ADDITIONAL TERM POSITION OF CONSTITUTIONAL JUDGES IN THE PERSPECTIVE OF FIQH PRIORITY OF YUSUF QARDHAWI

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Abstract: Emergence of the third amendment to the law on the constitutional court which was passed suddenly has sparked controversy among experts. This is due to three irregularities in the law. Among them are the discussion of the law is considered very fast, changes regarding the addition of the term of office of constitutional judges and the very fullness of the law with indications of political interests in order to facilitate the interests of the proposing institution. In examining this problem, this research uses the theoretical perspective of the working of law from Chambliss and Seidman and fiqh siyasah from Yusuf Qardhawi. This research is a normative legal research and with a statute approach and conceptual approach. The findings in this study indicate that an increase in the tenure of constitutional judges who continue to use retirement is in line with Yusuf Qardhawi's priority fiqh theory for several reasons, including a form of harmonization in regulating the tenure of the highest holder of judicial power and being able to maintain independence and credibility of every constitutional judge's decision.
Keywords: Constitutional Court, Term of Office, Fiqh Siyasah.

Abstrak: Munculnya perubahan ketiga atas undang-undang tentang mahkamah konstitusi yang disahkan secara

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mendadak menuai kontrovesrsi diantara para ahli. Hal ini disebabkan tiga kejanggalan yang ada dalam undang-undang tersebut. Diantaranya adalah pembahasan undang-undang tersebut dinilai sangat cepat, perubahan mengenai penambahan masa jabatan hakim konstitusi serta sangat saratnya undang-undang tersebut dengan adanya indikasi kepentingan politik guna memperlancar kepentingan-kepentingan dari lembaga pengusul. Dalam mengkaji permasalahan ini, penelitian ini menggunakan perspektif teori bekerjanya hukum dari Chambliss dan Seidman serta fikih siyasah dari Yusuf Qardhawi. Penelitian ini merupakan penelitian hukum normatif dan dengan pendekatan undang-undang (statute approach) dan konseptual (conseptual approach). Hasil temuan dalam penelitian ini menunjukkan bahwa adanya penambahan dalam masa jabatan hakim konstitusi yang tetap menggunakan masa pensiun telah sejalan dengan teori fikih prioritas Yusuf Qardhawi karena adanya beberapa alasan yang diantaranya adalah merupakan bentuk harmonisasi dalam pengaturan masa jabatan pemegang tertinggi kekuasaan kehakiman serta dapat menjaga independensi dan kredibilitas dari setiap keputusan hakim konstitusi.
Kata Kunci: Mahkamah Kontitusi, Masa Jabatan, Fikih Siyasah.

Introduction

The constitution explains that Indonesia is a constitutional state, with realising the judiciary's independence as one of its fundamental foundations. This rule makes sense because the judiciary plays a crucial role in a state that upholds the rule of law and is a significant component of the constitutional system. This rule demonstrates the court's power will always exist in

constitutional systems. The most crucial role of the judiciary is to resolve conflicts, including those between people, those between people and society, and even those between people and communities and the government over policy decisions.[1]

Based on its duties and authorities, the Constitutional Court, as the highest institution in judicial power, plays an important role in upholding justice and safeguarding the state constitution based on the 1945 Constitution of the Republic of Indonesia (1945 Constitution) as stated in Chapter 24C of the 1945 Constitution which explains that the Constitutional Court is an institution that has the authority to administer justice whose decisions are final on matters of reviewing laws that are considered contrary to the 1945 Constitution, testing of the authority of the branch of state power regulated in the 1945 Constitution, testing of cases that occurred in the matter of the results of general elections as well as disputes regarding disbanded political parties. The next task of the Constitutional Court is to provide a decision on the opinion of the House of Representatives (DPR) in the matter of the President or Vice President who is alleged to have violated the 1945 Constitution.

The Constitutional Court was established in accordance with Law Number 24 of 2003 establishing the Constitutional

[1] Walter, *Courts and Politics, An Introduction to the Judicial Process*, (Boston: Graw Hill, 2006), 45.

Court, which codifies the Chapter 24 mandate from the 1945 Constitution. Law Number 24 of 2003 concerning the Constitutional Court was passed together with it, and it was revised three times before Law Number 7 of 2020, which became the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, was published. The issue pertaining to the chapter, which governs the additional term of office for constitutional judges, is one of the significant items that the amendment regulates.

