by the public, especially if the proposed judges have questioned track records about their integrity and statesmanship. Various studies and scientific articles have argued that the selection mechanism of Constitutional Court judges affects the independence of constitutional judges.<sup>3</sup> If the mechanism for filling positions is carried out in a transparent and accountable manner, it is assumed that it will better guarantee the election of independent judges. Conversely, if the filling of judicial positions is done through appointment or closed doors, it will produce judges who are not independent, i.e. judges who can be influenced by the proposing institution, or at least will favor the interests of the proposing institution.

This study limits the selection mechanism of constitutional judges proposed by the DPR because as a political institution, the DPR has the most dominant political interests compared to the other two proposing institutions (the President and the Supreme Court). In addition, several phenomena show members of the DPR openly criticizing the Constitutional Court's decisions and expressing disappointment with the Constitutional Court judges who have been nominated.<sup>4</sup> Of course the President also has political interest on constitutional judges, but never publicly criticize the court decisions. However, the position of the

<sup>3</sup> Kristy Richardson, "A Definition of Judicial Independence," *The UNE Law Journal* 2, no. 1 (2005): 78, <http://www.austlii.edu.au/au/journals/UNELawJl/2005/3.pdf>.

<sup>4</sup> Erik Purnama Putra, "Anggota DPR Tuding MK Batakan UU Seenaknya [House Member Accuses Constitutional Court of Arbitrarily Nullifying Laws]," *Republika*, accessed September 9, 2024, [https://news.republika.co.id/berita/lt9923/anggota-dpr-tuding-mk-batakan-uu-seenaknya#google\\_vignette](https://news.republika.co.id/berita/lt9923/anggota-dpr-tuding-mk-batakan-uu-seenaknya#google_vignette).

constitutional judges proposed by the President also need to be analyzed in the next reasearch. The two issues raised in this study are the selection mechanism for constitutional judges nominated by the DPR and the correlation between the selection of constitutional judges nominated by the DPR and the position of the judge in the decision to review the law.

### 1.2. Research Questions

- a. What is the mechanism for appointing constitutional judges? And how is it implemented?
- b. What is the legal opinion and position of constitutional judges appointed by the DPR in the decision on judicial review of laws related to the authority and interests of the DPR?
- c. What is the correlation between the mechanism for filling the position of constitutional judges by the DPR and the decision in judicial review of laws related to the authority and interests of the DPR?

### 1.3. Method

To the focus and issues raised, this research uses empirical juridical methods. Law is seen as the reality of actions and decisions formed by the DPR and the Constitutional Court.<sup>5</sup> There are two variables to be found and described, namely the variable of the constitutional judge selection mechanism that has been carried out by the DPR and the variable of the opinion or legal position of the judge proposed by the DPR. Furthermore, the two variables are analyzed to determine whether or not there is a correlation.

## II. RESULT AND DISCUSSION

### 2.1. Independence and Impartiality of Judicial Power

Courts were originally established to resolve disputes and restore social harmony, addressing conflicts over ownership, property, and offenses based on laws and social norms. Their duty includes ensuring fair treatment for both

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<sup>5</sup> Johnny Ibrahim, *Teori & Metode Penelitian Hukum Normatif [Theory and Method of Normative Legal Research]* (Malang: Bayumedia Publishing, 2005), 33–41.

winners and losers. Over time, their role has expanded to include shaping public policy through dispute resolution.<sup>6</sup>

The independence of the judiciary is a central principle of the modern rule of law.<sup>7</sup> This principle was born out of the doctrine of separation of powers, which aims to limit power.<sup>8</sup> The judiciary's close ties to the modern rule of law stem from its role in upholding human rights in modern states. Judicial independence is crucial for safeguarding freedom and sustaining constitutional democracy.<sup>9</sup>

Independence can be mapped in three perspectives, namely functional, institutional, and personal perspectives.<sup>10</sup> Functional independence ensures courts can perform judicial functions free from interference by other institutions, prohibiting external influence in case examination and decision-making. Structurally, independence requires judicial institutions to safeguard impartiality and protect themselves from external intervention.<sup>11</sup>

The notion of independence originally emerged from jurists who held the view that judges should find the law, rather than merely interpret it, although at the same time, judges do not make the law.<sup>12</sup> This conception emphasizes the doctrine that the nature of the legislation is facultative, rather than merely substantive. This means that a regulation may be applied or not depending on the purpose of ensuring a better situation. Under liberal principles, a judge cannot even have personal preferences. The judge can only decide based on the facts following the law.<sup>13</sup>

Judges must be able to balance the intellectual and moral dimensions. In carrying out their profession, judges are not only incarnated as human beings

<sup>6</sup> Walter F. Murphy, C. Herman Pritchett, Lee Epstein, and Jack Knight, *Courts, Judges, & Politics: An Introduction to the Judicial Process* (New York: McGraw-Hill, 2006), 38–39.

<sup>7</sup> International Commission of Jurists, *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors* (Geneva: International Commission of Jurists, 2007), 18.

<sup>8</sup> Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara [Introduction to the Science of Constitutional Law]*, 2nd ed. (Jakarta: Konstitusi Press, 2006), 44–45.

<sup>9</sup> M. P. Singh, "Securing the Independence of the Judiciary—The Indian Experience," *Indiana International & Comparative Law Review* 10, no. 2 (2000): 246, <https://doi.org/10.18060/17703>.

<sup>10</sup> Singh, "Securing", 246.

<sup>11</sup> Matthew C. Stephenson, "When the Devil Turns . . . : The Political Foundations of Independent Judicial Review," *The Journal of Legal Studies* 32, no. 1 (January 2003): 60, <https://doi.org/10.1086/342038>.

<sup>12</sup> Isharyanto, *Ilmu Negara [State Theory]* (Karanganyar: Oase Pustaka, 2016), 137.

<sup>13</sup> International Commission of Jurists, *International Principles*, 24.

who work and think (*home Faber*), but more than that judges must also maintain ethical principles and values (*homo ethicus*).<sup>14</sup> Judges as 'authors of their own opinions' must be able to apply both principles with courage. A judge can be said to be independent when his/her judicial process reflects sincere judicial preferences.<sup>15</sup>

The independence of judges is a fundamental aspect that should not be diminished in the slightest. Intervention and pressure, both external and internal, must be eliminated in the nuances of a judge's thinking.<sup>16</sup> Impartiality is a principle born from the nature of the judge's duty to examine and decide cases that require neutrality and objectivity. In fact, in law review cases at the Constitutional Court, the position of judges is related to the triadic relationship between the state, the market, and citizens or society.<sup>17</sup> Therefore, judges must be impartial with an appreciation of the balance between interests in a case.<sup>18</sup>

## 2.2. Constitutional Judge Selection

The selection of constitutional judges is regulated by the Constitutional Court Act as mandated by Article 24C paragraph (6) of the 1945 Constitution. Article 18 paragraph (1) of the Constitutional Court Act stipulates that constitutional judges are nominated by the DPR, the President, and the Supreme Court. Provisions on the procedures for selection are regulated by each authorized institution.

The Constitutional Court Act does not detail selection procedures but grants the DPR, the President, and the Supreme Court the authority to regulate them (Article 20(1)). It mandates that selections be objective and accountable (Article 20(2)) and emphasizes transparency and participation during the nomination stage (Article 19).

<sup>14</sup> Arbijoto, "Pengawasan Hakim dan Pengaturannya dalam Perspektif Independensi Hakim [Supervision of Judges and Their Regulation from the Perspective of Judicial Independence]," in *Bunga Rampai Refleksi Satu Tahun Komisi Yudisial Republik Indonesia* (Jakarta: Komisi Yudisial Republik Indonesia, 2006), 58.

<sup>15</sup> William M. Landes and Richard A. Posner, "The Independent Judiciary in an Interest-Group Perspective," *The Journal of Law & Economics* 18, no. 3 (1975): 875, <https://www.journals.uchicago.edu/doi/epdf/10.1086/466849>.

<sup>16</sup> Bernard L. Tanya, Yoan N. Simanjuntak, and Markus Y. Hage, *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi [Legal Theory: Strategy for Human Order Across Space and Generations]* (Yogyakarta: Genta Publishing, 2013), 40.

<sup>17</sup> Asshidiqie, *Pengantar Ilmu Hukum [Introduction to the Science of Constitutional Law]*, 45.

<sup>18</sup> *Constitutional Court Judges Declaration on Code of Ethic and Conduct of Indonesian Constitutional Court Judges*, Chapter 2.

