

Doubting the Impartiality: Constitutional Court Judges and Conflict of Interest

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Submission Track:	Abstract
Received: August 11, 2022	The Constitutional Court ruling on the third amendment to the Law on the Constitutional Court is worth discussing. In the judicial review, the justices judge a case in which they have interests. The interests are related to a requirement for being a Constitutional Court justice, the term of office for Constitutional Court justices, and the term of office for the chief justice and deputy chief justice. Can they be impartial? This study is aimed at three things. First, analyzing their interpretation through legal annotation. Second, identifying the impacts of the ruling on the Constitutional Court. Third, providing a road map for judicial review concerning Constitutional Court judges. It is mixed legal research using primary and secondary data. This study discovered that the judges were not impartial due to a conflict of interest. They have compromised the universal principles of the judiciary. For impartiality, they should not be judges in their cause. Instead, the Supreme Court should have the authority to review legislation on them.
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INTRODUCTION

This article has three objectives. To begin with, the Constitutional Court judges' interpretation of legislation regarding their interests was analyzed through legal annotation. In addition, the impacts of conflict of interest on the Constitutional Court were also identified. Finally, a road map for judicial review concerning Constitutional Court judges was provided.

It is known that political interests have impacts on law-making. Through political interaction, sectoral interests are accommodated in law-making (Thusnet, 2014). *Marbury v. Madison* is deemed the foundation of judicial review (Fallon, 2004). Subsequent to the political transition in Indonesia, the Constitutional and Supreme Courts perform the judicial review. The

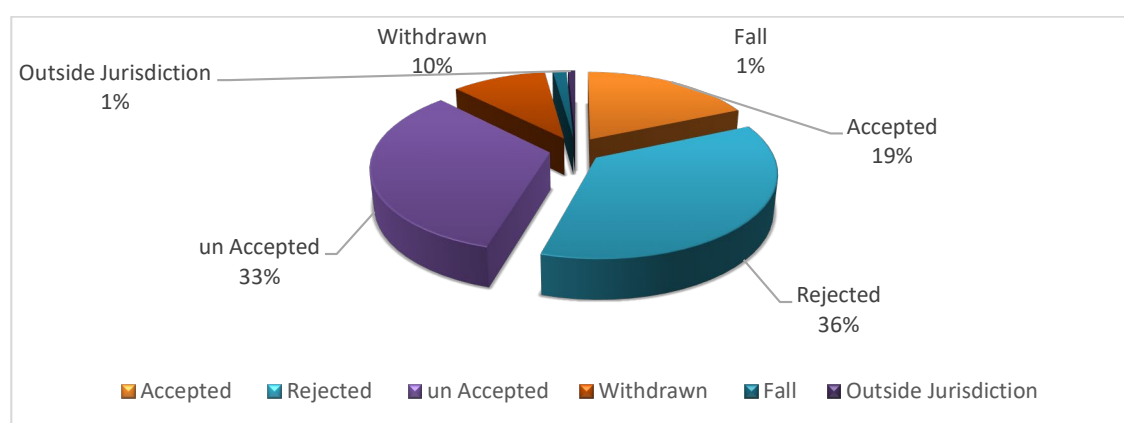
former shall have the authority to review statutory rules and regulations below the laws against the laws, while the latter can review laws against the constitution (Isra, 2015).

In several countries, constitutional adjudication was introduced, inspired by the wave of global democracy (Butt, 2015). The Constitutional Court was established to limit the power of the government through judicial review (Dixon, 2011) and protect human rights (Arjomand, 2007). In short, the Constitutional Court was established to uphold the rule of law and protect democracy and the fundamental rights of citizens (Palguna, 2010). Judicial review plays its role in checking the majority power in the legislative body (Ginsburg, 2003). Indeed, it is considered beneficial to checks and balances.

In addition, judicial review encourages lawmakers to be prudent (Isra, 2014). In other words, the judiciary occupies a significant role in improving a political system (Soeroso, 2013) to guard the constitution as the foundation of social and political order (Carolan, 2009). Thus, Constitutional Court should ensure that substantive and procedural aspects of laws are constitutional (Mochtar, 2015).

Since its establishment, the Constitutional Court has heard 1,549 judicial review cases. The details are displayed in the following figure.

