



THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

THE SUMMARY OF THE DECISION
OF CASE NUMBER 85/PUU-XVIII/2020

Concerning

**Periodization of Tenure of *Ad Hoc* Judges
at the Court of Criminal Acts of Corruption**

- Petitioner** : **Sumali and Hartono**
- Type of Case** : Review over Law Number 46 of 2009 concerning the Court of Criminal Acts of Corruption (UU 46/2009), against the 1945 Constitution of the Republic of Indonesia (UUD 1945)
- Subject Matter** : Article 10 paragraph (5) of Law 46/2009 is in contrary to Article 24 paragraph (1), Article 27 paragraph (1) and paragraph (2), Article 28D paragraph (1), and Article 28H paragraph (2) of the 1945 Constitution
- Verdict** : 1. To grant the petition of the Petitioners in part;
2. To declare that the Article 10 paragraph (5) of Law Number 46 of 2009 concerning the Court of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia of 2009 Number 155, Supplement to the State Gazette of the Republic of Indonesia Number 5074) is in contrary to the 1945 Constitution of the Republic of Indonesia and it does not legally binding conditionally as long as it is not interpreted as, "*ad hoc* Judge as referred to in paragraph (4) is appointed for a tenure of 5 (five) years and can be reappointed for 1 (one) tenure without re-selection as long as he/she still meets the statutory requirements, and he/she can be appointed for the next tenure of 5 (five) years by first following the re-selection process in accordance with the applicable laws and regulations". Therefore Article 10 paragraph (5) of Law Number 46 of 2009 concerning the Court of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia of 2009 Number 155, Supplement to the State Gazette of the Republic of Indonesia Number 5074) which originally read "*ad hoc* Judge as referred to in paragraph (4) is appointed for a tenure of 5 (five) years and can be reappointed for 1 (one) tenure", shall be read in full as, "***ad hoc* Judge as referred to in paragraph (4) is appointed for a tenure of 5 (five) years and can be reappointed for 1 (one) tenure without re-selection as long as he/she still meets the statutory requirements, and he/she can be appointed for the next tenure of 5 (five) years by first following the re-selection process in accordance with the applicable laws and regulations**";

3. To order the recording of this decision in the State Gazette of the Republic of Indonesia as appropriate;
4. To dismiss the Petitioners' petition for the rest/remainder.

Date of Decision : Wednesday, October 27, 2021

Overview of Decision :

The Petitioners are individual Indonesian citizens who at the time of submitting the *a quo* petition currently serve as *ad hoc* judges at the Court of Criminal Acts of Corruption (*Tipikor*) at the Denpasar District Court, as evidenced by the excerpt of Presidential Decree No. 22/P of 2016 concerning Honourable Dismissal and Re-appointment as *Ad Hoc* Judges at the Court of Criminal Acts of Corruption, dated February 10, 2016 as well as Excerpts from the Decision of the Chief Justice of the Supreme Court Number 91/DJU/SK/KP04.5/2/2016 concerning the Re-appointment of *Ad Hoc* Judges at the First Level Court of Criminal Acts of Corruption for the Second Tenure, dated February 26, 2016.

With regard to the Authority of the Court, since the Petitioners request for a review of the constitutionality of legal norms, *in casu* Article 10 paragraph (5) of Law 46/2009 against the 1945 Constitution therefore the Court has the authority to hear the petition of the Petitioner.

Whereas in relation to the Legal Standing, the Petitioners assume that there is a phrase periodization of *ad hoc* judge's tenure at the corruption court for 5 years and he/she can be reappointed for 1 (one) time, the norm in Article 10 paragraph (5) of Law 46/2009 is in contrary to the right to equality of position and the principle of independence of judicial power guaranteed by the 1945 Constitution. In fact, this principle is a 'fortress' for judges from the intervention of any interested parties, so that the judges can carry out their functions properly and correctly. In addition, the principle of independence of judicial power is not only related to the independence of judges who are free from any intervention from anything outside of the judiciary institutions, but the independence from any internal aspects of the judges is no less important, one of its forms is related to the existence of guarantees for the welfare of judges and guaranteed tenure of judges. Therefore, regardless of whether or not there is a question of the constitutionality of the norms as argued by the Petitioners, according to the Court, the Petitioners have legal standing to act as Petitioners in the *a quo* petition.

