CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION FOR CASE NUMBER 100/PUU-XVIII/2020

Concerning

Minimum Age, Term of Service, Background, and System of Recruitment of Constitutional Justices, Applicability of Extension of Term of Office of the Chief Justice and the Deputy Chief Justice of the Constitutional Court, and Applicability of Decisions of the Constitutional Court

Petitioner : **Raden Violla Reininda Hafidz, SH, et al.**

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 (Law 7/2020) and Law Number 24 of 2003 concerning the Constitutional Court (Law 24/2003), against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)

Subject Matter : Article 15 paragraph (2) item d and item h, Article 20 paragraph (1) and paragraph (2), Article 23 paragraph (1) item c, Article 59 paragraph (2), and Article 87 item a and item b of Law 7 /2020, Article 18 paragraph (1) and the Elucidation of Article 19 of Law 24/2003 are contradictory with Article 1 paragraph (2) and paragraph (3), Article 24 paragraph (1), Article 27 paragraph (1) and paragraph (3), Article 28C paragraph (2), Article 28D paragraph (1) and paragraph (3), Article 28E paragraph (3), and Article 28F of the 1945 Constitution

Verdict : **In Formal Review:**

To dismiss the petition of the Petitioners in its entirety;

In Material Review:
To declare that the petition of the Petitioners is not admissible.

Judgment Date : Monday, June 20th, 2022

Overview of Decision :

Petitioner I to Petitioner IV are researchers of the KoDe Inisiatif institution and the Bung Hatta Anti-Corruption Award association, having a special attention to the development and strengthening of the Constitutional Court, actively conducting research and scientific development, and actively overseeing the process of discussing Law 7/2020, with regard to either the formation procedure or material matters which are not oriented towards strengthening the Constitutional Court. According to Petitioners I to Petitioner III, the process of forming Law 7/2020 was formally defected and has caused actual damages because the Petitioners did not participate directly in the discussion of the Constitutional Court Bill which was conducted briefly for 3 (three) days in a closed manner. Furthermore, according to the

Petitioners, the substance of Law 7/2020 is not oriented towards strengthening the Constitutional Court, including: (1) the improvement of the recruitment of constitutional justices; (2) the supervision and tightening of the code of ethics for constitutional justices; (3) the authorities for constitutional questions and constitutional complaints; (4) a one-stop judicial review; (5) the compliance with and follow-up to the Constitutional Court's decisions; and (6) the improvement of the procedural law of the Constitutional Court. Meanwhile, Petitioner IV is active in highlighting and criticizing legislation products related to or in touch with constitutional issues and corruptions. Petitioner V to Petitioner VII claimed as lecturers who implement community service through the examination of laws at the Constitutional Court. The Petitioners used their knowledge to present the institutional concept of the Constitutional Court which is constitutional under the Revision of the Constitutional Court Law and criticized the process of forming the Revision of the Constitutional Court Law which was far from being aligned with constitutional values.

With regard to the Jurisdiction of the Court, considering that the Petitioners are requesting is to examine the constitutionality of the law, which in this case is the Formal Review and Material Review of the norms in Article 15 paragraph (2) item d and item h, Article 20 paragraph (1) and paragraph (2), Article 23 paragraph (1) item c, Article 59 paragraph (2), and Article 87 item a and item b of Law 7/2020, as well as Article 18 paragraph (1) and the Elucidation of Article 19 of Law 24/2003 against the 1945 Constitution, the Court has the jurisdiction to hear the petition of the Petitioners.

Regarding the deadline for submitting a request for a formal judicial review of the Law, the case in question, the Petitioners submitted a request for a formal review of Law 7/2020 to the Constitutional Court on November 3, 2020 pursuant to the Deed of Receipt of Petition Files Number 225/PAN.MK/2020 as recorded in the Electronic Constitutional Case Registration Book (e-BRPK) on November 9, 2020 under Number 100/PUU- XVIII/2020. Meanwhile, Law 7/2020 was enacted on September 29, 2020 in the State Gazette of the Republic of Indonesia Number 6554 so that the petition of the Petitioners was submitted on the 36th (thirty-sixth) day since Law 7/2020 was enacted under the State Gazette of the Republic of Indonesia of 2020 Number 16 and Supplement to the State Gazette of the Republic of Indonesia Number 6554. Therefore, based on the above-mentioned legal facts, the Petitioners' petition in relation to the formal review of Law 7/2020 against the 1945 Constitution was submitted within a grace period of 45 (forty-five) days from the enactment of Law 7/2020. Accordingly, the petition for the formal review of Law 7/2020 was submitted within the required grace period.

In relation to the legal standing of the Petitioners in the formal review, according to the Petitioners, the enforcement of the Revised Constitutional Court Law has caused constitutional damages to the Petitioners because the nature of the Constitutional Court Law is universal and has a broad impact on the public. The Constitutional Court does not belong to and have an impact on constitutional justices, the registrars, the secretariat general of the Constitutional Court, or the parties who wish to nominate themselves as constitutional justices only but it is connected with the functions of the Constitutional Court that is closely related to the wider public interest, namely as constitutional enforcement agency, the guardian of democracy, and the protector of the constitutional rights of citizens. According to the Petitioners, with the central position of the Constitutional Court and its direct contact with the public interest and the protection of the constitutional rights of citizens, the Petitioners have actually and potentially been harmed by the Revision of the Constitutional Court Law on the grounds that: (1) the formation process, which was not democratic and constitutional, violated the rule of law and degraded the nobility of the Constitutional Court because the planning and drafting stages violated the procedures, were carried out in a hurry during the covid-19 pandemic, in closed discussions, and were not participatory; (2) the formation process that violated the values of constitutional democracy and the values of the rule of law which resulted in regulations with potential conflicts of interest and attempts to subdue the Constitutional Court, namely the extension of the tenure of the Chairperson and the Deputy Chairperson and Constitutional Justices for incumbent officials; and (3) a hasty formation process without public deliberation which could not be justified academically and resulted in a

revision of the Constitutional Court Law which does not consider the grand design for strengthening the Constitutional Court in the future. The Petitioners are of the view that the parties who actually suffered the actual damages most were the constitutional justices since the revision of the Constitutional Court Law is not oriented towards the institutional strengthening and the implementation of the Constitutional Court's jurisdiction, particularly in relation to the extension of the term of office of constitutional justices which applies to the constitutional justices currently in office (Article 87 item a and item b of the Constitutional Court Law), will test the statesmanship and credibility of constitutional justices in the eyes of the public and it has subjected the constitutional justices to potential conflicts of interest. The process of forming the Revision of the Constitutional Court Law which was formally defected has actually reduced the honor and dignity of the Court. Therefore, the Petitioners as citizens who have concerns with the strengthening of the Constitutional Court made the initiatives to strengthen the Constitutional Court and keep the pulse of the constitution, taking into account the functions of the Constitutional Court which are related to safeguarding the constitutional rights of citizens. In relation to the legal standing in the formal review at the Constitutional Court, in several legal considerations of the Court's Decisions, the Court has affirmed its stance that a Petitioner who has the legal standing in the petition for a formal review is the person who has a linkage between their occupation and the substance of the requested formal review. Therefore, the Court pursuant to its Decision Number 27/PUU-VII/2009 dated June 16th, 2010, the Court has affirmed its stance, which was always considered by the Court in its subsequent decisions. In respect of this matter, if we take into account the current occupations of the Petitioners, namely:

1. Petitioner I to Petitioner IV are researchers of the KoDe Initiative institution and the Bung Hatta Anti-Corruption Award association, having a special attention to the development and strengthening of the Constitutional Court, actively conducting research and scientific development, and actively overseeing the process of discussing Law 7/2020 in relation to either the formation procedure or material matters which are not oriented towards strengthening the Constitutional Court. According to Petitioner I to Petitioner III, the process of forming Law 7/2020 was formally defected and has caused actual damages because the Petitioners had not participated directly in the discussions on the Constitutional Court Bill, which were conducted briefly for 3 (three) days in a closed manner. Furthermore, according to the Petitioners, the substance of Law 7/2020 is not oriented towards strengthening the Constitutional Court, including:
   (1) the improvement of the recruitment of constitutional justices; (2) the supervision and tightening of the code of ethics for constitutional justices; (3) the authorities for constitutional questions and constitutional complaints; (4) a one-stop judicial review; (5) the compliance with and follow-up of the Constitutional Court's decisions; and (6) the improvement of the procedural law of the Constitutional Court. Meanwhile, Petitioner IV is active in highlighting and criticizing legislation products related to or in touch with constitutional issues and corruptions;
2. Petitioner V to Petitioner VII claimed as lecturers who implement community service by way of the examination of laws at the Constitutional Court. The Petitioners use their knowledge to present the institutional concept of the Constitutional Court which was constitutional under the Revision of the Constitutional Court Law and criticized the process of forming the Revision of the Constitutional Court Law which was far from being aligned with constitutional values.

