

**A COMPARISON OF THE INCONSISTENCY OF THE CONSTITUTIONAL COURT'S  
DECISION ON THE LOWEST AGE LIMIT FOR PRESIDENTIAL AND VICE-  
PRESIDENTIAL CANDIDACY BASED ON LAW NUMBER 7 OF 2017 CONCERNING  
GENERAL ELECTIONS (JURIDICAL ANALYSIS OF THE CONSTITUTIONAL  
COURT'S DECISION NUMBER 90/PUU-XXI/2023)**

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**ABSTRACT**

At the beginning of the 21st century, there was a phenomenon in the world where courts became increasingly important in dealing with various issues of morality, public policy and political controversy. Through the judicial review process, the court plays a role as the main tool in resolving complex problems involving various aspects, such as individual rights and public policies such as the criminal justice system, trade, education, immigration and the environment. Indonesia, as a democratic and constitutional country, prioritises the principle of the rule of law based on the 1945 Constitution. This research highlights the Constitutional Court Decision No. 90/PUU-XXI/2023 concerning Age Limits for Presidential and Vice Presidential Candidates. Using a normative juridical approach, this research aims to explore the authority of the Constitutional Court in accordance with the state's legal basis. The author believes that this decision should be the authority of the legislature, not the jurisdiction of the Constitutional Court. This research also emphasises the importance of maintaining the independence and sovereignty of judicial institutions to prevent abuse of power and protect individual freedoms. The Constitutional Court is expected to maintain the balance of power and protect the rights of citizens. However, this decision is controversial because of the role of the Constitutional Court in the political context, and this research highlights that the Constitutional Court's authority should be limited to testing constitutionality. In conclusion, this research emphasises the importance of separation of powers and maintaining the independence of the judiciary to prevent abuse of power by the executive and legislature. Maintaining a balance between democratic principles and the power of state institutions in using and interpreting positive law is the focus of this research.

**Keywords:** Judicial Review, Constitutional Court, Decision no. 90/PUU-XXI/2023

## A. BACKGROUND

Indonesia is a democratic and constitutional country based on law and constitution. As stated in Article 1 paragraph 2 and paragraph 3 of the 1945 Constitution. The contents of Article 1 paragraph 2 in the 1945 Constitution which states that Sovereignty is in the hands of the people and implemented according to the Constitution. and in Article 1 paragraph 3 of the 1945 Constitution states that the State of Indonesia is a Constitutional state. Because as a country whose highest law is the constitution and requires the state to provide a mechanism that ensures the realisation and implementation of all matters in accordance with the provisions of the basic law in the life of society, nation and state.

The 1945 Constitution as the legal basis of our country has undergone four amendments and these amendments have brought about important changes in the Indonesian constitutional system. One of these changes includes the institutional system and the relationship between the legislature, executive and judiciary as the main branches of state power. In the local government system there are more detailed regulations that ensure the protection of human rights and various systems in organising the state such as elections, education, culture, economy and social security welfare.<sup>1</sup>

Changes in the judicial system of judicial power, amendments to the 1945 Constitution established the Constitutional Court with 9 judges to act as guardians of the constitution and as protectors of the constitutional rights of citizens. With the existence of the Constitutional Court as a new institution must be understood as a whole as a force for the foundation of the 1945 Constitution after the amendment. Based on the nature of constitutionalism, which means that all branches of government are required to have limits on their authority. Due to the importance of limiting these authorities, it is also quite important to have a constitution that regulates state institutions and the limits of their authority.<sup>2</sup>

Examining laws that are contrary to the 1945 Constitution is one of the authorities of the Constitutional Court, as was recently implemented by the Constitutional Court regarding Decision Number 90 / PUU-XXI concerning Age Limits for Candidates for President and Vice

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<sup>1</sup> Abdul Mukhtie Fadjar, *Constitutional Law and the Constitutional Court*, Cet. 1, Sekretariat General and Registrar of MKRI, Jakarta, 2006, pp. 34

President. This decision of the Constitutional Court occurred at a time before the registration deadline for presidential and vice presidential candidates caused many advantages and disadvantages in the community. As well as the many pros and cons that occurred due to this Constitutional Court decision. The Constitutional Court, which is expected by the community to balance political interests, but overall looks like it is too deeply involved in these political interests.