The regulation on constitutional judge recruitment was once governed by Perppu (Act in Lieu) Number 1 of 2013, amending the Constitutional Court Act. It required candidates proposed by the Supreme Court, DPR, and President to undergo a fit and proper test by an Experts Panel established by the Judicial Commission. According to Article 18A, candidates—up to three times the number of positions needed—were submitted for assessment. The panel comprised one representative each from the Supreme Court, DPR, and President, and four members selected by the Judicial Commission from public nominations, including former constitutional judges, community leaders, legal academics, and practitioners.

The provision for the Experts Panel was nullified by Constitutional Court Decision Number 1-2/PUU-XII/2014, which reviewed Perppu Number 1 of 2013. The Court held that the authority of the DPR, President, and Supreme Court to nominate constitutional judges is absolute and cannot be restricted or conditioned by involving other institutions. The requirement for candidate assessment by a Panel of Experts formed by the Judicial Commission was deemed to undermine the constitutional authority of these institutions.

Three patterns have become the general model of recruitment of constitutional judges in Indonesia, namely: (i) internal and closed selection mechanisms; (ii) appointment and extension of judges' terms of office; and (iii) formation of a panel of experts.<sup>19</sup> The first pattern tends to be applied by the Supreme Court. Meanwhile, the second and third patterns tend to be applied by the DPR and the President. The second pattern has been applied by the DPR in extending judge's term of office.<sup>20</sup>

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<sup>19</sup> Fence M. Wantu, Novendri M. Nggilu, Suwitno Imran, Supriyadi A. Arief, and Rahmat Teguh Santoso Gobel, "Proses Seleksi Hakim Konstitusi: Problematika dan Model Ke Depan [The Process of Constitutional Court Judge Selection: Problems and Future Models]," *Jurnal Konstitusi* 18, no. 2 (2021): 250–252, <https://doi.org/10.31078/jk1820>.

<sup>20</sup> Winda Wijayanti, Nuzul Quraini M., and Siswantana Putri R., "Transparansi dan Partisipasi Publik Dalam Rekrutmen Calon Hakim Konstitusi [Transparency and Public Participation in the Recruitment of Constitutional Court Judge Candidates]," *Jurnal Konstitusi* 12, no. 4 (2015): 673–674, <https://doi.org/10.31078/jk1241>.

### 2.3. The Effect of Judge Selection Mechanisms on the Position of Judges

Independence and impartiality are certainly influenced by many factors, one of which is the mechanism and institutions that select constitutional judges. Recruitment of judges is the initial gate in presenting the independence, impartiality, and integrity of judges. This opinion is in line with the thoughts of John Marshall who stated "What is that makes us trust our judges? Their independence in office and manner of appointment".<sup>21</sup> The selection or recruitment mechanism is related to the independence of judges.

The appointment mechanism can be done in two ways, namely the autocratic method and the democratic method. The autocratic method is carried out by a small group of power-holding actors and in general, the candidates come from members of the group itself so that it inevitably distances itself from popular participation. Democratic method, on the other hand, is a mechanism that involves and maximizes popular participation. Autocratic methods include determination through descent, submission or co-option, drawing lots, appointment by higher officials, and determination by a power struggle. Meanwhile, democratic methods include elections.<sup>22</sup>

Judicial independence depends on several factors: the appointment and tenure of judges, guarantees against external pressure, and the court's perceived independence. Independence requires a selection process free from specific interests. The more politically tied the selection mechanism, the less independent the judge's role. To prevent political entanglements, the proposing institution must ensure a transparent selection process, allowing public monitoring and using objective, accountable criteria.

From the explanation above, two assumptions emerge regarding the impact of constitutional judge selection mechanisms on their independence and impartiality: (1) A more transparent and participatory selection process enhances

<sup>21</sup> John Marshall, "Article 3, Section 2, Clause 1, Virginia Ratifying Convention," *Press-Pubs*, accessed September 9, 2024, [https://press-pubs.uchicago.edu/founders/documents/a3\\_2\\_1s26.html](https://press-pubs.uchicago.edu/founders/documents/a3_2_1s26.html).

<sup>22</sup> Susi Dwi Harijanti, "Pengisian Jabatan Hakim: Kebutuhan Reformasi dan Pengekangan Diri [Filling Judicial Positions: The Need for Reform and Self-Restraint]," *Jurnal Hukum Lus Quia Iustum* 21, no. 4 (2014): 6, <https://doi.org/10.20885/iustum.vol21.iss4.art2>.



the independence and impartiality of constitutional judges; (2) Conversely, a less transparent and participatory recruitment process weakens their independence and impartiality.

Judicial independence and impartiality can be assessed by examining a judge's stance on cases involving the interests of the proposing institution. A judge's alignment with the proposing institution, particularly when differing from other judges' opinions, indicates reduced independence and impartiality. Conversely, frequent divergence from the proposing institution, especially in dissenting opinions, reflects greater independence and impartiality.

### 1) **Transparent and Participatory Criteria**

To evaluate whether the selection mechanism for constitutional judges has met the qualifications of transparency and participation, it is necessary to determine the variables of transparency and participation. Transparent means open, not limited to certain people.<sup>23</sup> Transparency is interpreted as something without a hidden agenda by conveying all information. Based on the meaning of the word "transparent", it can be explained that transparency relates to information about something that is known not by certain people only. Information can be in the form of plans, stages, mechanisms, committee, and the criteria or basis for determining something in the certain stages or mechanisms.

Transparency is a necessity in a democracy where the people are the ultimate power holders. People must know and even participate in determining what is done in the administration of the state. Transparency is a prerequisite for public oversight, participation, and accountability.<sup>24</sup> Some indicators of transparency in governance include the provision of clear information, easy access to information, complaint mechanisms, and increased information through mass media.<sup>25</sup>

<sup>23</sup> "Transparan [Transparent]," *Kamus Besar Bahasa Indonesia*, accessed October 5, 2023, <https://kbbi.kemdikbud.go.id/entri/transparan>.

<sup>24</sup> Nuno Ferreira da Cruz, Yahua Zheng, and Susana Jorge, "Measuring Local Government Transparency," *Public Management Review* (2015), accessed September 5, 2023, <http://eprints.lse.ac.uk/62312/>.

<sup>25</sup> Krisna L. P. L., *Indikator dan Alat Ukur Prinsip Akuntabilitas, Transparansi, dan Partisipasi [Indicators and Measurement Tools of the Principles of Accountability, Transparency, and Participation]* (Jakarta: Badan Perencanaan Pembangunan Nasional, 2003), 17.

Based on the concept of transparency above, in the context of the selection of constitutional judges the word “transparent” can be interpreted as the availability and delivery of information relating to the selection process conducted by the DPR. Indicators of transparency in the selection of constitutional judges include the announcement of stages, candidate requirements, test or examination substances, scores for each stage, track records of candidates, and announcement of decision-making.

The indicator for the announcement of the stages and candidate requirements is absolute because the absence of this information has the consequence of the absence of other information. If there is no announcement of the stages and requirements, then the whole does not qualify as transparent and public participatory is impossible. Therefore, these two indicators have a greater weight (2) than the other indicators. The indicators and weights of the transparency criteria are presented in the table below.

**Table 1**  
**Transparent Indicator**

No.	Indicators	Weight
1.	Announcement of stages	2
2.	Announcement of candidate requirements	2
3.	Announcement of test or selection materials	1
4.	Candidate score at each stage	1
5.	Announcement of candidate's track record	1
6.	Decision-making announcement	1
	<b>Total</b>	<b>8</b>

A transparent selection mechanism is essential for public participation. Without it, citizens cannot engage meaningfully. Greater transparency in the selection of constitutional judges increases opportunities for public involvement, which includes joining the selection committee, nominating candidates, providing information, or monitoring the process. Key participatory indicators include forming a selection committee and opening registrations, each weighted at 2.

The committee ensures judicial independence by reducing political influence, while registration enables public access to the candidacy process.

**Table 2**  
**Participatory Indicators**

No.	Indicators	Weight
1.	Selection committee from outside the House	2
2.	Acceptance of applications from public	2
3.	Applications can be submit by another party	1
4.	Selection stages can be followed by the public (fit and proper test)	1
5.	Receiving input from the public on candidates' track records	1
6.	Decision-making can be followed by the community	1
<b>Total</b>		<b>8</b>

Based on these scores, classifications range from “very transparent and participatory” to “not transparent and participatory.” If no announcement is made regarding stages or candidate requirements, the process is classified as “not transparent and participatory,” as other indicators cannot be fulfilled. Conversely, while initial announcements and registration may occur, subsequent closed and non-participatory stages lower transparency and participation scores. The classifications, along with indicator fulfillment ranges, are outlined below.

**Table 3**  
**Transparent and participatory classification**

No.	Classification	Value
1.	Highly transparent and participatory	14 - 16
2.	Transparent and participatory	7 - 13
3.	Less transparent and participatory	3 - 6
4.	Not transparent and participatory	0 - 2

## 2) Selection of Constitutional Judges by the House of Representatives

The selection mechanism of constitutional judge candidates by the DPR can be divided into several parts according to the period of office. Each period reflects a different selection pattern.