In relation to the occupations of Petitioner I to Petitioner VII who are researchers and lecturers/teaching staff, the Court considers that there is a link of interest, either directly or indirectly, between the occupation or works of the Petitioners and the law being formally reviewed. Therefore, regardless of whether or not the arguments of the Petitioners regarding the existence of the issue of unconstitutionality in respect of the procedure for the amendment to Law 7/2020 as argued by the Petitioners in their main petition for the formal review, the Court is of the opinion that the Petitioners are able to establish a causal relationship or cause and effect between the perceived damage to constitutional rights arising from the process of forming/amending Law 7/2020. Therefore, the Petitioners have

the legal standing to act as Petitioners in the formal review of Law 7/2020 in question.

In relation to the legal standing of the Petitioners in the judicial review, the Petitioners consider that the guarantee for independence and impartiality of the independent and impartial Constitutional Court is a constitutional right of citizens which is not reflected in the Revision of the Constitutional Court Law, which is subject to a conflict of interest due to the substance of the law, which basically revolves around the extension of the term of office of the current constitutional justices. The revision of the Constitutional Court Law was designed to trap the Constitutional Court into potential conflicts of interest so that the Petitioners are striving for the restoration of their constitutional rights in other cases and/or advocating constitutional legislation through the Court's courtroom. According to the Petitioners, the rationalization of the violation of the Petitioners’ constitutional rights and the causal relationship with the provision in question are as follows:

a. The increase in the minimum age of a constitutional justice [Article 15 paragraph (2) item d of Law 7/2020] and the length of service of constitutional justices [Article 23 paragraph (1) of Law 7/2020]. The provision in question does not guarantee the legal certainty and the equality before the law and justice as regulated in Article 27 paragraph (1) and Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution in respect of the regeneration of constitutional justices;
b. With regard to the background of the constitutional justices as proposed by the Supreme Court [Article 15 paragraph (2) item h of Law 7/2020] which is limited only to high court judges or the Supreme Court judges and the position of the Supreme Court, the House of Representatives, and the President as nominating agencies [Article 18 paragraph (1) Law 7/2020] as regulated in Article 27 paragraph (1) and Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution;
c. With regard to the system of recruitment of constitutional justices [Elucidation of Article 19 and Article 20 paragraph (1) and paragraph (2) of Law 23/2004], which according to the Petitioners, the Petitioners are individuals who have the potential to become constitutional justices in the future, so that there is a need for a steady recruitment system and support a competitive and fair climate, and without any interpretation of the implementation of the principles of being objective, accountable, transparent, and open, as regulated in Article 24 paragraph (1), Article 24C paragraph (5), Article 27 paragraph (1) and Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution;
d. Whereas, according to the Petitioners, the Court should reaffirm that the Constitutional Court's decisions are a source of law that must be followed up and implemented by all parties, who are not limited to the House of Representatives and the Government, so that the Petitioners’ constitutional rights to obtain a fair legal certainty and compliance with the Constitutional Court's decisions [removal of Article 59 paragraph (2) of Law 7/2020], as stipulated in Article 28C paragraph (2) and Article 28D paragraph (1) of the 1945 Constitution;
e. Whereas, according to the Petitioners, the petition of the extension of the tenure of the Chairperson and the Deputy Chairperson of the Constitutional Court and the current constitutional justices (Article 87 items a and b of Law 7/2020]. The provision in question may potentially violate the constitutional rights of the Petitioners who actively use the constitutional adjudication forum at the Constitutional Court to obtain guarantees and certainty of an independent and impartial Constitutional Court and are not dragged into and trapped in any potential conflict of interest designed by lawmakers, as guaranteed in Article 27 paragraph (1), Article 28D paragraph (1), and Article 28D paragraph (3) of the 1945 Constitution which are the essence of Article 1 paragraph (3) and Article 24 paragraph (1) the 1945 Constitution.

With regard to the legal standing of the Petitioners in the judicial review, after taking into account the matters as explained by the Petitioners in elaborating on the legal standing mentioned above, the Court is of the opinion that it is apparent that the Petitioners cannot describe a causal relationship (*causal verband*), either the perceived potential and factual

damages to the provisions of Law 7/2020 and Law 24/2003 the review of which has been requested by the Petitioners. Furthermore, the matters described by the Petitioners in explaining their legal standing are not matters relating to the perceived damage to their constitutional rights, which further proves that there is no relationship between the perceived damage to constitutional rights as described by the Petitioners in explaining their legal standing and the provisions of Law 7/2020 and Law 24/2003 requested to be reviewed. In addition to this legal consideration, the Court is of the opinion that the Petitioners as Indonesian citizens who work as researchers and teaching staff must have working experience in the legal area for at least 15 (fifteen) years and/or for prospective judges from the Supreme Court, they must currently serve as high court judges or as the Supreme Court judges so that they do not meet the requirements to become constitutional justices because one of the requirements to become constitutional justices is an at least 15 (fifteen) years of working experience in the legal field and/or prospective judges from the Supreme Court. Therefore, regardless of whether or not the arguments of the Petitioners regarding the conflict of norms in Article 15 paragraph (2) item d and item h, Article 20 paragraph (1) and paragraph (2), Article 23 paragraph (1) item c, Article 59 paragraph (2), and Article 87 item a and item b of Law 7/2020, and Article 18 paragraph (1) and the Elucidation of Article 19 of Law 24/2003 with Article 1 paragraph (2) and paragraph (3), Article 24 paragraph (1), Article 27 paragraph (1) and paragraph (3), Article 28C paragraph (2), Article 28D paragraph (1) and paragraph (3), Article 28E paragraph (3), and Article 28F of the 1945 Constitution, and including if the petition of the Petitioners is granted by the Court, the perceived damage to the constitutional rights as referred to above does not occur or will not occur again, the Court is of the opinion that the Petitioners do not have the legal standing to file the petition for the judicial review of Law 7/2020 and Law 24/2003 in this case.

Since the Court has the jurisdiction to hear the petition in this case and the Petitioners have the legal standing to act as Petitioners in the petition for the formal review of Law 7/2020 in this case, then the Court will consider the subject matter of the petition for the formal review of Law 7/2020. Meanwhile, the subject of the petition for the material review and other matters are not considered further.

In relation to the subject matter of the petition for the formal review of Law 7/2020 against the 1945 Constitution, the Petitioners maintained that, as summarized by the Court, essentially the process of forming Law 7/2020 has, according to the Petitioners, violated the principle of formation of laws, namely the principle of openness in the process of forming Law 7/2020 so that the law was created without any public participation and discussions were carried out in a closed manner and in a very limited time.