Figure 1: Percentage of Cases in the Constitutional Court in 2003-2022



Source: MKRI as reviewed by the author

Out of the 1,549 cases, four (0.27%) allege the interests of Constitutional Court justices. One is a judicial review of the third amendment to the Law on Constitutional Court (UU-MK). The amendment directly impacts the term of office for three reasons. First, the minimum age of justice. Second, the term of office for the chief justice and deputy chief justice. Third, the term

of office for Constitutional Court justices. Hence, their impartiality is at stake. The transitional provisions assert that this amendment applies to justices serving to date (Law of Constitutional Court, n.d.).

This research analyzed Constitutional Court Ruling Number 100/PUU-XVIII/2020. In particular, this research was carried out to reveal Constitutional Court justices' interpretation of legislation affecting their interests. It is crucial as judicial independence requires impartiality (Richardson, 2005). Through legal annotation, the future of constitutional adjudication in Indonesia can be predicted and shaped.

RESEARCH METHODOLOGY

This study belongs to mixed legal research employing historical, statutory, and conceptual approaches. In this research, primary and secondary data were analyzed qualitatively. This research was conducted to analyze Constitutional Court Ruling Number 100/PUU-XVIII/2020.

RESULTS AND DISCUSSION

1. Interpreting Conflict of Interest

In legal annotation, the Identify Rules Application and Conclusion (IRAC) method can be used to analyze Constitutional Court rulings related to the interests of its judges. As Kelley Burton points out, IRAC can be employed to criticize and analyze legal reasoning. It is how IRAC can be utilized to analyze judicial interpretation (*Legal Reasoning Grid Based IRAC Methods*)(Burton, 2017).

Table 1: IRAC as a Tool

Issue	Rule	Application	Conclusion
<i>Framing the legal issues in the factual problem as questions using material facts, party names, and elements of the relevant rules of law</i>	<i>Breaking down the relevant rules of law into elements</i>	<i>Making a linkage between the elements of the law and the factual problem</i>	<i>Reaching a convincing conclusion on all of the legal issues in the factual problem based on strong support from statute and case law</i>
	<i>Including definitions from statute and case law</i>	<i>Making analogies between the factual problem and the case law</i>	<i>Justifying why alternative conclusions were not reached</i>
	<i>Including the facts of cases similar to a</i>	<i>Making analogies between the factual problem and the case</i>	

<i>factual problem</i>	<i>law</i>
	<i>Making assumptions clear</i>
	<i>Identifying additional facts required</i>

Issue

The main issue in the judicial review of the third amendment to UU-MK is impartiality. Under the transitional provisions, seven justices benefited. First, Article 87 point a stipulates that the term of office for the chief justice and deputy chief justice is five years based on the provisions of the law. Second, under Article Pasal 87 point b, the constitutional justices serving should complete their term of office until the age of 70 as long as the term does not exceed 15 years. Table 2 exhibits the term of office for each justice after the third amendment to UU-MK.

Table 2: Term of Office

Justice	Term of Office	
	Before the Amendment to UU-MK	After the Amendment to UU-MK
Anwar Usman (Chief Justice)	2021	2026
Aswanto (Deputy Chief Justice)	2024	2029
Arief Hidayat	2023	2026
Suhartoyo	2025	2029
Wahiduddin Adams	2024	2024
Manahan Sitompul	2025	2023
Saldi Isra	2022	2032
Enny Nurbaningsih	2023	2032
Daniel Yusmic Foekh	2025	2034

Source: author's review

Following the data in Table 2, two justices have benefited from the third amendment to UU-MK as they would turn 70. They were Adams and Sitompul. Before the amendment, Justice Sitompul was appointed to serve from 2020 to 2025. However, his term of office should end at 70 in 2023. In other words, their colleagues should serve until the age of 70 as long as their term of office does not exceed fifteen years.

However, the government cannot provide any valid reason for extending the term of office. Even there was no debate during the deliberation. All factions and government officials took it for granted. The legal policy for the amendment to UU MK seemed to be a compromise between the President and DPR. Furthermore, it is unusual in law-making. It cannot be denied that legal substance is strongly influenced by several factors, including non-legal factors such as the political interests of those in power and those influencing them (Arato, 1998). Through the amendment to UU MK, the political interests of those in power are accommodated as this law legitimizes how the government intervenes in the judiciary (Esmi Warassih, 2005).

