NEGREI
Academic Journal of Law and Governance

Institut Agama Islam Negeri (IAIN) Curup, Indonesia
ISSN 2775-8621 (p), 2798-3803 (e)
volume 4, number 2, 2024
DOI: http://doi.org/10.29240/negrei.v4i2.11579

Analysis of the Constitutional Court's Authority to Change the Age Requirements for Presidential Candidates and Vice Presidential Candidates in the Constitutional Court's Decision Number 90/PUU-XXI/2023

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Abstract. This study analyzes the authority of the Constitutional Court in changing the age requirements for presidential and vice presidential candidates through Decision Number 90/PUU-XXI/2023. The main focus of this research is qualitative research, with a literature study approach which examines a theory or decision to examine the legal basis and authority of the Constitutional Court in conducting a judicial review of the age requirements for presidential and vice presidential candidates in article 169 letter q of Law Number 7 of 2017 concerning General Elections against the 1945 Constitution. The research method used is normative juridical with a legislative and analytical approach. The results of the study show that the Constitutional Court's decision violates the principle of separation of powers and judicial activism.

Keywords: *Constitutional Court, Judicial Review, Presidential Age Requirements.*

NEGREI: *Academic Journal of Law and Governance*
Volume 4, Number 2, 2024

Introduction

The Constitutional Court (hereinafter abbreviated as the Constitutional Court) is an institution born after reform which is a constitutional mandate in accordance with the third amendment to the 1945 Constitution (hereinafter abbreviated as the 1945 Constitution) carried out by the People's Consultative Assembly (hereinafter abbreviated as MPR) in 2001. The Constitutional Court is an institution that exercises judicial power as mentioned in Article 24 paragraph (2) of the 1945 Constitution which reads "judicial power is exercised by a Supreme Court and judicial bodies under it in the general judicial environment, religious judicial environment, military judicial environment, state administrative judicial environment, and by a Constitutional Court". Based on these provisions, the Supreme Court and the Constitutional Court have an equal position as actors of judicial power in their respective duties and authorities. Jimly Asshididiqie argues that "The two institutions are *independent* and separate branches of judicial power from other branches of power, namely the government (*executive*) and consultative/representative institutions (*legislature*)".[1]

The separation of branches of power in the Indonesian constitutional system is one of the characteristics of the State of Law embraced by the Indonesian state as stipulated in article 1 paragraph (3) of the 1945 Constitution which reads that the State of Indonesia is a state of law". According to Julius Stahl, the concept of the State of Law, which he calls the term rechtsstaat, includes four important elements, namely: 1. Protection of human rights. 2. Division of power. 3. Governance based on law. 4. State administrative court. Meanwhile, A.V. Dicey outlined the existence of three important characteristics in each State of Law which he called *The Rule of Law*, namely: *1. Supremacy of Law. 2. Equality before the law. 3. Due Process of Law*.[2]

The Constitutional Court in exercising judicial power has different powers and duties from the Supreme Court, in Article 24 C of the 1945 Constitution it is stated that there are four powers from the Constitutional Court, namely the

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[1] Erli Salia, The *Position of the Constitutional Court in the Judicial Power System in Indonesia,* Tunas Gemilang Pers, 2017, Palembang, p. 130.

[2] Jimly Asshiddiqie, *IDEA OF THE INDONESIAN STATE OF LAW,* Paper in the National Legal Development Planning Dialogue Forum organized by the National Legal Development Agency of the Ministry of Law and Human Rights, Jakarta, 22-24 November 2011, .pp. 2-3.

authority to adjudicate at the first and last level whose decision is final to test the law against the Constitution, to decide disputes over the authority of state institutions whose authority is given by the Constitution, to decide the dissolution of political parties, and to decide disputes about the results of the general election. In addition to these four powers, the Constitutional Court has one obligation to give a ruling on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the Constitution.

The authority given by the 1945 Constitution to the Constitutional Court as a judicial institution reflects the strengthening of the principle of the state of law (*rechstaat*) in the 1945 Constitution after its amendment. This is also affirmed in Article 1 paragraph (2), which states that: "sovereignty is in the hands of the people and is implemented according to the 1945 Constitution". With the affirmation of this article, it is even more evident that Indonesia adheres to the principle of democracy in its constitutional system which relies on the constitution, namely the 1945 Constitution. Through the two ideal functions of the Constitutional Court, namely as the guardian of the constitution and the interpreter of the constitution, the realization of democratic constitutionalism in the life of the nation and state has become a new page of history in the Indonesian constitutional system.[3]

The Constitutional Court has conducted a lot *of judicial review* or testing of laws since it was formed in 2003, the tests are both in the form of formal and material examinations. Sri Soemantri explained, if the test is carried out against the content of laws or other laws and regulations, it is called the right to test material (*materiele toetsingsrecht*), if the test is carried out against the procedure for its formation, it is called the right to test formally (*formeletoetsingsrecht*).[4]

The unity of the legal system in the country needs to be maintained by testing whether one legal rule is not contrary to another legal rule, and especially whether one legal rule does not violate or is of the nature of setting aside a

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[3] Soimin and Mashuriyanto, 2013, *The Constitutional Court in the Constitutional System in Indonesia*, UII Pers, Yogyakarta, pp. 64-65.