The Petitioners essentially claimed that the process of forming Law 7/2020 has formally violated the principle of openness and is contradictory with the provisions regarding the procedure for the formation of laws, especially with regard to the absence of public participation and the discussions were carried out in a closed manner with a very limited time. According to the Court, based on the legal facts revealed in the trial, in particular the statements of the House of Representatives and the President, it appears that the Draft Law on Amendment to Law 24 of 2003 has been included in the list of 2015-2019 Prolegnas, priorities for 2019 [see Decree of the House of Representatives Number 19/DPR RI/I/2018-2019 concerning the National Legislation Program for the 2019 Priority Law and Amendment to the National Legislation Program for the 2015-2019 Draft Laws, dated October 31st, 2018, Annex I of the Decree of the House of Representatives Number 22]. In addition, the House of Representatives in the proceedings also explained that the amendment to Law Number 24 of 2003 was a proposal included into the open cumulative list in order to follow up 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 Formation of Legislation (Law 12/2011) [see the Minutes of Proceedings of the Constitutional Court with the agenda of Hearing the Statement of the

House of Representatives and the President, dated August 9th, 2021, pages 4 and 5].

Therefore, although the norms of the provisions requested to be materially reviewed are considered to have unconstitutionality issues, according to the Court the procedure for amending the Law in question which is based on the open cumulative list as a follow-up to several decisions of the Constitutional Court, the procedure for amending Law 7/2020 is no longer relevant to be discussed. However, it is important for the Court to emphasize that the proposed draft law, if it is included in the open cumulative list, can actually be formed at any time and is not limited in number as long as it meets the criteria contained in Article 23 paragraph (1) of Law 12/2011. In addition, changes of laws through an open cumulative list have special characteristics that are not entirely equal to the proposal for normal change of laws, namely draft laws that are included in the mid-term Prolegnas list. Meanwhile, the inclusion of a draft amendment to the Law in this case into the Prolegnas list as described above does not mean that the amendment to the Law cannot be raised and discussed in the open cumulative list because of the amendment to the Law in this case does meet the criteria for the open cumulative list as considered above.

Since the change of law in question was intended to address the decisions of the Constitutional Court, it is no longer relevant if the process of discussing the draft law still requires 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 25th, 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 as appropriate in a draft law outside the open cumulative list, it has the potential to judge and even negate the decision of the Constitutional Court. Based on the legal consideration above, according to the Court the arguments for the Petitioners' petition in the formal review of Law 7/2020 in this case is legally unjustifiable.

Based on the entire legal consideration above, the Court is of the opinion that the Petitioners have the legal standing to file the petition for the formal judicial review but they do not have the legal standing to file the petition for the material review. Meanwhile, the subject matter of the petition for the formal review is not legally justifiable. Therefore, the subject matter of the Petitioners' petition and other matters in the material examination were not considered further.

Whereas, based on the assessment of the facts and laws mentioned above, the Court passes a decision which in its verdict states:

In Formal Review:

To dismiss the petition of the Petitioners in its entirety;

In Material Review:

To declare that the petition of the Petitioners is not admissible.

DISSENTING OPINION AND CONCURRING OPINION

In relation to the decision of the Constitutional Court in question, there are dissenting opinions and concurring opinions from Constitutional Justice Wahiduddin Adams and Constitutional Justice Suhartoyo, as well as dissenting opinions from Constitutional Justice Arief Hidayat and Constitutional Justice Saldi Isra.

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

A. Concurring Opinion

1. Subject Matter of the Petition for Formal Review

The Concurring Opinion regarding the subject matter of the petition for formal review in this case is similar as my Concurring Opinion in the Constitutional Court Decision Number 90/PUU-XVIII/2020.

B. Dissenting Opinion

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

The Dissenting Opinion on the legal standing of the Petitioners in the material review in this case is similar to my Dissenting Opinion in the Constitutional Court Decision Number 90/PUU-XVIII/2020.

2. Subject Matter of the Petition for Material Review

a. Article 15 paragraph (2) item d of the Law in question

My Dissenting Opinion on the issue in question is similar to my Dissenting Opinion in the Constitutional Court Decision Number 90/PUU-XVIII/2020.

b. Article 15 paragraph (2) item h of the Law in question

Based on the original intent behind the enactment of Article 24C paragraph (3) of the 1945 Constitution, it is implied that the drafters of the amendment to the 1945 Constitution wished that, although not mandatory, the configuration of the Constitutional Court should include a Constitutional Justice having the background as a career judge. I can also understand if the matter in this case reflects the internal aspirations and idea of the Supreme Court and the judicial bodies under it in with an aim at taking part in maintaining and ensuring the continuity of the rule of law and the constitution in Indonesia. However, the exclusivity in the requirement under the relevant Law is constitutionally questionable for at least 6 (six) reasons as follows:

1) the exclusivity in the relevant norm eliminates the constitutional rights of citizens who satisfy other minimum cumulative requirements as candidates for Constitutional Justices simply because they are not currently serving as High Court Justices or Supreme Court Justices. This is contradictory with Article 27 paragraph (1) of the 1945 Constitution which stipulates that: "*All citizens have the same position in law and government and are obliged to uphold the law and government without any exception*";
2) the exclusivity in the relevant norm has caused a legal uncertainty because it negates the “open” principle that is also stipulated in the amendment to Article 20 paragraph (2) of Law 7/2020. With the enactment of the norm, the selection and election of candidates for Constitutional Justices proposed by the Supreme Court becomes "closed" and "discriminatory" because they only citizens currently serving as High Court Judges or Supreme Court Justices can participate. In addition to the contradiction with Article 27 paragraph (1) of the 1945 Constitution, the norm is also contradictory with the principle of "fair legal certainty" in Article 28D paragraph (1) and Article 28D paragraph (3) of the 1945 Constitution which stipulates: "*Every citizen has the right to have equal opportunities in the government*”;
3) the exclusivity in the norm reduces the constitutional authority of the Supreme Court in Article 24C paragraph (3) of the 1945 Constitution so that the Supreme Court can only nominate candidates for Constitutional Justices currently serving as High Court Justices or Supreme Court Justices. As a matter of fact, the Supreme Court could also nominate candidates for Constitutional Justices from "internal resources" who satisfy the minimum cumulative requirements even though they are not serving as High Court Justices or Supreme Court Justices;

4) the exclusivity in the norm has caused an inequality before the law towards the other agencies (in this case: the House of Representatives and the President) nominating the candidates for Constitutional Justices because neither the House of Representatives nor the President has the exclusivity under the relevant norm. The unequal treatment in this matter violates the principle of "fair legal certainty" in Article 28D paragraph (1) of the 1945 Constitution because it causes 1 (one) nominating agency (in this case: the Supreme Court) has an exclusivity which are not owned by the other 2 (two) nominating agencies (in this case: the House of Representatives and the President);

5) the exclusivity in the relevant norm will potentially trigger and inspire ideas of the House of Representatives to add an exclusive requirement namely "members of the People's Representative Council" for candidates for Constitutional Justices proposed by the House of Representatives and the President will also add an exclusive requirement namely "members of the cabinet or government officials" for candidates for Constitutional Justices proposed by the President. This is certainly contradictory with the "open" principle in the amendment to Article 20 paragraph (2) of Law 7/2020 and it eliminates the constitutional rights of citizens who satisfy other minimum cumulative requirements as candidates for Constitutional Justices for the reason that they are not "members of the House of Representatives" and/or "members of the cabinet or government officials". This is obviously contradictory with Article 27 paragraph (1) and Article 28D paragraph (1) and paragraph (3) of the 1945 Constitution. Besides, the norm also reduces original intent behind the formulation of the provision of the 1945 Constitution in respect of the Constitutional Court, which from the beginning wishes that the composition and configuration of the Constitutional Court will be diverse and mutually enrich the cognitive aspects and maturity among fellow Constitutional Justices; and/or

6) the exclusivity in the norm has reduced the essence of the phrase "*three persons are nominated by each of…*" as one of the constitutional norms in Article 24C paragraph (3) of the 1945 Constitution. Therefore, the requirements and mechanism for nominating candidates for Constitutional Justices, whether proposed by the Supreme Court, the President, or the House of Representatives, should not set forth in the norm within the phrase "…*who originate from*…" and "…*currently serving as a High Court Justice or the Supreme Court Justice*" in order to prevent and even remove the presumption of the public that Constitutional Justices are representatives of the nominating agencies, particularly in this case the Supreme Court.

