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Immunity Clause in The 1945 Constitution of The Republic of Indonesia

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Abstract

Indonesia is a country with a written constitution that contains various substantive provisions governing state structure, the distribution of power, human rights, and limitations on authority. Among these provisions are norms that grant immunity to certain state institutions, commonly referred to as immunity clauses. In the Indonesian constitutional context, immunity clauses are reflected in Article 7C and Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia. These provisions grant immunity to the House of Representatives (DPR), both institutionally and individually to its members. This raises an important constitutional question as to whether the existence of such immunity clauses is compatible with the principle of equality before the law. This study employs doctrinal legal research using statutory, conceptual, and historical approaches. The findings demonstrate that Article 7C constitutes a logical consequence of Indonesia's presidential system, under which the President is constitutionally prohibited from dissolving the DPR. Furthermore, the immunity granted under Article 7C and Article 20A paragraph (3) does not contradict the principle of equality before the law, as such immunity is not absolute, remains subject to good faith, and does not preclude legal or ethical accountability for actions taken outside constitutional authority.

Keywords: Immunity Clause; Constitution; Equality Before The Law.

1. INTRODUCTION

1.1. Background

The constitution serves as the fundamental law of a state, regulating essential matters such as the form of government, the structure of state power, the protection of human rights, and limitations on governmental authority.[1] To date, almost 196 countries have adopted written constitutions, as for countries that do not have a written constitution are the United Kingdom and New Zealand. Various references on online websites mention three countries, namely the UK, Israel and New Zealand. Apart from that, in principle a constitution consists of two, namely a written constitution and an unwritten constitution. This is in line with the definition outlined in Black's Law Dictionary which states that a constitution is either written or unwritten.[2]

Discussions concerning the constitution generally encompass at least five core aspects: (i) the definition of the constitution; (ii) the content of the constitution; (iii) the function of the constitution; (iv) the value of the constitution; and (v) changes to the constitution.[3] One aspect of constitutional substance that continues to generate scholarly debate is the presence of immunity clauses. An immunity clause may be understood as a constitutional provision that grants legal protection to certain state actors, shielding them from criminal or civil liability when acting within the scope of their constitutional authority. More broadly, immunity clauses may also refer to provisions that protect certain state institutions from dissolution or suspension.[4]

Immunity clauses have been adopted in various constitutional systems. Three of them are Indonesia, Germany and Russia. The immunity clause itself takes two forms, namely against the head of state and also against legislators. The 3 (three) countries referred to above have adopted the immunity clause against legislators. Evidence that the three countries have adopted the immunity clause in their constitutions is as follows: (1) Indonesia, contained in Article 7C and Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution); (2) Germany, contained in Article 46 paragraph (1) to paragraph (4) of the German Constitution; and Russia, contained in Article 91 of the Russian Constitution. All of them

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1 Pan Mohamad Faiz, *Amendemen Konstitusi: Komparasi Negara Kesatuan Dan Negara Federal* (Depok: Rajawali Pers, 2019), pg.1; Baharuddin Riqiey and Syofyan Hadi, "Constitutional Imperatives: Examining the Urgency of Term Limits for Members of the House of Representatives," *Mimbar Keadilan* 17, no. 1 (2023): pg.2, https://doi.org/10.30996/mk.v17i2.9635.

2 Henry Campbell Black, *Black's Law Dictionary* (St. Paul, MN: West Publishing Co., 2009), pg.384.

3 Baharuddin Riqiey, "Pembatasan Masa Jabatan Anggota Dewan Perwakilan Rakyat Dalam Perspektif Konstitusionalisme" (Universitas 17 Agustus 1945 Surabaya, 2024), pg.7-15.

4 Francis N Ukoh and Rita A Ngwoke, "Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform," *Journal of Politics and Law* 14, no. 2 (2020), https://doi.org/10.5539/jpl.v14n2p47; Usman Sambo, "Executive Immunity Clause and Its Effects on the Fight Against Corruption in Nigeria," *African Social Science and Humanities Journal* 3, no. 4 (2022), https://doi.org/10.57040/asshj.v3i4.227; Jaroslav Zenisek, "The Fourteenth Amendment to the United States Constitution and Its Interpretation by Main Constitutional Interpretive Methods," *Acta Universitatis Carolinae Iuridica* 67, no. 1 (2021), https://doi.org/10.14712/23366478.2021.1.

grant the right of immunity to legislators. Interestingly, in Indonesia, immunity is not only granted to personal legislators, but also to the institution.

The constitutional recognition of legislative immunity raises concerns regarding its compatibility with the principle of equality before the law. At first glance, immunity provisions may create the perception that legislators are exempt from legal accountability. This perception appears to conflict with the principle of equality before the law, which requires that all persons be treated equally within the legal system.[5] In Indonesia, this principle is constitutionally guaranteed under Article 27 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution.[6]

Another constitutional issue arising from immunity clauses in a constitution, especially in Indonesia, is that it has created a contradiction between the executive and the legislature. The reason is, if referring to the provisions of Article 7A of the 1945 Constitution of the Republic of Indonesia, the President and / or Vice President can be impeached, then why the House of Representatives institutionally cannot be dissolved. This is a question and a problem in itself. Moreover, is it still relevant to maintain the House of Representatives, while all of them do not represent the people at all. So, it is not surprising that on several occasions, ideas and ideas have emerged to dissolve the House of Representatives institutionally. Even since the time of President Gus Dur.[7]

In addition to the two issues above, a new problem arises, namely the absence of clear limits on the extent to which the right to immunity can be applied to legislators. This is because it cannot be denied that they may commit abuses of power in exercising power. Thus, the application of the right of immunity can apply flexibly to certain subjects. The practice of legislators to act arbitrarily is increasingly widespread. Starting from conditioning a draft law to be valid, even though it gets rejection from the public, and so forth. If seen from a narrow perspective, they are still in the corridor of exercising their authority. However, if this is the practice, is it good for the life of democracy in the country?