[4] Ni'matul Huda, et al., 2019, "Formulation of the Concept of Follow-up to Legal Testing Decisions by the Constitutional Court that is Regulating", Center for Research and Case Study, and Management of the Registrar's Library and the Secretariat General of the Constitutional Court, Jakarta, p. 21.

more important and higher legal rule. Differences and conflicts between legal principles in a legal system must be resolved and ended by the judicial institution that has the authority to determine what constitutes positive law in a country. The work of making decisions about whether or not the legal rule is in accordance with the constitution or with the equivalent constitutional principle, by Usep Ranawijaya, is called material constitutional testing.[5]

Based on the authority of the Constitutional Court as described above, it can be said that the Constitutional Court is the guardian of the constitution as well as the guardian of democracy, therefore the constitutional judges must be figures with integrity, with an irreproachable personality, fair, statesmen who control the constitution and state administration as described in the provisions of article 24 C paragraph (5) of the 1945 Constitution. The decisions of the Constitutional Court have a significant impact on the life of the nation and state, so in carrying out their roles, Constitutional Court judges must uphold independence, impartiality, and integrity.

Indonesia is a democratic country, as affirmed in Article 1 paragraph (2) which reads that sovereignty is in the hands of the people and is carried out according to the Constitution. As one of the characteristics of democracy carried out in Indonesia, the direct election of the president is carried out by the people as stipulated in article 6A of the 1945 Constitution which states that the President and Vice President are elected in one pair directly by the people. Presidential and Vice Presidential Candidate Pairs are proposed by Political Parties or Coalitions of Political Parties participating in the general election before the implementation of the General Election as technically regulated in the rules at the level of law.

In February 2024, Indonesia will again hold simultaneous general elections, including to elect the President and Vice President, ahead of the start of the election stage, several parties took the initiative to conduct a test of the requirements for presidential and vice presidential candidates to the Constitutional Court regarding the age limit as stipulated in Article 169 letter q of Law Number 7 of 2017 concerning General Elections. Upon the request for a material test of the age requirements for Presidential and Vice Presidential Candidates, the Constitutional Court as an institution given the authority to test

[5] *Ibid* p. 22

the law against the 1945 Constitution made a decision on several applications submitted by several parties, but in the Constitutional Court Decision Number 90/PUU-XXI/2023 the application with the same object as the application that had been previously decided, the Constitutional Court made a different decision so that it finally gave rise to legal problems and pros and cons.

The Constitutional Court's decision is disputed by various parties because in its decision the Constitutional Court granted the applicant's application in part, so that the age requirement to be a presidential candidate and vice presidential candidate who was originally at least 40 (forty) years old changed to be at least 40 (forty) years old or has been/is occupying a position elected through general elections, including the election of regional heads". So that Article 169 letter q of Law Number 7 of 2017 concerning General Elections in full reads "at least 40 (forty) years old or have/is occupying a position elected through general elections, including the election of regional heads.[6]

The Constitutional Court's Decision Number: 90/PUU-XXI/2023, which is considered problematic, has led several parties to make a report to the Honorary Assembly of the Constitutional Court (hereinafter abbreviated as MKMK) over alleged violations of the code of ethics committed by Constitutional Court judges. After conducting an examination of the complainant and the complainant, the MKMK issued a verdict in the form of 7 judges being declared to have violated the code of ethics and receiving sanctions in the form of verbal reprimands, 1 judge declared to have violated the code of ethics received sanctions of written reprimands and oral reprimands, and 1 judge was declared to have violated the code of ethics so that he received sanctions of dismissal from his position as Chairman of the Constitutional Court.[7]

Research methods

This type of descriptive qualitative research is more about the literature on legal decisions, in this case the decision of the Constitutional Court.

[6] Constitutional Court Decision Number 90/PUU-XXI/2023

[7]Decision of the Honorary Assembly of the Constitutional Court Number: 2/MKMK/L/11/2023, Number: 3/MKMK/L/11/2023, Number: 4/MKMK/L/11/2023, Number: 5/MKMK/L/11/2023

Research based on positive legal inventory, legal theory, legal principles and legal discoveries. Data analysis was carried out in a descriptive-qualitative way. The legal materials obtained from the research are presented and processed qualitatively with the following steps: 1. The legal materials obtained from the research are classified according to the problem in the research; 2. The results of the classification of legal materials are then systematized; 3. The legal material that has been systematized is then analyzed to be used as a basis for drawing conclusions later.

Discussion

In the case of *judicial review* of the law, according to Article 24 C of the 1945 Constitution and according to Article 10 (1) of the Constitutional Court Law, it is emphasized that the Constitutional Court is only authorized to assess or adjudicate the constitutionality of a law against the 1945 Constitution. The Constitutional Court can only declare whether a law, part of its contents, sentences, or phrases, is contrary to the constitution or not. Mahfud MD argued that the Constitutional Court could not break through the limits of constitutionality competence and enter into legality competence. In judicial review cases, the Constitutional Court's decision cannot enter the realm of legality.[8] In line with Mahfud MD, Mahrus Ali said that the constitutional authority of the Constitutional Court in examining, adjudicating and deciding cases of testing laws against the constitution is about the constitutionality of norms. The Constitutional Court authority is in the realm of testing abstract norms, not the implementation of norms (concrete cases).[9]

Testing of legal norms is a test of the value of the constitutionality of the law, both in terms of formal and material. Therefore, at the first level, the constitutionality test must be distinguished from the legality test. The Constitutional Court conducts a constitutionality test, while the Supreme Court (MA) conducts a legality test, not a constitutionality test.[10]

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[8] Moh. Mahfud MD, 2010, Constitution and Law in Controversial Issues, Second Edition, Rajawali Pers, Jakarta, p. 285

[9] Mohammad Mahrus Ali, 2019, Interpretation of the Constitution, Testing the Constitutionality and Legality of Norms, PT RajaGrafindo Persada, Depok, pp. 3 to 4.

