CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 90/PUU-XVIII/2020

Concerning

Formal Examination and Material Examination in Relation to the Requirements for Constitutional Justices

Petitioner **: Allan Fatchan Gani Wardhana**

Type of Case **:** Formal Examination and Material Examination of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court (UU 7/2020) against the 1945 Constitution of the Republic of Indonesia (UUD 1945).

Subject Matter **:** Formal Examination and Material Examination of Article 15 paragraph (2) letter d, Article 22, Article 23 paragraph (1) letter d, Article 26 paragraph (1) letter b, and Article 87 letter b of Law 7/2020 against Article 1 paragraph (2), Article 1 paragraph (3), Article 24 paragraph (1), Article 24C paragraph (3), Article 28D paragraph (1), and Article 28D paragraph (3) of the 1945 Constitution.

Verdict : **In Formal Examination**:

To dismiss the Petitioner's petition in its entirety.

In Material Examination:

To declare that the Petitioner's petition is unjustifiable.

Date of Decision **:** Monday, June 20, 2022.

Overview of Decision **:**

The Petitioner explained that as an individual Indonesian citizen, as a tax payer and who is working as a lecturer at the Faculty of Law of Universitas Islam Indonesia, in the field of Constitutional Law Studies, as well as serving as the Head of the Centre for Constitutional Law Studies (*Pusat Studi Hukum Konstitusi* or PSHK) of the Faculty of Law of Universitas Islam Indonesia, he believed to have been prejudiced by the promulgation of and several Article in Law 7/2020.

Regarding the authority of the Court, because the Petitioner is reviewing the Law, *in casu* Law 7/2020 against the 1945 Constitution, the Court has the authority to hear and decide on the *a quo* Petition.

Deadline for the Submission of Formal Examination

In this *a quo* case, the Petitioner submitted a petition for a formal examination of Law 7/2020 to the Constitutional Court on October 13, 2020 based on the Deed of Receipt of Petition Files Number 201/PAN.MK/2020 and recorded in the Electronic Constitutional Case Registration Book (*Buku Registrasi Perkara Konstitusi Elektronik* or e-BRPK) on October 27, 2020 under the Number 90/PUU- XVIII/2020. Meanwhile, Law 7/2020 was promulgated on September 29, 2020 in the State Gazette of the Republic of Indonesia of 2020 Number 216, Supplement to the State Gazette of the Republic of Indonesia Number 6554, therefore the Petitioner's petition is submitted on the 15th (fifteenth) day since Law 7/2020 was promulgated in the State Gazette of the Republic of Indonesia of 2020 Number 216 and

Supplement to the State Gazette of the Republic of Indonesia Number 6554;

Whereas based on the legal facts as mentioned above, therefore, the Petitioner's petition in relation to the formal examination of Law 7/2020 against the 1945 Constitution is being submitted within a grace period of 45 (forty five) days since the promulgation of Law 7/2020. Therefore, the petition for a formal examination of Law 7/2020 is submitted within the specified grace period.

In relation to the legal standing of the Petitioner, whereas in relation to the legal standing in the formal examination at the Constitutional Court, in several legal considerations of the Court's Decision, the Court has confirmed its opinion that the Petitioner who has the legal standing in the petition for formal examination is a party that has an interest between the profession of the Petitioner as a Lecturer of Constitutional Law and the substance of the examination for which the examination is petitioned. Therefore, regarding this matter, the Court since the Constitutional Court Decision Number 27/PUU-VII/2009, dated June 16, 2010, has confirmed its opinion, which ever since then such opinion has always been used as a legal consideration by the Court for any further decisions. In this regard, in relation to the profession of the Petitioner who currently works as a teaching staff at the Faculty of Law of Universitas Islam Indonesia, according to the Court, there is an interest, either directly or indirectly, between the profession or the work of the Petitioner and the law which is being formally examined. Therefore, regardless of whether the Petitioner's argument is proven or not proven that there is an unconstitutionality issue regarding the procedure for amending Law 7/2020 as argued by the Petitioner in the subject matter of the petition in the formal examination, the Court is of the opinion that the Petitioner has been able to prove a causal relationship between the perceived constitutional loss and the promulgation/amendment of Law 7/2020. Therefore, the Petitioner has the legal standing to act as the Petitioner in the formal examination of *a quo* Law 7/2020.