The government must have calculated the benefit of extending the term of office. The calculation had been undertaken before the President and DPR jointly approved the amendment. If the third amendment to UU MK is reviewed, the judges will deal with a conflict of interest. In other words, they act as judges in their cause. The conflict of interest undermines objectivity and impartiality when government interest is at stake. Put another way, the judges can take the government's side in reviewing controversial legislation. For instance, UU KPK, UU Minerba, Omnibus Law on Job Creation, and UU IKN.

Rules

Several controversial articles were reviewed as they were unconstitutional, categorized as follows.

Table 3: Controversial Articles in the Third Amendment to UU-MK

Issue	Before the Amendment to UU-MK		After the Amendment to UU-MK	
Minimum Age Limit	Article 16 point c	Shall be of the age of at least 40 when appointed	Article 15, paragraph (2) point d	Shall be of the age of at least 55
Term of Office for Justices	Article 22	Five years and can be reappointed for another term	Article 23, paragraph (1) point c	70 years

Term of Office for the Chief Justice and Deputy Chief Justice	Article 4, paragraphs (3) and (3)a	Two years and six months and can be reelected for the same office for one term	Article 4, paragraphs (3) and (3)a	Five years since appointed as the Chief Justice and Deputy Chief Justice
Transitional Provisions	-	-	Article 87 point a	The chief justice and deputy chief justice serve for a five-year term based on the provisions of the law.
			Article 87 point b	The constitutional justices currently serving shall complete their term of office until the age of 70 as long as the term does not exceed 15 years.

The articles in question result from the open legal policy, allowing lawmakers to make law-making policies (Ali, 2010). Therefore, in open legal policy, lawmakers can put their interpretation of a law. However, there are always two sides to the same coin. On the one hand, an open legal policy affords flexibility. On the other hand, it allows lawmakers to be authoritarian (Satriawan & Lailam, 2019). Despite Article 87 of the Third Amendment to UUMK, judicial independence enshrined in Article 24 paragraph (1) of the 1945 Constitution is undermined. Judicial tenure cannot be changed, reduced, or extended by law-making or amending (RI, 2010).

The constitution does not stipulate the minimum age limit and term of office for justices, the chief justice, and the deputy chief justice. However, they can affect the public interest. Constitutions do not work or are not implemented in a vacuum, as they are not drafted or come into being suddenly. They contain various interpretations and meanings discovered in central notions; historical contexts; compromises in drawing up the text, beliefs of the drafters (truth, ideology, or future); characteristics of society; interests of the drafters; information about their formulation (such as academic drafts); legal and non-legal knowledge; legal and non-legal doctrines and concepts; and meanings ascribed by main or dominant actors in their implementation (Falaakh, 2006).

Being flexible, constitutions can grow (Strauss, 2010b) and adapt to social changes (Strauss, 2010a). Thus, interpretation is critical. In this judicial review, the Constitutional Court

justices do not represent imagined law. They are artists making their laws. They are the secondary legislature when the rapid development of society leaves behind the law. Judicial creativity is inseparable from law and the judiciary (Barak, 2006). Interpretation is necessary to shed light on the meaning of a constitution. Meanwhile, law-making heralds a breakthrough in interpreting constitutions (Holland, 1991).

Application

Within the theoretical framework is the principle of *nemo iudex in propria causa* or *nemo debet esse iudex in (propria) sua causa*. This principle implies that no one should be judged based on their cause. It means the principle is used to prevent conflict of interest by the judges. In addition, *nemo iudex* is applied to maintain impartiality in the role of the judiciary. It is crucial to ensure impartiality (Vermeule, 2012). Nevertheless, there are three reasons why the court went on reviewing the third amendment to UU MK. First, it is the sole interpreter of the constitution whose ruling is final. Second, it should determine which law applies to a case. Third, the judicial review is in the national interest instead of the court or judges' interests. Hence, despite Article 87 point b UU 7/2020 on the term of office for justices and Article 87 point a UU 7/2020 on the term of office for the chief justice and deputy chief justice, the court carried out judicial review.