The periodization within five years was the notion chosen at the outset of the Constitutional Court's formation as the design of the tenure of constitutional judges and added to the potential of the judge being re-elected for a second time in the same position. Chapter 22 of Law Number 24 of 2003 governs it. When examined more closely, this pattern is identical to the features of the executive branch described in Chapter 7 of the 1945 Constitution, which stipulates that the President's term of office is five years and that he or she is eligible for reelection for one more term for the term after that. Given the executive command's immense power, limitations on its authority like these are only natural. The tenure of office of other organs of government, such as the People's Representative Council and the Regional Representatives Council, cannot be compared to this

periodization pattern (DPR). The President's term of office, as it is, plainly differs from the DPR and DPD terms of office, both of which are political positions.2

Further investigation reveals that the first and second changes to the proposal to create Article 7 of the 1945 Constitution, at the very least, are responsible for the variations in the pattern of terms of office. All sides in the debate for the second amendment agreed to shorten the president's tenure in office. It is predicated on the fact that the United States has a troubled past as a result of the lack of a presidential term limit, which gave rise to an authoritarian political system. The term restriction for the executive branch is also predicated on the existence of a philosophy in the democratic system of government that was coined by a British politician named Lord Acton, who argued that absolute power tends to corrupt.3

The President and the Parliament unexpectedly discussed the draft bill on the modification of the Constitutional Court statute while the corona virus outbreak was still spreading. The decisive moment came on September 1, 2020, at the Parliament plenary session, when the

[2] Azhari, *Mereformasi Birokrasi Indonesia*, (Yogyakarta: Pustaka Pelajar, 2011), 52.
[3] Sekretariat Jenderal Mahkamah Konstitusi, *Naskah Komprehensif Undang-undang Dasar Negara Republik Indonesia*, (Jakarta: Sekretariat Jenderal Mahkamah Konstitusi, 2011), 472.

Constitutional Court Draft Law (RUU), the third amendment to Law Number 24 of 2003, was unexpectedly passed. Experts were divided when the third amendment to the recently established Law on the Constitutional Court unexpectedly appeared. Three legal irregularities are to blame for this. The law's rapid discussion and modifications addressed the extension of constitutional judges' terms, and the bill's heavy reliance on political allusions to further the objectives of the institution proposing the law was among them.4

The Supreme Court and the Constitutional Court's terms of service are not expressly governed by the 1945 Constitution, which governs the judicial branch of government. The 1945 Constitution leaves all further arrangements in this regard to the law. According to Law Number 3 of 2009, which amends Law Number 14 of 1985 governing the Supreme Court, the term of office for supreme justices is determined on retirement, which is set at 70 years. Meanwhile, the Third Amendment to Law Number 7 of 2020 Regarding the Third Amendment to Law Number 24 of 2003 Concerning the Constitutional Court states that the arrangements relating to the tenure of constitutional judges follow a periodization pattern, similar to the term of office of

[4]https:m.hukumonlin.com/beritaa/bacaa/lt5f4f4070098e/bakal-digugat--ruu-Mahkamah Konstitusi-dinilai-bentuk-politisai-kekuaasaan-kehakimaan/, diakses pada 11 juni 2021.

the President and Vice President, which is for five years and can be re-elected for another two terms after that.

Despite these distinctions, it is interesting to note that the Constitutional Court is a very strategic and significant institution because both are fellow highest bearers of judicial authority. So what caused constitutional judges' tenure to change from the periodization notion to retirement? Given the likelihood of creating a range of established rules that can lead to discord and the ineffectiveness of laws that have been made in the future, this change is fascinating if investigated using the working theory of law.5 The theoretical study of Chambliss and Seidman's law is conducted while keeping in mind that during its formation and application, the law is influenced not only by surrounding personal and socio-political factors but also by normative juridical features. Additionally, according to legal professionals, the idea of a constitutional judge's term based on retirement is extremely similar to having political interests in it. Another factor is the Indonesian constitutional judges' tenure of office, which is

[5] Inche Suyana, *Harmonisasi Hukum dalam Surat Kuasa Membebankan Hak Tanggungan (SKMHT)* (Surakarta: Universitas Sebelas Maret, 2015), 17.

likewise thought to be the shortest in the world due to the country's five-year periodization pattern.6

Based on the context of the problem formulation in this study, the debate over adding a constitutional judge's term of office to Law Number 7 of 2020 is discussed. How to extend constitutional judges' terms of office under Law Number 7 of 2020, as seen from the standpoint of Jusuf Qardhawi's siyasa fiqh, is the primary issue that needs to be resolved in this study.