I think we should let this matter to become a judicial culture within the Supreme Court so that it is not necessary, even not allowed, to be normalized in the Law because if it is normalized in the Law then this is actually contradictory with several principles of the supremacy of the constitution as regulated in the 1945 Constitution.

Therefore, based on the description above, I am of the opinion that the Court should **GRANT PARTIALLY** the petition of the Petitioners by declaring that the phrase "…*and/or for candidates of justices who originate from the Supreme Court, currently serving as the high court justices or the Supreme Court justices*" in Article 15 paragraph (2) item h of the Law is contradictory with the 1945 Constitution and has no binding legal force.

c. Article 18 paragraph (1), Elucidation of Article 19, Article 20 paragraph (1) and paragraph (2), Article 23 paragraph (1) item c, Article 59

paragraph (2) of the Law.

The matters in this case are not considered further because in my opinion it is only a consequential sequence from several provisions and requests on which I have previously given a concurring opinion and a dissenting opinion and in relation to these matters, I consider that they have been covered both in the Constitutional Court Decision and in my concurring opinion and dissenting opinion.

Dissenting Opinion of Constitutional Justice Wahiduddin Adams in Regards Article 87 item b of the Law in the Constitutional Court Decisions No. 90, 96 and 100/PUU-XVIII/2020

My dissenting opinion regarding the constitutionality of Article 87 item b of the Law in question is divided into 3 (three) frameworks, namely:

1. Essence of the Transitional Provision

   As a comparison, Law Number 8 of 2011 concerning Amendment to Law Number 24 of 2003 concerning the Constitutional Court stipulates a transitional provision stating that: *"At the time when this Law comes into force: a). the constitutional justice who is currently serving as the Chairperson or the Deputy Chairperson of the Constitutional Court shall continue to serve as the Chairperson or the Deputy Chairperson of the Constitutional Court until their term of office expires pursuant to the provisions of Law Number 24 of 2003 concerning the Constitutional Court; and b). any current constitutional justices shall remain in office until they are dismissed pursuant to the provisions of Law Number 24 of 2003 concerning the Constitutional Court.* The method in the transitional provision of Law Number 8 of 2011 is clearly aligned with the guidelines and essence of the transitional provision in Annex II paragraph 127 of Law Number 12 of 2011 concerning the Formation of Legislation as one of the framework of a guarantee for a "fair legal certainty" (see: Article 28D paragraph (1) of the 1945 Constitution) in formulating transitional provisions in laws and regulations with a definite, precise and standard method.

   Based on the transitional provision in Law Number 8 of 2011, the then Chairperson, the Deputy Chairperson, and Constitutional Justices in office were protected from potential damages and/or arbitrariness that could occur from an amendment to the Law so that they could still rely on the old law temporarily (during the transition) until their terms of office expire pursuant to the old law and they did not get any privilege whatsoever under the new law. Therefore, transitional provisions in laws and regulations (including any Act) are generally created to guarantee the protection for parties affected by the change of laws and regulations so that they are generally created in a regulatory concept that parties affected by the change of laws and regulations can still follow and/or rely on the old laws and regulations temporarily (during the transition).

   Parties affected by the amendment to laws and regulations can indeed be required to follow the new laws and regulations as long as they are "not detrimental". However, regardless of that, transitional provisions in the laws and regulations shall not in any case be intentionally created to give a privilege to a legal entity. The highest limit that can be reasonably set by way of transitional provisions of the laws and regulations is to ensure that the parties affected by the change of laws and regulations are "not prejudiced" instead of "benefited" or given a certain privilege.

2. Interpretation of the Formulation of Norms *A Quo*

   Article 87 item b of the Law in question as one of the transitional provisions in the relevant Act reads as follows: ***"****Any constitutional justice who is in office by the time this Law is enacted shall be deemed to meet the requirements under this Law and shall end their term of office at the age of 70 (seventy) years old as long as their entire term of office does not exceed 15 (fifteen) years.*"

Based on the guidelines for the Drafting of Legislation Techniques as contained in Annex II number 127 of Law Number 12 of 2011 concerning the Formation of Legislations, I believe the transitional provisions in the relevant Law (particularly Article 87 item b) are not based on a common, precise, and standard model because the application of the norm has clearly and explicitly given a privilege to parties affected by changes in laws and regulations rather than simply ensuring that they are "not prejudiced" in accordance with the basic principles and objectives of a transitional provision in a law.

The existence and application of the norms in Article 87 item b of the Law, which are requested by all Petitioners in all cases of judicial review of the Law against the 1945 Constitution (Numbers 90, 96, and 100/PUU-XVIII/2020), become a clear evidence that the legislators have deliberately gone very far and deep into one of the most fundamental elements of the independence and impartiality of a judiciary body, in this case the Constitutional Court. The legislators have become very decisive and even actually given an undisputable privilege for the existence of most of the current Constitutional Justices who are subjected as *addressat* personal (*propia*) through the application of such norms.

Therefore, in my opinion the relevant norm as a matter of fact is an element of the Law which intentionally violates the ethics in the relationship between "State Agencies referred to in the Constitution". Meanwhile, we can still recall that the Court has, or at least I have, often made the best effort to safeguard this issue through several past decisions, particularly those decisions which are essentially intended to give the legislators an opportunity to make an or several improvements of law by way of amendment or replacement of the law.

3. The Issue of Constitutionality in the Relevant Norms

I have to differ from the consideration of the Court that it is necessary to take a legal action in the form of a confirmation from the agencies nominating the Constitutional Justices currently in office on the basis of 3 (three) main arguments, namely because: 1). the legal action in the form of confirmation is not recognized by the constitutional system of the Republic of Indonesia pursuant to either the 1945 Constitution of the Republic of Indonesia or various laws and regulations; 2). the legal action in the form of confirmation may prejudice the authority of the Court and the principle of independence of judicial power, the supremacy of the constitution, and the rule of law; and 3). won't such legal action in the form of confirmation trigger the creation of an understanding or even an affirmation that the Constitutional Justices were actually the representation of each nominating agency (in this case: the Supreme Court, the House of Representatives, and/or the President)?

I also believe that as Article 87 item b of the Law in question is declared to be contradictory with the 1945 Constitution of the Republic of Indonesia and to have no binding legal force, the affected parties (in this case: most of the current Constitutional Justices) are "not completely prejudiced" in any manner but simply they are not given any "inappropriate privilege". Therefore, in order to prevent any "inappropriate privilege", the statesmanship of a Constitutional Justice is being tested because a true statesman shall always consider the circumstances and the fate of future generations instead of just getting lost in a momentary interest and desire.

in the entire proceedings of the judicial review of the law in question (both formally and materially), I have made the best effort to maintain justice to myself and my fellow Constitutional Justices in accordance with the teachings of my religion. I believe that the God's command to always maintain justice including towards oneself and one's relatives is also contained in the scriptures of other religions although perhaps in a slightly different narrative. I'm really having a hard time and barely able to build another argument that can (perhaps) maintain this togetherness because the means and the spirit (intent) of the legislators in various matters, particularly Article 87

item b, of the law in question apparently and explicitly caused the violation of several constitutional principles of the 1945 Constitution of the Republic of Indonesia, especially the principle of the rule of law pursuant to Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia and the principle of independence of judicial power pursuant to Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. My stance and dissenting opinion are solely based on my true and sincere love for this togetherness and most importantly: for realizing the continuity of the rule of law and the constitution in Indonesia.