This study demonstrates a high degree of originality and novelty. This is because, through the mini-research conducted by the author, until now no one has studied this topic, especially in

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[5] Abdul Madjid, Triya Indra Rahmawan, and Mohamad Jainuri, "Indicators of Regulatory Legal Immunity Rights in the Perspective of the Indonesia State Constitution," *International Journal of Multicultural and Multireligious Understanding* 8, no. 3 (2021), https://doi.org/10.18415/ijmmu.v8i3.2480; Umi Rozah Rofingi and Adifyan Rahmat Asga, "Problems of Law Enforcement in Realizing the Principle of Equality Before the Law in Indonesia," *Law Reform* 18, no. 2 (2022), https://doi.org/10.14710/lr.v18i2.47477; Ari Wibowo and Michael Hagana Bangun, "Legal Aid by the State as a Constitutional Right of the Poor: Problems and Challenges in Indonesia," *The Indonesian Journal of International Clinical Legal Education* 3, no. 2 (2021), https://doi.org/10.15294/ijicle.v3i2.46176.

[6] Choerul Amin, "Implementation of Legal Aid for the Poor as a Form of Practicing Pancasila Values," *The Indonesian Journal of International Clinical Legal Education* 3, no. 2 (2021): pg.236, https://doi.org/10.15294/ijicle.v3i2.46172.

[7] Moch Nafi Maulana, "Membaca Sejarah Konstitusi Indonesia Era Reformasi (Studi Pemakzulan Presiden Abdurrahman Wahid)," *Sanskara Hukum Dan HAM* 1, no. 3 (2023): pg.71, https://doi.org/10.58812/shh.v1i03.59.

Indonesia. Thus, the author strongly believes that this research has a high degree of originality and novelty value for the science of Constitutional Law and Constitutional Law in Indonesia. Although there are studies on the right to immunity, these studies are not directed at the immunity clause in the Indonesian constitution, but rather on the right to immunity for members of the House of Representatives in the context of legislation in general.[8] As for the comparative perspective, studies on this immunity clause have been written by several authors, including Francis N. Ukoh and Rita A. Ngwoke with the title "Immunity Clause under the 1999 Constitution of Nigeria: A Dire Need for Reform".[9] The study examines the existence of the immunity clause in Article 308 of the Nigerian Constitution, which in its application can protect state leaders from the clutches of corruption, while in this study comprehensively examines and reviews the position of the immunity clause in the 1945 Constitution of the Republic of Indonesia reviewed from the perspective of equality before the law. Then, the research conducted by Enobong Mbang Akpambang and Aderonke Abimbola Ojo with the title "Impeachment Procedures in Nigeria and the United States of America: A Comparative Analysis".[10] Although the topic does not explicitly examine the immunity clause, this study examines the existence of the immunity clause. The study examines the impeachment procedures of the two countries by paying attention to the immunity granted by the constitutions of the two countries in exercising authority, while in this study comprehensively examines and analyzes the existence of the immunity clause in the 1945 Constitution of the Republic of Indonesia starting from its history to its general application reviewed from the perspective of equality before the law. Finally, the research conducted by Lene Johannessen with the title "A Critical View of the Constitutional Hate Speech Provision".[11] The research examines the existence of Article 16 paragraph (2) of the 1996 African Constitution which is considered an immunity clause, therefore according to Lene Johannessen this provision should be removed or is not needed, while in this research elaborates and answers the question regarding the existence of the immunity clause when viewed from the perspective of equality before the law. Looking at various previous studies as above, the author can conclude that related to the study of the immunity clause in the 1945 Constitution of the Republic of Indonesia viewed from the perspective of equality before the law, it appears to have a fairly high value of originality and novelty.

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[8] Baharuddin Riqiey, Moch Syahfudin, and Firyal Azelia Nasera, "Resignation Requirements for Elected Legislative Candidates," *Rechtenstudent* 6, no. 2 (2025), https://doi.org/10.35719/rch.v6i2.340.

[9] Ukoh and Ngwoke, *Loc.Cit.,* pg.47.

[10] Enobong Mbang Akpambang and Aderonke Abimbola Ojo, "Impeachment Procedures in Nigeria and the United States of America: A Comparative Analysis," *International Journal of Social Science and Human Research* 6, no. 4 (2023): pg.2294, https://doi.org/10.47191/ijsshr/v6-i4-39.

[11] Lene Johannessen, "A Critical View of the Constitutional Hate Speech Provision," *South African Journal on Human Rights* 13, no. 1 (1997): pg.135, https://doi.org/10.1080/02587203.1997.11834940.