Research Method

This researcher employed the kind of normative legal research that explores in-depth certain legal norms and aims to discover the reality using rational scientific reasoning based on its normative side. In this study, "normalcy research" refers to research gathering literature from primary, secondary, and tertiary legal sources. The legal materials will be evaluated in a disciplined and methodical way to arrive at conclusions that

[6] Mohamad Faiz, A Critic Analisis of Judicial Appointmen Proces and Tenure of Konstitutional court in Indonesia, *Law Review*, Vol. II, No. 2, 2016, 165.

can lead to logical problem-solving and solutions.7 In general, a qualitative technique and a conceptual approach to the law were used to address the issues addressed in this study (statute approach).8

Secondary data sources were used in this investigation. The secondary data comes from a survey of multiple prior research papers on the same topic, literary materials like books, or other literature appropriate for this research. In addition, this study employs an analytical technique known as content analysis (content analysis). The Constitutional Court then connected it to Yusuf Qardhawi's siyasa jurisprudence and fiqh working theory.

Discussion

1. Term of Office of Constitutional Justices

The term of state officials needs to be governed by legislation to reduce state institutions' influence. It is similar to what is stated in chapter 7 of the 1945 Constitution, which expressly stipulates that the President and Vice President have 5-year terms of office and are eligible for reelection to the same term. Article 22E

[7] Peter Mahmud, *Penelitian Hukum,* (Jakarta: Kencana, 2010), 43.
[8] *Ibid.*, 172.

paragraphs (1) and (2) of the 1945 Constitution, which specifies the requirements for elections, contain an implicit reference to the duration of office for officials of other state institutions, such as members of the DPR, DPD, and DPRD (general elections). Members of the DPR, DPD, and DPRD are chosen in elections held every five years by the democratic party. As a result, the phrase.

Considering the above justification, it is clear that the 1945 Constitution governs the legislature and the executive branch's terms of office, which are both set at five years, for the two branches of state power. On the other hand, the term of office of other organs of state authority, in this case, the judiciary, represented by two state institutions, the Supreme Court and the Constitutional Court, is not regulated by the 1945 Constitution. Similarly, the 1945 Constitution should have kept decisions about the terms of the two-state institutions' offices up to the law.

According to earlier Constitutional Court rulings, the Constitutional Court and the Supreme Court posts are both held by state entities within the same branch of government and are equal (equal); nonetheless, normative arrangements frequently differ. For example, the tenure of Supreme Court judges is governed by the idea of

retirement. It is based on productive age, which is 70 years of age, according to Article 11 of Law Number 3 of 2009 Concerning the Third Amendment to Law Number 24 of 1985 Concerning the Supreme Court.[9]

As stated in Chapter 11, Letter B of Law Number 3 of 2009, it differs from the tenure of Supreme Court justices, who customarily do not employ a periodization system but rather the age productivity measure. In addition, it is distinct from the Third Amendment to the Constitutional Court Law, found in Chapter 23, Paragraph (1) Letter C. It contains provisions addressing constitutional judges' tenure with a periodization scheme akin to that of the executive branch. This conflicts with several proposals for abolishing the position of constitutional judges, who can serve until 70.

The age requirement for constitutional judges has also changed, moving from a minimum of 47 years and a maximum of 65 years to at least 55 years, according to chapter 15, paragraph (2) letter d. In contrast to the DPR's bill proposal, which calls for a minimum age of 60 for constitutional judges, the President's plan calls for a minimum age of 55.

The maximum term of office for constitutional judges, when viewed from the Third Amendment to the

[9] Pasal 11 Undang-Undang Nomor 3 Tahun 2011.

Constitutional Court Law, is 15 years. If the judge is appointed at the age of 55 and retires, he will retire at the age of 70. Even juridically, the tenure of constitutional judges cannot be said to be 15 years, bearing in mind that the regulation regarding the tenure of constitutional judges has been omitted in the law. However, for constitutional judges who are currently serving, the provision that applies in chapter 87 as a Transitional Provision explains that constitutional judges who are serving will end their term of office until they are 70 years old as long as the accumulated term of office is not more than 15 years. If a constitutional judge has served for more than 15 years at the age of 70, then his or her term of office ends when the judge reaches the age of 15, not when the judge reaches the age of 70. Again, we can take constitutional judge Saldi Isra as an example. He is currently 53 years old and began serving in 2017. Therefore, his tenure will finish in 2032 rather than 2038 when he becomes 70.

2. **Theory of Political Jurisprudence Yusuf Qardawi**

Fiqh siyasah, etymologically, is a phrase from two different vocabularies. Namely the word fiqh and siyasah. First, fiqh is a derivative of the word faqih, which means

understanding.[10] As for the word Siyasah, it comes from the word Sasa, which means managing, leading or shepherding, for example it is like lafadz ساس الأمر سياسة "That person manages affairs for his good".[11] Terminologically, the word fiqh siyasah is defined by Abdul Wahab Khallaf with:

تَدْبِيرُ الشُّئُونِ العَامَّة لِلدَّوْلَةِ الإِسْلَامِيَّةِ بِمَا يُكَفِّلُ تَحْقِيقُ المَصَالِحِ وَدَفعُ المَضَارّ مِمَّا لَا يَتَعَدَّي حُدُودَ الشَّرِيعَةِ وَأُصُولِهَا الكُلِّيةِ وَإِن لَم يَتَّفِق بِأَقوَالِ الأَئِمَّةِ المُجْتَهِدِين.