During the course of the proceedings, one can feel that the existence of several norms, including and in particular Article 87 item b, of the Law in question have caused a very calculative atmosphere so that we, fellow Constitutional Justices, whether explicitly acknowledged or not, tend to take a wait-and-see and full-of-stake approach in respect of the stance of the other Constitutional Justices. In the opinion of Richard A. Posner in the book *How Judges Think*, this tendency to some extent is human because judges are ordinary human beings who are naturally *homo economicus* (creatures who always count/calculative) but in his next narrative, Richard A. Posner stated that such a tendency is very dangerous for the continuing guarantee for the rule of law and the constitution because the independence and impartiality of judges should always be maintained, including against the influence of their colleagues, in the spirit and principle of collegiality.

For the foregoing reasons, from the beginning the legislators should have established norms for the transitional provision which are better than those contained in Article 87 item b of the Law in question. Moreover, the Court has also granted the application to the extent that it relates to the constitutionality of Article 87 item a. Although its constitutional ground is different from that of Article 87 letter b, I believe that both of them are essentially similar because they are both stipulated in the Chapter regarding Transitional Provisions which seems to have been made in a hasty and reckless manner from the outset and it can reasonably be seen as giving a “privilege" to most of the current Constitutional Justices rather than simply ensuring that they are "not prejudiced" in accordance with the basic objectives and principles of a transitional provision in a law.

For the foregoing reasons, in my opinion the Court should **GRANT** the Applicant's application by declaring that Article 87 item b of the Law in question is contradictory with the 1945 Constitution of the Republic of Indonesia and has no binding legal force.

II. Dissenting Opinion and Concurring Opinion of Constitutional Justice Suhartoyo

1. In the formal review of Case Number 100/PUU-XVIII/2020.

Whereas, in proving the petition for case Number 100/PUU-XVIII/2020, I am of the opinion that the legal standing of the Petitioners and the subject matter of the petition cannot be separated, given the close relationship between the nature of the amendment to Law Number 24 of 2003 which was amended by Law Number 8 of 2011 into the amendment of Law Number 7 of 2020. Whereas, generally the formal judicial review cannot be separated from the requirements regarding the procedure for the formation of laws and regulations as regulated in Article 22A of the 1945 Constitution and Law Number 12 of 2011 (hereinafter referred to as Law 12/2011) and other related provisions. Therefore, generally in establishing the fulfilment of formal requirements in the formation or amendment of laws, these conditions cannot be separated. However, what must be observed then is the procedure for the formation or amendment of the law which is carried out specifically through an open cumulative system as regulated in Article 23 paragraph (1) item b of Law 12/2011, which confirms that one of the elements in the open cumulative list is the outcome of the decision of the Constitutional Court.

Whereas, it is further explained that in the context of the formation or

amendment of laws as a result of the decision of the Constitutional Court, it is confirmed that the legislators have formed or amended the laws due to the decision of the Constitutional Court. In the context of implementing a judicial decision, including in this case the decision of the Constitutional Court, the legislators can be seen as the "executor of the judicial decision" whose position must not shift from the basic essence mandated by the Constitutional Court decision. Therefore, in relation to the decision 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, all of these decisions are related to the case regarding the position of Constitutional Court Justices (with regard to the minimum age, additional requirements to fill positions, periodization of the tenure of Constitutional Court Judges/retirement age and tenure of the Chairperson and the Deputy Chairperson of the Constitutional Court) all of which are essentially related to the position of Judges of the Constitutional Court, whereby the decision confirmed that with regard to the positions of Judges of the Constitutional Court and other matters related to it, the Constitutional Justices who heard the cases were hindered by a general principle namely that the judge cannot adjudicate a case related to their own interests (*nemo judex idoneus in propria causa*) and further confirms that it is the authority of the legislators (*open legal policy*) to set/define it. Therefore, if the application for the formal review in this case is scrutinized, the amendment to Law Number 24 of 2003 which has been amended by Law Number 8 of 2011 and finally by the amendment to Law Number 7 of 2020 is a delegation through the decision of the Constitutional Court, and therefore it becomes inappropriate if the legislators in responding to the decision of the Constitutional Court by making the amendment by way of an open cumulative system, by determining either the requirements, the terms of office/periodization, the retirement age, and the tenure of the Chairperson and the Deputy Chairperson of the Constitutional Court, as well as other matters relating to the position of Judges of the Constitutional Court, the constitutionality of the amendment to the relevant law is still questioned and even reviewed. If that is the case, why are the provisions related to the position of Judges of the Constitutional Court are not declared unconstitutional from the beginning by the Constitutional Court itself through its decisions, it is not necessary to raise the argument for its rejection because it is hindered by the general principle, namely that the judge cannot adjudicate a case related to their own interests (*nemo judex idoneus in propria causa*) and further emphasize that it is the authority of the legislators (open legal policy). In my opinion, this indicates an "inconsistency" by the Constitutional Court in its decisions, which can result in a decrease in the trust, dignity, and authority of the Constitutional Court.

Whereas, it is further explained that decisions of a judiciary body, including decisions of the Constitutional Court, must theoretically be “considered correct" in accordance with the principle of *res judicata pro veritate habetur.* This means that as long as it is final and binding, it has an executorial nature and must be enforced. From this perspective, as long as it is announced in a trial that is open to the public, the decision of the Constitutional Court is final and binding (see Article 47 of the Constitutional Court Law). This means that the decision of the Constitutional Court shall immediately have the binding legal force since it is announced as long as it is not subject to certain conditions in the verdict. Therefore, considering that the issue relates to the position of Judges of the Constitutional Court including 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 further actions from the legislators to execute it are needed. Furthermore, using the “open cumulative” instrument for the change of law effected by the legislators in the context of

respecting and carrying out the mandate in the decision of the Constitutional Court. Thus, in my opinion, it is irrelevant if the change of law is still associated with the normal procedure for forming or changing laws as such changes of laws in general. This is because assessing the procedure for the formation or amendment of laws in response to the decision of the Constitutional Court through open cumulative instruments is similar as assessing decisions of judicial bodies that have permanent legal force, which of course cannot be justified. Therefore, upon the above-mentioned legal consideration, in the formal review in case Number 100/PUU-XVIII/2020, I think it is difficult to provide a justification if there are parties or legal subjects whose legal standing can still be considered to question the procedures for forming or amending the relevant law. For that reason, I have to emphasize that regardless of whether or not the Petitioners in the formal review have a legal standing, as mentioned in the opinion of the other Constitutional Justices, I am in the opinion that the subject matter of the application for the formal review in Case Number 100/PUU-XVIII/2020 must be declared as legally unjustifiable and the Constitutional Court should dismiss the application for the formal review in its entirety.