### **Selection of Constitutional Judges for the First Period (2003-2008)**

The selection of constitutional judges for the first term conducted by the House of Representatives through Commission II provided space for the public to recommend or criticize on the names of candidates. There were 14 candidates, three of whom were elected judges of the Constitutional Court in the first period, namely Jimly Asshidiqie, I Dewa Gede Palguna, and Achmad Roestand.<sup>26</sup> The recruitment process starts from the stages of (i) ratification of the rules of procedure, mechanism and schedule of recruitment, (ii) registration or screening, (iii) submitting the names of candidates to Commission II of the House of Representatives, (iv) administrative selection, (v) publication of judge candidates to the mass media, (vi) input from the public, (vii) fit and proper test, and (viii) election through voting mechanism. The following is a brief description of the selection of constitutional judges in the first period:

The task of the faction that collects candidates for judges is to submit the list to Commission II of the DPR. At this stage, announcements in the mass media are made to provide an opportunity for the public to submit the names of candidates for constitutional judges through factions in the DPR. A small team chaired by the Vice Chairman of Commission II of the House of Representatives is tasked with checking the completeness of the administration of constitutional judge candidates.<sup>27</sup> At the administrative stage, candidates for constitutional judges who have passed are published in the mass media by the DPR. Meanwhile, the fit and proper test mechanism is carried out the same as that of the Supreme Court judges.

The above stages if assessed based on transparency and participatory criteria are as follows.

<sup>26</sup> Indramayu, Jayus, and Rosita Indrayati, "Rekonseptualisasi Seleksi Hakim Konstitusi Sebagai Upaya Mewujudkan Hakim Konstitusi yang Berkualifikasi [Reconceptualization of Constitutional Court Judge Selection as an Effort to Realize Qualified Constitutional Court Judges]," *Lentera Hukum* 4, no. 1 (2017): 80, <https://doi.org/10.19184/eljh.v4i1.5267>.

<sup>27</sup> Wijayanti, Quraini, and Putri R, "Transparansi [Transparency]", 677.

**Table 4**  
**Transparent and Participatory Indicators**  
**First Period Judge Selection**

<b>Aspects</b>	<b>Description</b>	<b>Weight</b>
Transparent	Announcement of stages	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	1
	Candidate score at each stage	0
	Announcement of candidate's track record	1
	Decision-making announcement	1
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	2
	Registration can be done by another party	1
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community	1
<b>Total</b>		<b>13</b>

Thus the score of the transparent and participatory indicator in the selection of constitutional judges in the first period is 13. This category of selection fulfills the criteria as transparent and participatory selection. Jimly Assiddiqie (1)<sup>28</sup>, I Dewa Gede Palguna, and Achmad Roestandi in the first period were selected through transparent and participatory selection.

### **Selection of Constitutional Judges for the Second Period (2008-2013)**

On 4 October 2007, the deliberative body of DPR assigned Commission III to form a small team tasked with (i) administrative selection and (ii) determination of paper titles. In this period, the selection of constitutional judges was followed

<sup>28</sup> For the first term of office.

by 21 candidates and 18 candidates passed the administrative selection. The 18 candidates consisted of 16 candidates through personal registration and 2 candidates through factions<sup>29</sup>. As in the previous period, the selection of constitutional judges this period also involved public participation in Commission III of the House of Representatives.

Some weaknesses in this period's selection of constitutional judges include: (i) delays in the fit and proper test due to the lack of nominations from House of Representatives; (ii) special processes for incumbent judges nearing the end of their term; (iii) unpublished stages and timelines of the selection process; (iv) the absence of clear recruitment standards; (v) limited time to assess candidates' track records; and (vi) inconsistent changes in faction-based selection procedures.<sup>30</sup> In the final stage, three names with the highest number of votes, namely Mahfud MD with 38 votes, Jimly Asshiddiqie (2)<sup>31</sup> with 37 votes and M. Akil Mochtar with 32 votes, were finally inaugurated as constitutional judges for the second period<sup>32</sup>.

Based on the data collected, it was found that the recruitment mechanism for constitutional judges in the second period: (i) registration was opened, and requirements and criteria were published on February 25–27, 2008<sup>33</sup>; (ii) there was publication regarding the acceptance of registration of candidates for constitutional judges both from candidates and other institutions such as academics and lawyers; (iii) there was acceptance of input from the public; (iv) the establishment of a panel of experts in the recruitment process to conduct a fit and proper test; (v) and the conformity between the names of candidates for constitutional judges and the names submitted by the selection committee. Fulfillment of the transparent and participatory indicators is as follows:

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<sup>29</sup> Wijayanti, "Transparansi [Transparency]", 673.

<sup>30</sup> "Setiap Fraksi Boleh Usulkan Tiga Nama [Each Faction May Propose Three Names]," *Hukumonline*, accessed September 12, 2023, <https://www.hukumonline.com/berita/a/setiap-fraksi-boleh-usulkan-tiga-nama-ho18618>.

<sup>31</sup> Second term of office.

<sup>32</sup> Indramayu, Jayus, Rosita Indrayati. "Rekonseptualisasi Seleksi Hakim Konstitusi [Reconceptualization of Constitutional Court Judge]."

<sup>33</sup> Wijayanti, "Transparansi [Transparency]," 673.

**Table 5**  
**Transparent and Participatory Indicators**  
**Second-period Judge Selection**

<b>Aspects</b>	<b>Description</b>	<b>Weight</b>
Transparent	Announcement of stages	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	1
	Candidate score at each stage	0
	Announcement of candidate's track record	1
	Decision-making announcement	1
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	2
	Registration can be done by another party	1
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community.	1
<b>Total</b>		<b>13</b>

Based on the fulfillment of the indicators of transparency and participation, the score for the selection of constitutional judges in the second period is 13. With this score, the category is transparent and participatory. A different category occurred for Jimly Asshiddiqie (2) who was treated specifically and only asked for willingness without going through selection. Therefore, for Jimly Asshiddiqie (2) in the second period the category is not transparent and participatory.

### **Selection of Constitutional Judges for the Third Period (2013)**

The third period of constitutional judge selection was the extension of constitutional judge Akil Mochtar. The DPR at this stage had a very significant deterioration when compared to the selection of judges in the previous period. Public participation was not implemented as it had been in previous stages of

the selection of constitutional judges. Therefore, inputs from the public were not accommodated in the selection of constitutional judges in the third period<sup>34</sup>.

The selection of constitutional judge Akil Mochtar was the shortest and most closed process compared to previous periods. His extension was granted merely by asking for his consent to continue as a constitutional judge. The fulfillment of transparency and participatory indicators is outlined as follows:

**Table 6**  
**Transparent and Participatory Indicators**  
**Third-Period Judge Selection**

<b>Aspects</b>	<b>Description</b>	<b>Weight</b>
Transparent	Stage announcement	o
	Announcement of candidate requirements	o
	Announcement of test or selection materials	o
	Candidate score at each stage	o
	Announcement of candidate's track record	o
	Decision-making announcement	o
Participatory	Selection committee from outside the House	o
	Acceptance of applications from candidates	o
	Registration can be done by another party	o
	Selection stages can be followed by the public (fit and proper test)	o
	Receiving input from the public on candidates' track records	o
	Decision-making can be followed by the community.	o
	<b>Total</b>	<b>o</b>

### **Selection of Constitutional Judges for the Fourth Period (2009-2014)**

After the resignation of constitutional judge Jimly Asshiddiqie on November, 1<sup>st</sup> 2008<sup>35</sup>, constitutional judge Harjono who was previously a constitutional judge proposed by the President replaced Jimly Asshiddiqie. The selection of judges in

<sup>34</sup> Indramayu, Jayus, Rosita Indrayati. "Rekonseptualisasi Seleksi Hakim Konstitusi [Reconceptualization of Constitutional Court Judge]," 8.

<sup>35</sup> "Harjono Gantikan Jimly Jadi Hakim MK [Harjono Replaces Jimly as Constitutional Court Judge]," *Hukumonline*, February 13, 2009, [http://www.hukumonline.com/berita/baca/hol21191/harjono\\_gantikan-jimly-jadi-hakim-mk](http://www.hukumonline.com/berita/baca/hol21191/harjono_gantikan-jimly-jadi-hakim-mk).



this period went through 4 stages, namely internal meetings, the announcement of the registration of constitutional judges through the print media, the ability test at Commission III of the House of Representatives, and finally the fit and proper test stage.