Meaning: governance in general in an Islamic state that aims to create benefits and prevent harm following the provisions in Islamic law and general principles, even though it is contrary to what the mujtahid theologian say.[12]

One of the Theologian who has contributed significantly to revitalising liberal Islamic law is Jusuf Qardhawi, author of the siyasa fiqh research. He is a scholar who is successful in spotting modern issues and can offer numerous contemporary remedies in each of his articles. The priority fiqh theory, which describes the significance of priority scales in many areas relevant to

[10] Ibn Manzhur, *Lisan al-Arab*, *juz 11,* (Mesir: Daar al-Shadr, 2005), 310.
[11] Abdurrahman, *al-Siyasah al-Syar'iyah wa-al-Fiqh al-Islami,* (Mesir: Mathba'ah Daar alTa'lif, 1993), 7.
[12] Abdul Wahab Khallaf, *al-Siyasah al-Syar'iyah au Nizham al-Daulah al-Islamiyyah,* (Kairo: Mathba'ah al-Salafiyah, 1350 H), 14.

Islamic law, is one of the outcomes of his views. According to Yusuf Qardhawi, fiqh is an understanding of Islamic law that may be applied to numerous facets of human existence that have complicated challenges. Because time and resources are scarce, decisions must be made based on a priority scale to choose which issues to address.[13]

Yusuf Qaradawi, the creator of this priority Fiqh doctrine, is a wise and creative thinker. Yusuf Qardhawi's introduction of the priority fiqh theory is a breakthrough in resolving several previously unsolved policy issues. The priority fiqh theory is a fresh viewpoint that can be applied to many Islamic law-related situations. Priority factors must be considered as new government policies of various types emerge to evaluate their goals. The theory looks at what the government should prioritize in terms of the policy so that the consequences that result from these policies do not stray from religious teaching but can become effective, progressive, and promote humanistic principles.

The Arabic term for priority fiqh is "fiqh al-awlawiyat." Terminologically, the words fiqh and awlawiyat are combined to form fiqh al-awlawiyat. In

[13] Yusuf Qardhawi, *Fi Fiqh al-Awlawiyyat: Dirasah Jadidah fi Dlaw' al-Qur'an wa al-Sunnah,* (Kairo: Maktabah Wahbah, 2007), 6.

terminology, the word "fiqh" means "understanding." In comparison, "fiqh" refers to God's instructions on a mukallaf's activities.[14]

The phrase awlawiyat, meaning to exaggerate, is the plural of the verb awla. Terminologically, "more entitled" and "closer" can describe anything. While linguists, as well as Islamic jurisprudents themselves, have never defined the word awlawiyat in terms of its origin. In Islamic law, the phrase "awlawiyat" is new. The phrase "awlawiyat" has only been known since current scholar Yusuf Qardawi employed it in several of his writings on modernizing Islamic law.

According to Yusuf Qardawi, fiqh al-awlawiyat is to put things in their appropriate order by avoiding putting something first or last, demeaning something heavy, or burdening something light. Putting everything in its proper position in a fair manner, both in terms of law, value, and application, is a different concept put forth by Yusuf Qaradhawi. Work that needs to be prioritized according to sharia judgment in the context of reason and revelation.[15]

[14] Muhammad Hasan Badakhshi, *Manahij al-Uqul,* (Beirut: Daar al-Fikr, 2001), 20.
[15] Yusuf Qardhawi, *Fi Fiqh al-Awlawiyyat*, 9.

A theory in modern Islamic law called priority jurisprudence seeks to put Islamic law's rules into practice by using systematics or procedures for obtaining the law (istinbath al-hukm). According to Yusuf Qardhawi, the rules he assembled in the theory of priority fiqh represent a fresh take on the idea of jurisprudential deliberation (fiqh muwazanat), which is contextualized with what occurs when Islamic law is applied in daily life (fiqh waqi').16

Doing ijtihad using Yusuf Qardhawi's priority fiqh theory provides several stages or methods before a mujtahid determines his ijtihad in determining which things should be prioritized. These stages include:

a. consideration of mashlahah (goodness);
b. consideration of mafsadah (damages);
c. consideration of mashlahah (good) and mafsadah (damage).[17]

In Yusuf Qardhawi's view, the jurisprudence of consideration is the first step which in the next process becomes the priority jurisprudence, where the pattern of thinking is based on a number of things which include:

[16] Yusuf Qardhawi, *Awlawiyyat al-Harokah,* 20.
[17] Yusuf Qardhawi, *Fi Fiqh al-Awlawiyyat*, 9.

a. Prioritizing mashlahah dhoruriyat rather than mashlahah hajiyat.
b. Prioritizing mashlahah hajiyat rather than mashlahah tahsiniyat.