[10] Jimly Asshiddiqie, 2006, Procedural Law Testing Laws, Second Edition, Secretariat General and Clerk of the Constitutional Court of the Republic of Indonesia, Jakarta, pp. 5-6

Almas Tsaqibbirru Re A as the Applicant in case Number 90/PUU-XXI/2023, in his application considered that Article 169 letter q of Law Number 7 of 2017 concerning General Elections had contradicted the constitution so in his application, the applicant submitted the following petitum:

1. Accept and/or grant all Applicants' applications;
2. Declaring in Article 169 letter (q) of Law Number 7 of 2017 concerning General Elections (Statute Book of the Republic of Indonesia Number 182 of 2017, Supplement to Statute Book of the Republic of Indonesia Number 6109) as last amended by Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 of 2022 (Statute Book of the Republic of Indonesia Number 224 of 2022, Supplement to Statute Book of the Republic of Indonesia Number 6832) as long as "at least 40 (forty) years old) year;" is contrary to the 1945 Constitution of the Republic of Indonesia conditionally and does not have binding legal force as long as it is not interpreted as "... **or experienced as Regional Heads both at the Provincial and Regency/City levels."**;
3. Order the publication of this Decision in the State Gazette as appropriate;

If the Panel of Judges of the Constitutional Court of the Republic of Indonesia (MKRI) has a different opinion, please make a decision that is as fair as possible (ex aequo et bono).[11]

Furthermore, the Constitutional Court judge who examined the case made a decision with the following ruling:

1. Granting the Applicant's application in part;
2. Declaring that Article 169 letter q of Law Number 7 of 2017 concerning General Elections (Statute Book of the Republic of Indonesia No. 182 of 2017, Supplement to Statute Book of the Republic of Indonesia No. 6109) which states, "at least 40 (forty) years old" is contrary to the Constitution of the Republic of Indonesia of 1945 and does not have binding legal force, **As long as it is not interpreted as "at least 40 (forty) years old or has been/is**

[11] Constitutional Court Decision Number 90/PUU-XXI/2023

occupying a position elected through general elections including regional head elections". So that Article 169 letter q of Law Number 7 of 2017 concerning General Elections in full reads "at least 40 (forty) years old or have/is occupying a position elected through general elections including the election of regional heads";

3. Ordering the inclusion of this decision in the State Gazette of the Republic of Indonesia as appropriate.[12]

The Constitutional Court's Decision No. 90/PUU-XXI/2023 which changed the age requirements for Presidential Candidates and Vice Presidential Candidates finally reaped polemics, there are several things that are in the spotlight related to the Constitutional Court Decision No. 90/PUU-XXI/2023, including: 1. The Candidate Age Requirements are legal norms that are Open *Legal Policy*, 2. The authority of the Constitutional Court as *a Negative Legislator*, 3. The Constitutional Court's Decision No. 90/PUU-XXI/2023 is an Ultra Petita decision.

Age requirements for presidential candidates and vice presidential candidates as legal norms that are open *legal policy*

The minimum age requirement of 40 years for presidential candidates as stipulated in Article 169 letter q of the Election Law is one of the legal norms that is an open *legal policy* made by lawmakers (DPR and President) as a form of implementation of the order of the 1945 Constitution, namely Article 6 paragraph (2) and Article 6A paragraph (5). The concept of open legal *policy*, although it does not directly use the term open *legal policy*, has existed in the Constitutional Court's decision since 2004. Here are some of the Constitutional Court's rulings that contain assessments of open law policies:

Constitutional Court Decision No. 07/PUU-II/2004:

That to implement Article 18 of the 1945 Constitution, a Regional Government law is needed whose substance contains, among others, provisions on the Regional Elections. In this regard, **the Court held that to implement these provisions is the authority of lawmakers to**

[12] *Ibid*

> **choose direct elections or other democratic means**. Because the 1945 Constitution has stipulated the Regional Elections in a democratic manner, both direct elections and other methods must be guided by generally applicable election principles;[13]
>
> Constitutional Court Decision No. 006/PUU-III/2005:
> "... Therefore, such a proposal through a political party cannot be seen as contrary to the 1945 Constitution, **because the choice of such a system is a *legal policy*** that cannot be tested unless it is carried out arbitrarily (willekeur) and exceeds the authority of the lawmaker (detournement de pouvoir).[14]
>
> Constitutional Court Decision No. 51-52-59/PUU-III/2005:
> "… The court, in its function as the guardian of the constitution, cannot invalidate the Law or part of its contents, if the norm is an open delegation of authority that can be determined as legal policy by the lawmakers. Even if the content of a law is considered bad, such as the provisions of the presidential threshold and the separation of the election schedule in a quo case, the Court still cannot cancel it, because what is considered bad does not always mean unconstitutional, unless the product of the legal policy clearly violates morality, rationality and intolerable injustice".[15]

In the field of public policy science, the term policy already contains the meaning of free or open, because basically the meaning of policy always refers to the discretion of officials/authorities to do certain things whose implementation is not or has not been clearly regulated by laws and regulations. This is different from the definition of *open* in the field of law formation[16]

The concept of *Open Legal Policy* in the formation of laws provides freedom for lawmakers to formulate legal norms in accordance with the needs and developments of society. However, the Constitutional Court in its various decisions has emphasized that open law policies must still have limitations: 1.