Meanwhile, regarding the legal standing of the Petitioner in the judicial examination, after taking into consideration the matters as explained by the Petitioner in describing the aforementioned legal standing, the Court is of the opinion that it has been found that the Petitioner cannot clearly describe the causal relationship (*causal verband*), the presumption of both potential and factual loss with the articles in Law 7/2020 which are petitioned for review by the Petitioner. Moreover, the matters described by the Petitioner in explaining his legal standing are not the matters related to the loss of constitutional rights, so that it further proves that there is no relevance between the perceived loss of constitutional rights as described by the Petitioner in explaining his legal standing against the Articles in Law 7/2020 that are petitioned for examination. In addition to these legal considerations, the Court is of the opinion that the Petitioner as an individual Indonesian citizen who works as a teaching staff whose latest educational degree is Master of Law (*Magister Hukum* or MH) has not fulfilled the requirements to become a constitutional judge because one of the requirement to become a constitutional judge is to have a doctorate (*Strata 3*) as his latest educational degree. Therefore, regardless of whether or not the Petitioner's argument is proven regarding the existence of a conflict of norms in Article 15 paragraph (2) letter d, Article 22, Article 23 paragraph (1) letter d, Article 26 paragraph (1) letter b, and Article 87 letter b of Law 7 /2020 against Article 1 paragraph (2), Article 1 paragraph (3), Article 24 paragraph (1), Article 24C paragraph (3), Article 28D paragraph (1), and Article 28D paragraph (3) of the 1945 Constitution, and including in the event that the Petitioner's petition is granted by the Court, the presumption of such constitutional loss does not occur again or will not occur again, the Court is of the opinion that the Petitioner does not have the legal standing in submitting a petition for a material examination of *a quo* Law 7/2020.

The Petitioners basically petition for the Court to declare that the promulgation of Law 7/2020 does not fulfil the provisions for the promulgation of laws based on the 1945 Constitution, and to declare that Article 15 paragraph (2) letter d of Law 7/2020 is in contrary to the 1945 Constitution and does not have any conditional binding legal force along the phrase "55 (fifty-five)" if it is not construed as "47 (forty-seven)", to declare that Article 22 of Law 7/2020 is in contrary to the 1945 Constitution and does not have any conditional binding legal force if it is not construed as “The term of office of any constitutional judge shall be 5

(five) years and can be re-elected only for the next 1 (one) term of office", to declare that Article 23 paragraph (1) letter d of Law 7/2020 is in contrary to the 1945 Constitution and does not have any conditional binding legal force if it is not construed as "his term of office has ended", to declare that Article 26 paragraph (1) letter b of Law 7/2020 is in contrary to the 1945 Constitution and does not have any conditional binding legal force if it is not construed as "the term of office has ended" as referred to in Article 23 paragraph (1) letter d", and to declare that Article 87 letter b of Law 7/2020 is in contrary to the 1945 Constitution and does not have any binding legal force;

Regarding the subject matter of the formal examination, the Petitioner argue that the formal promulgation process of Law 7/2020 has violated the principle of openness and is in contrary to the provisions regarding the procedure for the promulgation of laws, especially regarding the absence of public participation and that the discussion process was carried out in a closed manner with a very limited time. Regarding this argument, according to the Court, based on the legal facts revealed in the trial, in particular the statements of the DPR (House of Representatives) and the President, it turns out that the Second Amendment Bill to Law Number 24 of 2003 has been included in the 2015-2019 *Prolegnas* (national legislation program) list, the priority for the year of 2019 [2].*vide* Decree of the House of Representatives Number 19/DPR RI/I/2018-2019 concerning the National Legislation Program for the Priority Laws of 2019 and Amendments to the National Legislation Program for the Bills of 2015-2019, dated October 31, 2018, Attachment I to Decree of the House of Representatives Number 22]. In addition, the DPR in the trial has also explained that the amendment to Law Number 24 of 2003 was a proposal for a Bill in the open cumulative list in order to follow up on the decisions of the Constitutional Court, including the Constitutional Court Decision Number 15/PUU-V/2007, the Constitutional Court Decision Number 37-39/PUU-VIII/2010, the Constitutional Court Decision Number 49/PUU-IX/2011, the Constitutional Court Decision Number 68/PUU-IX/2011, the Constitutional Court Decision Number 7/PUU-XI/2013 and the Constitutional Court Decision Number 53/PUU-XIV/2016 as stipulated in Article 23 paragraph (1) of Law Number 12 of 2011 concerning the Promulgation of Laws and Regulations (Law 12/2011) [*vide* Summary of Court Hearings with the Agenda to Hear the Statements of the DPR and the President, dated August 9, 2021, page 4 and 5]. Therefore, regardless of the norms of the articles petitioned for a material examination due to a perceived constitutionality issue, according to the Court, since the procedure for amending the *a quo* Law was based on the open cumulative list in order to follow-up on the several decisions of the Constitutional Court, the procedure for amending Law 7/2020 is no longer relevant to be disputed. However, it is important for the Court to emphasize that any proposed Bills in the event that they are included in the open cumulative list can actually be promulgated at any time and shall not be limited in number as long as they fulfil the requirements as contained in Article 23 paragraph (1) of Law 12/2011.