The ruling on the Third Amendment to the Law (UU) on the Constitutional Court (MK) has demonstrated two things. They are conflicts of interest in the term of office and internal struggle for leadership. None of the three petitions (Number 90, 95 & 100) was unanimously approved. The only partially approved petition has opposed the term of office for the chief justice and deputy chief justice. According to the court, the term of office for the chief justice should not be continued under the provisions of the third amendment to UU MK. Meanwhile, the minimum age limit is still 55. On the other hand, the justices can serve until the age of 70 as long as their tenure does not exceed 15 years. As a whole, UU MK is binding on the judges currently serving (Law of Constitutional Court, n.d.)

The dissenting opinion of Justice Wahiduddin Adams in the copy of the MK Ruling reflects the Justice Deliberation Meeting. From his point of view, the judges calculated before making their decision. Among his colleagues, they tended to wait and see and expect others' stances. The main issue is the transitional provisions of the third amendment to UU MK. First, Article 87 point a stipulates that the term of office for the chief justice and deputy chief justice

is five years based on the provisions of the law. Second, under Article Pasal 87 point b, the constitutional justices serving should complete their term of office until the age of 70 as long as it does not exceed 15 years. Thus, Justice Wahiduddin Adams is the only one demonstrating his impartiality. In other words, the third amendment to UU MK should only be applied in the future. Adams stated that the transitional provisions of points a and b undermine the rule of law and judicial independence. As previously mentioned, Justice Adams considered the protection of judicial independence ensured in the Indonesian Constitution. Meanwhile, Arief Hidayat and Justice Anwar Usman expressed partially dissenting opinions (*Constitutional Court Ruling Number 100/PUU-XVIII/2020*, 2020).

As Hidayat noted, the transitional provisions extending the term of office should be confirmed by each nominating institution, i.e., the President, DPR, and MA. Nevertheless, it can compromise MK's independence. The confirmation can be a trade-off to "get rid of" justices "posing a threat" to the government or MK. Justice Usman shared the same opinion. The transitional provisions are deemed constitutional with a minimum age limit of 55. Therefore, Saldi Isra is the only justice who cannot remain on the bench until he is 70. When UU MK was amended for the third time, he was only 53. Among the other judges, there is no debate on the constitutionality of the transitional provisions. To be fair, conditional unconstitutionality can bridge the gap between old and new provisions (*Constitutional Court Ruling Number 100/PUU-XVIII/2020*, 2020). To rephrase it, the transitional provisions can be declared unconstitutional if applied to the justices currently serving.

It differs from Article 87 point a, on the term of office for the chief justice and deputy chief justice. Once again, Adams is the only judge depicting his impartiality. Hence, an integral struggle for leadership is alleged to occur at MK. The transitional provisions infringe on the right to elect the chief justice and deputy chief justice. Nonetheless, why does not the point of the transitional provision b say so? It can be stated that this ruling lacks debates as scientific preferences for interpretation theories have theoretically and practically been accepted. The different stances among the nine justices result from different interests. Logically, they are involved in a conflict of interest and internal struggle.

Therefore, they justify extending the term of office by citing legal reasons. In short, this ruling diminishes their credibility and independence. It allows the court to be undermined or weakened by the government. Lessons can be drawn from the politicization of the judiciary in Hungary and Poland. In Hungary, Orban amended the rule to increase the number of

Constitutional Court justices from eight to fifteen. Then, he allowed the ruling party to directly appoint new justices (Kosař & Šípulová, 2018). In Poland, the winning party refused to support the judges nominated by the party of the previous regime. Then, the winning party appointed five new judges to delegitimize the old ones. The politicization of the judiciary is aimed at its impartiality to take the government's sides (Wyrzykowski, 2019).

Authoritarian regimes often utilize the judiciary to silence their critics. The judiciary helps regimes maintain social control, attract investors, maintain bureaucratic discipline, adopt unpopular policies, and increase their legitimacy (Tom Ginsburg, 2008). It is also suggested by Wiratraman in his research *Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics*. As Wiratraman argued, under Joko Widodo's administration, the judiciary is not impartial. Consequently, it is merely used to legitimize policies made by the government (Wiratraman, 2022).

Conclusion

The Constitutional Court justices promote their interests instead of this nation's. Their impartiality is undermined by the conflict of interest. Their legal reasoning illustrates that they seem to refrain from making a breakthrough in open legal policy. It is known as the concept of judicial restraint. In this concept, judges tend to refrain from making any breakthroughs in dealing with constitutional issues (Waltman, 2015).

