

Reformulation of Decision Execution and Honorary Council Position of Constitutional Court After Decision Number 604/G/2023/PTUN.JKT

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Abstract: This research analyzes the strength of the Decision of the Honorary Council of the Constitutional Court Number 2/MKMK/L/11/2023 and its execution after Decision Number 604/2023/PTUN.JKT questioning the Appointment of Constitutional Judge Suhartoyo in the object of a state administrative dispute in the form of Constitutional Court Decree Number 17 of 2013. This type of research is a doctrinal research that examines literature sources and statutory studies. Furthermore, this paper uses a *conceptual approach* and *comparative approach* that combines the concept of legal certainty and comparisons of several countries in terms of seeing a broader *prototype* of Ethics Institute arrangements comprehensively. After conducting an analysis, it can be concluded that the Decision of the Honorary Council of the Constitutional Court Number 17 of 2013 which contains ethical sanctions for violations of Constitutional Judge Anwar Usman is constrained by legal uncertainty in its execution. This is because there is no mechanism for the dismissal of the Chief Justice of the Constitutional Court after the imposition of ethical sanctions and there is a potential dualism in the ethical enforcement system that can be convoluted. The uncertainty of the implementation of the Constitutional Court Honor Council Decision which has the potential to be convoluted with the involvement of the State Administrative Court in adjudicating the Decision *a quo* should be a reflection to distinguish the authority of law enforcement and ethical enforcement and their scope. This can be encouraged by strengthening the status of the Honorary Council of the Constitutional Court in its position as a *Supervisory body* as well as the arrangement of the Supreme *Advisory* Council in the Armenian Constitution.

Keywords: Honorary Council of the Constitutional Court, Decision; ethics; execution

1. Introduction

Ethics is basically the science of studying good and bad, or right and wrong. A new view of ethics in modern times reveals that ethical attitudes are behaviors that comply with legal norms and moral norms because ethics is a system of norms in itself,¹ namely moral norms on the one hand and legal norms on the other.²

The efforts of positivists to make law as an instrument of coercion to submit to the principle of morality are basically very different from the ancient Greek proverb "*quid leges sine moribus vanae proficiunt*" which means "*what use are all these empty laws without the behavior that should accompany them*" or interpreted as "*of what avail empty laws without [good] moral s,?*". From this proverb it can be seen that the law will basically be useless without good behavior. This

¹ Moch. Ichsan and Anang Dony Irawan, "Kewenangan Mahkamah Konstitusi Terhadap Putusan Perkara Nomor 90/Puu-XXI/2023." *Gorontalo Law Review* 7, no. 1 (2024), 126, <https://doi.org/10.32662/golrev.v7i1.3371>

² Y Jaap Hage, Antonia Waltermann, and Bram Akkermans *Introduction to Law*, (Cham: Springer International Publishing, 2017): 54.

behavior is reflected in good morals as well. This provides an understanding that law and morals in their journey run simultaneously so that there is no dichotomy between one another.³ When the law is enforced, it must be accompanied by correct behavior. Also in the context of law enforcement in Indonesia, the implementation of *quid leges sine moribus vanae proficiunt* is reflected in the regulation of behavior in the form of a code of ethics for law enforcement officers.⁴

However, until when will we adhere to the formal provisions of the superior Constitutional Court decision so that it seems to ignore the existence of ethical flaws that have been proven to occur, thus excluding substantive justice. Moreover, there is a lawsuit filed by Anwar Usman against the Administrative Decision over the results of the ethical examination decision by Honorary Council of Constitution *in casu* "Majelis Kehormatan Mahkamah Konstitusi" (MKMK)⁵ The validity of the Constitutional Court's decision on the requirements for presidential and vice presidential candidates even though the process has been proven to violate ethics is another matter that will not be discussed in this article, but rather we will focus on the issue of enforcing the code of ethics and the involvement of the Administrative Court in it, as with the issue and enforcement of MKMK ethics that were requested to the Administrative Court Of Jakarta.⁶

The fact that the instruments and enforcement of ethical or non-ethical sanctions at the Constitutional Court are still not firm has encouraged MK judges to receive ethical sanctions repeatedly during 2023-2024.⁷ Not only is the issue of ethical sanctions that seem to have no teeth, the ethical sanctions are also threatened with not being able to be applied if the Administrative Decision as a follow-up to the ethical decision is canceled by the State Administrative Court. The involvement of the Administrative Court in adjudicating administrative disputes related to Administrative Decision for ethical violations is a new discourse that is interesting to study. The reform of its authority in practice continues to experience expansion or development so that it gives rise to many leniencies. The leniency in question is the openness of various Administrative Decisions to be sued, for example Administrative Decisions based on the decision of the results of an ethical examination at an ethics institution, especially MKMK.⁸

Administrative Decision based on civil legal acts, general regulations, which still require approval, issued on the Criminal Code-Criminal Procedure Code-or regulations that are criminal in nature, on the basis of examination by the judicial body, Indonesian

³ Frank Lovett, *A Republic of Law* (Cambridge, United Kingdom: Cambridge University Press, 2016): 9.