The priority fiqh perspective of Yusuf Qardhawi highlights the significance of developing a new paradigm in Islamic legal studies. Priority fiqh suggests merging many ideas, legal goals, and legal clauses to address the existing social reality. Because of this, Yusuf Qardhawi is regarded as a scholar with a moderate viewpoint. In his writings, Yusuf Qardhawi seeks to suggest certain measures of moderation. Initially, incorporating the fundamentals of both traditional and modern Islamic law. second, changing any static thoughts to flexible ones. Thirdly, keeping the study of Islamic law from becoming stagnant or suffering setbacks. Introducing Islamic law as a standard of law.[18] So among the importance of creating priorities in government policy in the theory of priority fiqh introduced by Yusuf Qardhawi shows that Islamic law must be applied in a way that collaborates between legal objectives, legal provisions and existing social realities.

The Islamic legal approach using priority jurisprudence theory in government policy aims to

[18] Yusuf Qardhawi, *Kalimat fi Takrim wa Buhuts wa fiqh*, (Kairo: Daar al-Salam, 2002), 903.

respond to problems that occur in society with solutions that focus on humanism. The problem of government policies not oriented towards humanism is a crucial matter to be resolved through an approach to Islamic law studies, especially with priority fiqh theory.[19]

3. Analysis of the Additional Tenure of Constitutional Justices in the Perspective of Priority Fiqh Theory of Yusuf Qardhawi

In the study of Islamic law and its constitution, the question of term limits for governmental officials is a recent development (fiqh siyasa). Limits on a state official's tenure of office are a topic that past salaf scholars have never thoroughly examined. Furthermore, neither the Koran nor the hadith mention nor explain this. Even if a leader plays a significant role in society, he or she is solely responsible for managing and carrying out any preparations involving processes and other technical issues.

The study of the tenure of constitutional judges in Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, which is analyzed from the perspective of the

[19] Rahmat Yulianto, "Kebijakan Pengungsi di Indonesia Perspektif *Maqashid* Syari'ah", *Al-Manahij: Jurnal Kajian Hukum Islam*, Vol. 8, No. 2, Desember 2019, 182.

priority fiqh theory of Yusuf Qardhawi, two solutions can be compared to find out which has more priority between the two. First, the solution to limiting the term of office for constitutional judges is based on a periodization pattern under the contents of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. Second, the term limit for constitutional justices is based on retirement. In the theory of priority fiqh, Yusuf Qardhawi argues that to determine which one is more priority in solving problems based on priority fiqh, we must analyze the problem based on three stages which include:

a. Consideration of *Mashlahah*

The researcher is currently attempting to study several issues related to the application of term limitations for constitutional judges, including those using both the notion of periodization and retirement. Several mashlahah sides of the law relating to the term of office for constitutional judges in Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 regarding the Constitutional Court, which states that the term of office for constitutional judges is five years and can be re-elected for two terms in office:

1) Limiting an Authority

The establishment of long terms of office for state authorities will indirectly impact the occurrence of constitutional judges abusing their position or authority. As a result, the term of office restriction for constitutional judges based on periodization, with an optimum term span of five years, comparable to the term of office of the President and Parliament, is extremely appropriate. This is consistent with what Mahfuz MD, a former head of the Constitutional Court, said. He claimed that the establishment of the Constitutional Court during the reform era was done to stop other state power branches from abusing their positions of authority. It also echoes Lord Acton's observation that absolute power corrupts absolutely, and power tends to corrupt.[20]

Another factor supporting the significance of constitutional judges' terms of office is the fact that it is typical practice to apply a periodization system to state officials' terms of office in order to restrict their authority. Given that constitutional judges are, coincidentally, representatives from

[20] Tim Penyusun Naskah Komprehensif, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia*, 472.

both the President and the Parliament, how can they have terms of office? It exceeds the submission's institution's length.

2) Guaranteeing the Rotation of Authority

As is common knowledge in today's democracies, the goal of periodization-based term limits for public officials is to ensure that the balance of power remains balanced and does not concentrate on a small number of individuals or groups. It is further supported by the fact that one of the three branches of the trias politica's three powers is the Constitutional Court. Accordingly, the Constitutional Court must also have a restricted term of office when the President and the Parliament have limited terms based on the Constitution.