In addition, any amendment to the laws through the open cumulative list have special characteristics that cannot be fully equated with the proposal for amending the normal laws, namely the bills that are included in the mid-term *Prolegnas* list. Meanwhile, the inclusion of the bill to amend the *a quo Law* in the *Prolegnas* list as described above, shall not mean that the amendment to the Law is closed for any proposal and any discussion in the open cumulative list because the amendment to the *a quo Law* actually fulfils the requirements for the open cumulative list as considered above.

Due to the amendment in the *a quo* law in order to follow up on the decisions of the Constitutional Court, it is no longer relevant that the discussion process of the Bill still requires any discussion, including in this case the strict requirements for public participation as stated in the Constitutional Court Decision Number 91/PUU-XVIII/2020, dated November 25, 2021. This is intended so that the essence of the amendment fully adopts the substance of the Constitutional Court's decision. In this case, if the amendment is made in the same process as the Bill outside of the open cumulative list, it has the potential to assess and even negate the decision of the Constitutional Court. Based on the description of the legal considerations above, the Court is of the opinion that the arguments of the Petitioner's petition in the formal examination of *a quo* Law 7/2020 is legally unjustifiable.

Based on the entire description of the aforementioned legal considerations, the Court is of the opinion that the Petitioner has the legal standing to file a formal examination petition, but he does not have the legal standing to file a material examination petition. Meanwhile, the subject matter of the formal examination petition is legally unjustifiable. Therefore, the subject matter of the Petitioner's petition and any other matters in the material examination shall not be considered further.

Therefore, regarding the *a quo* petition, the Court has issued a decision with the verdicts as follows:

In Formal Examination :

To dismiss the Petitioner's petition in its entirety.

In Material Examination :

To declare that the Petitioner's petition is unjustifiable.

DISSENTING OPINIONS AND CONCURING OPINIONS

Whereas against the *a quo* decision of the Constitutional Court, there are dissenting opinion and concurring opinion from Constitutional Justice Wahiduddin Adams and Constitutional Justice Suhartoyo, as well as dissenting opinion from Constitutional Justice Saldi Isra.

I. Concurring Opinion and Dissenting Opinion from Constitutional Justice Wahiduddin Adams

A. Concurring Opinion

1. Subject Matter of the Formal Examination Petition

Accordingly, regarding the subject matter of the formal examination of the *a quo* Law, I am also of the opinion that the Petitioner's petition is legally unjustifiable and DISMISS the Petitioner's petition.

B. Dissenting Opinion

1. The Legal Standing of the Petitioner in the Material Examination

Accordingly, I am of the opinion that the Court should declare the Petitioner as having the legal standing to file a material examination of the *a quo* Law.

2. Subject Matter of the Material Examination

a. Article 15 paragraph (2) letter d of the *a quo* Law

Accordingly, I am of the opinion that the Court should declare the Petition as legally unjustifiable and DISMISS the Petitioner's petition.

b. The Removal of Article 22 of the *a quo* Law

Accordingly, I am of the opinion that the Court should declare the Petitioners' petition as legally unjustifiable and **DISMISS** the Petitioner's petition.

c. The Removal of Article 23 paragraph (1) letter d of the *a quo* Law

Based on my opinion on the removal of Article 22 of the *a quo* Law and since Article 23 paragraph (1) letter d of the *a quo* Law is non-existent as a further consequence of the presence or absence of Article 22 of the *a quo* Law, I am of the opinion that the Court should declare the Petitioner's petition as legally unjustifiable and **DISMISS** petitioner's petition.