1.2. Research Problem

Seeing the various problems and questions above, this study aims to examine and analyze the historical setting of the immunity clause in the 1945 Constitution of the Republic of Indonesia and the suitability of the immunity clause in the perspective of equality before the law. The purpose of this study is to determine the history behind the immunity clause arrangement in the 1945 Constitution of the Republic of Indonesia and to determine the suitability of the immunity clause in the perspective of equality before the law.

1.3. Method

To address the legal issues examined in this study, the author uses a research methodology with the type of legal research.[12] Writing a methodology with the type of legal research only without adding normative after it, is a much more appropriate use.[13] Because this research is a type of legal research, the approaches used are statutory, conceptual, and historical approaches. The legal materials used by the author in this case are primary legal materials and secondary legal materials. Primary legal materials were collected through inventory and categorization, while secondary legal materials were collected through literature searches. After primary and secondary legal materials are collected, they are analyzed using legal reasoning with the deductive method.

2. RESULT AND DISCUSSION

2.1. The Historical Setting of the Immunity Clause in the 1945 Constitution of the Republic of Indonesia

Article 7C and Article 20A paragraph (3) of the 1945 Constitution are two provisions that can be categorized as immunity clauses for the DPR in the 1945 Constitution. Article 7C of the 1945 Constitution is an institutional immunity clause, while Article 20A paragraph (3) of the 1945 Constitution is a membership immunity clause. Both provide protection to the DPR. Referring to these arrangements, it is necessary to examine the rationale of the constitutional framers, it is interesting to look back at the reasons why the framers of the amendments to the 1945 Constitution of the NRI Year 1945 regulated in such a way for the running of the wheels of government in Indonesia. To see this, we cannot escape to re-read the Comprehensive Manuscript of the Amendment to the Constitution, especially in Book 3 volume 1 and volume 2.

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[12] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2021), pg.47.

[13] Baharuddin Riqiey and Muhammad Ahsanul Huda, "Interpreting Article 22(2) of the 1945 Constitution of the Republic of Indonesia Post Constitutional Court Decision 54/PUU-XXI/2023," *IPMHI Law Journal* 4, no. 1 (2024): pg.26, https://doi.org/10.15294/ipmhi.v4i1.76687.

When looking at the Comprehensive Manuscript of the Amendment to the Constitution, especially in Book 3 volume 1 and volume 2, there are interesting descriptions from the framers of the amendment to the Constitution. For example, in Book 3 volume 1, Soekiman explicitly proposed that the People's Consultative Assembly (hereinafter MPR) could not be dissolved, as stated on July 15, 1945.[14] Soekiman's proposal is certainly interesting, because it is not the DPR as an institution that cannot be dissolved as in Article 7C of the 1945 Constitution, but rather the MPR that cannot be changed. Unlike Soekiman, Sri Soemantri Martosuwignyo argued that the institution that could not be dissolved by the President was the DPR. This is because it is one of the characteristics of the presidential system of government.[15] In contrast to the parliamentary system, where in running the wheels of government, both the government and parliament can dissolve each other. In the past, when talking about the presidential system of government, the main reference was the United States.[16]

Besides Soekiman proposing that the MPR could not be dissolved, on March 4, 2002 Roeslan Abdulgani proposed an idea that reversed Soekiman's proposal, namely Roeslan proposed that the MPR be abolished.[17] Against this, Theo L. Sambuaga from F-PG did not agree with the proposal.[18] Furthermore, Sutradara Ginting as the spokesperson for F-KKI said that the current DPR through the provisions of Article 7C of the 1945 Constitution has a constitutional guarantee that the DPR as an institution cannot be suspended or dissolved.[19] The constitutional guarantee that states that the DPR cannot be frozen and dissolved by the President is not only contained in Article 7C of the 1945 Constitution of the NRI Year 1945, but also contained in the Explanation of the 1945 Constitution of the NRI Year 1945 Point VII. Interestingly, this provision contains an exception, meaning that the prohibition of the President freezing and dissolving the DPR is not absolute, but can be done if all members of the DPR are concurrently members of the MPR (see Elucidation of the 1945 Constitution Point VII).

The regulation on the prohibition of the President to freeze and dissolve the DPR apparently received disapproval by Hendy Tjaswadi from F-TNI/Polri. Hendy Tjaswadi argued that if the President can be proposed to be impeached by the DPR, then in the perspective of checks and balances the President can dissolve the DPR by submitting a proposal to the MPR. According to him, this is a logical consequence of adhering to the presidential system, which if it does not apply to one particular thing, then it does not apply to other things either. Apart from that, in my opinion,

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[14] Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (Jakarta: Sekretariat Jenderal Mahkamah Konstitusi Republik Indonesia, 2010), pg.30.

[15] *Ibid*., pg.143.

[16] Jimly Asshiddiqie, *Pokok-Pokok Hukum Tata Negara Indonesia Pasca Reformasi* (Jakarta: Bhuana Ilmu Populer, 2007), pg.316.

[17] Mahkamah Konstitusi Republik Indonesia, *Op.Cit*, pg.514.

[18] *Ibid*.