In fact, Supreme Court justices are career judges and constitutional judges come from varied backgrounds and hold political positions, it is necessary to distinguish between them and the Supreme Court's justices who serve terms that end at retirement age. The constitutional judges' term

restriction also tries to avoid abuse of power by too-long terms of service.[21]

Additionally, it is regarded as important to assess the idea of office using a periodization pattern of terms of office with a period of 5 years and which can be prolonged for an additional period. The concerned judge is qualified to be re-elected and serves for the remainder of the current term if his academic and professional performance were of high caliber during the first period. While it is possible to learn and comprehend this technical skill by handling cases involving these judges at the Constitutional Court while serving their initial terms in office.[22]

The Maslahah that exist in the limitation of the term of office of constitutional judges based on retirement include:

1) Guaranteeing the Independence of the Judiciary

One of the issues with limiting a constitutional judge's tenure based on retirement is ensuring that the judge has sufficient personal

[21] Novianto, "Implikasi Masa Jabatan", 197.
[22] *Ibid.*, 198.

independence to be able to serve for an extended period, or at the very least, to prevent the constitutional judge from being interfered with by the institution making the proposal, which could compromise the judge's independence. The fact that such a post factum exists represents a critical study of several factors, including the fundamental nature of the judiciary's role in the constitutional order, which ought to be one of career advancement rather than of political office.

This maslahah is founded on the existence of a rule of law principle that emphasizes the realization of the independence of the judicial power, so it is deemed necessary to provide an official term that can ensure the independence of the judicial power and prevent the occurrence of political transactions in each election of constitutional judges. Furthermore, considering how destructive or advantageous the choices he will make to the proposed institution will be, it is appropriate in modern times to employ the retirement system as the tenure of constitutional

judges to prevent the nomination of these judges from returning to the following era.[23]

Alternatively, even worse, if the judge is chosen again for the subsequent term, it will also bring up more ethical concerns. If the judge is not elected later, this will undoubtedly raise concerns about the calibre of the decisions the judge made in the prior period. Finally, the judge is elected until the third term. In that case, this will result in a sense of debt for constitutional judges to the proposing institution, who, of course, have mutual interests.

2) Harmonization of Judicial Authority

The existence of balances and checks and equality between the constitutional court and the supreme court is the second justification for using the term constitutional judges based on retirement. The Constitutional Court supports this claim, and the Supreme Court are the ultimate arbiter of legal matters. Where the Constitutional Court serves as the Court of Law and the Supreme Court serves as the Court of Justice.[24]

[23] Ali Safaat, "Pengisian dan Masa Jabatan", 4.
[24] Yuliandri, *Pengadilan Khusus*, 64.

Therefore, it complies with the Supreme Court's position as the holder of the highest authority within the judicial institution. The Constitutional Court's term of office should be based on retirement rather than a periodization system, as in the current institutional practice of judicial power. This is at least a result of the discrepancy between the terms of office of constitutional judges and justices of Indonesia's supreme court, who are also fellow supreme holders of judicial authority.

b. Mafsadah Considerations

Using the ideas of periodization or retirement, the researcher attempts to understand some of the mafsadah, or harm, that results from adopting term restrictions for constitutional judges. Among the mafsadah, or harm, brought on by the periodization-based implementation of constitutional judges' terms of office are:

1) Providing Possibilities for Political Deals

One interpretation of the employment of a periodization system to determine the tenure of constitutional judges is the creation of chances for political transactions. In the periodization system, constitutional justices have a brief term of office and are allowed to re-register for the following

period; therefore, this should be expected. However, it is feared that in his re-nomination, the institution proposing will consider how advantageous the decision will be for it or vice versa.[25] Moreover, the constitutional judges will feel obligated to the proposing institution, which is interested in them if he is elected for a third term.

2) Disharmony of Law

Among the mafsadah or damage resulting from the limitation of the term of office of constitutional judges based on the periodization system is the existence of legal disharmony or incompatibility among existing regulations. It reflects that in their position, the Supreme Court and the Constitutional Court are the highest actors in the same and equal branches of judicial power, as explained by the previous Constitutional Court decisions. However, in practice, they look very different. The existence of chapter 11 of Law Number 3 of 2009 concerning the Third Amendment to Law Number 24 of 1985 concerning the Supreme Court which explains that the term of

[25] Ali Safaat, "Pengisian dan Masa Jabatan", 4.

office for supreme justices is regulated by the concept of retirement and is based on productive age, namely 70 years old.[26] As stated in Chapter 11, Letter B of Law Number 3 of 2009, it differs from the term of office for Supreme Court judges, who customarily do not employ the periodization idea but rather the age productivity metric. Contrary to the Third Amendment, which provides rules addressing the tenure of constitutional judges with a periodization system akin to that of the executive branch, chapter 23 paragraph (1) letter c.