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[13] Constitutional Court Decision No. 07/PUU-II/2004, p. 109
[14]Constitutional Court Decision Case No. 006/PUU-III/2005, p. 21
[15] Constitutional Court Decision Case No. 010/PUU-III/2005, p. 187
[16] Mardian Wibowo, 2015, Measuring the Constitutionality of an Open Legal Policy in Testing the Law. Constitution Journal, Vol.12, p. 210

Not exceeding the authority of lawmakers, 2. Not constituting an abuse of authority, 3. Not manifestly contrary to the 1945 Constitution[17]

Article 54 of the Constitutional Court Law stipulates that the Constitutional Court may request information and/or minutes of meetings related to the application being examined to the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, and/or the President. Then in practice, the Constitutional Court often asks for information from the House of Representatives and the President when examining cases of testing laws.

The House of Representatives of the Republic of Indonesia in several statements on the case of testing the law, used the concept of open legal policy (*Open Legal Policy*) to explain that the legal norms that are being tested are norms whose regulation is the authority of the lawmakers. The following is an example of a statement by the House of Representatives that uses the concept of Open Legal Policy:

Statement of the House of Representatives of the Republic of Indonesia in Case Number 31/PUU-XI/2013 concerning the Testing of Law Number 15 of 2011 concerning General Election Organizers:

> "… In the Election Organizer Law, the framers of the Law give authority to the DKPP as a quasijudicial institution, especially in the field of violations of the code of ethics to make final and binding decisions, just as the a quo Law also gives the same authority to Bawaslu as a quasi-judicial institution for the resolution of election disputes, this is a choice of legal policy that cannot be tested. unless it is carried out arbitrarily (willekeur) and beyond the authority of the lawmaker (detournement de pouvoir), in other words, such a policy becomes the authority of the lawmaker, in this case the President and the House of Representatives (vide Constitutional Court Decision No. 006/PUU-III/2005, page 21, and No. 5/PUU-V/2007, page 72). [18]

In addition to the DPR, the President is also a party that is often asked for information by the Constitutional Court. In line with the House of Representatives, in several statements submitted by the President in the

[17] Maruarar Siahaan, 2021, "Procedural Law of the Constitutional Court', Sinar Grafika, Jakarta, p. 198

[18] Constitutional Court Decision Number 31/PUU-XI/2013

Constitutional Court session in response to the testing of the law, it was stated that the legal norms that are being tested are norms that are Open Legal *Policy*. The following is an example of a statement by the House of Representatives that uses the concept of Open Legal Policy:

Statement of the President/Government in Case No. 25/PUU-XI/2013 concerning the Testing of Law No. 3 of 2009 concerning the Second Amendment to Law No. 14 of 1985 concerning the Supreme Court:

> "That the 1945 Constitution does not specify in detail the requirements for candidates for the supreme court justice, the stages of testing at the Judicial Commission, the number of candidates for the supreme judge proposed to the House of Representatives, all of which are further regulated by the Law as stipulated in Article 24A paragraph (5) of the 1945 Constitution. This is a legal policy or an open policy choice that ultimately determines that in the selection of candidates for the supreme court judge through processes by the Judicial Commission then submitted to the House of Representatives for a fit and proper test. These provisions are in order to obtain the best and qualified supreme court judges, so that the filling requires thorough, meticulous, and accurate mechanisms and methods in order to obtain supreme court judges who have adequate integrity."[19]

Mardian Wibowo in his Dissertation entitled The Meaning of Open Legal Policy in the Decision to Test the Law at the Constitutional Court, based on the Constitutional Court's legal considerations in its various decisions, formulated the Constitutional Court's views on the concept and testing of legal norms which are Open *Legal Policy* as follows:

> According to the Constitutional Court, an open legal policy is a condition when there is a formulation of legal norms whose norm material is not regulated in the 1945 Constitution, or a formulation of legal norms that arise as a consequence of the implementation of explicit orders of the 1945 Constitution, so that the legal norms cannot be assessed for their constitutionality, and the legal norms can be changed at any time by the lawmakers. The essence of the Constitutional Court's concept of open law policy is the freedom for lawmakers to regulate all matters that are

[19] Constitutional Court Decision Number 25/PUU-XI/2013

not ordered/regulated by the 1945 Constitution, in order to ensure the smooth running of the government or state activities.[20]

In the case of testing the norms that regulate the age of presidential and vice presidential candidates in cases number 29/PUU-XXI/2023, number 51/PUU-XXI/2023, and number 55/PUU-XXI/2023, the Constitutional Court considered that the requirements for determining the age requirements for presidential and vice presidential candidates are the domain of the authority of the House of Representatives and the President to discuss and decide on them in the formation of laws. The following are the considerations of the Constitutional Court Judges regarding the testing of the age requirements for presidential candidates and vice presidential candidates:

Constitutional Court Decision Number 29/PUU-XXI/2023:

"Considering that based on the development of the regulation of the minimum age limit requirements for presidential and vice presidential candidates, the original intent on Article 6 paragraph (2) of the 1945 Constitution and court decisions related to the age limit for public office, the minimum age limit requirement for presidential and vice presidential candidates is an open law-making policy option that is likely to be adjusted to the dynamics and age needs of presidential and vice presidential candidates. For the Court, it is important to determine the minimum age limit for presidential candidates and vice presidential candidates, which in reasonable judgment may not cause harm to the constitutional rights of citizens who in reasonable reasoning are potentially proposed by political parties or coalitions of political parties participating in the general election as presidential candidates or vice presidential candidates. **In this regard, the desire of the House of Representatives and the President as expressed in their statements hopes that the benchmark for the age limit of presidential candidates and vice presidential candidates will be adjusted to the dynamics of the development of the productive age, according to the Court, this is the domain of the authority of the House of Representatives and the President to discuss and decide on it in the formation of laws**. Moreover, Article 6 paragraph (2) of the 1945 Constitution states the conditions to become President".[21]