d. The Removal of Article 26 paragraph (1) letter b of the *a quo* Law

Based on my opinion on the removal of Article 22 of the *a quo* Law and since the presence or absence of Article 26 paragraph (1) letter b of the *a quo* Law is also one of the further consequences of the presence or absence of Article 22 of the *a quo* Law, I am of the opinion that the Court should declare the Petitioner's petition as legally unjustifiable and **DISMISS** Petitioner's petition.

e. Article 87 letter b of the *a quo* Law

Because of the *a quo* material petitioned by all Petitioners in all cases of *a quo* judicial review against the 1945 Constitution of the Republic of Indonesia (No. 90, 96, and 100/PUU-XVIII/2020), specifically regarding the *a quo* material, I will consider and give a dissenting opinion at the end for all petition for material examination of Article 87 letter b of the *a quo* Law against the 1945 Constitution of the Republic of Indonesia.

C. Dissenting Opinion to Article 87 letter b of the *a quo* Law

Therefore, the legislators from the beginning should be able to regulate the better norms of transitional provisions than those stated in Article 87 letter b of the *a quo* Law. Furthermore, the Court has also granted the petition to the extent that it is related to the constitutionality of Article 87 letter a which even though the constitutionality reasons are different from Article 87 letter b, I consider both as essentially the same because they are both regulated in the Chapter on Transitional Provisions which seems to have been made in a hurry and very imprecise from the outset and can essentially be judged quite reasonably as giving more privilege for the majority of the existing Constitutional Justices, instead of simply being "not prejudiced" as one of the basic objectives and principles of a transitional provision in the laws and regulations.

Therefore, I am of the opinion that the Court should **ACCEPT** the Petitioner's petition by declaring that Article 87 letter b of the *a quo* Law is in contrary to the 1945 Constitution of the Republic of Indonesia and it has no binding legal force.

II. Different Legal Opinions and/or Legal Reasons to Declare the Dissenting Opinion and Concurring Opinion from Judge Suhartoyo

1. In the formal examination of Case Number 90/PUU-XVIII/2020.

Whereas it can be further explained that the decisions of the courts, including the decisions of the Constitutional Court, are doctrinally "must be considered correct" in accordance with (the principle of *res judicata pro veritate habetur).* That means, as long as it has permanent legal force, it has an executorial nature and must be carried out (execution). In this perspective, the Constitutional Court's decision as long as it is declared in a trial that is open to the public, then the *a quo* decision shall be final and has binding legal force (*vide* Article 47 of the Constitutional Court Law). That means, the Constitutional Court's decision immediately has binding legal force since it is being declared as long as it is not dependent on certain requirements contained in the decision. Therefore, because regarding the design of the positions of the Constitutional Court Justices includes such matters relating to it, the Constitutional Court through its decisions is of the opinion that it is the authority of the legislators to regulate/determine it, then this shall be the purported condition, namely the need for further action to be taken from the legislators to implement it (execution). Furthermore, by using the "open cumulative" instrument for the amendment to the *a quo* law as conducted by the legislators, it was conducted in the perspective of respecting and carrying out the orders of the Constitutional Court's decisions. Therefore, I am of the opinion that it is irrelevant if the amendment of *a quo* law is still associated with the procedure for promulgating or amending the laws normally as the amendment to laws in general. This is because by judging the procedure for the promulgation or amendment of laws based on the consequences of following up on the decisions of the Constitutional Court through open cumulative instruments, it is the same as assessing the decisions of any judicial bodies that have permanent legal force, which of course shall be unjustifiable. Therefore, based on the aforementioned legal considerations, in the formal examination of case Number 90/PUU-XVIII/2020, I am of the opinion that it is difficult to provide any justification if there are any parties or legal subjects whose legal standing can still be considered to question the procedures for promulgating or amending the *a quo* law. Therefore, I emphasize that regardless of whether the Petitioner in the formal examination has legal standing or not, as in the opinion of other Constitutional Justices, I am of the opinion that the subject matter of the petition for a formal examination in Case Number 90/PUU-XVIII/2020 must be

declared as legally unjustifiable and the Constitutional Court should dismiss the request for the *a quo* formal examination in its entirety.

2. In the material examination of Case Number 90/PUU-XVIII/2020.

Based on the reasons for the aforementioned legal considerations, even in this material examination case, I am of the same opinion as in considering the petition for a formal examination, regardless of the legal standing of the Petitioner as with the opinions of other Constitutional Justices, on the subject matter part of the petition, I am of the opinion that the *a quo* Petitioner's petition is legally unjustifiable and the Constitutional Court should dismiss the Petitioners' petition in its entirety.