3) **Undermining the Credibility of Constitutional Judges**

The third interpretation of the periodization system's application to the tenure of constitutional judges is that if the judge is chosen for the following period, it will pose further ethical concerns. If the judge is not elected later, it will be obvious that there are concerns about the calibre of the decisions the judge made in the prior period. If the judge is elected for a third term, it will make constitutional judges feel obligated to

[26] Pasal 11 Undang-Undang Nomor 3 Tahun 2011 Tentang Perubahan Atas Undang-Undang Nomor 24 Tahun 2003 Tentang Mahkamah Konstitusi.

the proposing institution, which is, of course, in their best interests.

As for the mafsadah in limiting the term of office of a constitutional judge based on the retirement age, among them are:

1) **The Emergence of the Absolute Authority of Constitutional Justices**

Unquestionably, the appearance of constitutional judge abuse of office or authority will be indirectly impacted by the length of a state official's term in office. Therefore, it is deemed extremely desirable as a preventative measure for a term limit for constitutional judges based on periodization with an optimum term span of five years, comparable to the president's term of office and Parliament. It is consistent with what Mahfuz MD, a former head of the Constitutional Court, said. He said that the formation of the Constitutional Court during the reform period aimed to prevent abuse of authority by other branches of state power. This is also under the expression of Lord Acton, who said that power

tends to corrupt and absolute power corrupts absolutely.[27]

2) The Exclusion of the Rotational Authority Principle

One interpretation of the constitutional judges' term limits based on retirement is the loss of one of the key democratic concepts, the transfer of power within the state structure. An excessively long term of office may prevent other parties from filling the position. Additionally, the President and the Parliament, which are the organizations that propose constitutional judges, have five-year terms in office. How, therefore, can constitutional judges serve for a period that is significantly longer than the entity that is proposing them?

c. Consideration of Mashlahah and Mafsadah

Analysis of the considerations of mashlahah and mafsadah will be compared between mashlahah and mafsadah from the limitation of the term of office of constitutional judges, both from the pattern of periodization and retirement, which of the two should be prioritized.

[27] *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia*, 472.

It is understandable that, of all the maslahah and mafsadah that have been previously discussed, the periodization of judges' terms of office is feared to have an impact on the existence of judicial power. This is also demonstrated by events in numerous nations, where judges appointed by other parts of government who follow a periodic schedule are constantly at risk of interference. The branch of executive power whose duration of office is governed by the term periodization notion cannot, of course, be compared to the issue of limiting the term of office of constitutional judges.

In terms of maslahah, the Constitutional Court's judicial institutions should be subject to a term of office that is consistent with that of the Supreme Court, which holds the position of highest authority and whose term of office is based on retirement rather than a periodization system.

As mentioned above, the regulation on term limits in Law Number 7 of 2020 Concerning the Third Amendment to Law Number 24 of 2003 Concerning the Constitutional Court does indeed have several issues to consider. However, there is a better maṣlahah to implement, namely limiting the tenure of

constitutional judges based on retirement. This is because the limitation on the term of office of constitutional judges based on retirement is ḍaruriyyat in nature. After all, it is directly related to hifẓ al-din. In the sense that religion orders everyone to do justice to his people. As in the word of Allah SWT:

اِنَّ اللّٰهَ يَأْمُرُكُمْ اَنْ تُؤَدُّوا الْاَمٰنٰتِ اِلٰٓى اَهْلِهَاۙ وَاِذَا حَكَمْتُمْ بَيْنَ النَّاسِ اَنْ تَحْكُمُوْا بِالْعَدْلِۗ اِنَّ اللّٰهَ نِعِمَّا يَعِظُكُمْ بِهٖۗ اِنَّ اللّٰهَ كَانَ سَمِيْعًاۢ بَصِيْرًا

> Indeed, God told you to deliver the mandate to those who deserve it, and when you set the law between people, you should set it justly. Indeed, Allah is the best who teaches you. Indeed, Allah is All-Hearing, All-Seeing.[28]

It is clear from the verse mentioned above that constitutional judges are required to render the most impartial judgment feasible in each issue brought before them. In the meantime, refraining from meddling in other institutions that can compromise the independence of constitutional justices is one of the necessary steps in establishing justice. In order to address this issue, fiqh rulings that state:

مَا لَا يَتِمُّ الوَاجِبُ اِلَّا بِهِ فَهُوَ وَاجِبٌ

[28] QS. an-Nisa(4):176.