[19] *Ibid*., pg.578.

the author does not agree with what was conveyed by Hendy Tjaswadi as above. In simple terms, this opinion can be understood as a very logical thing, namely when talking about the ability of the DPR to impeach the President, while the President cannot dissolve the DPR. The author argues that, once again, the reference is to the characteristics of the presidential government. Impeachment is also part of the characteristics of presidential government, as is the prohibition of the President to freeze and dissolve the DPR. There are many scholars who elaborate on the prohibition of the President to freeze and dissolve the DPR, because it is a characteristic of the presidential system of government.

For example, the opinion of Witmandan as quoted by Inu Kencana Syafiie and Andi Azikin, Witamandan mentions there are 4 (four) characteristics and requirements of the presidential system of government, namely:[20]

1. Based on the principle of separation of powers;
2. The executive has no power to dissolve the legislature nor must he resign when he loses the support of the majority of its membership;
3. There is no mutual responsibility between the president and his cabinet, the latter is wholly responsible to the chief of executive; and
4. The executive is chosen by the electorate.

Not only stated by Witmandan as quoted by Inu Kencana Syafiie and Andi Azikin above, C.F. Strong also explicitly states that one of the four main characteristics of the presidential system of government is that the President cannot dissolve parliament or legislative power.[21] In addition, Alan R. Ball and B. Guy Peters also mentioned that one of the four characteristics of presidential government is that the president cannot dissolve the legislature.[22] Likewise with Douglas V. Verney, he mentioned that one of the eleven characteristics of the presidential system of government is that the president cannot dissolve or coerce the assembly.[23] In line with these opinions, Jimly Asshiddiqie argues that one of the nine characteristics of the presidential system of government is that the President cannot dissolve or coerce the parliament.[24]

Looking at the opinions of constitutional law experts as above, this further shows that the prohibition of the President to freeze or dissolve the DPR is a logical consequence of the presidential system of government. This is because the prohibition of the President to freeze or dissolve the DPR is a feature that is always attached when talking about the characteristics of the presidential system

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[20] Inu Kencana Syafiie and Andi Azikin, *Perbandingan Pemerintahan* (Bandung: Refika Aditama, 2011), pg.29.

[21] C F Strong, *Modern Political Constitution: An Introduction to the Comparative Study of Their History and Existing Form* (London: Sidgwick & Jackson Limited, 1975), pg.239.

[22] Alan R Ball and B Guy Peters, *Modern Politics and Government* (New York: Macmillan, 2000).

[23] Douglas V Verney, *Parliamentary Government and Presidential Government* (Oxford: Oxford University Press, 1992), pg.47.

[24] Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara* (Jakarta: RajaGrafindo Persada, 2016), pg.216.

of government. Therefore, it is logical that Indonesia regulates the prohibition of the President to freeze or dissolve the DPR through Article 7C of the 1945 Constitution. If this is not the case, then Indonesia's presidential system of government will be increasingly questioned.

Prior to the enactment of Article 7C of the 1945 Constitution, in 1960 the President of Indonesia wanted to freeze the DPR. Briefly, in 1960, the political situation in Indonesia was heating up, and President Sukarno took the controversial step of planning to freeze the DPR. This move was triggered by Sukarno's dissatisfaction with the performance of the DPR, which he considered not in line with his government's vision and programs, especially in the face of complex economic and political challenges. Sukarno argued that the DPR, which was dominated by various political factions that were often in conflict, hindered the country's progress and stability. In this context, he sought to strengthen his power and pushed the concept of "Guided Democracy," which favored strong, centralized leadership. This plan sparked pros and cons among politicians and the public, with many fearing that the move would lead to authoritarianism. Although the plan was not fully realized in the end, these tensions reflected the complicated political dynamics in Indonesia at the time, leading to major changes in the country's governance structure and way of doing politics.

Furthermore, the wording of Article 7C of the 1945 Constitution is one of the evidences that in the study of Constitutional Law it can be referred to as the immunity clause. The immunity clause as referred to in Article 7C of the 1945 Constitution only applies to the DPR institutionally or institutionally. The purpose of this immunity clause is to protect the DPR institutionally to be free from fear in carrying out the checks and balances mechanism against the executive. Thus, it is expected that the DPR as an institution should represent the aspirations of the people. Although the parliamentary system is not the benchmark for whether or not the legislature can be dissolved because it does not reflect the aspirations of the people, the DPR should be an institution that always sides with the interests of the people and performs its functions properly.

Then, there is one interesting question. Does the provision of Article 7C of the 1945 Constitution not conflict with Article 22B of the 1945 Constitution? In this regard, the author argues that the two norms do not contradict each other. This is because Article 7C of the 1945 Constitution talks about institutions, while Article 22B of the 1945 Constitution talks about personal members of the House of Representatives. Therefore, it is not apple to apple. The author also argues that the existence of Article 22B of the 1945 Constitution is a form of limitation of the immunity clause of Article 7C in conjunction with Article 20A paragraph (3) of the 1945 Constitution.