⁴ *Deny Indrayana*, PBHI, *etc. against nine Justices of the Court Constitution*, Decision Number 2/MKMK/L/11/2023, (2023). 352.

⁵ *Ibid.* P. 326.

⁶ V Vitorio Mantalean and Dani Prabowo, "Terungkap Isi Gugatan Ke PTUN, Anwar Usman Ingin Kembali Jadi Ketua MK," 31 January 2024, <https://nasional.kompas.com/read/2024/01/31/16313461/terungkap-isi-gugatan-ke-ptun-anwar-usman-ingin-kembali-jadi-ketua-mk?page=alln>, accessed September 24, 2024.

⁷ Ady Thea DA, "Sepanjang Sejarah MK, Tahun 2023 Paling Banyak Hakim Konstitusi Disanksi Etik", 8 January 2024 <<https://www.hukumonline.com/berita/a/sepanjang-sejarah-mk--tahun-2023-paling-banyak-hakim-konstitusi-disanksi-etik-lt659b6afc8159b/>>, accessed 29 April 2024.

⁸ *Law on State Administrative Courts*, Law Number 5 of 1986, LN of 1986 No. 77 TLN No. 3344 as amended by Law Number 9 of 2004, LN of 2004 No. 35 TLN No. 4380 as amended by Law Number 51 of 2009, LN of 2009 No. 160 TLN No. 6079 hereinafter referred to as the PTUN Law, Article 1 paragraph (2).

National Military's state administration, and also regarding election results. Furthermore, the nature of Administrative Decision which has so far been understood to be limited to concrete, individual and final criteria has been expanded to include abstract-individual, or concrete-general Administrative Decision along with the effective implementation of Administrative Act.⁹ By this increasingly developing new paradigm, many types of Administrative Decision have potential to be sued to the Administrative Court.¹⁰ One of them is the type of Administrative Decision issued as a follow-up to the decision of an ethics institution such as MKMK which continues to be a polemic amidst the thoughts of academics and practitioners.

It is a very interesting academic study on how ethical sanctions by MKMK should have regulations that are legally certain and not easily intervened through lawsuits at the State Administrative Court. The specific position of MKMK, which is an ethical institution but whose position cannot be equated with other ethical institutions, is the initial preposition that will be built in finding the main idea in this paper. Thus, this study will examine the regulations regarding the power of the Constitutional Court's Honorary Council Decision as an ethical institution within the framework of legal certainty and how the execution of The Decision of MKMK should be after the issuance of Decision Number: 604/G/2023/PTUN.JKT.

2. Method

The type of research used is doctrinal research,¹¹ by observing library materials and regulation related to the enforcement of ethical sanctions in the Constitutional Court and its relation to the authority of the State Administrative Court. Furthermore, the approach used in formulating and analyzing the problem is the approach conceptual. This approach is an approach model that emphasizes certain legal theories, concepts, or doctrines as a basis for writing research.¹² In addition, as a comparative material, a comparative approach is also used *as* a basis for seeing more universal formulations that apply in several countries related to the topic of discussion. This study compares the legal systems in various countries that apply.¹³ Specifically referring to the constitution of a country that includes the Regulations on the enforcement of ethical sanctions at the Constitutional Court in each country.

⁹Enrico Simanjuntak, *Hukum Acara Peradilan Tata Usaha Negara: Transformasi & Refleksi*, (Jakarta Timur: Sinar Grafika, 2018),110.

¹⁰Zaka Firma Aditya, Muhammad Adiguna Bimasakti, dan Anna Erliyana, *Hukum Administrasi Negara Kontemporer: Konsep, Teori, dan Penerapannya di Indonesia*, (Depok: Rajawali Pers, 2023), 184.

¹¹Soerjono Soekanto and Sri Mamuji, *Normative Legal Research - A Brief Review*, (Jakarta: Rajawali Press, 1985), 1.

¹² Agung Hidayat, "Critical Review Buku "Penelitian Hukum" Peter Mahmud Marzuki Penelitian Hukum Ad Quemtentang Norma" *Yustisia Merdeka: Jurnal Ilmiah Hukum*, 7, no. 2 (2021): 117–25, <https://doi.org/10.33319/yume.v7i2.109>

¹³ Mark Van Hoecke, "Methodology of Comparative Legal Research," *Law and Method* 4, no. 24 (2015): 1-30 <https://doi.org/10.5553/REM/.000010>

3. Results and Discussion

Table I. Several provisions regarding the nature of decisions of the Ethics Council and MKMK

Power of Judgment	PMK No. 1/2023	PMK No. 2/2013	PMK No. 2/2014	PMK No. 1/2023
Final and binding MKMK	Article 34 (MKMK decision)			
Final and binding on the Ethics Board		Article 17 paragraph 2 (sanction of warning from the Ethics Council)		
Final and binding on MKMK and the Ethics Council			Article 69 (decision of the Ethics Council and MKMK)	
It is not regulated as final and binding on either MKMK or the Ethics Council.				The nature of The Decision of MKMK or the Ethics Council decision is not regulated.