2. Compromising Universal Principles

If the Constitutional Court justices act as judges in their cause, the universal principles of the judiciary will be undermined. The first principle is a fair trial. *European Convention for the Protection of Human Rights and Fundamental Freedoms* stresses the importance of an independent and impartial tribunal (Langford, 2009). Even international conventions concerning the judiciary also emphasize the impartial judiciary. For instance, *Siracusa Principles* 1981, *IBA Minimum Standards of Judicial Independence* 1982, *Montreal Universal Declaration on the Independence of Justice* 1983, *UN Basic Principles of the Independence of Judiciary* 1985, *Beijing Principles* 1995, and *the Bangalore Principles of Judicial Conduct* 2002 (Rishan, 2016).

To be impartial, law enforcers cannot take sides, be involved in a conflict of interest, doubt, or represent a particular group. They must uncover the truth and observe the law to serve justice. Impartiality requires law enforcers to be free from prejudice and objectivity when

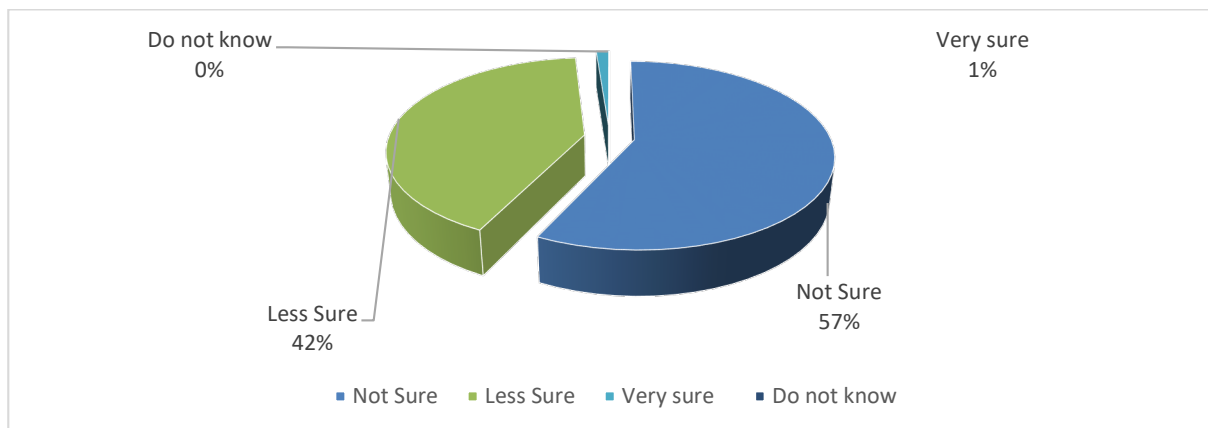
dealing with facts contrary to the principle of impartiality subjectively and objectively. In subjective impartiality, they cannot take sides, turn away, or be involved in a conflict of interest with any party. On the other hand, in objective impartiality, they cannot take sides and be involved in a conflict of interest with any subject matter (Marzuki, 2022).

Regarding the *nemo iudex* principle, the Constitutional Court justices cannot act as judges in their cause, including in judicial review. If they do so, they will be involved in a conflict of interest. It is worth noting that a conflict of interest involving them cannot be justified by any legal instrument in theory and practice.

3. Roadmap

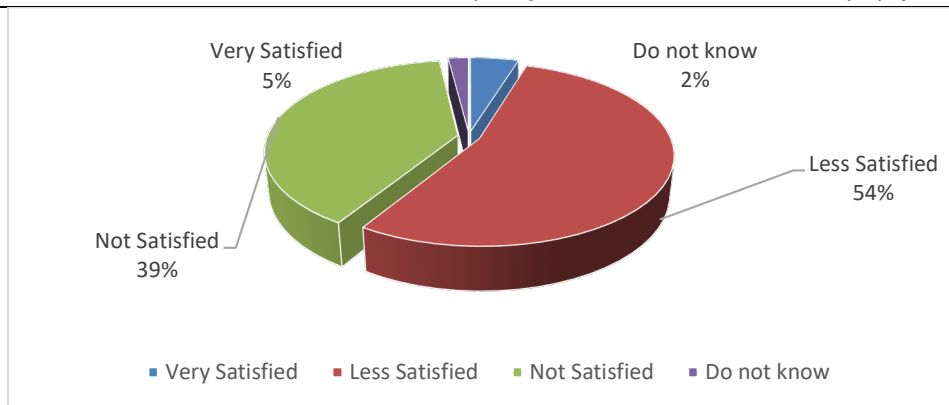
To prevent conflict of interest from occurring at MK, a survey was conducted using purposive sampling. It involved 250 respondents from students, lecturers, researchers, and the general public. The following figures exhibit the survey results.