Due to the pros and cons and controversies that have arisen as a result of the Constitutional Court's decision, the researchers will conduct a literature study on the comparative inconsistency of the Constitutional Court's decision on the lowest age limit for nominating the president and vice president based on Law Number 7/2017 on General Elections.

## **B. RESEARCH METHODOLOGY**

This research is a qualitative research with analytical descriptive method. The type of research used in this research is *normative law* research using normative case studies in the form of legal behaviour products, for example examining the Law. The subject of study is law which is conceptualised as norms or rules that apply in society and become a reference for behaviour for everyone. The specifications in this research are describing the applicable laws and regulations associated with legal theories and the practice of implementing positive law related to the problems that have been formulated.<sup>2</sup> The data source used in normative legal research is secondary data. Research data collection techniques through literature studies and interviews.

## **C. FINDING & DISCUSSION**

The concept of *judicial review*, and particularly in relation to *judicial review*, is known as *Judicial Review*. *Review* itself means to look at, assess, or re-examine, which comes from the words *re* and *view*.<sup>3</sup> *Judicial Review* is the testing of legislation whose authority is limited to the judicial power, and does not include testing by the legislature and executive.<sup>4</sup>

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<sup>2</sup> Soerjono Soekanto, *Introduction to Legal Research*, UI Press, Jakarta, 2010, pp. 53

<sup>3</sup> Putera Astomo, *Legislative Science (Theory and Practice in Indonesia)*, Cet. First, Rajawali Pers, Depok, 2018, p. 145.

<sup>4</sup> Zainal Arifin Hoesein, *Judicial Review in the Supreme Court of Indonesia (Three Decades of Legislative Testing)*, Cet. First, Raja Grafindo, Jakarta, 2009, p. 5.

The term *Judicial review*, is a technical term characteristic of Constitutional Law from the United States that refers to the authority of the court used to cancel any government action that is contrary to the constitution.<sup>5</sup> According to legal expert Jimly Ashiddiqie, *judicial review* is an effort to test the judicial body on the subject of law established by the legislative, executive and judicial branches of power.

The authority granted to judges is an application of the principle of *checks and balances* and based on the separation of state powers that can be trusted and ensure and realise democratic power as well as the ideals of the rule of law in accordance with *checks and balances* which has become one of the main ideas in the post-amendment 1945 Constitution. Testing the constitutionality of material laws has been determined to be the authority of judges, namely the Constitutional Court.<sup>6</sup>

The competence of the Indonesian Constitutional Court in the field of *judicial review* is shown against the testing of laws against the Constitution both in terms of formal and material aspects, which is commonly termed constitutional testing. The basis for the Constitutional Court to conduct constitutionality testing is found in Article 24C of the 1945 Constitution and is also further regulated in Article 10 of Law No. 24 of 2003 concerning the Constitutional Court and its amendment with Law No. 8 of 2011.<sup>7</sup> The adoption of the *judicial review* system is a form and effort to strengthen the concept of the rule of law that places the constitution as the supreme law of a country.

This is in line with the *Stufenbau* theory put forward by Hans Kelsen which explains that the legal order is a hierarchical or multilevel system of norms and above the constitution as the basic law, there is a higher hypothetical basic rule that is not a positive rule known as the *groundnorm*. In the hierarchy of the legal order, the legal rules of the lower level gain strength from the higher legal rules.<sup>8</sup> In the context of this *judicial review*, the judge has the right to

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<sup>5</sup> Kartono, "The Politics of Judicial Review Law in Indonesia", *Journal of Legal Dynamics*, Vol. 11, No. 1, 2011, pp. 18.

<sup>6</sup> Fatkhurohman, *Understanding the Existence of the Constitutional Court in Indonesia*, PT Citra Aditya Bakti, Bandung, 2004, p. 25. 25.

<sup>7</sup> Nurul Qamar, "The Judicial Review Authority of the Constitutional Court", *Jurnal Konstitusi*, Vol. 1, No. 1, 2012, pp. 3.