The existence of the ethics institution in the Constitutional Court institution has undergone reformation towards the better, after experiencing several conflicts of interest at the beginning of its formation until external intervention through the membership structure has been passed even though at that time it was full of debate.¹⁴ Now, the main discussion is the reformulation of the decisions of the Ethics Council and MKMK. Based on the table presented, it can be observed that the nature of the decisions of MKMK and the Ethics Council initially had a final and binding nature. Until in 2013, in PMK Number 2 of 2013, MKMK no longer had a final and binding decision. Then what was found was only as regulated in Article 17 paragraph 2 of PMK Number 2 of 2013 which stated that the Ethics Council's warning sanctions had final and binding power. In 2014, the nature of the decisions of MKMK and the Ethics Council had the same final and binding power as

¹⁴ Jonny Simamora and Patricia Ekowati Suryaningsih, "Pembentukan Keanggotaan Majelis Kehormatan Mahkamah Konstitusi Republik Indonesia Sebagai Hakim Peradilan Etik," *Jurnal Ilmiah Kuteo* 23, no. 1 (2024). 39-26, <https://doi.org/10.33369/jik.v23i1.34330>

in Article 69 of PMK Number 2 of 2014. The final and binding power of MKMK's decisions is no longer stated in PMK Number 1 of 2023 concerning amendments to MK Regulation Number 2 of 2014 concerning the Honorary Council of the Constitutional Court.

However, what is clearly visible from the changes in the institutional structure that apply to the ethics institutions at the Constitutional Court, both the Ethics Council and MKMK, were initially only *ad hoc institutions* that were temporary in nature,¹⁵ especially the existence of MKMK was originally proposed by the Ethics Council to the court as stated in Article 18 Paragraph (1) of PMK Number 2 of 2013 to PMK Number 1 of 2023 as the forerunner to its ratification as a permanent institution. This can be seen after the issuance of the Constitutional Court's decision letter number 1 of 2024 dated January 2, 2024.

¹⁶Along with the enactment of PMK Number 1 of 2023 and MK Decision Number 1 of 2024, in the practice, only one ethic institution is tasked with handling requests for ethical violations at the Constitutional Court, that is MKMK. The Honorary Council of the Constitutional Court is basically in accordance with its formation as delegated in Article 27A paragraph (2) of UUD 1945 that:

"To enforce the code of ethics and guidelines for the conduct of Constitutional Court Judges as referred to in paragraph (1), a Constitutional Court Honorary Council is formed..."¹⁷

Otherwise, the alleged violation of the code of ethics of Constitutional Court judges is increasing in quantity and in order to guarantee and respect the rights of the reported Constitutional Justices, in the Constitutional Court Regulation Number 1 of 2023, the Constitutional Court Honorary Council for Appeals has also been formed. This appeals MKMK that is given the authority to examine and decide on appeals against MKMK decisions regarding violations of ethics and behavior of Constitutional Justices.¹⁸

This is the reason that the existence of legal certainty through the availability of regulations in responding to the needs of the state is a necessity as always voiced by modern legal expert Jan M. Otto.¹⁹ These needs are very significant for developing countries like Indonesia. However, in terms of responding to the phenomenon of ethical enforcement practices in the state, Indonesia is not backward. This can also be witnessed by the availability of a collection of codes of ethics in each profession plus internal institutions that are given the authority to implement the code of ethics. However, there are still some legal gaps that will technically be part of the recommendations of this study. In addition, *legitimacy*

¹⁵ Fajlurrahman Jurdi, Rizqa Ananda Hanapi, And Taufik Hidayat, "Optimalisasi Fungsi Pengawasan Dewan Etik Mahkamah Konstitusi" *Jurnal Hukum & Pembangunan* 50, no. 3 (2021): 689 <https://doi.org/10.21143/jhp.vol50.no3.2763>

¹⁶ Mahkamah Kostitusi Republik Indonesia, 'MK Bentuk MKMK Permanen', *Siaran Pers*, Desember 2023 https://www.mkri.id/public/content/infoumum/press/pdf/press_3093_20.12.23%20MK%20BENTUK%20MKMK.pdf, diakses pada: 24 November 2023

¹⁷ Republic of Indonesia, *Law on the Constitutional Court , Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court ,* LN NO. 2016 TLN NO. 6554. Article 27 paragraph (1)

¹⁸ Mahar Prastiwi, "3 Pandangan Pakar Hukum Unair Tentang Putusan MK Terhadap Pilkada," Agustus 2024, <https://www.kompas.com/edu/read/2024/08/24/154841871/3-pandangan-pakar-hukum-unair-tentang-putusan-mk-terhadap-pilkada>, accessed 21 September 2024.

¹⁹ Adrian W. Bedner, *Socio-Legal Studies* (Denpasar: Pustaka Larasan, 2012).

by constitution is also very necessary as a strong basis in formulating ethical norms that will be adopted according to the needs of today's practices.