Figure 2: Public Perception of MK Impartiality



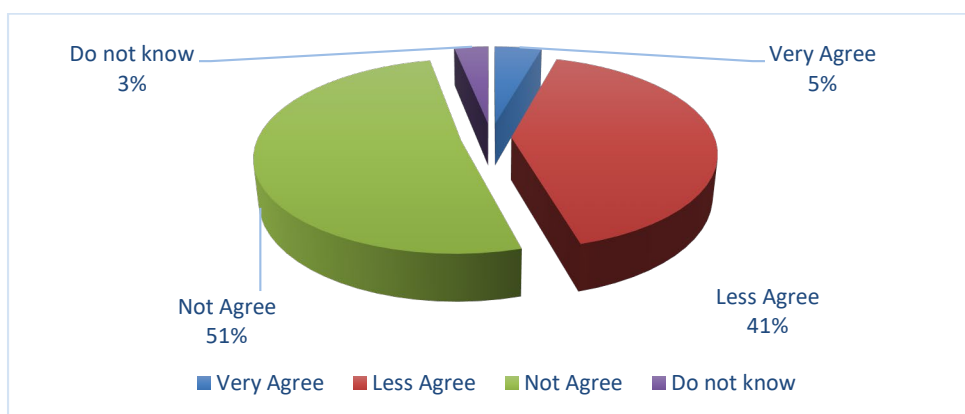
Source: author's review

Figure 3: Public Satisfaction with MK Ruling



Source: author's review

Figure 4: Public Perception of MK Competence



Source: author's review

Regarding impartiality, 57% of the respondents were unsure, 42% were less sure, and only one was sure. Concerning satisfaction with MK ruling on conflict of interest, only 5% of the respondents were very satisfied. On the other hand, 54% were less satisfied, and 39% were unsatisfied. The rest 3% did not know. Asked about MK's competence in resolving conflict of interest, 51% of the respondents disagreed, 41% did not quite agree, and only 5% agreed, while the rest 3% did not know (Rishan, 2022).

Departing from those data, there are two formulas for dealing with conflict of interest. First, applicants should be conferred the right of refusal if the judges are involved in a conflict of interest. Consequently, the justices involved in the conflict of interest should not try and adjudicate. Therefore, they can remain impartial and avoid conflict of interest. Second, if all the justices are involved in the conflict of interest, the Supreme Court can perform the constitutional review. There are two reasons why the Supreme Court should be selected. First, it is one of the judicial bodies under the constitution. Moreover, it also performs judicial review as enshrined

in the 1945 Constitution. Despite the jurisdiction stipulated in the constitution, constitutional review by the Supreme Court can be justified as a constitutional convention. It is logical, as constitutional conventions are one of the sources of law in Indonesia.

C. Conclusions

It can be concluded from Constitutional Court Ruling Number 100/PUU-XVIII/2020 that the justices are involved in the conflict of interest. This conflict can be determined by their interests and interpretation of the constitution. They promote their interests, abandon legal principles, and lack scientific preferences as a doctrine of interpretation. It signifies that they can be impartial when acting as judges in their cause. This phenomenon sets an ominous precedent for the court and constitutional democracy.

Unwittingly, the court has abandoned universal principles such as fair trial and *nemo iudex* as the requirements for the impartial judiciary. It is worth noting that Constitutional Court justices cannot try and decide a case if they are involved in a conflict of interest. An alternative should be explored if all Constitutional Court justices are involved in the conflict of interest. To avoid it, the Supreme Court should perform a constitutional review. A survey revealed that, according to most respondents, Constitutional Court justices could not act as judges in their cause. Therefore, as a constitutional convention, the Supreme Court should conduct the constitutional review to prevent Constitutional Court justice from being involved in the conflict of interest.

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