<sup>8</sup> Janpatar Simamora, "Juridical Analysis of the Model of Judicial Review Authority in Indonesia." *Mimbar Hukum*, Vol. 25, No. 3, 2013, pp. 389.

prohibit and cancel the following government actions:<sup>9</sup>

1. *Arbitrary, capricious, abuse of discretion* and other unlawful acts;
2. Contrary to constitutional rights, contrary to authority/power, *privilege* or immunity;
3. Exceeds the limits of authority prescribed by law or is not based on any right;
4. Conducted without regard to or in accordance with the procedures prescribed by the judge;
5. Not supported by the truth in the facts of the matter in question which constitutes "substantial *evidence*" of the government's action.

In order for a petition for judicial review of a law against the 1945 Constitution to have *legal standing* before the Court, the petitioner must be a party whose constitutional rights and/or authorities have been impaired by the existence of the governing law. The absence of regulations that follow up on the decision of the Constitutional Court does not reduce the binding force that has been attached since it was read out. Every relevant party must implement the judgement. If any implemented regulation turns out to be contrary to the decision of the Constitutional Court, then the legal basis is the decision of the Constitutional Court.

The mechanism is the same as the formation of a new law. A law has binding legal force from the time it is enacted. However, there are provisions that can be implemented immediately, but some require implementing regulations. If the implementing regulations have not been made or adjusted, it does not reduce the binding nature of the Law itself. In fact, in every closing provision of the Law, it is always stated that all implementing regulations remain in effect as long as they do not conflict with the Law itself.

The decision of the Constitutional Court No. 90/PUU/XXI/2023 on the age limit for presidential and vice-presidential candidates has been widely contested in all circles, especially by activists committed to supporting democracy. And it did not escape the views of law professors and legal experts who strongly opposed this decision and expressed their disagreement with the significant changes in the presidential election regulations.<sup>10</sup>

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<sup>9</sup> Putera Astomo, *Op. Cit.* p. 146.

<sup>10</sup> Neli Agustin, "Controversy and Influence of Constitutional Court Decision No. 90: Political Dynamics, Legal Perspectives and the Possibility of Forming Political Dynasties." Kompasiana, available at <https://www.kompasiana.com/kamekosantai7478/657f3fc312d50f35ec0abea2/kontroversi-dan-influence-verdict-mk-no-90-political-dynamics-legal-perspective-and-the-possibility-of-forming-political-dynasties>, accessed on 4 January 2024.

Explanation of the case of Constitutional Court Decision No. 90/PUU/XXI/2023 which was granted, while there were three decisions rejected by the Constitutional Court, one of which was Case No. 29/PUU- XXI/2023. In this petition, the Plaintiffs requested that the age requirement be returned to 35 years old as stipulated in the previous Presidential Election Law. The Petitioners argued that the provisions of Article 169 letter q. were discriminatory, unscientific, and contrary to the original intent of the formation of the 1945 Constitution. In addition, there is a petition from the Garuda Party in Case No. 51/PUU-XXI/2023 which argues the same reason.

In this application, the Petitioner requested an additional alternative requirement, namely "having been a state organiser" to be able to deviate from the minimum age limit of 40 years. All of this was rejected by the Constitutional Court and decided to accept the case requesting that the 40-year age requirement for presidential and vice presidential candidates could be waived, if they had served as regional heads. Gratuitously and full of inconsistencies.

### **Juristocracy Paradigm in Constitutional Court Decision Number 90/PUU-XXI- 2023**

A worldwide phenomenon in the early 21st century is the reliance on the courts to resolve issues relating to morality, public policy, and political controversies. Through the instrument of judicial review. The courts continue to be used as a tool to confront the interests of society with multidimensional issues such as the right to freedom of expression, freedom of religion, privacy rights, reproductive rights, and issues related to public policy such as the criminal justice system, trade and business, education, immigration, labour, environmental protection, campaign finance restrictions, and affirmative action policies.

The power to adjudicate political polemics has turned the court into a political institution. This happened because, according to Hirschl, Constitutional Law is another form of politics. Legal scholars call this "*political judicialisation*" or "*judicialisation of politics*". Neal Tate defines "*judicialisation of politics*" as "*the infusion of judicial decision-making and of court like procedures into political arenas where they did not previously reside*".<sup>11</sup>

The study of juristocracy is a long one, and in its development, has undergone changes

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<sup>11</sup> Neal Tate, *Why the Expansion of Judicial Power, In The Global Expansion of Judicial Power*, New York University Press, New York, 1995, pp. 23

in meaning and context. In his book entitled "*Republica*", Plato conceptually formulated an expectation, the existence of an elite group, which has wisdom and systemic intelligence, to be relied upon to be the manager of an organisation called the State. This elite group was later called the juristocrats. A group of elites, who have intelligence and wisdom in the field of law, who with this valuable modality, transform into "*the philosopher king*".