> Something that is obligatory cannot be perfect except with that something, then something is obligatory.[29]

The permissibility of new ijtihad in the matter of limiting the term of office for constitutional judges which is regulated by the concept of retirement is based on the principle of public benefit. Therefore, it is important to properly comprehend the advantage of limiting constitutional judges' terms of office. The term of office based on retirement has a greater degree of maslahah, which is more palpable than the term of office based on a periodization pattern. It is feared that when the tenure of constitutional judges is based on the periodization notion, this will become a tool for political purposes for the institution proposing the tenure to interfere with the competence and independence of constitutional judges. In addition, the position of a constitutional judge and his position in the state system is a career position, not a political one. Therefore, it is necessary to enforce a fundamental fiqh rule known as qawa'id al-asasiy,

[29] Jazuli, *Kaidah Fikih: Kaidah Kaidah Hukum Islam dalam Menyelesaikan Masalah yang Praktisi*, (Jakarta: Kencana Prenada, 2020), 20.

which forms the basis of every legal determination. That rule is:

دَرءُ المَفَاسِدِ وَجَلْبُ المَصَالِحِ

The purpose of Islamic law is to avoid mafsadah and create maslahah.[30]

According to the rule above, the term restriction for constitutional judges must be viewed as a whole, both from the perspective of the maslahah and the mafsadah it causes. Regarding the advantages of mandating retirement as a term limit for constitutional judges and refraining from harm by not mandating the position of constitutional judges based on a periodization pattern, this is because damages to tenure based on that pattern are more likely to occur than term limits based on retirement. Even if there were no term constraints during the al-Rashidin khulafa, it would still be a benefit today if there were not any. This reason is based on a consideration that the rejection of the mafsadah that will appear must take precedence. This is as stated in a rule that says:

دَرءُ المَفَاسِدِ مُقَدّمٌ عَلَى جَلْبُ المَصَالِحِ

[30] *Ibid.*, 27.

Rejection of mafsadah must be prioritized over taking maslahah.[31]

This rule can be used to determine how long constitutional judges serve. The benefit to be achieved is prioritizing the rejection of harm and harm, such as opportunities for disturbances to the independence of judges and the politicization of the mechanism for selecting constitutional judges. It is well known that the aspect of mashlahah is that there is no term limit concerning the practice carried out by the khulafa al-Rashidin. Therefore, the rejection of the emergence of harm must be prioritized over taking aspects of benefit which are considered difficult to implement in a developing government system in this modern era, or at least it is very difficult to realize this as expected in the context of being a state in this modern era.

The conclusion that can be reached is that there is a system of limiting the term of office of constitutional judges based on the retirement age of a judge in terms of the term of office, as is the case in the priority fiqh theory introduced by Yusuf Qardhawi

[31] Amir Sarifudin, *Ushul Fiqh*, Jilid 2, (Jakarta: Kencana Prenada, 2011), 430.

in the matter of adding the term of office of constitutional judges above. Compared to using a constitutional judge's tenure based on a periodization pattern, productive is more rational and appropriate to be utilized on a priority scale.

Meanwhile, being able to relate the term of office of constitutional judges to political jurisprudence also shows that limiting the term of office of a leader is also an inseparable part of the study of political jurisprudence. This can be seen in the complete considerations used in it, which shows that the existence of the common good, the universal value of Islamic law, is the goal to be achieved in it. It is further supported by legal exploration patterns that use mashlaha and mafsadah as the foundation for legality. Because of this, according to siyasa fiqh or Islamic politics, the existence of arrangements regarding the term of office of constitutional judges based on retirement cannot be said to be at odds with the values found in the shari'ah; rather, it is very closely related to justice and benefit that is covered by Islamic law.

Conclusion

According to the analysis conducted for this study, which is based on an examination of Yusuf Qardhawi's priority fiqh theory, the addition of constitutional judges' tenure in Law Number 7 of 2020 concerning the Constitutional Court based on retirement is the right one to prioritize because it has a more flexible interpretation than the concept of periodization. This study makes the recommendation that the Parliament alter the 1945 Constitution's 5th article to use a retirement period rather than periodization for the term of office for supreme and constitutional judges. The Constitutional Court judges should be chosen based on experience and ability, similar to how judges at the Supreme Court are chosen, so that the position's design becomes a career position that cannot be influenced by the political interests of the institution proposing the position. In addition, the Parliament should reorganize the mechanism for filling in constitutional judges. This mechanism should not be based on the principle of delegating constitutional judges from other state institutions.

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