Whereas regarding the position of the *ad hoc* judges in the judicial system in Indonesia, the Constitutional Court has decided several times, including the Constitutional Court Decision Number 56/PUU-X/2012, dated January 15, 2015, which takes into account the understanding of *ad hoc* judges; Decision of the Constitutional Court Number 32/PUU-XII/2014, dated April 20, 2015, which relates to the issue of the exclusion of *ad hoc* judges as state officials; Constitutional Court Decision Number 49/PUU-XIV/2016, dated February 21, 2017, which questioned the existence and position of *Ad Hoc* Judges at the Industrial Relations Court; and Decision of the Constitutional Court Number 6/PUU-XIV/2016, dated August 4, 2016 which relates to the issue of tenure of tax court judges. In relation to these decisions, the Court has confirmed that the establishment of *ad hoc* judges is in principle, to meet the demands of law enforcement needs in the judicial system in Indonesia, which is basically due to considering the need for expertise and effectiveness in reviewing cases in special courts, it is necessary to have *ad hoc* judges.

Whereas further relates to the position of the *ad hoc* judges at the Corruption Court, it cannot be separated from the position of the Corruption Court which is a special court within the General Court, which has the authority to review, adjudicate, and decide the cases of:

- a. corruption crime;
- b. money laundering crime which original crime was corruption; and/or
- c. criminal acts that are expressly determined in other laws as criminal acts of corruption (vide Article 6 of Law 46/2009).

Meanwhile, with regard to the composition of judges in reviewing, adjudicating, and deciding the corruption cases at the Corruption Court, the high court, and the Supreme Court, it consists of Career Judges and *ad hoc* Judges [vide Article 10 paragraph (1) of Law 46/2009]. The initial purpose of the establishment of *ad hoc* judges is to strengthen the role and function of the judicial power in enforcing law and justice in line with the complexity of the corruption case. The presence of *ad hoc* Judges as non-career judges is needed because they are considered to have the expertise and ability to adjudicate special cases with the complexity that accompanies them, both concerning the aspects of the *modus operandi*, evidence, and the broad scope of corruptions, including in the fields of finance and banking, taxation, capital markets, procurement of goods and services to the government (see Article 1 point 9 and General Elucidation of Law 46/2009). Therefore, the composition of *ad hoc* judges in Corruption Courts is designed to have positive impacts when *ad hoc* judges collaborate with career judges in handling corruption cases. This is relevant to the basic idea of the need to establish a Corruption Court as a special court because the consequences of corruption have caused damage in various aspects of people's lives, the nation, and the state so that extraordinary methods of handling are needed. In addition, the prevention and eradication must also be carried out continuously and sustainably, supported, among others, with adequate human resources so that anti-corruption awareness and attitude can be developed (see General Elucidation of Law 46/2009).

Whereas by citing some of the legal considerations above, the provisions relating to the periodization and tenure of *ad hoc* judges in corruption court is contained in Article 10 paragraph (5) of Law 46/2009 which determines that *ad hoc* judges appointed for a tenure of 5 (five) years and can be reappointed for 1 (one) tenure, according to the Court has limited or closed the opportunity for someone who is serving as an *ad hoc* judge to run for re-election for the next tenure. However the main essence of the existence of *ad hoc* judges is due to the consideration of certain skills or abilities possessed as well as independence and integrity as *ad hoc* judges so that they can synergize with career judges in deciding various types of cases at hand. Meanwhile, *ad hoc* judges at the corruption court that has served the first and second tenures at least has met the requirements as considered above with proven competence, capacity, and/or professionalism so that they are deemed eligible to be re-nominated as *Ad Hoc* Judges at the Corruption Court in the next tenure which is as the same opportunity for *ad hoc* judges at the Industrial Relations Court. Furthermore, the Decision of the Constitutional Court Number 49/PUU-XIV/2016 which confirms in its consideration that the re-nomination of candidates for *Ad Hoc* Judges at the Industrial Relations Court who has served in the past may not deprive the opportunity from the other candidates of *Ad Hoc* Judges who also meet the requirements, therefore, the re-nomination of *ad hoc* judges at the Corruption Court must also not blocking any opportunities for other citizens who meet the requirements as stipulated in Article 12 of Law 46/2009. That means, any *ad hoc* judges that have served for the first and second tenures can enter the re-election as *ad hoc* Judges at the Corruption Court by being re-nominated for the next tenure by following all the requirements and the nomination process from the start as candidates for *ad hoc* judges at the Corruption Court together with other citizens in accordance with the provisions of the laws and regulations.