The selection process began with the DPR holding a consultation meeting with the Constitutional Court to discuss judge replacements. In the second stage, Commission III of the DPR announced the registration of judicial candidates. After receiving eight candidates, Commission III conducted a *fit and proper test*, accompanied by publications in mass media. The publications highlighted that Commission III could only select four new constitutional judge candidates. Following a written ability test, voting determined the candidates who passed through to the final stage of the selection process.<sup>36</sup> Harjono was then elected as a constitutional judge for period IV proposed by the DPR.

Some information is obtained related to the recruitment mechanism of constitutional judges for the fourth period, namely: (i) the publication of the registration requirements for constitutional judge candidates; (ii) the publication of the selection stages; (iii) the acceptance of candidate registration from candidates and other institutions; (iv) the acceptance of input from the public; (v) the existence of an expert panel in the selection process; (v) input from the public and track records of candidates; and (vi) the existence of an expert panel in the fit and proper test process<sup>37</sup>. The selection mechanism above represents the composition of the transparent and participatory indicator points as follows.

**Table 7**  
**Transparent and Participatory Indicators**  
**Fourth Period Judge Selection**

Aspects	Description	Weight
Transparent	Stage announcement	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	1
	Candidate score at each stage	0

<sup>36</sup> Indramayu, Jayus, Rosita Indrayati. "Rekonseptualisasi Seleksi Hakim Konstitusi [Reconceptualization of Constitutional Court Judge]," 8.

<sup>37</sup> Wijayanti, "Transparansi [Transparency]," 677.

Aspects	Description	Weight
	Announcement of candidate's track record	0
	Decision-making announcement	1
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	2
	Registration can be done by another party	1
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community.	1
	<b>Total</b>	<b>12</b>

Thus, the selection of constitutional judges in the fourth period (Harjono) was transparent and participatory.

### **Selection of Constitutional Judges for the Fifth Period (2013-2018)**

The selection of constitutional judges for the fifth term was conducted through an open selection process. Six candidates for constitutional judges registered and underwent selection on February, 27th 2013<sup>38</sup>. In this period, the House of Representatives did not form a selection committee as it did in the previous period. Commission III of the House of Representatives was the only organ that conducted the selection of constitutional judges.

Registration for constitutional judges was announced in the mass media. There were six candidates for constitutional judges who registered. However, three candidates, Patrialis Akbar, Lodewijk Gultom, and Nimatul Huda<sup>39</sup>, eventually decided to resign. The names that survived until the end of the selection were Arief Hidayat with 42 votes, who defeated Sugianto with 5 votes, and Djafar Albram who only received 1 vote. The fulfillment of the transparent and participatory indicators in this period's selection is as follows.

<sup>38</sup> Wijayanti, "Transparansi [Transparency]", 677.

<sup>39</sup> Carlos K. Y. Paath, "Tiga Calon Hakim Konstitusi Mengudurkan Diri [Three Constitutional Court Judge Candidates Resign]," *BeritaSatu*, accessed August 26, 2023, <https://www.beritasatu.com/nasional/99295/tiga-calon-hakim-konstitusi-mengudurkan-diri>.

**Table 8**  
**Transparent and Participatory Indicators**  
**Fifth Period Judge Selection**

Aspects	Description	Weight
Transparent	Stage announcement	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	1
	Candidate score at each stage	0
	Announcement of candidate's track record	1
	Decision-making announcement	1
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	2
	Registration can be done by another party	1
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community.	1
	Total	12

Thus, the selection of constitutional judges in the fifth term (Arief Hidayat)<sup>40</sup> was transparent and participatory.

### **Selection of Constitutional Judges for the Sixth Period (2014-2019)**

In this period, The DPR formed a team of experts to carry out the task of conducting selection of constitutional judges.<sup>41</sup> The expert team consisted of Syafii Maarif, Hasyim Muzadi, Laica Marzuki, Zein Badjeber, Andi Matalatta, Natabaya, Lauddin Muzani, and Saldi Isra.<sup>42</sup> Public participation was organized by making announcements through the media regarding the track records of candidates (Wijayanti, Quraini, and Putri, 2015).

<sup>40</sup> For the first term of office.

<sup>41</sup> Wijayanti, "Transparansi [Transparency]", 677.

<sup>42</sup> "DPR Didesak Segera Rekrut Calon Hakim MK," *Hukumonline*, accessed September 12, 2023, <https://www.hukumonline.com/berita/a/dpr-didesak-segera-rekrut-calon-hakim-mk-lt52fod3ecbofao>.

There were 12<sup>43</sup> candidates for constitutional judges who registered.<sup>44</sup> A series of tests were conducted by the panel of experts that eventually led to Wahiduddin Adams with 46 votes and Aswanto with 23 votes. The weakness of the selection in this sixth period was the delay in sending representatives of the expert panel by the DPR, which narrowed the selection time.

The recruitment mechanism for constitutional judges during this period included: (i) publication of registration requirements and criteria, (ii) publication of selection stages, (iii) receipt of public input, and (iv) the involvement of an expert panel in the recruitment process. However, some data were unavailable, including examination materials, announcements of candidates' track records, stage scores, the involvement of a selection committee outside the DPR, and the names of candidates submitted to the selection committee. The fulfillment of transparency and participatory indicators is outlined as follows:

**Table 9**  
**Transparent and Participatory Indicators**  
**Sixth-Period Judge Selection**

Aspects	Description	Weight
Transparent	Stage announcement	2
	Announcement of candidate requirements	2
	Announcement of test or selection materials	0
	Candidate score at each stage	0
	Announcement of candidate's track record	1
	Decision-making announcement	1
Participatory	Selection committee from outside the House	2
	Acceptance of applications from candidates	2
	Registration can be done by another party	1

<sup>43</sup> The twelve candidates are: Dr. Sugianto, SH. MH., Dr. Wahiduddin Adams, SH. MA., Dr. Ni'matul Huda, SH. MHum., Dr. Ir. Franz Astaani, SH. MKn. SE. MBA. MM. MSi. CPM., Atip Latipulhayat, SH. LLM. Phd., Prof Dr. Aswanto, SH. MSi. DFM., Dr. H. RA Dimiyati Natakusumah, SH. MH. MS., Prof Dr. Yohanes Usfunan, Drs. SH. MH. Dr. Atma Suganda, SH. M.Hum., Prof Dr. HM Agus Santoso, SH. MH., Dr. Edie Toet Hendratno, SH. MSi., dan Dr. Drs. Ermansjah Djaja, SH. MSi.

<sup>44</sup> Carlos K. Y. Paath, "Ketua DPR Apresiasi Pembentukan Tim Pakar Seleksi Hakim MK [Chairman of the House of Representatives Appreciates Formation of Expert Team for Selection of Constitutional Court Judges]," *BeritaSatu*, accessed September 15, 2023, <http://www.beritasatu.com/nasional/168071-ketua-dpr-apresiasi-pembentukan-tim-pakar-seleksi-hakim-mk.html>.

Aspects	Description	Weight
	Selection stages can be followed by the public (fit and proper test)	1
	Receiving input from the public on candidates' track records	1
	Decision-making can be followed by the community.	1
	<b>Total</b>	<b>14</b>

Based on the fulfillment of the transparent and participatory indicators, the score for the selection of constitutional judges in the second period is 14. With this score, the category is very transparent and participatory.

### Selection of Constitutional Judges for the Seventh Period (2018 - 2023)

The first term of constitutional judge Arief Hidayat ended in April 2018. This term was extended by the House of Representatives for a second term of 2018-2023. The extension was carried out through a fit and proper test process in the DPR conducted by Commission III of the DPR. The extension of this term of office was colored by information about the lobbying of constitutional judge Arief Hidayat for the extension of his term of office.<sup>45</sup> Even the Chairman of Commission III of the House of Representatives at the time stated that there were political nuances in the selection of Arief Hidayat as the sole candidate for constitutional judge.<sup>46</sup>

The extension of Arief Hidayat's term of office was carried out without any announcement, registration, or other selection mechanism.<sup>47</sup> Therefore, none of the indicators of transparency and participation were fulfilled, resulting in a score of 0 with a category of non-transparent and non-participatory.

<sup>45</sup> Nabila Tashandra, "DPR Sahkan Perpanjangan Arief Hidayat sebagai Hakim Konstitusi [House of Representatives Approves Extension of Arief Hidayat as Constitutional Court Judge]," *Kompas*, accessed October 8, 2023, <https://nasional.kompas.com/read/2017/12/07/16533091/dpr-sahkan-perpanjangan-jabatan-arief-hidayat-sebagai-hakim-konstitusi>.

<sup>46</sup> Priska Sari Pratiwi, "Ketua MK Pasrahkan Perpanjangan Masa Jabatan ke DPR [Chief Justice of the Constitutional Court Submits Extension of Term to the House of Representatives]," *CNN Indonesia*, accessed October 8, 2023, <https://www.cnnindonesia.com/nasional/20171205084919-12-260188/ketua-mk-pasrahkan-perpanjangan-masa-jabatan-ke-dpr>.

