



Ijtihad of the Judges of the Constitutional Court of the Republic of Indonesia in the Case of Number 2/Phpu.Pres-XXii/2024 (An Analysis of the Judges' Dissenting Opinion Legal Considerations)

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Abstract. One of the authorities of the Constitutional Court is to resolve disputes over the results of general elections, both legislative elections (DPR, DPD and DPRD) and executive elections (president and vice president, governor and deputy governor, regent and deputy regent, mayor and deputy mayor). The implementation of elections should take place directly, freely, and confidentially, as well as honestly and fairly, which is usually abbreviated as *luber* and *jurdil*. Every contestant who competes in the election must target victory, so it is not uncommon for violations and the use of all resources (including the use of the state budget in the form of social assistance). The Constitutional Court is the last bastion to guarantee the implementation of free and fair elections. So, what is an interesting problem in this research is how the views of the Constitutional Court judges on the principles of overflow and justice in the election of the president and vice president in 2024? The Constitutional Court is also known as the guardian of constitutions whose decisions have permanent legal force since they have been announced in a plenary session open to the public, namely final and binding. Thus, the Constitutional Court is expected to provide a fair decision based on the objectives of the constitution, so that the continuity and continuity of governance are well maintained.

Keywords: Constitutional Court, elections, social assistance, constitutions

1. Introduction

The Constitutional Court is the fruit of the reforms desired by the Indonesian people after the fall of the New Order regime through amendments to the 1945 Constitution. In the amendment referred to, the structure of state institutions underwent a very significant overhaul. Including the establishment of a constitutional supremacy paradigm that was agreed to replace parliamentary supremacy (Mariyadi Faqih, 2010). Article 24 paragraph (2) of the 1945 Constitution which states "Judicial power is exercised by a Supreme Court and judicial bodies subordinate to it in the general court environment, the religious court environment, the military court environment, the state administrative court environment, and by a Constitutional Court". Thus, the provisions of the norms of Article 24 paragraph (2) of the 1945 Constitution are a form of recognition and legitimization of the existence of the Constitutional Court (Hizbullah et al., 2023).

Case Number 2/PHPU.PRES-XXII/2024 is a dispute over election results filed by presidential candidate H. Ganjar Pranowo, SH, M.IP and vice presidential candidate Prof. Dr. H. Mahfud MD, SH, SU, M.IP serial number 03 against the General Election Commission. The object of the case is General Election Commission Decree Number 360 of 2024 concerning the Results of the Determination of the General Election of the President and Vice President, Members of the People's Representative Council, Regional Representative Council, Provincial Regional People's Representative Council, and Regency/City Regional People's Representative

Council Nationally in the General Election of 2024 dated March 20 2024, as far as the general election for President and Vice President in 2024 is concerned (Marni et al., 2023).

The constitutional authority of the Constitutional Court to resolve disputes over election results at the first and last level whose decisions are final is regulated in Article 24C paragraph (1) of the 1945 Constitution. Based on the 1945 Constitution, the Judicial Power Law and the Constitutional Court Law, the authority of the Constitutional Court relating to general elections. It seems limitative, that is, it is limited to deciding disputes about the results of the general election. The decision of the Constitutional Court which created a new law, is seen as using a progressive legal interpretation, in this case progressive law is part of a process of searching for truth that never stops (Ali, 2010: 70). The Constitutional Court is a judicial body that was directly created to adjudicate cases that have a strong connection with political issues. The Constitutional Court has the authority to assess the constitutionality of a law made by the President together with the DPR. Not to mention other authorities related to political issues, for example the dissolution of political parties, impeachment of the president and/or vice president, disputes over the results of general elections and regional head elections, as well as disputes over authority between state institutions. So with such authority, the potential for political intervention in the Constitutional Court is very large (Yance Arizona, 2024). Whether the Constitutional Court's decision is effective or not really depends on the acceptance of the parties (Johansyah, 2021).

Thus, the authority to resolve disputes over the results of the presidential and vice presidential elections cannot be separated from the constitutional obligations of the Constitutional Court as a constitutional court which must ensure that the implementation of elections does not violate the principles of elections which are direct, public, free, secret, honest, fair and periodically as specified in Article 22E paragraph (1) of the 1945 Constitution. This means that constitutionally, the 1945 Constitution contains a spirit that requires the holding of elections that are fair, democratic and with integrity. In fact, ideally, within the limits of reasonable reasoning, after the entire series of elections is over, whoever wins the election will exercise leadership with strong legitimacy. This cannot be separated from the existence of elections, both theoretically, conceptually and practically, that elections are a legal means for carrying out a transition of power in a country. (as decided in the Constitutional Court Decision on Case Number 2/PHPU.PRES-XXII/2024 which was pronounced in a plenary session open to the public on April 22 2024, pp. 1574-1575).