2. **In the material review in Case Number 100/PUU-XVIII/2020.**

The evidence regarding the legal standing of the Petitioners and the subject matter of the petition cannot be separated and must also be discussed simultaneously. Furthermore, with regard to the subject matter or substance of the norm that had been amended and then challenged by the Petitioners, namely the Petitioners in the Case Number 100/PUU-VIII/2020 who challenged the constitutionality of the norms in Article 15 paragraph (2) item d and item h, Article 20 paragraph (1) and paragraph (2), Article 23 paragraph (1) item c, Article 59 paragraph (2), and Article 87 item a and item b of Law 7/2020, as well as Article 18 paragraph (1) and the Elucidation of Article 19 of Law 24/2003, all of which are related to the position of Constitutional Justices, I will also express the same opinion because these matters relate to the position of Constitutional Justices, the requirements, procedures for nomination/appointment, terms of office, retirement age, periodization, and terms of office of the deputy/chairperson including the procedure for their election. Therefore, in my opinion these matters cannot be separated from my opinion in considering and concluding in a formal review. This is because the substance of the amendment to Law 7/2020 is actually the subject matter that has been followed up by the legislators using the open cumulative system as a result of the decision of the Constitutional Court. Therefore, the process of formation/amendment cannot be separated from the substance or subject matter of the law as long as it relates to the position of judges. Therefore, in my opinion as the subject matter of the petition in the cases filed by the Petitioners is still closely related to the position of judges, then the change in the subject matter of Law 7/2020 becomes an integral part and its integrity must still be protected from issues aimed at assessing the constitutionality of the norms of the said change. Furthermore, in the context that the legislators made a change of law as a response to or as a result of the decision of the Constitutional Court and by using an open cumulative instrument, in this case the legislators can be seen as using its "privilege" in a specific and limited manner, in amending the law in question, because only the substance of certain laws can be made/changed through such an open cumulative system (see Article 23 of Law 12/2011). Therefore, if any person considers that the change of the law in this case contains a defect in will as it is not in accordance with what has been decided by the Constitutional Court in responding to the amendment, then such an opinion/view should be raised to the legislators for the purpose of a legislative review. Meanwhile, if any parts of the substance are not relevant with the pattern of the position of judges, and they are included in the amendment to the law in question, then if there is any question on its constitutionality, it can be raised to be reviewed by the Constitutional Court.

Upon the foregoing legal considerations, I also share the same opinion as the one in the formal review in a previous decision, although in the opinion of the other Constitution Justices, the legal standing of the Applicant can be considered, on the subject matter of the application I made a conclusion that the Applicant's application in this case is legally unjustifiable and the Constitutional Court should dismiss the Applicant's petition in its entirety.

3. **In the formal and material examination of Case Number 100/PUU-XVIII/2020.**

   Whereas upon the foregoing legal considerations, I came to the final conclusion that insofar as the petition for which the Constitutional Court in its verdict has ruled that the petition of the Petitioners is dismissed and the petition of the Petitioners is granted, I express a dissenting opinion on either the legal considerations or the verdict, while on the part of the decision of the Constitutional Court which dismissed the petition of the Petitioners, I declare that I share the same view as stated in the verdict but I have a concurring opinion on the legal considerations.

III. Dissenting Opinion of Constitutional Justice Arief Hidayat

Based on several aspects in the formal review, the Petitioners have only questioned the procedural violation at the stage of forming the amendment to the Constitutional Court Law as follows.

1. **Legislators Have Circumvented the Law by Claiming that They were Responding to the Constitutional Court Decision**

   In respect of the argumentation of the Petitioners in this case*, t*he House of Representatives and the President have basically explained that the Constitutional Court Law had been created as a response to decisions of the Constitutional Court, namely Decision Number 49/PUU-IX/2011, Decision Number 34/PUU-X/2012, Decision Number 7/PUU-XI/2013, Decision Number 48/PUU-IX/2011, Decision Number 1-2/PUU-XII/2014, and Decision Number 68/PUU-IX/2011.

   In general, the Constitutional Court's decisions have been followed up by the House of Representatives and the President. However, in its consideration it considers, although the explanation of Law 7/2020 did not refer to, contain, and explain that the relevant Law is a response to the Constitutional Court's decision.

   In its development, several provisions in Law Number 24 of 2003 concerning the Constitutional Court have been amended several times, most recently by Law Number 4 of 2014 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2013 concerning the Second Amendment to Law Number 24 of 2003 concerning the Constitutional Court into Law which have also been reviewed and declared to be contradictory with the 1945 Constitution of the Republic of Indonesia by the Constitutional Court. This law is the third amendment to Law Number 24 of 2003 concerning the Constitutional Court. The reason for the amendment to the law was that because several provisions were no longer aligned with the development of the legal needs of the community and the life of the state administration. Several important points in the third amendment of Law Number 24 of 2003 concerning the Constitutional Court are, among others, the election of the Chairperson and the Deputy Chairperson of the Constitutional Court, the requirements to become a constitutional judge, dismissal of constitutional justices, the retirement age for constitutional justices.

   The Law, which addressed the Constitutional Court's decision, should provide a description in its Consideration section or in the Elucidation section that the Law is a response to the Constitutional Court's decision. This explanation is important in order to distinguish which laws are a response to the Constitutional Court's decision and which are not. This is also related to the obligation to involve a public

participation for the purpose of giving inputs to the process of forming the law. A law which is a response to the Constitutional Court's decision does not require any public participation. This is because the Constitutional Court's decision is final and binding on all citizens, including the legislators. However, any material norms in a law that is not a response to any Constitutional Court’s decision or is included into the realm of open legal politics must involve a public participation and those norms relate to the following rules.

a. **the extension of the maximum tenure of 15 (fifteen) years until the retirement age, which is 70 (seventy) years old, which is applied to the current constitutional justices in office;**
b. **the removal of the periodization of judges' positions;**
c. **the extension of the term of office of the Chairperson and the Deputy Chairperson of the Constitutional Court from two years and six months into five years;**
d. **the addition of 1 (one) academic background in the field of law as required for a member of the Honorary Council of the Constitutional Court;**
e. **the requirement for candidates for constitutional justices as nominated by the Supreme Court to originate from the Supreme Court and be serving as a high court judge or as the Supreme Court judge.**

2. **The incorporation of Law Number 4 of 2014 concerning Stipulation of Government Regulation in Lieu of Law Number 1 of 2013 concerning Second Amendment to Law Number 24 of 2003 concerning the Constitutional Court in its Consideration Section which has been Annulled upon the Constitutional Court's Decision**

One of the legal products referred to as the legal basis in item c of the Consideration section and item 2 of the “in View of” section in Law on the Third Amendment of the Constitutional Court Law is Law Number 4 of 2014 concerning Stipulation of Government Regulations in Lieu of Law Number 1 of 2013 concerning the Second Amendment to Law Number 24 2003 concerning the Constitutional Court into Law. This Law has been declared to be contradictory with the 1945 Constitution and has no binding legal force by the Constitutional Court upon the Decision Number 1-2/PUU-XII/2014 which was announced on February 13th, 2014. In summary, Law Number 4 of 2014 is no longer a law and cannot be used as the basis for law formation because it has been declared unconstitutional in its entirety upon the Constitutional Court’s Decision.

When the Law on the Third Amendment of the Constitutional Court Law was formed on the basis of something that is not lawful, especially on the "in View of" section which indicates the juridical basis for the formation and substance of the Law, it becomes undeniable that the Law on the Third Amendment of the Constitutional Court Law had a legal defect since its enactment. Therefore, the language of the Consideration section in the amendment to a law should take into account whether the Law that is included in the Consideration section is still valid or not. Has there been any Constitutional Court’s Decision which nullified the enactment of the Law? If there is any Constitutional Court’s Decision which nullified the amendment to the Law then the language of the Consideration section should only refer to the latest amendment to the Law and it is not necessary to include the Law that has been nullified by the Constitutional Court. For example, in the formation of Law 7/2020 which is the third amendment to the Constitutional Court Law, Law 4/2014 which is the Second Amendment and has been annulled by the Constitutional Court should not be referred to in the Consideration section so that the Consideration section would only cite up to the first amendment, namely Law 8/2011, although Law 7/2020 remains the third amendment. This is intended to

ensure that the formation of the law is not based on a law that is no longer valid because of the decision of the Constitutional Court.