That by opening up opportunities for *ad hoc* judges at the Corruption Court who has served in the first and second tenures or periods and the opening of the opportunity to be re-nominated for the next period does not conflict with the temporary nature of *ad hoc* judges which is needed only to adjudicate certain cases and has been considered in the Decision of the Constitutional Court Number 56/PUU-X/2012. The importance of opening opportunities for *ad hoc* judges to be re-nominated after their second tenure correlates with the efforts to obtain *ad hoc* judges at the Corruption Court which fulfils the need for expertise and effectiveness in reviewing corruption cases. Therefore, the norm for the periodization of *Ad Hoc* Judges' tenure at the Corruption Court in Article 10 paragraph (5) of Law 46/2009 which does not open up opportunities for *ad hoc* judges at the Corruption Court to be re-nominated for the next tenure is not in line with the desire to create consistency in court decisions including in the Corruption court as well as the principle of independence of judicial power. Therefore, the norm of Article 10 paragraph (5) of Law 46/2009, in the *a quo* case should be interpreted as "*ad hoc* Judges as referred to in paragraph (4) is appointed for a tenure of 5 (five) years and can be reappointed

for 1 (one) tenure without re-selection as long as he/she still meets the statutory requirements, and he/she can be appointed for the next tenure of 5 (five) years by first following the re-selection process in accordance with the applicable laws and regulations”.

Whereas based on all the legal considerations above, according to the Court, the arguments of the Petitioners regarding Article 10 paragraph (5) of Law 46/2009 have turned out to have created unequal legal standing and fair legal uncertainty and thus contradicts Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, therefore the arguments of the Petitioners are legally grounded in part.

Therefore, based on all of the legal considerations above, according to the Court, the arguments of the Petitioners regarding Article 10 paragraph (5) of Law 46/2009 have turned out to have resulted in unequal legal standing and fair legal uncertainty and thus contradicts Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, therefore the arguments of the Petitioners are legally grounded in part.

Whereas based on the assessment of the facts and laws mentioned above, the Court issued a decision which verdicts declare:

1. To grant the petition of the Petitioners in part;
2. To declare that the Article 10 paragraph (5) of Law Number 46 of 2009 concerning the Court of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia of 2009 Number 155, Supplement to the State Gazette of the Republic of Indonesia Number 5074) is in contrary to the 1945 Constitution of the Republic of Indonesia and it does not legally binding conditionally as long as it is not interpreted as, "*ad hoc* Judge as referred to in paragraph (4) is appointed for a tenure of 5 (five) years and can be reappointed for 1 (one) tenure without re-selection as long as he/she still meets the statutory requirements, and he/she can be appointed for the next tenure of 5 (five) years by first following the re-selection process in accordance with the applicable laws and regulations”. Therefore Article 10 paragraph (5) of Law Number 46 of 2009 concerning the Court of Criminal Acts of Corruption (State Gazette of the Republic of Indonesia of 2009 Number 155, Supplement to the State Gazette of the Republic of Indonesia Number 5074) which originally read "*ad hoc* judges as referred to in paragraph (4) is appointed for a tenure of 5 (five) years and can be reappointed for 1 (one) tenure", shall be read in full as, "***ad hoc* judge as referred to in paragraph (4) is appointed for a tenure of 5 (five) years and can be reappointed for 1 (one) tenure without re-selection as long as he/she still meets the statutory requirements, and he/she can be appointed for the next tenure of 5 (five) years by first following the re-selection process in accordance with the applicable laws and regulations**";
3. To order the recording of this decision in the State Gazette of the Republic of Indonesia as appropriate;
4. To dismiss the Petitioners' petition for the rest/remainder.