<sup>47</sup> Syamsudin Rajab, "Cacat Hukum Pemilihan Hakim Konstitusi [Legal Flaws in the Selection of Constitutional Court Judges]," *antikorupsi.org*, accessed October 8, 2023, <https://antikorupsi.org/id/article/cacat-hukum-pemilihan-hakim-konstitusi>.

## Selection of Constitutional Judges for the Eighth Period (2022 -)

The seventh period of judge selection to replace constitutional judge Aswanto did not use the methods applied in the previous period which tended to involve the public. Starting from a judicial review case with Decision Number 96/PUU-XVIII/2020,<sup>48</sup> which granted the review of Article 87 letter a of Law No. 7 of 2020 regarding the term of office of the chairman and deputy chairman of the Constitutional Court, on July, 21<sup>st</sup> 2022, the Constitutional Court sent a copy of the decision to the DPR. The DPR held a deliberation meeting to decide on constitutional judge Guntur Hamzah to replace constitutional judge Aswanto.

Constitutional judge Aswanto was officially dismissed because he often annulled DPR legislation.<sup>49</sup> Some of the main things that are important to note in the selection of constitutional judges for this seventh period are the lack of transparency and public participation. There are at least 4 fundamental reasons: (i) the unannounced registration of constitutional judges; (ii) the absence of procedural mechanisms involving public participation; (iii) the absence of an expert panel/selection team in the recruitment process; and (iv) the appointment of Guntur Hamzah who was the sole candidate appointed by the DPR. The fulfillment of the transparent and participatory indicators is 0 because there is no selection mechanism. Therefore, the category of selection of constitutional judge Guntur Hamzah is not transparent and participatory.

**Table 10**  
**Transparent and Participatory Indicators**  
**Eighth-Period Judge Selection**

Aspects	Description	Weight
Transparent	Stage announcement	0
	Announcement of candidate requirements	0

<sup>48</sup> Wildan Ansori Nasution, "Konstitusionalitas Pengangkatan dan Pemberhentian Hakim Konstitusi dalam Sistem Ketatanegaraan Indonesia [Constitutionality of the Appointment and Dismissal of Constitutional Court Judges in the Indonesian Constitutional System]" (Thesis, Universitas Muhammadiyah Malang, 2003), 23.

<sup>49</sup> Muhammad Fawwaz Farhan Farabi and Tanaya, "Polemik Legalitas Pemecatan Hakim Konstitusi oleh Lembaga Pengusul: Tinjauan Kasus Pemecatan Hakim Aswanto dan Implikasinya Terhadap Kemandirian Kekuasaan Kehakiman [The Legal Polemic of the Dismissal of Constitutional Court Judges by Nominating Institutions: A Case Study of Judge Aswanto's Dismissal and Its Implications on Judicial Independence]," *Hukum dan HAM Wara Sains* 2, no. 04 (April 2023): 296, <https://doi.org/10.58812/jhhws.v2i04.291>.

Aspects	Description	Weight
	Announcement of test or selection materials	0
	Candidate score at each stage	0
	Announcement of candidate's track record	0
	Decision-making announcement	0
Participatory	Selection committee from outside the House	0
	Acceptance of applications from candidates	0
	Registration can be done by another party	0
	Selection stages can be followed by the public (fit and proper test)	0
	Receiving input from the public on candidates' track records	0
	Decision-making can be followed by the community.	0
	Total	0

Based on the description of constitutional judge selection practices above, there have been 10 constitutional judges from the DPR. Three of the 10 constitutional judges were nominated for a second term, resulting in a total of 13 selections conducted by the DPR to obtain candidates for constitutional judges.

**Table 11**  
**Categories of Constitutional Judge Selection by the House of Representatives**

No.	Judge's name	Selection Value	Category
1.	Jimly Assdiddiqie (1) (2003 – 2008)	13	Transparent and Participatory
2.	I Dewa Gede Palguna (2003 – 2008)	13	Transparent and Participatory
3.	Achmad Roestandi (2003 – 2008)	13	Transparent and Participatory
4.	Jimly Asshiddiqie (2) (2008 – 2009)	0	Not Transparent and Participatory
5.	M. Akil Mochtar (1) (2008 – 2013)	13	Transparent and Participatory

No.	Judge's name	Selection Value	Category
6.	Moh. Mahfud MD. (2008 - 2013)	13	Transparent and Participatory
7.	Harjono (2008 - 2016)	12	Transparent and Participatory
8.	M. Akil Moctar (2) (2013)	0	Not Transparent and Participatory
9.	Arief Hidayat (1) (2013 - 2018)	12	Transparent and Participatory
10.	Wahiduddin Adam (2014 - 2019)	14	Highly Transparent and Participatory
11.	Aswanto (2014 - 2019)	14	Highly Transparent and Participatory
12.	Arief Hidayat (2) (2018 - 2023)	0	Not Transparent and Participatory
13.	Guntur Hamzah (2022 - hingga sekarang)	0	Not Transparent and Participatory

Based on the table above, there are 7 judges selected through transparent and participatory selection, 2 judges selected through highly transparent and participatory selection, and 4 judges selected through non-transparent and participatory selection. The judges who were selected through non-transparent and participatory selection were elected in the second term, except Guntur Hamzah.

### III. THE POSITION OF CONSTITUTIONAL JUDGES NOMINATED BY THE HOUSE OF REPRESENTATIVES IN LAW REVIEW DECISIONS RELATING TO THE AUTHORITY AND INTERESTS OF THE HOUSE OF REPRESENTATIVES

Laws eligible for review by the Constitutional Court include all laws jointly enacted by the DPR and the President, as stipulated in Article 20 of the 1945 Constitution. Laws related to DPR authority involve regulations on its powers and the rights of its members. The 1945 Constitution assigns the DPR three



functions: legislative, budgetary, and supervisory, as outlined in Article 20A. Institutionally, the DPR has rights, including: (i) the right of interpellation, to request information from the government on significant and impactful policies; (ii) the right of inquiry, to investigate the implementation of laws or policies suspected of conflicting with regulations; and (iii) the right to express opinions on government policies. Additionally, Article 20A(3) grants DPR members the rights to ask questions, propose bills and opinions, and enjoy immunity.

Other criteria for a law that relates to the interests and authority of the DPR are laws that contain the requirements to become a member of the DPR, the dismissal of members, and the mechanism for the resignation of DPR members. In addition, there is also the authority of the DPR to conduct fit and proper tests for candidates for public office.<sup>50</sup>

The analysis of law review decisions in this study is limited to two specific criteria that are relevant to the conclusions that will be presented, namely the interests of the DPR and members of the DPR, including political parties as participants in elections for DPR members. In the decisions on judicial review of laws, the position of constitutional judges nominated by the DPR will be analyzed, whether they are in favor of or against the interests of the DPR. There are 37 decisions on judicial review of laws that relate to the interests of the DPR.

To see the position of constitutional judges proposed by the DPR, the decisions selected from the 37 decisions above are those have dissenting opinions. For unanimous decisions, it is not possible to analyze the position of the judges against or in favor of the interests of the DPR because there is no alternative opinion as a comparison. Even if the judge's opinion is entirely in line with the interests of the DPR, it cannot be said to be in favor given that judges who were not nominated by the DPR also held the same opinion.

Of the 37 decisions on judicial review of laws relating to the interests of DPR, 8 decisions were not unanimous, with one or more constitutional judges submitting dissenting opinions. The 8 decisions are.

<sup>50</sup> I Ketut Bayu, "Kewenangan DPR dalam Melaksanakan Uji Kepatutan dan Kelayakan Bagi Calon Pejabat Publik dari Aspek Ketatanegaraan [The Authority of the DPR in Conducting Fit and Proper Tests for Candidates of Public Officials from the Constitutional Perspective]," *IUS* 2, no. 5 (2014): 20.

**Table 12**  
**Decision with Dissenting Opinion**

No.	Decision Number	Law Examined	Legal Issues
1.	011/PUU-I/2003	Law 11/2003 (Election Law for DPR, DPD, <sup>51</sup> and DPRD <sup>52</sup> )	Candidates must not be former members of the PKI <sup>53</sup> or involved in G 30/S PKI. <sup>54</sup>
2.	008/PUU-IV/2006	Law 22/2003 (Parliament Law)	Dismissal of members of the House of Representatives on the recommendation of political parties.
3.	22-24/PUU-VI/2008	Law 10/2008 (Election Law)	Determination of elected candidates based on BPP (voter divisor number)
4.	10/PUU-VI/2008	Law 10/2008 (Election Law)	Political party membership requirements for DPD candidates
5.	56/PUU-VI/2008	Law 42/2008 (Presidential Election Law)	Individual Candidates in Presidential Elections
6.	21/PUU-IX/2011	Law 27/2009 (Parliament Law)	Determination of the seat of the new local government
7.	36/PUU-XV/2017	Law 17/2014 (Parliament Law)	House of Representatives inquiry right
8.	53/PUU-XV/2017	Law 7/2017 (Election Law)	Presidential Treshold

<sup>51</sup> *Dewan Perwakilan Daerah* [Regional Representative Council or Senat].