In order to ensure that Constitutional Judges remain compliant with the values and rules inherent in their positions, several countries have constitutionally imposed a firm repressive threat through dismissal.²⁰ This dismissal is also not only based on criminal acts but also on professionalism towards the position and compliance with ethical principles as stipulated in the constitutions of Lithuania and Thailand. In addition to the reasons for dismissal in the constitution, an institution has also been regulated that has the authority to dismiss Constitutional Judges, either through an internal institutional mechanism at the Constitutional Court such as Albania, Ukraine and Bulgaria or through the president or king as in Thailand. Then there is also through a legislative institution such as what happened in Lithuania and Bolivia. In addition, it has been commonly regulated in the constitutions of several countries concerning external institutions that are separate from the Constitutional Court or the executive and legislative powers in the form of independent institutions such as the Supreme Representative Council in Armenia which has the authority to dismiss Constitutional Judges.²¹ Several of the models that have been mentioned are a reflection of the importance of maintaining the dignity of the Constitutional Court through constitutional strengthening of the mechanism for dismissing Constitutional Judges.²²

In the current Indonesian context, the institution that is given the authority to enforce repressive actions in the form of dismissing Constitutional Justices as well as the position of Chief Justice of the Constitutional Court is an institution called the Constitutional Court Honorary Council (MKMK). However, the basis for the establishment of MKMK normatively only refers to the Constitutional Court regulations. A very weak source of legitimacy with a very vital role as the main supporter of the professionalism of Constitutional Justices.²³ The weak legitimacy of the position of MKMK council is a special concern when it is always juxtaposed or equated with ethical institutions in other government organs which in terms of position and function are clearly very different. For example, the DKPP, an institution that is considered to have the same position as MKMK because they both act as ethical institutions. Of course, there is no need to explain in detail where the difference lies, because it is known that MKMK has a very vital role in maintaining the organs of high state institutions in the judicial group such as the Constitutional Court with the urgency and function that have been explained previously. One thing that is also very important to reflect through *comparative study* is that several countries that have been considered successful in strengthening the enforcement of ethics in their constitutions such as Albania, Ukraine and Thailand. Hopefully, this will also happen in Indonesia.

²⁰ Anton Simons, "The Full and Empty Formula of Solovyov's Legal Philosophy: Juridical Pragmatism and Ethical Perfectionism," *Archiv Für Rechts- Und Sozialphilosophie* 88, no. 4 (2002): 481–94, <https://www.jstor.org/stable/23679961>

²¹ Brandon Hamm and Bryn S. Esplin, "The Boundaries of "Good Behavior" and Judicial Competence: Exploring Responsibilities and Authority Limitations of Cognitive Specialists in the Regulation of Incapacitated Judges," *Journal of Law, Medicine & Ethics* 46, no. 2 (2018): 514–20, <https://doi.org/10.1177/1073110518782959>

²² Khusnul Catur Prasetya and Moh Sa'diyin, "Pelaksanaan Pengawasan Terhadap Kode Etik Dan Perilaku Hakim Konstitusi Di Indonesia," *JOSH: Journal of Sharia* 3, .no. 02 (2024): 120–28, <https://doi.org/10.55352/josh.v3i02.919>

²³ Hamm and Esplin. Pg. 514-520.

However, in the midst of the struggle to provide constitutional legitimacy to the enforcement of ethics in the Constitutional Court, the essence of the ideas of constitutional ethics as voiced by Prof. Jimly Ashiddiqie in the 21st century has its own challenges.²⁴ The weak position of the Constitutional Honorary Council and the absence of legal norms to legitimize MKMK decision, the substance of which is related to the enforcement of ethics so that it can be implemented, legally administratively in the practice that has been carried out by the Jakarta State Administrative Court for the first time created a rule for the cancellation of several decisions in The Decision of MKMK Number 2 /MKMK / 1 / 11/2023.

3.1. Legal Vacuum Regarding the Independence of the Constitutional Court's Honorary Council Decisions

One of the studies that emerged immediately was the binding force of the Constitutional Court's Honorary Council's Decision on *the status quo*. What is meant is related to the cancellation of Anwar Usman's status as Chief Justice of the Constitutional Court who was appointed based on Constitutional Court Decision Number 4 of 2023. The debate arose when questions were asked through the arguments of the lawsuit in Case Number 604/G/2023/PTUN.JKT which stated that:

"that it turns out that in the process from the procedural aspect the defendant in issuing the object of the lawsuit has done something very wrong, namely before issuing the object of the lawsuit, the defendant did not carefully pay attention to the existence of the Constitutional Court decision number 4 of 2023 concerning the appointment of the Chief Justice of the Constitutional Court for the 2023-2028 term (*in casu* the appointment of the plaintiff as Chief Justice of the Constitutional Court). Because until now there has been no legal product whatsoever that cancels and/or revokes the Constitutional Court decision number 4 of 2023 concerning the appointment of the Chief Justice of the Constitutional Court for the 2023-2028 term. Therefore, in terms of formal juridical terms "the plaintiff is still serving as Chief Justice of the Constitutional Court", and also the decision of the Constitutional Court's Honorary Council dismissing the plaintiff as Chief Justice of the Constitutional Court cannot immediately cancel the Constitutional Court's decision Number 4 of 2023, because the Constitutional Court's Honorary Council does not have the authority to cancel the Constitutional Court's decision regarding the appointment of a position or regarding the dismissal of the Chief Justice of the Constitutional Court.²⁵