3. In the formal and material examination of Case Number 90/PUU-XVIII/2020.

Whereas based on the description of the aforementioned legal considerations, I conclude that, as long as the petition in which the Constitutional Court's verdicts declare that the Petitioner's petition is unjustifiable and grants the Petitioner's petition, I declare a dissenting opinion, both in legal considerations and the verdict, while on the part of the Constitutional Court's decision which verdict is to dismiss the Petitioner's petition, I declare that I agree with the verdict part of the decision, but I have concurring opinion on the reasons for the legal considerations.

III. Dissenting Opinion from Judge Saldi Isra

Regarding the Court's verdict or opinion, I would like to declare that, even though it is factual, for example, regarding the age requirements that he have not been fulfilled to be able to become a constitutional judge and the level of education that he does not have a doctoral degree (S3), at least the Petitioner has the potential to be prejudiced by the enactment of the norms submitted in the *a quo* petition. Therefore, without having to elaborate on the fulfilment of the requirements for the loss of constitutional rights to be able to file a petition at the Constitutional Court, for me there is no doubt at all to arrive at the verdict and opinion that: The Petitioner has experienced, or at least has the potential to experience, a constitutional loss so that he has the legal standing to file the *a quo* petition.

Whereas because the Petitioner has a legal standing, I will then consider the subject matter of the petition for a material examination in the *a quo* case as follows.

Whereas regarding the provisions of Article 15 paragraph (2) letter d of Law 7/2020, the Petitioner petition for the Court to declare that the article is in contrary to the 1945 Constitution and does not have any conditional binding legal force as long as the phrase *"55 (fifty-five years old"* is not construed as *"47 (forty-seven) years old"*.

By using the same pattern and without having to explicitly determine the minimum age of 47 years to become a constitutional judge as petitioned by the Petitioner, it is sufficient for the Court to issue an order within a certain period of time to be harmonized with the age limit to become a supreme judge in the Supreme Court which according to Article 24 paragraph (2) of the 1945 Constitution are both holders of judicial power. Therefore, the Petitioner's petition as long as the provisions of Article 15 paragraph
(2) letter d of Law 7/2020 is legally justifiable in part.

Whereas regarding the provisions of Article 22 of Law no. 7/2020, the Petitioner petitioned for the Court to declare that it is in contrary to the 1945 Constitution and does not have any conditional binding legal force if it is not construed as "The term of office of any constitutional judge shall be 5 (five) years and can be re-elected only for the next 1 (one) term of office".

Because of this reason or argument, the Constitutional Court handed over the process of determining the legal politics of filling, term of office, and periodization of the term of office of the constitutional justices to legislators. In this case, the legislators have removed the periodization of the term of office by determining the term of office of constitutional justices to be longer. In my opinion, this is in line with the spirit of the Constitutional Court Decision No. 53/PUU-XIV/2016. That means, by reviving the periodization of the term of office of the constitutional justices is tantamount to giving up the opportunity to maintain and strengthen the independence of judicial power. Therefore, the Petitioner's petition as long as

Article 22 of Law 7/2020 is legally unjustifiable.

Whereas regarding the provisions of Article 23 paragraph (1) and Article 26 paragraph (1) of Law 7/2020, because the two norms have a correlation with the periodization of the term of office, the basis of my legal argument for the *a quo* two norms is essentially in line with the legal considerations as stated in Sub-Paragraph [6.2.2] above. Therefore, the Petitioner's petition as long as Article 23 paragraph (1) and Article 26 paragraph (1) of Law 7/2020 is legally unjustifiable.

Whereas regarding the provisions of the norm of Article 87 letter b of Law 7/2020, the Petitioners petitioned for the Constitutional Court to declare that the *a quo* norm is in contrary to the 1945 Constitution and has no binding legal force. In general, Article
87 letter b of Law 7/2020 is a transitional norm, namely the transfer or transition of the old law to the new law. In simple terms, if the *a quo* norm is declared as “in contrary to the 1945 Constitution and has no binding legal force" then there are no other norms or provisions that will bridge the enactment of Law 7/2020 with the justices who are currently in service. That means, by stating the *a quo* norm as “in contrary to the 1945 Constitution and has no binding legal force” it can actually result in a legal vacuum (*rechtsvacuum*) and legal uncertainty. Therefore, the Petitioner's petition as long as Article 87 letter b of Law 7/2020 is legally unjustifiable.