3. **Discussions were Conducted in a Closed Manner, Without the Public Engagement, Hasty, and with the Lack of Sense of Crisis during the COVID-19 Pandemic**

The formation of the Third Amendment to the Constitutional Court Law was not only carried out by way of a fast track legislation but also in a closed manner by precluding the public. It can be seen at least from the chronology of the formation of the Law on the Third Amendment to the Constitutional Court Law namely as follows:

1. Member of the House of Representatives of the Republic of Indonesia from the Gerindra Faction, Suparman Andi Agtas, proposed the revision of the Constitutional Court Law in the open cumulative list on February 3rd, 2020;
2. The Legislative Body of the House of Representatives held a harmonization meeting to discuss the Constitutional Court Bill at the Legislative Body Meeting on February 13th, 2020;
3. Meeting of the Working Committee on the Harmonization of the Constitutional Court Bill on February 19th, 2020;
4. This bill was adopted as a proposal from the House of Representatives on April 2nd, 2020;
5. Assignment for the discussion on the Constitutional Court Bill by the Deputy Speaker of the House of Representatives on July 20th, 2020;
6. The Constitutional Court Bill was approved for a joint discussion between the House of Representatives and the government on August 24th, 2020;
7. On August 26th-28th, 2020 a working committee meeting was held to discuss DIM in a closed forum;
8. On August 31st, 2020, the Constitutional Court Bill was passed in the Level-I Discussion;
9. On September 1st, 2020, in the Level-II Discussion, the Constitutional Court Bill was passed into law.

Based on an *amicus curae* information from Brawijaya University, during the entire formation process, the public could not obtain any official information from members of the House of Representatives and the government regarding the Academic Papers and Bills that were prepared and discussed so that they could not give any input or express any opinion. The preparation process starting from the proposal for approval to be discussed together in a closed manner without involving and inviting the public participation. In fact, the process of DIM discussions and joint discussions were also carried out in a closed manner and without engaging community groups, which at that time actually had expressed opinions in relation to the closed process which violated the principle of openness and the subject matter of the proposed changes. The joint discussion process, which only took 3 days, was clearly beyond reasonable understanding unless it was done to eliminate the public participation. In fact, several points on the content of the Constitutional Court Law are not a response to the Constitutional Court's decision and require the views and participation of the community, namely:

a. **the extension of the maximum tenure of 15 (fifteen) years until the retirement age, which is 70 (seventy) years old, which is applied to the current constitutional justices in office;**

b. **the removal of the periodization of judges' positions;**

c. **the extension of the term of office of the Chairperson and the Deputy**

Chairperson of the Constitutional Court from two years and six months into five years;

d. **the addition of 1 (one) academic background in the field of law as required for a member of the Honorary Council of the Constitutional Court;**

e. **the requirement for candidates for constitutional justices as nominated by the Supreme Court to originate from the Supreme Court and be serving as a high court judge or as the Supreme Court judge.**

The chronological facts of the formation of the Third Amendment of the Constitutional Court Law clearly show that there has been no meaningful participation of the public as the implementation of the democratic principles adopted by the 1945 Constitution. The lack of the public participation should become a strong argument that the formation of the Third Amendment Law of the Constitutional Court Law is contradictory with the 1945 Constitution and is aligned with the Decision Number 91/PUU-XVIII/2020. Furthermore, the Court in its legal consideration in the Decision Number 91/PUU-XVIII/2020 stated that the stages and the public participation are part of the assessment standard in the formal review which shall strengthen the assessment criteria in the formal review as implied in the Court's opinion.

Upon the legal consideration above, the formation of the Constitutional Court Law is formally defected so that it must be declared to be contradictory with the 1945 Constitution and has no binding legal force. Therefore, the Court should have granted the formal review requested by the Petitioners.

IV. Dissenting Opinion from Constitutional Justice Saldi Isra

The Court in its formal review declared that the Petitioners had a legal standing in filing the petition but in the material review the Court stated otherwise, namely that the Petitioners did not have the legal standing to file the petition. Therefore, in the decision on the judicial review, the Court declared that the petition of the Petitioners shall not be admissible (NO, *niet ontvankelijk verklaard*). With regard to the decision or the Court's stance, I would like to state that, even though as a matter of fact, for example, the age requirements for becoming constitutional judges are not satisfied yet and in respect of the level of education, they do not have any doctoral degree (S3), at least the Petitioners may potentially be prejudiced by the enactment of the norms referred to in the petition. Therefore, without having to elaborate the satisfaction of the requirements for the damage to the 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 attitude and stance that the Petitioners have suffered, or at least potentially suffer, a constitutional damage so that they have the legal standing to file the petition.

With regard to Article 15 paragraph (2) item d of Law 7/2020, the Petitioners requested the Court to declare that the provision is contradictory with the 1945 Constitution and does not have binding legal force and to re-enact Article 15 paragraph (2) item d of Law 8/2011 concerning the Amendment to Law 24/2003. Regarding the substance of the petition which is essentially not much different from the intent of one of the materials of the Constitutional Court Decision No. 90/PUU-XVII/2020, I have expressed a dissenting opinion on the same norm. Therefore, even though the Petitioners in the Case No. 90/PUU-XVII/2020 have not questioned the maximum age to become a constitutional judge, I believe that legal consideration for the maximum age for nominating oneself as a candidate for constitutional judge, the legal argumentation for the minimum age requirement may essentially be applied or used as well to assess the constitutionality of the maximum age limitation. Therefore, the petition of the Petitioners to the extent related to the provision of Article 15 paragraph (2) item d of Law 7/2020 shall be legally justifiable in part.

With regard to the norm of Article 15 paragraph (2) item h of Law 7/2020, the

Petitioners requested the Court that as long as the phrase "and/or for the candidates for judges who originate from the Supreme Court, currently serving as a high court judge or as the Supreme Court judge" is contradictory with the 1945 Constitution and has no binding legal force. Pursuant to the Constitutional Court Decision No. 49/PUU-IX/2011, October 18th, 2011, the Constitutional Court has also nullified a similar requirement that is exclusive and does not reflect an equal treatment, namely the phrase "*and/or have served as a state official*" in Article 15 paragraph (2) item h of Law Number 8 of 2011. Therefore, the petition of the Petitioners to the extent related to the unconstitutionality of Article 15 paragraph (2) item h of Law 7/2020 shall be legally justifiable.

With regard to Article 18 paragraph (1) of Law 24/2003, the Petitioners requested the Constitutional Court that the phrase "*… 3 (three) people are nominated by the Supreme Court, 3 (three) people by the DPR, and 3 (three) people by the President…*" shall be declared as contradictory with the 1945 Constitution and having no binding legal force as long as it is not interpreted as follows: (1) the nominated candidates for constitutional justices are not representatives of the agency and profession from each agency. However, they are the representatives of the wider public; and (2) the Supreme Court, the House of Representatives, and the President shall only act to nominate constitutional justices. Based on a careful reading, the formulation of the norm in Article 18 paragraph (1) of Law 24/2003 is exactly the same as the formulation of the phrase "three people are nominated by the Supreme Court, three people by the House of Representatives, and three people by the President" in the norm of Article 24 paragraph (3) of the 1945 Constitution. Therefore, based on a reasonable reasoning, it is impossible for the Court to nullify certain legal norms or phrases in the law with a formulation that is exactly similar to the formulation in the 1945 Constitution. I have described the interpretation of the phrase in the legal consideration in Sub-paragraph [6.5.3]. Therefore, the petition of the Petitioners to the extent related to the phrase "*… 3 (three) people are nominated by the Supreme Court, 3 (three) people by the House of Representatives, and 3 (three) people by the President…*" in Article 18 paragraph (1) of Law 24/2003 is not legally justifiable.