As for the immunity clause arrangement for members of the DPR as clearly stated in Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia, specifically in the phrase "..., as well as the right to immunity", it is a form of immunity clause for personal members of the DPR in carrying out their functions and authorities. The provision was born from the proposals of various framers of the amendment to the Constitution, including Lukman Hakim Saifuddin from

F-PPP, Asnawi Latief from F-PDU, Slamet Effendy Yusuf, Hamdan Zoelva as spokesperson for F-PBB, Anwar Arifin from F-PG.[25] The right of immunity as referred to in Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia is that members of the DPR cannot be prosecuted either criminally or civilly in the context of carrying out their functions and authorities. The regulation regarding immunity rights as regulated in Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia is then reaffirmed in Article 80 jo Article 224 of Law Number 17 of 2014 concerning the People's Consultative Assembly, the House of Representatives, the Regional Representatives Council, and the Regional Representatives Council as last amended by Law Number 13 of 2019 concerning the Third Amendment to Law Number 17 of 2014 concerning the People's Consultative Assembly, the House of Representatives, the Regional Representatives Council, and the Regional Representatives Council.

Looking at the description above, it can be concluded that the 1945 Constitution recognizes the immunity clause. This immunity clause only applies to the DPR, both for the institution and for DPR members. However, there is one thing that the author needs to emphasize, namely that the provisions of Article 7C of the 1945 Constitution must be interpreted as either temporary or permanent. This is because the phrase "... cannot freeze and/or dissolve the House of Representatives" strongly indicates that the President is not allowed to freeze or dissolve the House of Representatives under any circumstances. This means that even if there are conditions that cause a state of emergency, the President still cannot freeze or dissolve the DPR.

2.2. Immunity Clause in the Perspective of Equality before the Law

Contemporary Indonesian democracy is confronted with discourse concerning the dissolution of the House of Representatives. This is fueled by poor communication among DPR members, their unreasonable allowances, and their low quality.[26] This has led to a public movement to disband the DPR. The author believes this is constitutionally unconstitutional, as Article 7C of the 1945 Constitution of the Republic of Indonesia effectively closes this loophole. Therefore, the author recommends that the most appropriate solution is to improve the quality of DPR members through revisions to the laws relating to DPR members.

The dissolution of the House of Representatives is not only unconstitutional under Article 7C of the 1945 Constitution of the Republic of Indonesia, which prohibits the dissolution of legislative bodies, but also has the potential to undermine Indonesia's presidential constitutional system. Dissolving the DPR could disrupt the balance of power between the executive and legislative

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[25] Mahkamah Konstitusi Republik Indonesia, *Loc.Cit*, pg.706, 942, 979, 1001, 1020.

[26] Rafyq Panjaitan, "Demo Di DPR Ricuh, Massa Tuntut Bubarkan DPR Dan Hapus Gaji Anggota Dewan," 2025, https://timesindonesia.co.id/peristiwa-nasional/551549/demo-di-dpr-ricuh-massa-tuntut-bubarkan-dpr-dan-hapus-gaji-anggota-dewan.

branches, create a vacuum in popular representation, and threaten the democracy painstakingly built through reforms. Therefore, the author continues to encourage improvements, starting with political parties that provide opportunities for nominating their cadres, and so on.

The existence of the provisions of Article 7C in conjunction with Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia raises an interesting question, namely whether the existence of the article is not contrary to the principle of equality before the law. In response to this question, the author would like to first explain what is meant by equality before the law. Equality before the law is one of the principles that must exist in a rule of law such as Indonesia.[27] Therefore, Indonesia concretized this principle into Article 27 paragraph (1) jo 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The principle of equality before the law according to Tom Bingham applies to everyone (there should not be one law for the rich and another for the poor).[28]

According to the interpretation of the Constitutional Court (the guardian of constitution),[29] on the provisions of Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia as stated in Decision Number 25/PUU-XIII/2015 and Decision Number 40/PUU-XIII/2015, the birth of the right as stated in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia is due to a form of resistance to the arbitrariness of the authorities, so that tyrannical power is not born.[30] More specifically about that, the Constitutional Court emphasized that the principle of equality before the law is a principle that applies in a democratic state of law. Even in consideration of the decision, the Constitutional Court quoted the opinion of A.V. Dicey who said that:[31]

> "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or ever of wide discretionary can authority on the part of the government.

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[27] Syofyan Hadi and Tomy Michael, *Negara Hukum* (Yogyakarta: Jejak Pustaka, 2024), pg.55; Adetomiwa Fowowe, "Rule of Law: The Perspective of the Principle of Equality Before the Law," *SSRN Electronic Journal*, 2024, pg.2, https://doi.org/10.2139/ssrn.4684451.

[28] Tom Bingham, *The Rule of Law* (London: Penguin Group, 2011), pg.54.

[29] John Sampe, Rosa Ristawati, and Be Hakyou, "The Guardian of Constitution: A Comparative Perspective of Indonesia and Cambodia," *Hasanuddin Law Review* 9, no. 2 (2023): pg.216, https://doi.org/10.20956/halrev.v9i2.4627; Carissa Patricia Hong et al., "Review of the Authority of the House of Representatives in Removing Constitutional Court Judges," *QISTINA: Jurnal Multidisiplin Indonesia* 2, no. 1 (2023): pg.768, https://doi.org/10.57235/qistina.v2i1.472; Diantika Chayani and Arif Wibowo, "The Role of the Constitutional Court in Realizing a Democratic Law State Through State Administration in Indonesia," *JUSTICES: Journal of Law* 2, no. 3 (2023): pg.132, https://doi.org/10.58355/justices.v2i3.47.