The system that relied on jurists in managing the state was later called yuristocracy. At first, the term yuristocracy was a positive term.<sup>12</sup> However, along with its development, juristocracy has experienced a significant shift, which is commonly described as the power of a group of jurists, or judges, which is basically a manifestation of the sovereignty of the judiciary, in hijacking the legislative function, which should be the authority of the legislative line. According to Ran Hirschl's view in his book entitled "*Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*", an in-depth study of the increasing role of judicial institutions in political decisions, especially in the context of modern constitutionalism. Hirschl discusses how the power of judges and the judiciary in many countries has developed into a significant force in determining public policy.

In relation to the Constitutional Court Decision No. 90, it is clear that Article 169 letter (q) of Law Number 7 Year 2017 on General Elections should be applied. "The requirement to be a presidential candidate and vice presidential candidate is at least 40 (forty years) old" has consistently been decided by the Constitutional Court as an article that is open legal policy, as the Court did in previous similar decisions. However, many assume that the exception made by the Constitutional Court in Constitutional Court Decision No. 90 is allegedly to smoothen the political steps of Gibran to perpetuate himself as one of the participants in the upcoming 2024 Presidential Election.

Constitutionally, it is true that legal norms cannot apply to only one individual (Gibran). However, what the Constitutional Court did by going in the opposite direction by not stating that Article 169 is an open article, caused the Constitutional Court to violate the principle of exceeding authority by state institutions, which in Latin is called "*ultra vires*". This phrase literally means "exceeding power" or "beyond power."

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<sup>12</sup> Alip D. Pratama, "Opinion: Towards a Juristocracy." *Tribun News*, available at <https://palembang.tribunnews.com/2023/12/04/opini-menuju-negara-yuristokrasi>, accessed on 5 January 2024.



The concept of "*ultra vires*" refers to an action or decision of a government agency or legal entity that exceeds or is not in accordance with the authority or power that has been given to it by law or the constitution. *Ultra petita*, on the other hand, is a verdict by a judge on a case that is not prosecuted or "the judge makes a verdict that exceeds what is requested."<sup>13</sup> The provision of *ultra petita* is regulated in Article 178 paragraphs (2) and (3) *Het Herziene Indonesisch Reglement* (HIR) and its equivalent in Article 189 paragraphs (2) and (3) RBg which prohibits a judge from deciding more than what is demanded (*petitum*). HIR is the applicable procedural law in civil courts in Indonesia. In Decision No. 90/PUU-XXI-2023 related to the examination of Article 169 letter q of Law No. 7/2017 on General Elections, the Constitutional Court Judge issued a decision that exceeded the *petitum* of the petition or *ultra petita*.<sup>14</sup>

The decision reads that Article 169 letter q of Law Number 7 Year 2017 on General Elections (State Gazette of the Republic of Indonesia Year 2017 Number 182, Supplement to State Gazette of the Republic of Indonesia Number 6109) which states, "at least 40 (forty) years old" is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force, as long as it is not interpreted as "at least 40 (forty) years old or has / is currently holding an office elected through general elections including regional head elections".

Therefore, Article 169 letter q of Law Number 7 Year 2017 on General Elections reads "at least 40 (forty) years old or has / is currently holding an office elected through general elections including regional head elections" (Constitutional Court Decision No. 90/PUU-XXI-2023). The philosophical basis for the Constitutional Court to issue a decision that is *ultra petita* is determined by the inclusion of the applicant's subsidiary request which reads: "If the court is of another opinion, please issue the fairest possible decision (*ex aequo et bono*)".