The first problem is the question by the plaintiff against MKMK which does not have the authority to appoint and dismiss the position of Chief Justice of the Constitutional Court. The Administrative Court Of Jakarta Decision Number 604/G/2023/PTUN.JKT which granted part of the applicant's lawsuit *in casu* dismissal of Anwar Usman as Chief Justice of the Constitutional Court based on Constitutional Court Decision Number 17 of 2023 was declared null and void. So the Administrative Court requires the Constitutional Court to revoke the decision to appoint Suhartoyo. In relation to this, the Court has the view in its legal considerations that based on Article 24C paragraph (4) of the 1945

²⁴Jimly Asshiddiqie, "Memperkenalkan Peradilan Etika," *Jurnal Konstitusi Dan Demokrasi* 1, no. 1 (2021): 1-8 <https://doi.org/10.7454/JKD.v1i1.1101>

²⁵Jakarta State Administrative Court, Decision No. 604/G/2023/PTUN.JKT, *Anwar Usman vs. Chief Justice of the Constitutional Court of the Republic of Indonesia* (2023). 21.

Constitution, the Chief Justice and Deputy Chief Justice of the Constitutional Court are elected from and by the Constitutional Court Judges themselves. However, it is not stated in the constitution implicitly how the technicalities of appointing or dismissing the Chief Justice and Deputy Chief Justice of the Constitutional Court are. As for Article 24C paragraph (6) it is only stated that the appointment and dismissal of Constitutional Justices, procedural law, and other provisions concerning the Constitutional Court are regulated by law. However, in the law governing the Constitutional Court, there are no regulations regarding the appointment and dismissal of the Chief Justice of the Constitutional Court.²⁶ The appointment and dismissal of the Chief Justice of the Constitutional Court are only regulated technically in Constitutional Court Regulation Number 6 of 2023, which is nothing more than a technical regulation and is not promulgated as is the position of the Supreme Court Regulation in our country's legal system.

Referring to the Constitutional Court Law which has been amended several times, most recently by Law Number 7 of 2020 concerning the third amendment to Law Number 24 of 2003 concerning the Constitutional Court, it does not implicitly regulate the mechanism for the appointment or dismissal of Constitutional Court Judges. Article 4 of the Constitutional Court Law only regulates the quorum, term of office, and decision-making. Whereas Article 4 paragraph (5) of the Constitutional Court Law emphasizes that further provisions regarding the procedures for electing the Chief Justice and Deputy Chief Justice of the Constitutional Court are regulated in the Constitutional Court Regulation. Now, the regulation in question refers to Constitutional Court Regulation Number 6 of 2023 concerning the Procedures for the Election of the Chief Justice and Deputy Chief Justice of the Constitutional Court. However, the regulation does not contain the mechanism for dismissing the Chief Justice of the Constitutional Court, especially when linked to dismissal from office based The Decision of MKMK which should also have a point of contact with Constitutional Court Regulation Number 1 of 2023 concerning MKMK.

The fundamental thing, which cannot be answered normatively through legislation can be seen from the core of the discussion above. This means that in practice there are no laws and regulations that can be applied to justify whether MKMK does not have the authority to revoke the decree appointing the Chief Justice of the Constitutional Court in the name of Anwar Usman or vice versa. In this case, the Court in deciding the *a quo case* also acknowledged that there is currently confusion in the administrative legal framework related to the revocation of the decision on the appointment of the Chief Justice and Deputy Chief Justice of the Constitutional Court who have resigned/been dismissed in the middle of their term of office. This is because the pattern and design of the determination and ratification of the elected Chief Justice and Deputy Chief Justice of the Constitutional Court are carried out by the Chief Justice himself, so that in administrative law if something happens that causes the Chief Justice to resign or be dismissed, there is confusion and uncertainty regarding who has the authority to revoke the decision on the appointment of the Chief Justice of the Constitutional Court who has resigned or been dismissed?

²⁷ However, if we look at the perspective of MKMK decision, regarding the authority to

²⁶ Denico Doly and Ully Ngesti Pratiwi, "PTUN Decision on the Appointment of the Chief Justice of the Constitutional Court," *Berkas,Dpr.Go.Id* , August 2024 available at: https://berkas.dpr.go.id/pusaka/files/isu_sepekan/Isu%20Sepekan---III-PUSLIT-Agustus-2024-208.pdf, accessed on: October 15, 2024

²⁷ Jakarta State Administrative Court , Decision No. 604/G/2023/PTUN.JKT, *Anwar Usman vs. Chairman Court Constitution of the Republic of Indonesia* (2023). 326

impose sanctions for violations of the code of ethics as regulated in the Constitutional Court Regulation Number 1 of 2023, then MKMK has the authority to impose sanctions for dismissal of the position as the Chief Justice of the Constitutional Court, where the substance regarding the position of the position is also inherent in the Constitutional Court Decision Number 4 of 2023 as the legality of the validity of the position of the Chief Justice of the Constitutional Court on behalf of Anwar Usman. Can this not be said that MKMK can *mutatis mutandis deactivate the position as the Chief Justice of the Constitutional Court without going through the process of revoking the a quo Constitutional Court decision letter first?*

It can be said that this question can certainly be answered by providing legal certainty. One of them is to revise Law Number 7 of 2022 concerning the Constitutional Court to add Norms related to the dismissal of the chairman and/or deputy chairman of the Constitutional Court and also related to officials who are authorized to ratify the decision to dismiss or appoint.