<sup>52</sup> *Dewan Perwakilan Rakyat Daerah* [Local House of Representative].

<sup>53</sup> Indonesian Communis Party.

<sup>54</sup> Coup de etat in 1965<sup>th</sup> that allegly supported by Indonesian Communis Party.

### **Decision Number 011/PUU-I/2003**

Case No. 011/PUU-I/2003 was filed by several individual community leaders and non-governmental organizations. This decision tested the provisions of Article 60 letter g of Law No. 12/2003 on General Elections for Members of DPR, DPD, and DPRD, which stipulates that one of the requirements for candidates is “not a former member of the banned organization the Indonesian Communist Party, including its mass organizations, or not a person directly or indirectly involved in G.30.S./PKI, or other banned organizations”. The Constitutional Court stated that it granted the applicant’s petition. Article 60 letter g of Law 12 Year 2003 is contrary to the 1945 Constitution and has no binding legal force.

This decision is based on the argument that the 1945 Constitution and international human rights legal instruments prohibit discrimination based on religion, ethnicity, race, ethnicity, group, social status, economic status, language, and political beliefs. Article 60 paragraph g of Law 12/2003 prohibits a group of citizens from being nominated and exercising their right to be elected based on their political beliefs. Restrictions on the right to vote are usually only made based on considerations of incompetence (for example, age and mental health factors) and impossibility because the right to vote has been revoked by a court decision. Article 60 letter g of Law 12 Year 2003 contains nuances of political punishment without a court decision (Decision No. 11/PUU-I/2003).

As the legislator, Article 60 letter g of Law 12 Year 2003 is a product of DPR’s authority and therefore has an interest in maintaining the norm. Constitutional judges who believe that the petition should be rejected are in favor of the interests of Parliament. Conversely, constitutional judges who find that the petition should be granted are in a position that is contrary to the interests of Parliament.

In this decision, the judges from the DPR were Jimly Assiddiqie (1), I Dewa Gede Palguna, and Achmad Roestand. Jimly Assiddiqie and I Dewa Gede Palguna were part of the constitutional judges who granted the petition so their position was against the interests of the DPR. On the other hand, Achmad Roestand delivered a dissenting opinion that the petition should be rejected so that his position is in favor of the interests of the DPR.

### **Decision Number 008/PUU-IV/2006**

Case No. 008/PUU-IV/2006 was filed by a member of DPR, Djoko Edhi Soetjipto Abdurahman, who was proposed by his political party to be dismissed as a member of the DPR based on Article 85 paragraph (1) letter c Law No. 22/2003 (Parliament Law) which stipulates that members of DPR cease to exist intermittently because they are proposed by the political party concerned (political party recall rights). The interests of the DPR in this case overlap with the interests of political parties to be able to regulate and discipline members of the DPR who come from these political parties. Therefore, the DPR's interest is to maintain the norm of Article 85 paragraph (1) letter c of Law No. 22/2003.

The verdict rejected the petition in its entirety. The verdict is based on the argument that political parties as political infrastructures must be empowered to be able to carry out their roles and functions. One of them is to give them the authority to discipline their members, including those who become members of DPR so that they can realize the campaigned programs. This is also to avoid "jumping fleas" within political parties. Protection of members still exists but through internal mechanisms regulated in the articles of association and bylaws of political parties. Political parties have the authority to propose recalls based on their position as participants in general elections as stipulated in Article 22E paragraph (3) of the 1945 Constitution (Decision, No. 008/PUU-IV/2008).

The constitutional judges from the DPR in this decision were Jilmy Asshiddiqie, I Dewa Gede Palguna, and Achmad Roestand. Two of the three judges were in the majority position, rejecting the petition, thus siding with the interests of the DPR. Jilmy Asshiddiqie, on the other hand, filed a dissenting opinion, arguing that the petition should have been granted, thus siding with the interests of the DPR.

### **Decision Number 10/PUU-VI/2008**

Case No. 10/PUU-VI/2008 was filed by DPD institutions, individual DPD members, individual citizens, and individuals living in certain provinces. The proposed provisions are Article 12 and Article 67 of Act No. 10/2008 on Elections

which does not contain the requirement of not being a member of a political party for DPD candidate. This means that the provisions of the Election Law allow DPD candidates to be members of political parties. This is argued by the applicant contrary to the provisions of Article 22E paragraph (4) of the 1945 Constitution which states that participants in the election of DPD members are individuals. The applicant also argued that the membership of DPD candidates in political parties is contrary to the intent of the establishment of DPD as a regional representative institution.

For DPR, the interests that exist in the provisions are of course the interests of political parties themselves, namely for the distribution of political party cadres and to influence the formation of laws and policies that require the role of DPD. DPD has the constitutional authority to propose and participate in discussing certain bills, supervise the implementation of the Act, especially those relating to the region, as well as the selection process of BPK members (Article 22D of 1945 Constitution). Thus, the position of the judge who favors the interests of DPR is the one who rejects the petition, while the opposing position is the one who argues in favor of the petition.

The verdict rejected the applicant's petition. The Court stated that the non-political party requirement for DPD candidates is not a constitutional norm that is implicitly attached to Article 22E paragraph (4) of the 1945 Constitution. The provision only regulates the nomination process that must be done individually, not by a political party.

The constitutional judges nominated by the DPR in this decision were Jimly Asshiddiqie, I Dewa Gede Palguna, and Moh. Mahfud MD. In this decision four constitutional judges filed dissenting opinions, namely H. A. S. Natabaya, I Dewa Gede Palguna, Moh. Mahfud MD, and Harjono. Constitutional Judge Jimly Asshiddiqie was part of the majority of judges and thus took sides. Judges from the House of Representatives who filed dissenting opinions were I Dewa Gede Palguna and Moh. Mahfud, MD. However, the substance of the dissenting opinion was not against the interests of the DPR but contained an argument that the petition should not be accepted because the matter submitted was

something that did not exist in the norms of Article 12 and Article 67 of the Election Law. The Constitutional Court's authority is to test the provisions of laws against the 1945 Constitution. If the proposed provision does not exist in the norms of the law, then the test cannot be conducted.

### **Decision Number 22-24/PUU-VI/2008**

The Decision No. 22 - 24/PUU-VI/2008 was against Article 55 paragraph (2) and Article 214 letters a, b, c, d, and e of Law No. 10/2008 on Elections for Members of the DPR, DPD, and DPRD. According to the applicant, Article 55(2) and Article 214(a) to (e) of Law 10/2008 had the potential to cause the applicant not to be elected as a member of the DPRD and was considered to violate his constitutional rights. The articles are detrimental to the applicant because if the vote is less than 30% of the BPP (voter divisor number) then the determination of the elected candidate will be based on the candidate's serial number.

According to the Constitutional Court, the provision of determining elected candidates as stipulated in the Election Law is unconstitutional because it contradicts the substantive meaning of popular sovereignty. It is a violation of the will of the people, which is reflected in their choices but is not used in the determination of elected candidates. This decision is contrary to the interests of the DPR, especially political parties because it negates the meaning of serial numbers, which are the authority of parties and in previous elections determined the chances of electing DPR candidates.

The constitutional judges from the DPR in this decision were Mahfud MD and M. Akil Mochtar. Both judges agreed with the majority judges, granting the applicant's request, which was thus against the interests of the DPR.

In this decision, there was one constitutional judge who filed a different opinion, namely Maria Farida Indrati. The substance of the dissenting opinion is that the determination of elected candidates based on the majority vote is considered detrimental to efforts to increase women's representation through affirmative action.

### **Decision Number 56/PUU- VI/2008**

This case was filed by an individual Indonesian citizen against the provisions of Article 1 paragraph (4), Article 8, Article 9, and Article 13 paragraph (1) of Law Number 42/2008 on the General Election of the President and Vice President relating to the provision that candidates for President and Vice President can only be nominated by political parties and/or coalitions of political parties that obtain 20% of the seats in the House of Representatives or obtain 25% of the national valid votes. This provision is seen as blocking the right of individuals to run for office as part of their right to participate in government. The provision was also seen as contradicting the 1945 Constitution, which does not prohibit individuals from running as candidates for President and Vice President.