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[20] Mardian Wibowo, 2017, The Meaning of Open Legal Policy in the Decision to Test the Law at the Constitutional Court, Dissertation, Brawijaya University, Malang, p. 396

[21] Constitutional Court Decision Number 29/PUU-XXI/2023

Constitutional Court Decision Number 51/PUU-XXI/2023:

"That based on the above quote of legal considerations, because the substance in question by the Applicant is essentially the same as what has been previously decided by the Court in the Constitutional Court Decision Number 29/PUU-XXI/2023, among others related to the minimum age limit for presidential candidates and vice presidential candidates, the **legal considerations in Decision 156 of the Constitutional Court Number 29/PUU-XXI/2023 above mutatis mutandis apply in the legal considerations of the a quo application.**[22]

Constitutional Court Decision Number 55/PUU-XXI/2023:

"That based on the above quote of legal considerations, because the substance at issue by the Petitioners in the a quo case is essentially the same as what has been previously decided by the Court in the Constitutional Court Decision Number 29/PUU-XXI/2023 which was then quoted in the Constitutional Court Decision Number 51/PUU-XXI/2023, among other things related to the minimum age limit for presidential candidates and vice presidential candidates, Therefore, **the legal considerations in the two decisions mutatis mutandis apply in the legal considerations of the a quo application**. Based on the citations of the two decisions, **the Court is essentially of the opinion that the minimum age restriction for presidential and vice presidential candidates is an open legal policy that is fully authorized by the Legislator, namely the House of Representatives together with the President**. The court in a quo case did not find a justifying reason or justification argument to declare a norm that is an open legal policy as an unconstitutional norm or at least conditionally unconstitutional. **The change to the norm which is an open legal policy, in casu the age requirement is not regulated in the 1945 Constitution because it is further regulated in the law [vide Article 6 paragraph (2) of the 1945 Constitution].** This means that the Legislator as mandated by Article 6 paragraph (2) of the 1945 Constitution has the authority to determine it. Moreover, in the trial of the a quo case, both the House of Representatives and the President have affirmed in written statements and oral statements that both "leave it entirely to the discretion" of the Court to consider and assess the constitutionality of Article 169 letter q of Law 7/2017 [vide Statement of the House of

[22] Constitutional Court Decision Number 51/PUU-XXI/2023

> Representatives, p. 30; President's Statement, p. 5; and Minutes of the Session dated August 1, 2023".[23]

In contrast to the three previous decisions, in the Constitutional Court's decision in case Number 90/PUU-XXI/2023, even though it has the same object, the Constitutional Court has a different view in its legal considerations. The Constitutional Court also stated in its consideration that the Constitutional Court can change its stance in assessing the constitutionality of a case being examined and tried as long as there are strong fundamental reasons. The following are the Constitutional Court's considerations in decision Number 90/PUU-XXI/2023:

> "... Based on the legal considerations of the Court's decision above, **the Court can basically change its stance in assessing the issue of the constitutionality of a case that is being examined and tried as long as there are fundamental reasons** including in the a quo case, if the Court has a different opinion related to the age requirements of the voter and the elected, in casu the age limit for Presidential and Vice Presidential candidates if there are fundamental reasons in the development of the constitution. In addition, in relation to legal policy or *open legal policy* related to the age limit, the Court in several decisions related to *legal policy* often maintains that legal policy can be set aside if it violates the principles of morality, rationality, and intolerable injustice. Likewise, as long as the choice of policy does not exceed the authority of the lawmakers, does not constitute an abuse of authority, and is not manifestly contrary to the 1945 Constitution, then such a choice of policy can be declared unconstitutional or conditionally unconstitutional by the Court. In addition, norms related to *legal policy* are something that is not expressly regulated in the Constitution because if it is expressly regulated in the constitution, then the law must not regulate norms that are different from constitutional norms. In recent decisions, the Court has reinterpreted and set aside *the open legal policy* as in the case related to the retirement age limit and the minimum age limit for state administrators because it is considered by the Court that the norms that are requested to be tested are considered to violate one of the principles to be able to override or ignore *the open legal policy* such as violations of the principles of morality, rationality, and injustice that *intolerable*, does not exceed

[23] Constitutional Court Decision Number 55/PUU-XXI/2023

> authority, does not constitute an abuse of authority, and/or is contrary to the 1945 Constitution..."[24]

In the Constitutional Court's subsequent considerations, it was further elaborated on its views on *the open legal policy* that:

> "... In this regard, according to the Court, the existence of a legal policy or open legal policy (*open legal policy*) although it is acceptable in constitutional practice, but in its development such as in some of the Court's decisions mentioned above, the Court can ignore/override while reinterpreting the norm which is an *open legal policy* aforementioned. In fact, the Court can assess whether the norm that previously included the open legal policy is still constitutional or unconstitutional or constitutional/unconstitutional conditionally, partially or completely..."[25]

Based on the views of the Constitutional Court contained in its decision above, the researcher found two things related to the *open legal policy* related to testing the age requirements for presidential and vice presidential candidates:

1. There is an inconsistency in the attitude of the Constitutional Court in testing the norms of Article 169 letter q of Law No. 7 concerning the age requirements for presidential candidates and vice presidential candidates, which has been expressly stated by the Constitutional Court itself in its previous rulings as an open *legal policy*.
2. The Constitutional Court's inconsistency regarding the testing of norms, which is an open legal policy, causes a lack of legal certainty in the implementation of judicial review at the Constitutional Court.