[30] Viktor Santoso Tandiasa and Aida Mardatillah, *Kompilasi Tafsir UUD 1945 Dalam Putusan Mahkamah Konstitusi Tahun 2003--2022* (Yogyakarta: Laksbang Akademika, 2023), pg.157-159.

[31] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, *Macmillan and Co.* (London: Macmillan and Co., 1915), pg.120, https://archive.org/details/introductiontost0000unse_r6a8/page/n5/mode/2up; C A M., "Review of Introduction to the Study of the Law of the Constitution, by A. V. Dicey," ed. A V Dicey, *Harvard Law Review* 28, no. 5 (1915): 532–35, https://doi.org/10.2307/1326908.

> Englishmen are ruled by the law and the law alone; a man may be punished for a breach of law, but he be punished for nothing else. It means, again, equality before the law, or the equal subjection of all classes to the ordinary law courts; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals".

Looking at the above interpretation, it can be concluded that treating someone differently is not necessarily an act or action that is contrary to the principle of equality before the law. However, to determine whether an act or action is contrary to the principle of equality before the law is to see whether the treatment or action is carried out differently when faced with the same problem and position. If so, then the act or action is clearly contrary to the principle of equality before the law. This is also in line with the ushul fiqh rule which states, Al-Musawah fi al-Mu'amalah.

At this point, a question that may be of interest and can be asked is whether any different treatment of a person or a particular group can be considered discrimination? Based on the definition provided by Article 1 point 3 of Law 39 of 1999, it is clear that discrimination includes any different treatment carried out on the basis of religion, race, color, sex, or any other race. However, not all different treatment can be considered discriminatory if we look at the development of other Constitutional Court decisions. There are at least 2 (two) Constitutional Court decisions that clearly describe the characteristics of discriminatory acts.

First, the Constitutional Court Decision Number 070/PUU-II/2004. The Constitutional Court stated that discrimination can only be said to exist if there is different treatment without a strong basis to distinguish it. In fact, if things that are actually different are treated uniformly, it will cause injustice. *Second*, the Constitutional Court Decision Number 27/PUU-V/2007. The Court stated that discrimination is treating the same thing differently. Conversely, it is not discrimination to treat things that are actually different differently.

Constitutional Court Decision No. 22-24/PUU-VI/2008 is one of the decisions that can be used as a reference to show that not all different treatment equals discrimination. The Constitutional Court allowed the application of positive action provisions against certain groups that are considered culturally, socially, and politically weak, such as women, in its decision. The constitutional provision in Article 28H paragraph (2) of the 1945 Constitution, which states that everyone is entitled to special treatment and facilities to obtain equal opportunities and benefits in an effort to achieve equality and justice, further strengthens this.

The right to immunity does not constitute absolute protection for members of Parliament. This means that the right to immunity has clear limits, so that not all actions taken by members of Parliament are free from the law. The immunity right is designed to protect members of Parliament in carrying out their legislative and supervisory functions without fear of legal action that could prevent them from carrying out their duties. As such, the right to immunity serves as a guarantee

that members of Parliament can carry out their duties effectively and independently in a democratic context.

The birth of immunity is rooted in ancient legal traditions, where protection for public officials dates back to Roman and Greek times. The concept emerged in response to the need to protect legislators from external pressure, allowing them to perform their functions without fear of reprisal. In the modern context, the right to immunity has been adopted in various constitutions around the world, including in the United States and Indonesia, as a guarantee of freedom of speech and action in an official capacity. In Indonesia, the right to immunity is set out in the 1945 Constitution of the Republic of Indonesia, which reflects a commitment to safeguarding the independence of the DPR and ensuring that the people's representatives can function effectively in a democratic system. From time to time, the right to immunity continues to be a topic of debate, particularly regarding its limits and the accountability of its members.

The regulation of immunity clauses in various countries is very diverse, as is the case in the 1996 African Constitution. They recognize the immunity clause in Article 16 (2). This provision provides a limitation on the right to freedom of expression, and is therefore considered an immunity clause aimed at parliament. Unlike Indonesia, Indonesia is regulated in Article 7C jo Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia. Both provisions are immunity clauses aimed at the DPR institutionally and personally in the context of exercising constitutional authority as regulated in legislation. Unlike the immunity clause in Section 308 of the 1999 Nigerian Constitution, the implementation of this provision is very likely and can be abused by the government when it is caught in corruption. Unlike Indonesia, the provisions of Article 7C in conjunction with Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia can only be used in exercising authority, and must be accompanied by good faith. It cannot be allowed to go against the law, then argue with the existence of the immunity clause, either institutionally or personally.

Many researchers have argued that the immunity clause is inconsistent with the principles of human rights, democracy, and the rule of law. For example, the research conducted by Credence Sol with the title "Exploring the Magna Carta and Governmental Immunity Doctrines: The View from the United States".[32] He said that Article 39 is completely contrary to the rule of law. However, it is different with the author. The author is of the view that the existence of the immunity clause does not necessarily contradict the principle as above. Rather, each case and condition must be examined first. Thus, it creates the goal as intended by the founding parents to ensure that the objects granted immunity are not worried in exercising their constitutional authority.