The court decision which declared null and void the Constitutional Court Decree Number 17 of 2023 concerning the appointment of Suhartoyo as chairman of the Constitutional Court *in casu the object of the a quo* dispute on the grounds that the revocation of Decree Number 4 of 2023 concerning the appointment of Anwar Usman as Chairman of the Constitutional Court should actually also contradict its own legal considerations. The unclear regulations, the confusion regarding the appointment and dismissal of the chairman of the Constitutional Court according to the Court itself, should be considered to provide legal certainty for the execution of The Decision of MKMK as stated in the substance of the appointment of Suhartoyo as the new Chairman of the Constitutional Court in Constitutional Court Decree Number 17 of 2023, because there is no mechanism for dismissing the chairman of the Constitutional Court regarding who has the right to revoke the decree appointing Anwar Usman. On the other hand, it would be even more ambiguous if the decree appointing Anwar Usman as Chief Justice of the Constitutional Court was revoked by himself as Chief Justice of the Constitutional Court who at the same time had been dismissed from his position by MKMK as implied by the consideration of the Court's Decision which requires the revocation of the Constitutional Court Decision Number 4 of 2023 first. The provisions of *argumentum a contrario* in constructing the law can be applied by the Court in finding the right legal provisions (*rechtsvinding*) in solving this problem.²⁸

Therefore, it is very important to provide legal certainty in answering the problems that occur so that the interpretation of the final and binding power and position of MKMK is not so easily equated with other ethical institutions that substantially have different weights so that they are used as a reason to place MKMK as one of the subjects of the lawsuit in the state administrative court. This has also been expressed in the conclusion of The Decision of MKMK Number 2 /MKMK / 1 / 11/2023 that the DKPP decision regarding the KPU decision and The Decision of MKMK regarding the decision to test the law cannot be equated.²⁹

²⁸ Imam Sujono, "Urgensi Penemuan Hukum Dan Penggunaan Yurisprudensi Dalam Kewenangan Mahkamah Konstitusi," *Jurnal Konstitusi* 18, no. 3 (2022), 585, <https://doi.org/10.31078/jk1835>

²⁹ *Deny Indrayana, PBHI, etc. against nine Justices of the Court Constitution*, Decision Number 2/MKMK/L/11/2023, (2023), 380.

3.2. Execution of the Decision of the Constitutional Court's Honorary Council

The execution of The Decision of MKMK is also a relevant discussion to discuss after the issuance of decision Number 604/G/2024/PTUN/JKT. The main reason is regarding the legal certainty of the execution. Through the decision in the main case which states that Anwar Usman *in casu* the Plaintiff whose rights were restored as a Constitutional Judge,³⁰ it is contrary to the decision previously issued by MKMK which stated that the reported judge:³¹

1. The reported judge does not have the right to nominate himself or be nominated as the leader of the Constitutional Court until the reported judge's term of office as a Constitutional Justice ends;
2. The reported judge is not permitted to be involved or involve himself in the examination and decision-making in cases of disputes regarding the results of the presidential and vice presidential elections, the election of members of the DPR, DPD, and DPRD, as well as the election of Governors, Regents, and Mayors which have the potential to give rise to a conflict of interest.

The Administrative Court Of Jakarta decision mentioned earlier, generally provides a picture that there is uncertainty in the examination based on ethical norms and legal norms that are not distinguished at all in all legal considerations of the *a quo decision*. There should be arguments built to qualify the authority of the examining institution for ethical violations and administrative violations. So that things that cannot be touched by the examination mechanism based on administrative law against ethical violations can also be limited. As a result, the court went too far in testing the procedural validity of the ethical examination mechanism at MKMK when examining the dispute, thus deciding that MKMK violated the provisions in PMK Number 1 of 2023 concerning closed ethical examination procedures.³²

However, it should also be understood that MKMK is not a superior institution, let alone its decision is directly final. This is not the case, because respect for the rights of the reported Constitutional Judge is also upheld so that they are still given the opportunity to file a defense against the Decision issued by MKMK. After considering the related regulations, the Decision of MKMK is required to provide an opportunity for the reported Judge to defend himself in MKMK appeal, especially those who are given a dishonorable dismissal sanction.³³ However, MKMK's appeal can also be used as an effort to defend the reported judge who objects to MKMK decision.³⁴ However, until this research was written, there was still no mechanism that regulated the PMK related to MKMK appeal in handling violations of appeal ethics.