In the event that the applicant submits an application based on juridical justice or the fairest decision, it can be concluded in the law that the applicant has submitted to the Constitutional Court the contents of the application that are not required or exceed the applicant's request. As we all know, in law the purpose of law is justice, in addition to certainty and

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<sup>13</sup> Ach Rubaie, *Ultra Petita Decisions of the Constitutional Court in Philosophical, Theoretical, and Juridical Perspectives*, LaksBang Pressindo, Yogyakarta, 2017, pp. 45

<sup>14</sup> Dea, Amanda, "The Ultra Petita Decision of the Constitutional Court: Understanding the Holistic Phenomenon of Progressive Law Finding (*Rechtvindig*)."  
*Limbago: Journal of Constitutional Law*, Vol. 1, No. 1, 2021, pp. 2



expediency, so the law must truly and proportionally reflect these three objectives. This is also in line with the principle of *judicis est ius dicere non dare* which means the authority of the judge to determine what the law is.

This is done with reference to the legal principle in the world of judicial power known as *dominus litis*, which means that it requires judges to actively seek and find justice as an independent judicial power to administer justice to uphold law and justice, as mandated in Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. From a legal perspective, the court is of *the* opinion that as the *guardian of the constitution*, the court's main reference in upholding the law is to adhere to the principles of national life based on the 1945 Constitution.

The court decided that in safeguarding the constitution, the court should not allow itself to be bound by justice, not only for procedural justice, but also for substantive justice. An important basis for this stance is the provision of Article 45 paragraph (1) of the Constitutional Court Law, which stipulates that the court decides cases in accordance with the 1945 Constitution based on evidence and the judge's conviction. What is meant by a judge's decision is a judge's decision based on evidence (Interpretation of Article 45 Paragraph 1 of the Constitutional Court Law).

Meanwhile, it is known that the *Dissenting Opinion* of Judge Saldi Isra expressed an academic opinion by citing 2 (two) opinions from Louis Henkin who brought the opinion "*Is There a Political Question' Doctrine*" and the opinion of John Serry, who brought the opinion "*Too Young to Run: A Proposal for an Age Amendment to the U.S Constitution.*" The 2 (two) opinions basically stated that whether or not someone who is young is eligible to lead this country. His *Dissenting Opinion* focuses on the age of 40 (forty) years old to run as a candidate for president and/or vice president in Indonesia.

Based on this, it appears that the resolution of political cases is deliberately attached to the Constitutional Court. Especially in the Constitutional Court Decision Number 90/PUU-XXI-2023. Therefore, the existing authorities of the Constitutional Court are authorities that have high political nuances. In addition, political considerations in the formation of the Constitutional Court seem to dominate more than scientific considerations. These political aspects are complemented by the mechanism for filling the positions of constitutional judges which are also

full of political interests. Therefore, it can be concluded that by "*nature*" the Constitutional Court is a political institution.

This is what Béla Pokol calls the creation of a pseudo-constitution. That the powers of the state based on democracy are massively altered by the constitutional court with its expanded powers.<sup>15</sup> In addition, the judicial activity of the ordinary courts, which is removed from the statutory provisions and based more on abstract statements of the constitution, makes the idea of democracy even more empty.

#### D. CONCLUSIONS AND RECOMMENDATIONS

Based on the results of the above research, it can be concluded that the Constitutional Court Decision Number 90/PUU-XXI/2023 which overrides the 40-year age limit for presidential and vice-presidential candidates who have served as regional heads has caused controversy in the community and among legal experts. This decision shows the importance of the judicial review mechanism as part of the system of *checks and balances* to assess the conformity of regulations with the constitution and protect constitutional rights. Although this decision is legally binding and must be respected, criticism and judicial review are part of the dynamics of a healthy democracy. The Constitutional Court's decision also reflects the growing phenomenon of juristocracy, raising questions about the independence of the judiciary and the limits of its power.

Expansion of understanding of the concept of *judicial review* and the importance of maintaining the independence of the Constitutional Court in carrying out its supervisory function over the executive and legislative powers is needed. There needs to be clear and firm regulations in following up on decisions of the Constitutional Court and law enforcement against violations of these decisions. In addition, it is important to encourage the participation of the public, legal experts and academics in overseeing the *judicial review* process, as well as increasing transparency and accountability in the Constitutional Court's decision-making. Reforms in the mechanism for filling the position of constitutional judge are also needed to ensure independence and expertise appropriate to the demands of the position.

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<sup>15</sup> Béla Pokol, *Juristocracy Trends and Versions*, Századvég Publishing House, Budapest, 2021.

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