With regard to the Elucidation of Article 19 of Law 24/2003, the Petitioners requested the Constitutional Court that the phrase " *candidates for constitutional judges*" shall be declared to be contradictory with the 1945 Constitution and has no binding legal force as long as it is not interpreted as follows, "the announcement of the registration of candidates for constitutional justices, names of candidates for constitutional justices, and names of candidates for constitutional justices". Based on careful review and reading of the Elucidation of Article 19 of Law 24/2003 particularly the phrase "*candidates for constitutional justices*" and based on my experience of being involved in the Selection Committee and having participated as a candidate in the selection process, the subject matter requested by the Petitioners is something that has happened and was carried out by each nominating agency. The meaning as desired by the Petitioners might not be fully implemented during the recruitment of candidates for constitutional justices at the early stages after the establishment of the Constitutional Court. Based on a reasonable reasoning, when the selection process for candidates for constitutional justices is carried out, there is always an announcement of the registration of candidates for constitutional justices, the names of the candidates for constitutional justices, and the names of the candidates for constitutional justices. Moreover, there is a provision that states that the nomination of Constitutional Justices is carried out in a transparent and participatory manner. In this case, if it is found out that in a registration of candidates for constitutional justices, the names of the candidates for constitutional justices, and the names of candidates for constitutional justices are not announced, this is a matter of practice and not a matter of the constitutionality of norms. Such practice can be raised to the agency authorized to examine and decide on the actual case. Upon the above consideration, the petition of the Petitioners which requested that the Elucidation of Article 19 of Law 24/2003 in respect of the phrase "*candidates for constitutional judges*" shall be declared to be contradictory with the 1945 Constitution and does not have the binding legal force

as long as it is not interpreted as follows, "the announcement of the registration of candidates for constitutional justices, names of candidates for constitutional justices, and names of candidates for constitutional justices" is not legally justifiable.

With regard to Article 20 paragraph (1) of Law No. 7/2020 to the extent related to the phrase "... regulated by each authorized body...", the Petitioners requested to the Constitutional Court that the phrase shall be declared to be contradictory with the 1945 Constitution and does not have the binding legal force as long as it is not interpreted as follows, "regulated by each authorized body with the procedure for selecting, electing, and nominating constitutional justices with the same procedures and standards". After carefully studying and reading the norms of Article 20 paragraph (1) of Law No. 7/2020, referring to the experience of selecting candidates for constitutional justices in each of the nominating agencies to date, the system and process of recruiting candidates for judges still have certain weaknesses. One of the reasons is that the recruitment system and process in each of the nominating agencies are not equipped with a fixed standard or the same standard. Therefore, the petition of the Petitioners is legally justifiable.

With regard to Article 20 paragraph (2) of Law 7/2020 to the extent related to the phrase "*objective, accountable, transparent and open*", the Petitioners requested it to be declared as contradictory with the 1945 Constitution and having no binding legal force as long as it is not interpreted as follows:

a. *objective shall mean that the nominating agency establishes a panel of experts to conduct a feasibility and integrity test as well as an assessment of candidates for constitutional justices based on the constitutionality criteria in Article 24C Paragraph (5) of the 1945 Constitution. The expert panel consists of elements from nominating agencies, academics/legal experts, former constitutional justices, community leaders, and the Judicial Commission. The candidates selected to be nominated as constitutional justices are candidates who obtain the highest ranks in the assessment by the panel of experts;*

b. *accountable shall mean that the proposing agency in collaboration with the Corruption Eradication Commission (KPK), the Financial Transaction Reports and Analysis Centre (PPATK), and the Judicial Commission (KY) will examine the track records of candidates for constitutional justices which will be considered for the assessment of candidates for constitutional justices by the panel of experts;*

c. *Transparent shall mean that the process of selecting candidates for constitutional justices by the panel of experts from each nominating agency is open and may be witnessed by the public. After the candidate is elected, the nominating agency and the panel of experts shall publicly explain about the assessment and reasons for selecting the candidates for constitutional justices; and*

d. *Open shall mean that the entire recruitment process for the candidates for constitutional justices is participatory and open to the public so that the public has the right to supervise and give advice and input to the panel of experts and to the nominating agency regarding the recruitment process and the candidates for constitutional justices who will be considered in the assessment by the panel of experts*;

After carefully studying and reading the entire phrase “*objective, accountable, transparent and open*" in the norm of Article 20 paragraph (2) of Law 7/2020, although I agree with the subject matter maintained by the Petitioners, it is more appropriate to propose such style of interpretation as part of a legislative review. Accordingly, the petition of the Petitioners is not legally justifiable.

With regard to Article 23 paragraph (1) item c of Law No. 7/2020, the Petitioners request that the Constitutional Court shall declare that it is contradictory with the 1945 Constitution and has no binding legal force as long as it is not interpreted as having reached the age of 70 (seventy) years old and/or having served for 11 (eleven) years.

With regard to the petition of Article 23 paragraph (1) item c of Law No. 7/2020 which is interpreted as "70 (seventy) years old and/or having served for 11 (eleven) years", I need to quote again the Constitutional Court's Decision No. 53/PUU-XIV/2016 with regard to the "group of positions" of constitutional justices, particularly with regard to age limits, terms of office, and periodization of tenure, are within the authority of legislators (*open legal policy*) to determine it. This is permitted as long as it does not violate the limitation under the principle of open legal policy, including the principle of rationality. That is because the determination is within the authority of the legislators. This is because of the legal politics of legislators which diminish the periodization, causing some of the current judges to serve for longer terms. In this case, the 70 (seventy) years old limitation or the maximum tenure of 11 (eleven) years as a constitutional justice as desired by the Petitioners may be decided by the individual judges. Despite the maximum age of 70 (seventy) years old or the maximum tenure of 15 (fifteen) years which are considered or seen by the public to be favourable to certain constitutional justices who are currently in office, it is still possible to leave early before the age of 70 (seventy) years old or serving before 15 (fifteen) years. Time will tell! For these reasons and upon such consideration, the petition of the Petitioners is legally unjustifiable.

With regard to Article 59 paragraph (2) of Law 7/2020, the Petitioners requested the Constitutional Court to declare that it is contradictory with the 1945 Constitution and does not have the binding legal force as long as it does not mean as follows, "the House of Representatives, the President, Government Bodies, and any other parties related to the amendment to the laws that have been tested, shall immediately respond to the decision of the Constitutional Court as referred to in paragraph (1) in accordance with the laws and regulations". With regard to the request for reinstating Article 59 paragraph (2) which had been removed by Law 7/2020, I agree with the Constitutional Court's Decision No. 49/PUU-IX/2011, dated October 18th, 2011. Article 24C paragraph (1) of the 1945 Constitution states, among other things, that "the Constitutional Court has the authority to adjudicate at the first and final instance and its decisions shall be final...". It is clear that the decision of the Constitutional Court is final and binding on the general public *(erga omnes)* and it can be immediately enforced (self-executing). Court decisions are the same as laws that must be implemented by the state, all citizens, and existing stakeholders. In this case, affirming or re-arranging the obligation to follow up on the decision of the Constitutional Court, is tantamount to negating the final nature of the decision of the Constitutional Court. Based on these reasons, the petition of the Petitioners, to the extent that Article 59 paragraph (2) of Law 7/2020 is contradictory with the 1945 Constitution and has no binding legal force as long as it is not interpreted as follows, "the House of Representatives, the President, Government Bodies, and Other Parties related to the amendment to laws that have been reviewed immediately as a response to the decision of the Constitutional Court as referred to in paragraph (1) in accordance with the laws and regulations", is not legally justifiable.

With regard to the petition of the Petitioners to the extent related to Article 87 item a and Article 87 item b of Law 7/2020, because Article 87 item a has been considered and granted in the Decision of the Constitutional Court Number 96/PUU-XVIII/2020, while as for Article 87 item b I have previously expressed a concurring opinion and a dissenting opinion so that I will not elaborate and consider further such two provisions.

Upon the foregoing legal consideration, in my opinion, the Petitioners' petition to the extent related to the material review shall be legally justifiable in part.