Theoretically, it can be understood that there are 3 qualifications of the nature of the Decision in State Administrative Law, namely declaratory, constitutive, and condemnatoir.

³⁰ *Ibid*, page 339. The verdict states that "Declares that the Plaintiff's request to be restored to his dignity and honor as a Constitutional Judge is granted."

³¹ *Deny Indrayana , PBHI, etc. against nine Justices of the Court Constitution*, Decision Number 2/MKMK/L/11/2023, (2023), p . 383.

³² Jakarta State Administrative Court , Decision No. 604/G/2023/PTUN.JKT, *Anwar Usman vs. Chairman Court Constitution Republic Indonesia* (2023), p. 312

³³ *Constitutional Court Regulation*, PMK No. 1 of 2023, Article 44 paragraph (2).

³⁴ *Ibid*, Article 1 number 5.

³⁵Declaratory is a decision that reaffirms the legal status, constitutive creates or eliminates legal status, and condemnatoir is a nature that imposes something on a party such as a burden to do something. the Decision of MKMK number 2 MKMK/ 1/ 1/2023, contains the categories of constitutive and condemnatoir decisions, which stated that Anwar Usman was proven to have violated the code of ethics and the Constitutional Court was given time to immediately elect a new Chief Justice by him, it is very important to see the power of execution, how the Constitutional Court carries out MKMK decision.

The Decision of MKMK Number 2/MKMK/1/11/2023 stated that Anwar Usman was proven to have violated Sapta Karsa Hutama and was dismissed from his position as Chief Justice of the Constitutional Court, there was a prohibition on running as Chief Justice of the Constitutional Court until the last term as a Constitutional Justice and a prohibition on being involved in handling election or regional election disputes that have the potential to give rise to a conflict of interest.³⁶ The substance of this decision is basically constitutive in nature, however, the decision stating the order to the Constitutional Court to elect a new Constitutional Court leadership within 2x24 hours is a decision of condemnatoir nature.

The execution of the constitutive decision, specially The Decision of MKMK indicates a sanction against the revocation of the reported Judge's rights as a Constitutional Judge which has been in effect since the decision was read. However, the weak execution of the decision which is constitutive in nature is because it has not been regulated to what extent The Decision of MKMK is final and binding so that there is no further legal remedy against it. Due to this legal uncertainty, a legal event has arisen which caused The Decision of MKMK to be included in the object of the dispute over the Constitutional Court Decree Number 17 of 2023. Thus, the legal implications that arose ultimately made The Decision of MKMK which was produced through the examination of ethical norms (*code of ethics*) canceled by the TUN Court Decision which examined it by an administrative law mechanism.

The relevant legal certainty then refers to the decision of a condemnatoir nature above, in the form of a burden on the Constitutional Court to carry out the Meeting of Judge Deliberation of Constitutional Justice (MJDC) in order to elect a new Constitutional Court leadership. At this time there is no mechanism that regulates the procedure for MJDC in electing a new Chief Justice based on The Decision of MKMK on the imposition of ethical sanctions.³⁷ Thus, it raises problems in implementing the Election of a new Chief Justice. In relation to the *a quo case*, the question that can be raised is whether it is necessary to first revoke the Decree appointing Anwar Usman as Chief Justice *in casu* Constitutional Court Decision Number 4 of 2023 before appointing Suhartoyo as Chief Justice through Constitutional Court Decision Number 17 of 2023? Then what is the mechanism, through the same MJDC as the agenda for electing a new Chief Justice or through MJDC and other different mechanisms.

In this regard, the plaintiff's argument stating the need to revoke the Constitutional Court Decision Number 4 of 2023 before issuing the disputed object of the Constitutional Court Decision Number 7 of 2023 was denied by the defendant that with the existence of

³⁵Sigar Aji Poerana, "Perbedaan Sifat Putusan Deklarator, Konstitutif, Dan Kondemnator," *Hukumonline.Com*, 19 November 2021, <https://www.hukumonline.com/klinik/a/perbedaan-sifat-putusan-deklarator--konstitutif--dan-kondemnator-lt58ed9048160ee/>, diakses pada 5 Oktober 2024..

³⁶The Decision of MKMK Number 2/MKMK/L/11/2023, 83.

³⁷This statement was also expressed by the Court's Considerations in adjudicating dispute Number 404/G/2023/PTUN.JKT, 333.