In case Number 2/PHPU.PRES-XXII/2024 the Constitutional Court divided the arguments of the Petitioner's petition into 6 (six) clusters, namely: Independence of election organizers, validity of presidential and vice presidential candidacy, social assistance (*bansos*), mobilization/neutrality of officials /state apparatus, procedures for holding elections and utilization of the Electronic Recapitulation Information System (Sirekap) application. Constitutional Court decisions have binding power, evidentiary power and executorial power to create a sense of justice and legal certainty for the community (Ayuk Hardani and Lita Tyesta Addy Listiya Wardhani, 2019).

Of the 6 clusters that were used as legal considerations by the Panel of Judges of the Constitutional Court, this article only examines and discusses legal considerations relating to social assistance by judges who expressed *dissenting opinions* (Liza et al., 2023).

2. Methods

An effort to see the dissenting opinions of the Panel of Judges at the Constitutional Court which adjudicated case Number 2/PHPU.PRES-XXII/2024 from a legal sociology perspective,

especially the judge's accuracy in assessing people's behavior in choosing leaders. This research is library research *which* exploits sources in a specific field related to this research, so the primary data source for this research is a book by Munir Fuady with the title Theories in Legal Sociology. Meanwhile, related books and journals as well as books discuss methodology including secondary sources, including writings related to this research. The data collected will then be presented using descriptive analysis methods, namely clear research data on each theme discussed (IM Winartha, 2006)

3. Results and Discussion

Ijtihad Of The Judges Of The Constitutional Court

3.1 Legal Considerations of Judges' Dissenting Opinions

Ijtihad is trying to maximize the power and efforts one has (Rahmat Syafei, 1999). There are also those who have a broader view about ijtihad, according to them *ijtihad* includes *ra'yu*, *qiyas* and reason (Mukti Ali, 1990). By looking at developments in the current era, especially among Muslims in Indonesia or in the world, it is very difficult to find people who are experts in matters of *ijtihad* if they follow the standard rules of *ijtihad* from ancient times. However, if we go through the right path, namely looking for new laws or exploring unresolved problems, while remaining guided by the correct principles, the door to *ijtihad* may still be wide open (Abd Wafi Has, 2013).

The cases submitted to judges vary, some are the same as previous cases and the resolution is contained in written regulations (laws). Cases like this can be resolved easily. However, if the case is a new case and there are no rules for resolving it in written regulations (law), then it requires ijtihad to handle it. Therefore, the person chosen as judge should be someone who is qualified in the field of ijtihad (Misbahuzzulam, 2013). Indonesia is a country of law, so the role of judges is guided by statutory regulations. In carrying out his duties, he is required to have more knowledge to find the law when the problems faced by him do not clearly refer to the regulations in question (Nurdin Juddah, 2013). In line with chapter IV, article 28 paragraph (1) Republic of Indonesia Law no. 4 of 2004 concerning judicial power states the obligations of judges which states: Judges are obliged to explore, follow and understand the legal values and sense of justice that exist in society (Hizbullah et al., 2023).

In case Number 2/PHPU.PRES-XXII/2024, there were three of the 8 Constitutional Court judges who expressed a dissenting opinion *from* the Court's decision, namely Constitutional Justice Saldi Isra, Constitutional Justice Enny Nurbaningsih, and Constitutional Justice Arief Hidayat who highlighted the number budget and distribution of social assistance by President Joko Widodo, who incidentally is the biological father of one of the contestants, namely Gibran Rakabuming Raka) and other government officials. According to the author, they have carried out ijtihad to look at the issue of presidential and vice-presidential elections in depth by exploring, following and understanding legal values and society's sense of justice, so as not to decide the case purely in normative juridical terms. The differences of opinion referred to are as follows:

3.1.1 Constitutional Justice Saldi Isra

"Regarding the Court's legal considerations in responding to the Petitioner's arguments, in essence, I have a similar legal position on some of these issues, except for several issues which are the focus of my attention and are included as part of the arguments in the petition. There are 2 (two) things that made me take a different view (dissenting opinion) with the opinion of the majority of the panel of judges, namely in (i) the issue regarding the distribution of social assistance funds which are considered to be a tool to win one of the