The immunity rights of members of Parliament in Indonesia are regulated in Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which provides protection to

[32] Credence Sol, "Exploring the Magna Carta and Governmental Immunity Doctrines: The View from the United States," in *The Rights and Aspirations of the Magna Carta*, 2016, https://doi.org/10.1007/978-3-319-42733-1_4.

members of Parliament from prosecution for opinions and actions taken in carrying out their official duties. In addition, Article 80 letter f of Law No. 17/2014 on the MPR, DPR, DPD, and DPRD strengthens this provision by emphasizing that members of the DPR cannot be prosecuted in carrying out their legislative, supervisory, and budgetary functions. This arrangement aims to create a conducive environment for members of Parliament to carry out their duties, so that they can function effectively without fear of legal pressure or intimidation, while maintaining the integrity of the legislature in a democratic system.

This arrangement reflects recognition of the strategic role of members of Parliament as representatives of the people. In carrying out their oversight and lawmaking functions, members of Parliament must be able to operate without pressure from external parties, including the government and interest groups. With immunity rights, they are given the space to explore important issues and voice the aspirations of the people without fear of legal action that could hamper their independence in carrying out their duties. However, it is important to remember that immunity rights are not a form of absolute freedom. Ratio legis also emphasizes the need for accountability for DPR members. Article 80 letter f of Law No. 17/2014 stipulates that while members of Parliament are protected from prosecution in the performance of their duties, they remain morally and ethically accountable to the public.

Back to the issue of immunity clause in the perspective of equality before the law. Regarding the provisions of Article 7C of the 1945 Constitution, the author argues that it cannot be contested from the perspective of equality before the law. This is because the provision absolutely must exist in a country that adheres to the presidential system. However, it is different from the provisions of Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which grants various rights to members of the DPR, one of which is the right to immunity. In this context, it is necessary to explain the limits of DPR members in carrying out their functions and authorities, so that they remain bound by the immunity right. Otherwise, legal uncertainty will arise and lead to discrimination.[33]

For example, in 2022 a member of the House of Representatives was suspected of harassing one of the regional languages, and he was reported to the House of Representatives' Honorary Council (hereinafter MKD). In response, Nazaruddin Dek Gam, then Deputy Chairman of MKD, said that the immunity rights of members of the House of Representatives were absolute.[34] Thus, the fundamental question is whether DPR members are truly untouchable by the law as long as they carry out their functions and authorities as determined by laws and regulations.

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[33] Arie Elca Putra, Baharuddin Riqiey, and Abdul Aziz Zulhakim, *Dinamika Hukum Tata Negara Indonesia: Refleksi Terhadap Praktik Ketatanegaraan Dan Pemilu Dalam Negara Hukum Demokratis* (Depok: Rajawali Pers, 2025).

[34] Tim Detikcom, "MKD Soal Arteria Tak Bisa Dipidana: Imunitas Anggota DPR Sifatnya Mutlak," 2022, https://news.detik.com/berita/d-5928663/mkd-soal-arteria-tak-bisa-dipidana-imunitas-anggota-dpr-sifatnya-mutlak.

If seen from the perspective of equality before the law formally, then the immunity right is not allowed to exist in a state of law. Because, in the perspective of the rule of law, all people are equal before the law. However, if seen from a substantive or material perspective, it must be seen comprehensively first, namely whether different treatment is distinguished for the same thing in the position. Tom Bingham said that the principle of equality before the law also recognizes that different treatment for some people because of their position requires different treatment. If the different treatment is done because of differences in position, then it is not said to violate equality before the law.

The right to immunity for members of Parliament is often misinterpreted as absolute immunity from all forms of law. However, it is important to understand that this right has clear limits. The right to immunity does not give members of Parliament unlimited freedom to commit unlawful acts. Rather, the right is designed to protect members of Parliament in carrying out their functions, powers and duties, such as expressing opinions, asking questions, or taking official action in the context of legislation. As such, the right to immunity serves as a safeguard against external pressures that could compromise the independence and integrity of the legislative process.

In this context, limits on immunity are crucial to maintain a balance between the protection of members of Parliament and their accountability to the public. While members of Parliament have the right to speak and act without fear of prosecution in the context of their official duties, actions outside of that scope can still be subject to legal sanctions. For example, if a member of parliament engages in criminal acts or abuse of power outside the context of their duties, they cannot claim immunity to avoid accountability. This creates a system where members of Parliament are expected to act ethically and responsibly, and not abuse the rights granted to them.

In fact, according to the author. The right of immunity owned by members of the House of Representatives does not apply absolutely in the context of carrying out their functions and authorities as stated by Nazaruddin Dek Gam as the Deputy Chairman of the MKD of the House of Representatives of the Republic of Indonesia at that time. Rather, the right of immunity of members of the House of Representatives can be non-binding for members of the House of Representatives if they have deviated too much from the provisions of the legislation. For example, a case in 2025, which happened to a member of the House of Representatives. MKD stated that the reported party was proven to have violated the code of ethics of DPR RI members and imposed sanctions on the reported party (DPR member) in the form of light sanctions in the form of verbal reprimands accompanied by the obligation for the reported party to apologize to the complainant.[35] This shows that DPR members can still be touched by the law, despite the specificity of the settlement mechanism.

[35] EMedia DPR RI, "MKD Putuskan Beri Sanksi Kepada Anggota DPR RI Teradu," 2025, https://emedia.dpr.go.id/2025/05/09/mkd-putuskan-beri-sanksi-kepada-anggota-dpr-ri-teradu/.