The Decision of MKMK stating that the plaintiff was dismissed from his position as the Chief Justice of the Constitutional Court and the order to the Constitutional Court to carry out the election of a new Chief Justice of the Constitutional Court *mutatis mutandis* canceled the Constitutional Court Decision Number 4 of 2023. However, the court has a view regarding the position of the disputed object that was not preceded by a revocation decision, that:³⁸

Considering, that the court is of the opinion that the defendant's actions in only issuing the appointment of Suhartoyo as the new Chief Justice of the Constitutional Court but not issuing a letter of decision to dismiss the plaintiff's position as Chief Justice of the Constitutional Court as stipulated in Decree Number 4 of 2023 are actions that are not in accordance with legal principles and statutory norms;

Considering, that in *casu*, in evidence P-2, T-1 and T.II.Intv- 24 in the form of The Decision of MKMK and its dictum, there is not a single sentence stating that decision number 4/2018 is declared no longer valid. The same thing in evidence t-2 in the form of minutes of the plenary meeting of judges, not a single sentence in the minutes states that decision Number 4/2023 has been revoked and declared no longer valid;

Although it is not specifically regulated whether MKMK needs to issue a decree of revocation or dismissal of the Chief Justice of the Constitutional Court who was given a sanction of dismissal by MKMK before being appointed through a Constitutional Court Decision, there is no statement that can deny that the status of the position as Chief Justice of the Constitutional Court attached to Anwar Usman has lapsed along with the completion of The Decision of MKMK Number 2/MKMK/1/11/2023 being read, not after the determination of the MJDC which was ratified through the issuance of Decree Number 17 of 2023. This is conceptually the same as Decree "a", for example, whose status is declared invalid because there is a revocation decree. Such as a land certificate that is revoked through a Decree of revocation of the land certificate based on the decision of the State Administrative Court. Decree "a" is declared null and void since the TUN Decision was read, not upon the issuance of a new revocation decree. So the revocation decree is only a decree that confirms that Decree "a" was revoked based on a Court Decision. This is different from the CPNS appointment decree which is revoked by the PNS decree which contains a decision to dismiss as a CPNS and then be appointed as a PNS. This is a decree that is issued and declared invalid after the existence of a new decree whose contents are revocation and appointment. Thus, this CPNS decree is declared to remain valid before the existence of the PNS decree. In this regard, it can be concluded that the legitimacy of Anwar Usman's non-active position lies in The Decision of MKMK number 2/MKMK/1/11/2023, not in the revocation of the Constitutional Court decision number 4 of 2013 or the issuance of the Constitutional Court decision number 17 of 2017. So it is not relevant to question the Constitutional Court decision number 4 of 2013 as a reason to cancel the Constitutional Court decision number 17 of 2017. The reason for the Constitutional Court decision number 17 of 2017 to be canceled or invalid should be whether the *a quo Constitutional Court decision* is in line with The Decision of MKMK number 2/MKMK/1/11/2023 or the plenary meeting of judges as the basis for the issuance of the Constitutional Court decision.

³⁸ Jakarta State Administrative Court , Decision No. 604/G/2023/PTUN.JKT, *Anwar Usman vs. Chairman Court Constitution Republic Indonesia* (2023): 325.

As for the legal certainty initiated by Jan M. Otto, it is important to have more specific legal regulations in responding to the dynamics that occur in society.³⁹ In relation to this discussion, it is necessary to regulate in the Constitutional Court regulations regarding the legal status of the Decree on the appointment of the Chief Justice of the Constitutional Court, whose officials have been sanctioned by MKMK in order to create legal certainty without the need to issue a revocation decree. This is because the Decision on the dismissal of Anwar Usman as Chief Justice of the Constitutional Court has *mutatis mutandis* eliminated the validity of the Constitutional Court decision number 4 of 2023 concerning the appointment of Anwar Usman as Chief Justice of the Constitutional Court. In particular, the scope of the Constitutional Court which has currently been greatly influenced by political factors, *conflicts of interest* so that MKMK was formed which still requires more technical regulations related to the power of execution of its decisions.

4. Conclusion

The Constitutional Court's Honorary Council Decision Number 17 of 2023 containing sanctions for Anwar Usman's ethical violations is hampered by legal uncertainty in its execution. This uncertainty is reflected in the weak position of MKMK in terms of institutional structure. This is evident through Decision Number 604/G/2023/PTUN.JKT which changes several main substances of MKMK Decision. This change in substance is based on the legal vacuum that confirms the final and binding nature of The Decision of MKMK which was eliminated in Constitutional Court Regulation Number 1 of 2023 even though previously, it was regulated in Constitutional Court Regulation Number 1 of 2013, thus giving rise to the interpretation that The Decision of MKMK is a State Administrative Decision that can be tested at the PTUN. Also, there is no mechanism for dismissing the Chief Justice of the Constitutional Court after the imposition of ethical sanctions and there is the potential for dualism in the ethics enforcement system that can be complicated. The uncertainty of the execution of The Decision of MKMK which has the potential to be complicated due to the involvement of the PTUN should be a reflection to distinguish the authority of law enforcement and ethics enforcement along with their scope. The scope of MKMK has vital authority that can dismiss Constitutional Court judges, even the Chief Justice, which should be balanced by strong constitutional legitimacy. This legitimacy can refer to the regulation of the position of MKMK in the Constitution as done by the Armenian constitution and the affirmation of ethical violations as a condition for dismissal of Constitutional Judges through the Albanian constitution. Of course, with this new position, the position of MKMK also plays a role as a *supervisory body* in enforcing the ethics of Constitutional Judges with a strong constitutional basis in the basic law.

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³⁹ Jan Michiel Otto, *Legal Certainty in Developing Countries* (Jakarta: National Law Commission of the Republic of Indonesia, 2003). 122.

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