participants in the presidential and vice presidential elections; and (ii) regarding the involvement of state officials, state officials or organizers in a number of regions. Because it is not easy to divide them unequivocally, these two problems will be described as intertwined as follows. That the Petitioner argued the above issues in the descriptions spread throughout most of the petition. Without intending to simplify the problem, but rather to make it easier to answer the Petitioner's arguments, I will not respond by detailing each explanation of the arguments in the petition. I took the initiative to respond in two major parts. First, look at the aspects of the arguments and facts that are put forward in a concrete and specific manner. Then, look at it generally in the context of managing the state budget and implementing government programs in the period close to the holding of elections. In his petition, the Petitioner disclosed certain specific facts and events, namely the support given by the President to the Related Party, Presidential and Vice Presidential Candidate Pair Number 02. The support in question, as argued by the Petitioner, was carried out by allocating a certain state budget and realized through the implementation of the program by the government in the form of distribution of social assistance . The Petitioner added that one of the mechanisms for distributing social assistance funds was carried out and/or packaged in conjunction with the President's working visits to several regions. This method, added the Petitioner, is a form of disguised campaign and makes a large/significant contribution to the increase in votes for Presidential and Vice Presidential Candidate Number 02.

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Based on the considerations above, institutionally, I understand the position of the Court or the majority of judges which is constrained by many considerations, especially regarding evidence and the assessment of evidence in order to "move further". However, personally, as a judge, I have different beliefs from some other judges. In this case, there are court facts

regarding the provision or distribution of social assistance or other terms, which were more massively distributed in a time period close to/coinciding with the election . This practice is one of the patterns that often occurs to gain advantage in elections (electoral incentive). The involvement of several active ministers who are part of the campaign team in distributing social assistance related to the position of President, directly or indirectly as providers of social assistance, gives rise to, or at least has the potential for, a conflict of interest with the candidate pairs."

3.2.2 Constitutional Justice Enny Nurbaningsih

"However, with the provision of social assistance before the election and during the campaign period, within the limits of reasonable reasoning, this certainly has an impact on election participants because of inequality. Among the factors that support this situation is the existence of legal loopholes that exist in unclear election regulations, which are then exploited. It is at this point that ethics plays an important role, so as not to take advantage of gaps in legal regulations. This is because the impact of support shown by the social assistance provider is closely related to one of the election participants will cause inequality of participants in the contest for the people's vote. In fact, one form of realizing the principle of fairness in elections is an effort to ensure that election participants are in an equal position. Moreover, if there is a clear indication of support for a candidate pair, this can be considered an action that is not neutral and provides significant benefits for that pair. This becomes increasingly complicated, considering the difficulty of separating state facilities and personal political interests.

A leader is expected to meet higher standards than are required in personal life. They may have fewer rights to privacy than ordinary citizens, and may not even have the right to use their position for personal, family or group gain. Personal ethics and political ethics are often considered a conflict of interest. Therefore, a leader is required to understand and apply the importance of integrity and responsibility in holding public power, as well as the need to maintain a clear separation between personal interests and public interests in order to maintain national unity and integrity. "Moreover, in the context of using DOP originating from the APBN for community assistance ahead of the 2024 elections, it cannot be avoided that political objectives have a very strong influence so that the election principles guaranteed by the constitution cannot be fully realized."

3.3.3 Constitutional Justice Arief Hidayat

"Based on the statements of the Ministers referred to in the Court hearing, it has become clear that the politicization of social security and social assistance is actually occurring . The statement that the distribution of goods needed by the community by the President during his work visit used the President's operational budget, not the Perlinsos or social assistance budget, further strengthening the existence of the President's *cawe-cawe* during the campaign stages of the candidate pairs. There is nothing wrong if the President's operational funds are used to distribute social security and social assistance. However, the timing of the distribution and distribution was not right so this further strengthens that the allegations of politicization of social security and social assistance funds are true. Moreover, in the context of political psychology and political communication, the President's attitudes and actions are intended to create "stigmatization and framing or messages" to the public that if this program wants to continue, the public must choose certain Candidate Candidates who are supported by President Jokowi.

Based on the legal considerations above, according to the three constitutional judges, the Court should order re-voting in several regions.

3.3.4 Voter behavior in general elections

The majority of Constitutional Justices in case Number 2/PHPU.PRES-XXII/2024 in their legal considerations have stated that "The Petitioner cannot show and cannot prove the connection between the distribution of social assistance referred to by the Petitioner and his/her electability in the 2024 Presidential and Vice Presidential Election. Moreover, if What the Petitioner means is that there is a violation of misuse of the state budget for electoral purposes, so if this is true, it is actually within the authority of Bawaslu or the DPR, including in this case law enforcement agencies which are given inherent constitutional authority throughout their term of office regarding the right to ask for opinions, the right to interpellation, even the right to inquiry is part of the task of monitoring government actions that are suspected of violating statutory provisions, as is the case for Bawaslu and law enforcement elements also based on the provisions of applicable statutory regulations. In addition to the legal considerations above, as also considered in relation to the *a quo social assistance*, the Court also holds the opinion that the regulations governing the use of social assistance related to elections have not been regulated expressly and in detail, therefore the Court emphasized that the *a quo* matters should be regulated in law. related issues, so that in the implementation of future elections, including post-conflict regional elections, such matters can be identified as part of election violations, both administratively and/or criminally."