The interests of the DPR and political parties, in this case, are to monopolize the authority to nominate candidates for President and Vice President. If individual candidates are allowed, then political parties will not only compete with other political parties but also with individual candidates. Therefore, the position in favor of the DPR is to reject the petition, and against the interests of the DPR is the opinion that grants the petition.

The Constitutional Court stated that Article 6A paragraph (2) of the 1945 Constitution means that only a political party or a coalition of political parties can propose a pair of candidates for President and Vice President in a general election. The provision does not allow for other interpretations. This is not discriminatory because anyone who meets the requirements can be registered and nominated by a political party or a coalition of political parties without having to be an organizer or member of a political party. Therefore, the Constitutional Court's verdict rejects the petition.

The DPR judges who decided the case were Moh. Mahfud MD. and M. Akil Mochtar. Judge Moh. Mahfud MD, who was also the Chief Justice of the Constitutional Court at the time, was part of the majority of judges, so his position favored the interests of the DPR. Meanwhile, M. Akil Mochtar expressed a different opinion along with 2 other constitutional judges, namely A. Mukthie Fadjar and Maruarar Siahaan. M. Akil Mochtar stated that the provisions in the

1945 Constitution only regulate matters of principle that cannot be interpreted as inhibiting the rights of citizens. Individual candidates must be accommodated and enforced in the 2014 elections. Thus, Judge M. Akil Mochtar's position is contrary to the interests of the DPR.

### **Decision Number 21/PUU-IX/2011**

Decision No. 21/PUU-IX/2011 was about the judicial review of Article 354 paragraph (2) of Law No. 27/2009 on Parliament Law, which stipulates that the chairman of the DPRD of the new local government (expansion) after the General Election is determined to come from the political party that wins the most seats.

The provision was seen as obstructing the applicant's rights as Chairman of the DPRD in the origin local government because he could no longer become Chairman of the DPRD in the new local government. This was argued to be contrary to, among other things, the right to equal opportunity in government and the right not to be prosecuted under retroactive laws as guaranteed in Article 28D(1) and Article 28I(1) of the 1945 Constitution.

The interests of the DPR, in this case concerning political parties, are to obtain the chairmanship of the DPRD if they obtain the most seats. This conflicts with the applicant's interest in having the opportunity to become the leader of the DPRD even though his political party does not have the most seats.

The verdict rejected the petition because the provision was in line with the 1945 Constitution. Members of whichever political party wins the most seats in the DPRD are entitled to occupy the position of DPRD leader. This provision was considered fair because the acquisition of seats also reflected the rank of the people's choice as the holder of sovereignty. The Constitutional Court considered that this provision did not violate the principle of fair legal certainty and equal treatment before the law for DPRD leaders who had been appointed as leaders and then, due to expansion as the aspiration of the sovereign people, had to end their positions as leaders because the ranking of their political parties' seats had been reduced. The legal certainty of the regulation lies precisely in the provision that if the order of political party seats changes in the new local government



due to regional expansion, as a result of the aspirations of the sovereign people, then the composition of the leadership position must also change.

The constitutional judges nominated by the DPR in this decision were Moh. Mahfud MD, M. Akil Mochtar, and Harjono. Moh. Mahfud MD and Harjono were part of the majority opinion and thus sided with the interests of the DPR. M. Akil Mochtar, along with three other judges, expressed a different opinion. They stated that the composition of the DPRD leadership should not change despite changes in the number of seats of political parties for the sake of legal certainty. Therefore, M. Akil Mochtar's position was against the interests of the DPR.

### **Decision Number 36/PUU-XV/2017**

Decision No. 36/PUU-XV/2017 is about the testing of Article 79 paragraph (3) of Law 17/2014 on Parliament Law, which is related to the DPR's right of inquiry whether it can also be conducted against the KPK (Commission for Corruption Eradication). This relates to the legal issue of whether the KPK is included in the category of implementing agencies of the Act or part of the executive. This issue stems from the action of the DPR in exercising the right of inquiry against the KPK, which is considered by the applicant as an attempt to obstruct the eradication of corruption by the KPK. Thus, the interpretation that the KPK is part of the executive and the object of the right of inquiry as used by the DPR is in favor of the DPR. Conversely, the opinion that the KPK is not part of the executive and therefore not the object of the right of inquiry is contrary to the interests of the Parliament.

Decision 36/PUU-XV/2017 rejected the petition. In the legal considerations, it was stated that KPK is an institution that carries out the task of investigating and prosecuting corruption crimes because government institutions that handle corruption cases have not functioned effectively and efficiently. KPK is an institution in the executive domain that carries out functions in the executive domain. KPK is not in the judicial domain, so it can be the object of the DPR's right of inquiry.

The constitutional judges nominated by the DPR during this decision period were Arief Hidayat (2nd term), Aswanto, and Wahidudin Adam. The three constitutional judges were the majority judges who sided with the interests of the DPR, namely declaring the KPK as part of the executive and thus the object of the DPR's right of inquiry. Judges who dissented were Maria Farida Indrati, I Dewa Gede Palguna (who was elected for a second term from the Presidential line), Suhartoyo, and Saldi Isra.

### **Decision Number 53/PUU-XV/2017**

Case Number 53/PUU-XV/2017 was filed by the Islamic Peace and Security Party (IDAMAN). One of the provisions submitted for review was Article 222 of Law No. 7/2017 on General Elections related to the minimum threshold requirement for to propose a candidate pair for President and Vice President, 20% of DPR seats or 25% of national valid votes. The petitioner argues that the presidential threshold provision contradicts the logic of the simultaneous 2019 elections, damages the presidential system, eliminates the evaluation function of the elections, and contradicts the principle of One Person, One Vote, One Value (OPOVOV).

The legal reasoning of the decision states that one of the directions of the 1945 Constitution amendment is to strengthen the presidential system. The presidential institution is idealized to reflect the sense of belonging of all the people and represent the reality of the diversity of Indonesian society. This is the basis of the spirit of constitutional engineering contained in Article 6A paragraph (3) of the 1945 Constitution.

This case is closely related to the interests of the DPR and political parties, especially major parties, as it gives them the right to nominate candidates for President and Vice President. With the presidential threshold, only major parties can nominate their candidates, and only parties that have obtained seats in the DPR or obtained nationally valid votes can form coalitions to nominate candidates for President and Vice President. Therefore, constitutional judges who argue against the petition are in favor of the interests of the DPR. Meanwhile,

constitutional judges who believe in granting the petition have a position that is contrary to the interests of the DPR.

In this decision, two constitutional judges expressed different opinions regarding the presidential threshold, namely Suhartoyo and Saldi Isra. Suhartoyo is a constitutional judge proposed by the Supreme Court and Saldi Isra is a constitutional judge proposed by the President. Meanwhile, the constitutional judges nominated by the DPR, namely Arief Hidayat (2), Aswanto, and Wahiduddin Adam, all sided with the interests of the DPR.

Based on the data on the position of constitutional judges nominated by the DPR in 8 decisions related to the interests of the DPR, it can be seen that out of all constitutional judges nominated by the DPR, there are several constitutional judges whose position cannot be seen, namely Jimly Asshiddiqie in his second term, M. Akil Mochtar in his second term, Arief Hidayat in his first term, and Guntur Hamzah. Jimly Asshiddiqie in his second term was nominated through a selection process that was not transparent and participatory, but he did not serve long because he resigned. M. Akil Mochtar in the second term was selected through a selection process that was not transparent and participatory but was dismissed in the same year due to a corruption case. Arief Hidayat did not participate in the first eight decisions analyzed. Guntur Hamzah also did not participate in the eight decisions analyzed because he was only appointed as a constitutional judge in 2022.

The selection of constitutional judges and the position of judges in decisions related to DPR interests can be presented in the following table.

**Table 13**  
**Judge selection and position in judgment**

No	Judge's Name	Selection	Position	
			Pro	Cons
1	Jimly Asshiddiqie (1)	Transparent and Participatory	1	2
2	I Dewa Gede Palguna	Transparent and Participatory	2	1
3	Achmad Roestandi	Transparent and Participatory	2	0
4	M. Akil Mochtar (1)	Transparent and Participatory	0	3

No	Judge's Name	Selection	Position	
			Pro	Cons
5	Moh. Mahfud MD.	Transparent and Participatory	3	1
6	Harjono	Transparent and Participatory	1	0
7	Wahiduddin Adam	Highly Transparent and Participatory	2	0
8	Arief Hidayat (2)	Not Transparent and Participatory	2	0

**Note:** Pro: In favor; Con: Contrary.

There are five constitutional judges whose overall position is in favor of the interests of the DPR, namely Achmad Roestandi, Harjono, Wahiduddin Adam, Aswanto, and Arief Hidayat (2). The constitutional judge whose position is always against the interests of the House is M. Akil Mochtar, who was nominated through a transparent and participatory selection process. The other constitutional judges, namely Jimly Asshiddiqie, I Dewa Gede Palguna, and Moh. Mahfud MD, have each taken sides and been in conflict.