The Constitutional Court as a Negative Legislator.

Article 6 paragraph (2) of the 1945 Constitution reads that the conditions for becoming President and Vice President are further regulated by law. The aforementioned provisions have expressly delegated the regulation regarding the content material that has been determined in the 1945 Constitution into the law, the delegation is marked by the formulation of the word "further regulated by law". The use of the sentence ".... further regulated by law" means that the content material that is delegated has been partially regulated in the delegating

[24] Constitutional Court Decision Number 90/PUU-XXI/2023
[25] *Ibid*

Laws and Regulations but the content material must be regulated only in the delegated Laws and Regulations and should not be further delegated to the lower Laws and Regulations (subdelegation).[26]

Based on the provisions of Article 20 paragraphs (1) and (2) of the 1945 Constitution, the authority to make laws lies with the House of Representatives and the President, the compliance with the requirements for presidential candidates and vice presidential candidates is the domain of the House of Representatives and the President. The authority of the House of Representatives and the President as institutions that have the authority to make laws that regulate is often referred to as the *Positive Legislator*. Bagir Manan said that *positive legislator* refers to the authority to form new legal norms that are *regulating*. This function is mainly carried out by the legislature, in this case the House of Representatives together with the President.[27] Furthermore, Mahfud MD explained that *a positive legislator* is an organ or institution (referring to a state institution, namely the House of Representatives ("DPR") and the Government that has the authority to make norms.[28]

In its development, the Constitutional Court as an institution that exercises judicial power which has the authority to test the law against the Constitution in its decisions not only makes decisions *that are negative legislative* but also makes decisions that are *positive legislatures,* which makes the Constitutional Court which is the institution that implements judicial power *from a Negative legislator* to a *Positive Legislator*. *Negative legislator* is defined as shaping laws negatively, or forming laws not by drafting formulations but by negating or canceling the formulation of laws. The Constitutional Court forms (new meaning) of the law by eliminating/deleting the formula that previously existed and then becomes non-existent or invalid.[29]

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[26] Radita Ajie, 2018, "Limitations of Open Legal Policy Options in the Formation of Laws and Regulations Based on the Interpretation of the Constitutional Court's Decision," Indonesian Journal of Legislation, volume 13, no. 2, p. 113.

[27] Bagir Manan, 2005, *DPR, DPD and MPR in the New 1945 Constitution,* FH UII Press, Yogyakarta, p. 22

[28] Mahfud MD, 2012, *Constitution and Law in Controversial Issues,* Rajawali Pers, Jakarta, p. 280

[29] Mardian Wibowo, Op Cit, The Meaning of Open Legal Policy in the Decision to Test the Law at the Constitutional Court, p. 142

Normatively, the Court was formed as a judicial institution with a negative *legialture*. Article 57 paragraph (2a) of Law Number 8 of 2011 concerning the Constitutional Court stipulates that decisions are not allowed to decide outside the provisions of paragraphs (1) and (2), namely they may not give orders to lawmakers (legislative institutions), and do not produce the formulation of norms from laws that are decided unconstitutional. However, Article 57 paragraph (2a) of Law 8/2011 is no longer valid based on the decision Number 48/PUU-IX/2011, in *the ratio decidendi* the Court stated that Article 57 paragraph (2a) of Law 8/2011 has reduced the freedom of constitutional judges in: (i) Testing the constitutionality of norms; (ii) Establishing a new legal situation as a result of the Court's decision while waiting for the legislative process that is too long; (iii) Constitutional Judges have the obligation to always follow, understand, and explore the state of law and the sense of justice that develops in society.[30]

In the period from 2012 to 2022, it was recorded that of the 198 decisions granted by the Court, more than 54% were *positive legislatures* or if counted in total, as many as 107 (one hundred and seven) Court decisions were *positive legislatures* with the elaboration of 98 (ninety-eight) conditionally unconstitutional decisions) and 9 (nine) *conditionally constitutional decisions*.[31]

Ahead of the implementation of the registration stage for presidential and vice presidential candidates to the KPU, on October 16, 2023, the Constitutional Court again made a *positive legislative decision* in decision Number 90/PUU-XXI/2023 which tested the age requirements for Presidential Candidates and Vice Presidential Candidates. The court in its decision granted part of the applicant's application and the decision was *positive legislation* with a *conditionally unconstitutional ruling*. The Constitutional Court, in its legal considerations, argued that the age requirement restriction that is only placed at a certain age without opening an equal alternative requirement is a form of injustice that is *intolerable* in the contestation of the presidential and vice presidential elections.

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[30] Muhammad Alief Farezi Efendi, Muhtadi, and Ahmad Saleh, 2023, "Positive Legislature Decisions by the Constitutional Court," Constitutional Journal, volume 20, no.4, p. 624

[31] *ibid*, p. 628.

The Constitutional Court further held that regional heads (Governors, Regents, and Mayors) and elected *officials* in legislative elections (members of the House of Representatives, members of the House of Representatives, and members of the House of Representatives) who have been/are in office should be seen as having the qualifications and capacity as candidates for national leaders. The Constitutional Court in principle held that the age requirement for presidential and vice presidential candidacy should provide opportunities and eliminate restrictions (*to give opportunity and abolish restriction*) in a rational, fair, and accountable manner.