From the legal considerations above, the Court would like to convey to the parties in particular and the Indonesian people in general that the direct distribution of social assistance by President Joko Widodo does not affect the contestant's selection. And there are still weak or non-existent relevant laws and regulations to make social assistance distributed during the campaign period an election violation, both administratively and/or criminally.

Executive Director of the Association for Elections and Democracy (Perludem), Khoirunnisa Nur Agustyati, said that misuse of social assistance (*bansos*) from state budget sources (APBN/APBD) falls into the category of money politics during the campaign period. Abuse is like distributing basic necessities and then accompanied by photos of legislative members who want to run again and so on. For basic necessities, using state facilities such as various types of social assistance sourced from the APBN is a category of money politics during the election period (Kompas, 2024). Prof. Edward Aspinall, Ph.D., a researcher at the Australian National University (ANU), said that people should think critically about the benefits of assistance provided by the government. In general, BLT is part of problematic politics that is very full of manipulation (ugm.ac.id).

Regional head elections in Indonesia are one of the causes of corrupt practices, *money politics*, and strong patronage relationships between voters and candidates (Hadiz, 2010; Mietzner, 2010). Regional heads whose terms of office have ended and will run again as regional head candidates will tend to use discretionary funds *to* increase their popularity in order to be re-elected in the next period (Sjahrir et al., 2013). Hessami (2014) states that abuse of political authority is related to the preparation of the composition of the public budget. Empirical research evidence shows that there are irregularities in the preparation and determination of the budget, including Mauro (1998) who examined corruption in the composition of the public budget. Other research is also related to election contestation and political decision making in public service sector budgeting and its deviations (Keefer and Khemani, 2003; Gupta et al., 2000; Garamfalvi, 2003). Budgeting politics is also related to legislative behavior, as in Abdullah and Asmara's (2006) research on opportunistic legislative behavior in regional budgeting.

Even though the research results show that political factors do not influence the amount of social assistance funds and grants, the fairly high increase in this budget ahead of the

regional elections is something to be wary of. This indicates that even though there is no tendency for social assistance funds to increase and these grants are made by *incumbent regional heads*, it could be that this budget is actually used by *non-incumbent regional heads* to gain higher power or there are other personal interest factors such as relatives or family members who wants to serve in the next term. Therefore, it is necessary to implement a moratorium policy for both budgets ahead of the elections and regional elections (Dwi Resti Pratiwi and Marihot Nasution, 2018).

Budget politicization is basically not a new discourse in electoral politics. However, in the midst of a limited pandemic situation, the use of *privileges* in order to fulfill electoral interests is certainly contrary to political ethics. Ethics in carrying out social obligations and building one's self-image seems to be ignored, even when fellow state institutions speak out, this empty space is used as the ultimate weapon to ward off accusations of budget politicization by the incumbent (Mahpudin and Francisca Mega Lestari, 2021). The *incumbent* is a candidate for regional head who has an ongoing position, power or position. The opportunistic attitude of the *incumbent politician* can be seen in how he manages economic policy, in order to be re-elected in the next general election year (Abdul Rahman Mansyur, 2022).

4. Conclusion

Basically, general elections are a democratic party that can be enjoyed by all Indonesian people happily. General elections are a means of carrying out leadership transitions. So it must be done directly, freely, confidentially, honestly and fairly. Throughout the history of the establishment of the Constitutional Court, the resolution of the 2024 presidential and vice presidential election dispute is the first time that the Constitutional Justices were not unanimous in making a decision.

The majority of Constitutional Justices still use a normative juridical point of view, while 3 (three) Constitutional Justices choose a sociological juridical point of view. Borrowing a term conveyed by Constitutional Justice Saldi Isra, the Court should no longer be purely procedural in upholding justice, but has gone a long way by upholding substantial justice. This needs to be done to maintain the continuity of democratic national and state life.

To achieve substantial justice, the state needs judges who are capable of *ijtihad* in deciding cases. Able to carry out the mandate of the law by exploring, following and understanding legal values and the sense of justice that lives in society. So that the state budget is used truly for the needs of the people, not for political power interests.

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