Achmad Roestandi is one of the first-term Constitutional Judge proposed by the DPR. Before becoming a constitutional justice, Achmad Roestandi was a military officer who was appointed as member of the people consultative assembly.<sup>55</sup> In the case of the judicial review of the Election Law in Case Number 011/PUU-I/2003, he submitted a dissenting opinion against the opinion of the majority of judges who granted the request to grant voting rights to former Communist Party's members or those involved in the G.30.S./PKI incident. Achmad Roestandi submitted a different opinion in accordance with the position of the DPR, namely by stating that the revocation of voting rights is indeed possible and permitted by the 1945 Constitution. Meanwhile, the majority of judges from the DPR are Jimly Asshiddiqie and I Dewa Gede Palguna who have a different position from the DPR's view, namely stating that the restriction is a form of discrimination.

<sup>55</sup> Rizky Darmawan, "Mengenal Achmad Roestandi, Sosok Jenderal TNI yang Pernah Duduki Jabatan Hakim MK [Getting to Know Achmad Roestandi, the TNI General Who Once Held the Position of Constitutional Court Judge]," *SindoNews*, accessed August 24, 2024, <https://nasional.sindonews.com/read/1442221/14/mengenal-achmad-roestandi-sosok-jenderal-tni-yang-pernah-duduki-jabatan-hakim-mk-1724501317>.

In the second case, Decision number 008/PUU-IV/2006, Achmad Roestand together with I Dewa Gede Palguna were in the position as one of the majority judges who rejected the applicant's request to limit the power of political parties to recall members of the DPR because the authority was considered as the power needed to carry out the role and function of political parties. This is certainly in line with the interests of political parties in the DPR. Meanwhile, the dissenting judge from the DPR was Jimly Asshiddiqie who stated that the authority was a form of restriction on the freedom possessed and needed by members of the DPR even though the opinion differed from the opinion of political parties and the DPR.

Judge Harjono is always in the same position as the interests of the DPR. In Case Number 21/PUU-IX/2011, he was part of the majority of judges who stated that the DPRD chairman's seat is permanent even though there is a change in the composition of DPRD members. Likewise, Constitutional Justices Wahiduddin Adam, Aswanto, and Arif Hidayat, in Case Number 36/PUU-XV/2017 and Case Number 53/PUU-XV/2017 were part of the majority of judges whose positions are in line with the interests of the DPR. In Case 36/PUU-XV/2017, the three judges, as part of majority judges, stated that the KPK is part of the executive which is the object of the DPR's investigation rights. Meanwhile, the dissenting judge stated that the KPK is not part of the executive and is independent and not the object of the DPR's investigation rights.

Judge Akil Mochtar has always been in a position that is at odds with the DPR, namely in Case Number 22-24/PUU-VI/2008 and Case Number 56/PUU-VI/2008. In Case Number 22-24/PUU-VI/2008, Akil Mochtar together with Mahfud MD were part of the majority of judges who granted the applicant's request and stated that the determination of elected legislative candidates was based on the largest votes not based on the list number candidacy position. This reduces the power of political parties that determine the list number of a political party's candidates.

Meanwhile, in case No. 56/PUU-VI/2008, constitutional judges Akil Mochtar and Mahfud MD were in different positions. Mahfud MD was part of the majority

of judges who were in line with the interests of the DPR, namely rejecting the petitioners' request regarding the provision on submitting presidential and vice presidential candidate pairs only through political parties or coalitions of political parties. Meanwhile, Akil Mochtar submitted dissenting opinion that in the election of the President and Vice President, an opportunity should also be given to individual candidates.

If the position of the constitutional judge from the DPR in the above decisions is correlated with the selection category, the judge who was selected through a very transparent and participatory selection process, namely constitutional judge Wahiduddin Adam, in two decisions was positioned as a majority judge who was in line with the interests of the DPR. The orientation of the position of constitutional judge Wahiduddin Adam cannot be separated from his background before serving as a constitutional judge who had a career in the government bureaucracy at the Ministry of Law and Human Rights, especially at the National Legal Development Agency, until serving as Director General of Legislation.<sup>56</sup>

Judges who were selected transparently and participatively, namely Jimly Asshiddiqie, I Dewa Gede Palguna, Achmad Roestandi, Akil Mochtar, Mahfud MD, and Harjono, each have varying positions. Constitutional Justice Achmad Roestandi is always in a position that is in line with the interests of the DPR. This is influenced by his background as a military officer and member of the MPR. In contrast, Constitutional Justice Akil Mochtar is always in a position that is at odds with the interests of the DPR in the three cases that have been described. Akil Mochtar's position is unique considering his background before becoming a constitutional justice was a politician and member of the DPR.

Other constitutional judges, namely Jimly Asshiddiqie, I Dewa Gede Palguna, and Mahfud MD have been in positions both in line with and against the interests of the DPR, both as majority judges and as judges who expressed dissenting opinions. Meanwhile, constitutional judges who were elected through a mechanism

<sup>56</sup> Ruhma Syifwatul Jinan, "Jejak Rekam dan Profil Wahiduddin Adam Selama Jadi Hakim MK [Track Record and Profile of Wahiduddin Adams During His Tenure as Constitutional Court Judge]," *Tirto*, accessed September 17, 2024, [https://tirto.id/jejak-rekam-dan-profil-wahiduddin-adams-selama-jadi-hakim-mk-gUCF#google\\_vignette](https://tirto.id/jejak-rekam-dan-profil-wahiduddin-adams-selama-jadi-hakim-mk-gUCF#google_vignette).

that was not transparent and participatory, namely constitutional judge Arif Hidayat, have always been in positions that are in line with the interests of the DPR. Arif Hidayat's background is an academician<sup>57</sup> who should be able to take positions both in line with and against the interests of the DPR. However, the election of Arif Hidayat for a second term, in addition to being non-transparent and participatory, was also colored by information about the lobbying he did to members of the DPR. Constitutional's Etic Council has decided that Arif Hidayat violated Code of Ethic.<sup>58</sup>

Based on above analysis, judges who are nominated through a selection process that is highly transparent and participatory or transparent and participatory may be in favor of or against the interests of the DPR. However, judges who were nominated with a selection process that was not transparent and participatory in all their decisions were in favor of the interests of the DPR. That can be an initial conclusion that judges selected by the DPR through a transparent and participatory mechanism tend to be more independent, both in their position that support or contradict the DPR's interest. On the other hand, judges selected through a process that is not transparent and participatory tend to be in a position that is in accordance with the interests of the DPR. However, to have a stronger conclusion, further research is needed by analysing larger number of decisions. Another factor that influences a judge's decision that can be studied is the ideological<sup>59</sup> and professional background before becoming a judge.

### III. CLOSING

The practice of selecting constitutional judge candidates conducted by the DPR varies from non-transparent and participatory, transparent and participatory, to highly transparent and participatory. The opinions and positions of constitutional judges nominated by the DPR in decisions related to the

<sup>57</sup> "Prof. Dr. Arief Hidayat, S.H., M.S.," *Mahkamah Konstitusi Republik Indonesia (MKRI)*, accessed September 17, 2024, <https://testing.mkri.id/hakim/hakim-periode-sebelumnya/66g/prof-dr-arief-hidayat-s-h-m-s->.

<sup>58</sup> *Decision of Constitutional Court Ethic Council Number 18/Lap-V/BAP/DE/2018*, accessed September 17, 2024, <https://www.mkri.id/public/content/dewanetik/Berita%20Acara%2018.pdf>.

<sup>59</sup> Bjorn Dressel and Tomoo Inoue, "Megapolitical Cases before the Constitutional Court of Indonesia Since 2004: An Empirical Study," *Constitutional Review* 4, no. 2 (December 2018): 166.

authority and interests of the DPR vary. In general, some have taken sides, and some have reverse position. There are two constitutional judges whose positions are always in favor and two judges always reverse.

Judges who are nominated through a highly transparent and participatory selection process or a transparent and participatory process may rule in favor of or against the interests of the Parliament. However, judges who were nominated with a selection process that was not transparent and participatory in all their decisions were in favor of the interests of the DPR. That pattern indicate that the judge nominated through transparent and participatory selection process tend to be more independent form the DPR than the judge nominated through less transparent and participatory selection process. Further research is needed with a larger number of decisions to be able to confirm the relationship and influence of the constitutional judge selection mechanism on the position of judges in the Constitutional Court's decision. Further research also can be conducted for judges nominated by the President to review laws related to the interests of the President or the government.

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