On the basis as described above, the Constitutional Court then in its decision changed the provisions of the age requirements for presidential candidates and vice presidential candidates by formulating new legal norms, from the provision of "at least 40 (forty) years old" to "at least 40 (forty) years old or ever/currently occupying a position elected through general elections, including the election of regional heads".

Based on the Constitutional Court's decision, the researcher found several important things in the Constitutional Court's decision Number 90/PUU-XXI/2023 which is a positive legislature:

a. In the perspective of the theory of the state of law, there is a violation of the principle of separation of powers. There is a shift in the function of the institution, where the formation of legal norms is the exclusive part of the lawmakers, namely the House of Representatives and the President, so the Constitutional Court's decision which is *positive legislator* is an act of taking over the legislative function to regulate the requirements for presidential candidates and vice presidential candidates as mandated by the 1945 Constitution. The Constitutional Court's Decision Number 90/PUU-XXI/2023 is evidence of a change in the constitutional system, because there has been a change in the constitutional design of the Constitutional Court's authority as stipulated in the 1945 Constitution, which has an impact on the disruption of checks and balances.
b. Causing Legal Uncertainty
   The absence of clear standards or limitations for the Constitutional Court in issuing decisions that are positive legeslature, causes ambiguity or uncertainty in the legal system regarding the formation of norms in the law.
c. Dominance of Judicial Power of the Constitutional Court

The Constitutional Court's decision, which is positioned as a positive legislator, shows the dominance of the judicial power institution, even under certain conditions can cause abuse of judicial authority by the Constitutional Court.

d. Inconsistency with Constitutional Theory
The decision that is positive legislation is contrary to the concept of the original intent of the 1945 Constitution, deviates from the classical theory of law formation, and the problem of constitutional legitimacy. Martitah argued that the Constitutional Court's decision is a positive legislature, is a manifestation of the judge's discretion, but allowing the judge's discretion without limits, will open a loophole and the possibility that the judge will act as freely as possible, which is very dangerous, even not impossible, the judge can take over the function of legislation.[32] In line with this opinion

Ultrapetita's Decision on the Constitutional Court Decision Number 90/PUU-XXI/2023

Law Number 24 of 2003 concerning the Constitutional Court is not known as a conditionally *constitutional decision* as the Constitutional Court decision Number 90/PUU-XXI/2023. According to the provisions of Article 64 of Law Number 24 of 2003 concerning the Constitutional Court, the types of rulings of the Constitutional Court are divided into three, namely: 1. the ruling states that the application is unacceptable, in the event that the Constitutional Court is of the opinion that the applicant and/or the application does not meet the requirements, 2. the ruling stating that the application is granted, in the event that the Constitutional Court is of the opinion that the application is reasonable, and 3. the ruling stating that the application is rejected, in the event that the application is unreasonable.

In its development, there are models of decisions issued by the Constitutional Court of the Republic of Indonesia, especially in the authority of the Constitutional Court to test laws against the Constitution, namely: 1. Partial Granting Decision, 2. *Conditional Constitutional* Decision, 3. *Conditionally Unconstitutional Decision*, 4. The Decision on the Implementation of the Decision

[32] Martitah, 2013, The Constitutional Court from Negative Lagislature to Positive Legislature, Konpress, Jakarta, pp. 265-266.

is Postponed (*Limited Constitutional*), and 5. The Decision That Formulates the New Norm.[33]

The Constitutional Court's Decision Number 90/PUU-XXI/2023, which changes the formulation of article 169 letter q of Law Number 7 of 2017 concerning General Elections, is a model decision that formulates new norms. A Constitutional Court decision that formulates a new norm is a Constitutional Court decision that changes or makes something new to a certain part of the law being tested, thus causing a change in the norm being tested. Decisions that formulate new norms are attached to conditional constitutional decisions and conditional unconstitutional decisions, this is because it is through the model of decisions that it is possible to formulate new norms.[34]

The Constitutional Court clearly in considering its decision using its choice to consider the Petitioner's petitum in the choice/substitute petitum, namely "*ex aequo et bono*" then based on the provisions of Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which reads "The judicial power is an independent power to administer the judiciary to uphold law and justice" and Article 45 paragraph (1) of the Constitutional Court Law which reads, "The Constitutional Court decided the case based on the 1945 Constitution of the Republic of Indonesia in accordance with the evidence and the judge's conviction" The Constitutional Court made an *ultra-petita decision* so as to create a new legal norm in deciding the case of testing the age requirements for Presidential Candidates and Vice Presidential Candidates in case Number 90/PUU-XXI/2023.

The Constitutional Court must not go beyond the boundaries or enter the realm of other powers (legislative), Mahfud MD revealed that there are ten signs limiting the authority of the Constitutional Court. As quoted by Ach Rubaie in his book Ultra Petita Decision of the Constitutional Court Supraphallological, Theoretical and Juridical, here are four of the ten limiting signs of Mahfud MD's opinion regarding the *ultra petita decision*:

> **First**, in testing the Law, the Constitutional Court must not make a ruling that is regulating, and the cancellation of the Law must not be accompanied by regulation. Because the regulatory field is the legislative

[33] Geofani Milthree Saragih, et.el, Constitutional Court Decision in the Practice of Testing the Law against Law 45, PT Raja Frafindo Persada, Depok, 2023, pp. 160 to 163

[34] *Ibid* p.163

realm. So, the Constitutional Court can only say that a law or its contents are constitutional.