As such, the right to immunity for members of Parliament should be understood as a mechanism that guarantees freedom of opinion and action in the context of legislative duties, not as a tool to avoid legal liability. It is important for the public to realize that this right aims to support the functioning of democracy, where members of Parliament can operate effectively without fear of repression. However, awareness of the limits of the right to immunity must also be upheld, so that members of Parliament can be held accountable for their actions outside the scope of official duties, maintaining public trust in the legislature and the integrity of the legal system as a whole. Therefore, although members of Parliament have the right to immunity as stipulated in Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia, if a member of Parliament is found to have committed an unlawful act outside the exercise of his/her constitutional authority, then the logical consequence is that he/she must still be enforced by the law that applies to him/her, like everyone else. However, if they are not prosecuted, this would be contrary to the 1945 Constitution which guarantees equality before the law and the principles of human rights, democracy and the rule of law.

The limitation of immunity rights held by members of the House of Representatives was further strengthened through Constitutional Court Decision Number 37/PUU-XVIII/2020.[36] In this decision, the Court emphasized that the right to immunity is not absolute and can be subject to certain conditions to ensure that the use of the right remains in accordance with applicable legal principles. This decision emphasizes the importance of good faith in every action taken by members of Parliament when exercising their functions and authorities. As such, members of Parliament are expected not only to use the right to immunity as a shield from prosecution, but also to act responsibly and ethically.

The Constitutional Court emphasized that any action protected by the right to immunity must still comply with the provisions of the applicable laws and regulations. This suggests that while members of Parliament have the freedom to express opinions or take actions in the context of their official duties, this freedom should not be abused to commit unlawful acts. By setting these conditions, the Court seeks to maintain a balance between protecting the rights of members of Parliament and their accountability to the public. It also reflects a commitment to upholding the principles of democracy, human rights and the rule of law in Indonesia.[37]

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[36] Baharuddin Riqiey, "Hak Imunitas Ditinjau Dari Prinsip Equality Before The Law," Kompasiana.com, February 7, 2022, https://www.kompasiana.com/baharuddinriqiey4078/62006ca287000047fe015673/hak-imunitas-ditinjau-dari-prinsip-equality-before-the-law.

[37] I D G Palguna, Saldi Isra, and Pan Mohamad Faiz, *The Constitutional Court and Human Rights Protection in Indonesia* (Depok: Rajawali Pers, 2022), pg.35-55; Baharuddin Riqiey and Reza Maulana Hikam, "Constitutionality of Formal Testing of Draft Laws by the Constitutional Court," *Indonesian Journal of Law and Islamic Law* 7, no. 1 (2025): pg.81, https://doi.org/10.35719/ijlil.v7i1.450; Sultoni Fikri Hufron, Syofyan Hadi, and Baharuddin Riqiey, "Regional Head Election Post-MK Decision Number 60/PUU-XXII/2024 in the Constitutional Law Landscape," *Legality: Jurnal Ilmiah Hukum* 33, no. 1 (2025): pg.230, https://doi.org/10.22219/ljih.v33i1.39064.

Constitutional Court Decision No. 37/PUU-XVIII/2020,[38] is an important foundation in emphasizing that the right to immunity should not be used as a loophole to avoid legal responsibility. With the emphasis on good faith and compliance with laws and regulations, it is expected that members of the House of Representatives can carry out their duties more transparently and responsibly. This decision also sends a positive signal to the public that the legislature is willing to be monitored and held accountable for the actions of its members. As such, the limits on immunity outlined in this decision contribute to enhancing the integrity and public trust in the institution of Parliament and the legal system as a whole.

3. CONCLUSION

Historically, Article 7C constitutes a logical consequence of Indonesia's presidential system of government of Indonesia's presidential system of government. The prohibition for the President to freeze and dissolve the DPR is absolute. In fact, it is not bound by time or the current situation. That is, absolutely at any time, a President cannot freeze and/or dissolve the DPR. The history of the birth of Article 20A paragraph (3) of the 1945 Constitution of the Republic of Indonesia is to provide protection to members of the DPR in carrying out their functions and authorities. Thus, it is hoped that through this arrangement, the DPR can be able to carry out the checks and balances mechanism properly. The two provisions, namely Article 7C and Article 20A paragraph (3) of the 1945 Constitution of the NRI Year 1945 are immunity clause norms. The immunity clause in question is for the DPR as an institution and also for individuals. The existence of this immunity clause does not contradict the principle of equality before the law as one of the principles in a rule of law country. This is because: (i) the right to immunity held by the DPR does not apply absolutely, but remains based on good faith; (ii) members of the DPR can still be punished if they violate their functions and authorities; and (iii) members of the DPR can still be punished by MKD if they are proven to have violated the code of ethics. With the existence of this immunity right, the author hopes that every member of the DPR will always carry out their functions and authorities with good faith.

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[38] Alfian Reymon Makaruku, "Kekuatan Mengikat Pertimbangan Hukum Putusan Mahkamah Konstitusi Nomor 37/PUU-XVIII/2020," *Jurnal Ilmiah Pendidikan Pancasila Dan Kewarganegaraan* 7, no. 3 (2022), https://doi.org/10.17977/um019v7i3p729-737.

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