Second, in testing the law, the Constitutional Court must not make an ultra petita decision (a decision that is not requested by the applicant), because by making an ultra petita decision, it means that the Constitutional Court intervenes in the legislative realm. Even so, there are also those who argue that ultra petita can be carried out by the Constitutional Court, if the content of the law requested for judicial review is directly related to other articles that cannot be separated.

Third, in making a decision, the Constitutional Court must not use the law as the basis for the annulment of other laws, because the Constitutional Court's task is to test the constitutionality of the Law against the Constitution, not the Law against other laws. Overlap between various laws is the obligation of the legislature to resolve through legislative review.

Fourth, in making decisions, the Constitutional Court must not interfere in matters delegated by the Constitution to the legislature to regulate them with or in the Law according to its own political choice. In the 1945 Constitution itself, many issues are submitted to be regulated based on the needs and political choices of legislative institutions which of course cannot be interfered with by other institutions, including the Constitutional Court.[35]

Ach Rubaie formulated strict requirements if the Constitutional Court issues *an ultra petita* decision that is *positive legislature*, namely:

1. It is intended to fill the legal vacuum (*rechtvacuum*);
2. It is carried out under very urgent conditions, because the legislature (DPR) is unlikely to make legal rules in a relatively short time;
3. It is implemented only once or until the legislature makes a replacement rule;
4. In order to protect, guarantee and enforce the constitutional rights of citizens;

[35] Ach Rubaie, *op.cit*, hlm 220

5. The aim is solely to uphold substantive justice and constitutional justice.[36]

Based on the description of the Constitutional Court judges' considerations and the opinions of the experts mentioned above, the researcher found several important things in the Constitutional Court decision Number 90/PUU-XXI/2023 which is *ultra petita*, namely as follows:

1. In the perspective of the Theory of the State of Law,
   The basis for the Constitutional Court's decision in case Number 90/PUU-XXI/2023 in an *ultra-arbitrary* manner so as to create a new legal norm is seen as incompatible with the principle of separation of powers which is also embraced in the Indonesian constitution, where the Constitutional Court is the institution that implements judicial power, not the legislature.
2. In the perspective of authority theory.
   The Constitutional Court is a state institution that gets authority by attribution, where its authority is expressly stated in Article 24 letter C of the 1945 Constitution to assess or adjudicate the constitutionality of a law against the 1945 Constitution. If you look at the description in the consideration of the Constitutional Court deciding case Number 90/PUU-XXI/2023 which then made a decision that is *ultra-petita* so as to create a new legal norm, then the Constitutional Court's decision is a form of action that exceeds the limit of its authority given by the 1945 Constitution.
3. In the Perspective of Judge's Decision Theory.
   The Constitutional Court has done what is called *rechtschepping, judge made law*, by changing the provisions of article 169 letter q of Law Number 7 of 2017 concerning General Elections by formulating new norms on the grounds that the Constitutional Court makes alternative conditions other than age to give opportunity *and abolish restrictions*) in a fair, rational and accountable manner. The reason for the Constitutional Court is not in line with the formulation in its decision which reads "at least 40 (forty) years old or have/is occupying a position elected through a general election", because the formulation of the new norm only opens

[36] Ach Rubaie, *op.cit*, hlm 223

limited opportunities for certain people, namely those who have/are currently occupying positions elected through general elections.

Decisions that are conditional on political interests

The Constitutional Court's decision that is *ultra-petita* in case Number 90/PUU-XXI/2023 so that it formulates a new legal norm is not a form to realize substatative justice, but a form of inconsistency of the Constitutional Court that shows the existence of double standards to accommodate the political interests of certain parties. The Honorary Assembly of the Constitutional Court in its conclusion in Decision Number: 2/MKMK/L/11/2023 with the reported judge of the Constitutional Court Chief Justice Anwar Usman The Assembly clearly found that there was intervention from parties outside the Constitutional Court who were interested in the legal norms that were being tested in case Number 90/PUU-XXI/2023.

Conclusion

The Constitutional Court's Decision Number: Number 90/PUU-XXI/2023 has raised various serious legal issues. This decision illustrates the inconsistency of judges regarding the application of the principle of open legal policy, the Constitutional Court's decision has also made a formulation of new legal norms and is different from what was requested by the applicant (ultra petita). Furthermore, the ruling shows that the Constitutional Court as the holder of judicial power has acted as a *positive legislature,* which should be the authority of the legislative body. This reflects a shift in roles and is not in accordance with the principle of separation of powers in the constitutional system in Indonesia.

The Constitutional Court's Decision Number 90/PUU-XXI/2023 has exceeded the constitutional authority of the Constitutional Court in conducting judicial review, the Constitutional Court as a judicial institution should remain in its position as a Negative Legislature. Changes in the age requirements for Presidential Candidates and Vice Presidential Candidates should be carried out through a mechanism to amend the law by law-making institutions in accordance with the authority given by the 1945 Constitution, namely the House of Representatives and the President.

The Constitutional Court's Decision Number 90/PUU-XXI/2023 is also a form of failure of the Constitutional Court in carrying out its functions as the *guardian of the constitution (the guardian of the constitution*) and the interpreter of the constitution (*the interpreter of the constitution).* The decision has shown the inconstitutionality of the Constitutional Court in its decision, violations in the procedure for examining cases, and shows that the Constitutional Court has also failed to maintain the principle of independence, the principle of integrity, the principle of competence, the principle of impartiality, and the principle of propriety as revealed by the decision of the Honorary Assembly of the Constitutional Court Number: 2/MKMK/L/11/2023.

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