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## JURIDICAL ANALYSIS OF PROBLEMATICS OF CONSTITUTIONAL COURT DECISION NUMBER 90/PUU- XXI/2023

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**Abstract:** Indonesia is a country that establishes law as the basis for the principles of nation and state life in accordance with the 1945 Constitution. This article analyzes the Constitutional Court decision Number 90/PUU-XXI/2023 which contains a material review of the age provisions for President and Vice President candidates Article 169 Letter q of the Law Number 7 of 2017 concerning General Elections. This research uses a normative juridical approach through library research with literature and legal documents. The results of this research reveal that the Constitutional Court as a judicial institution whose authority is stated in the Constitution, especially in examining the constitutionality of laws and regulations against the Constitution, has caused problems and controversy in decision Number 90/PUU-XXI/2023. This research examines all the problems that occurred in the decision from various points of view starting from examining the limits of constitutional authority, their position as negative legislators, the code of ethics of constitutional judges, the composition of decisions to formal legal defects. The conclusion of this research is that the Constitutional Court as a state institution which has a vital role and function should maintain independence, accountability and credibility to maintain democratic balance and as a reference for determining good positive law in Indonesia.

#### **Abstrak:**

Indonesia adalah negara yang menetapkan hukum sebagai dasar kehidupan prinsip berbangsa dan bernegara sesuai dengan UUD 1945. Artikel ini menganalisis putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 yang berisi uji materil ketentuan usia calon Presiden dan Wakil Presiden Pasal 169 Huruf q Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum. Penelitian ini menggunakan pendekatan yuridis normatif melalui studi pustaka dengan literatur dan dokumen hukum. Hasil penelitian ini mengungkap Mahkamah Konstitusi sebagai lembaga

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kehakiman yang wewenangnya tercantum dalam UUD, terutama dalam menguji konstusionalitas peraturan perundang-undangan terhadap UUD, menimbulkan problematik dan kontroversi dalam putusan Nomor 90/PUU-XXI/2023. Penelitian ini mencermati semua problematika yang terjadi pada putusan tersebut dari berbagai macam sudut pandang mulai dari telaah mengenai batasan kewenangan konstitusi, kedudukannya sebagai negative legislator, kode etik hakim konstitusi, pengambilan komposisi putusan hingga pada cacat hukum formil. Kesimpulan penelitian ini adalah Mahkamah Konstitusi sebagai lembaga negara yang mempunyai peran dan fungsi yang vital sudah seharusnya menjaga independensi, akuntabilitas dan kredibilitas untuk menjaga keseimbangan demokrasi dan sebagai acuan penetapan hukum positif yang baik di negara Indonesia.



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## A. INTRODUCTION

The call for the termination of the position of Chief Justice of the Constitutional Court (MK) Anwar Usman has again added to the history of abuse of authority and damage to the reputation of the Constitutional Court in this country due to the decision of the Constitutional Court Number 90/PUU-XXI/2023. This proves how sinister 'Family Court' politics can be carried out by powerful officials. There are almost no more government positions that are obtained completely through honesty and clean efforts, but there are always political interest groups that are the main route.

Even with this decision, the Constitutional Court as one of the judicial institutions which was formed with its duties and authority to protect the constitution and legal principles is also unable to maintain the accountability and credibility expected to uphold the constitution.<sup>1</sup>

With the final and binding nature of the Constitutional Court's decisions, coupled with the large function and role of the existing Constitutional Court, every decision made by the Constitutional Court will have a significant impact on the state system, especially on the establishment of democracy in Indonesia.

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<sup>1</sup> Dinoroy M. Aritonang, "Peranan dan Problematika Mahkamah Konstitusi (MK) dalam Menjalankan Fungsi dan Kewenangannya," *Jurnal Ilmu Administrasi* 10, no. 3 (2013): 374.

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The development of democracy in Indonesia occurs dynamically, this is influenced by the emergence of several factors in the process, such as the existence of political culture, political forces and the behavior of political actors. Since the 1999 General Election, the dynamics of democracy have become increasingly vibrant and rapid, then peaked after the 2004 direct Presidential Election and the direct regional head election (Pilkada) in 2005.<sup>2</sup> Problems regarding democracy are increasingly varied as conditions of government and state systems develop.

Maintaining democracy at the national level is not an easy process, especially when improving the quality of the election of President and Vice President and consolidating democracy. This process is considered crucial, this is because all stages of the process of selecting the President and Vice President can influence the quality of government governance in the future. For this reason, this section requires our collective attention, because in general democracy is understood as prioritizing the development of the people, so that in particular the results of the election of a high-quality President and Vice President can form increasingly effective government management. So with a democratic political system, it should be able to better guarantee the welfare of the people.<sup>3</sup>

In implementing a competent democracy, there is a need for balanced synergy between existing elements. Covers the duties, authority and relationships between state institutions that have been regulated in the 1945 Constitution. The establishment of balanced relationships between superstructure and infrastructure components will fulfill their respective achievements within their scope so that this can result in a better orderliness of political life in the country. However, with the existing diversity and continuing changes in people's lives, deviations and problems cannot be avoided and always change over time.<sup>4</sup>

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<sup>2</sup> Alifia Silvi Fatiha, Sorharjoto, dan Wahyuningsih Santosa, "Pemilihan Umum sebagai Wujud Pelaksanaan Demokrasi di Indonesia," *Jurnal Pendidikan Dasar dan Sosial Humaniora* 1, no. 3 (2022): 347.

<sup>3</sup> Alifia Silvi Fatiha, dkk, "Pemilihan Umum sebagai Wujud Pelaksanaan Demokrasi di Indonesia," hal. 347.

<sup>4</sup> Fauzan Khairazi, "Implementasi Demokrasi dan Hak Asasi Manusia di Indonesia," *Jurnal Inovatif* 8, no. 1 (2015): 88

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Therefore, the role of the judiciary in safeguarding democracy in Indonesia will become increasingly difficult every day. It is hoped that the amount of authority and all the powers given to the Constitutional Court in Indonesia can become a forum for providing solutions and dispelling state conflicts that occur in accordance with the purpose of its formation.

However, the Constitutional Court's decision has created a dilemma for the public regarding the current independence of the Constitutional Court. This occurred as a result of controversy over the Constitutional Court decision Number 90/PUU-XXI/2023, which many parties considered a problematic decision because this decision was very tangential to the 2024 general election which will soon be held.

Constitutional Court Decision Number 90/PUU-XXI/2023 regarding the material review of the minimum age requirements for President and Vice President candidates as regulated in Article 169 letter q of Law Number 7 of 2017 concerning General Elections is considered to be full of conflicts of interest because it was decided to smooth Gibran's path. Rakabuming Raka, the son of President Joko Widodo, who was also the nephew of the then Chief Justice of the Constitutional Court, Anwar Usman, before being dismissed from his position, is running for Vice President alongside Prabowo Subianto as running mate number 2 (two) in the 2024 General Election.<sup>5</sup>

Julius Hebrew as Chair of the Indonesian Legal Aid and Human Rights Association (PBHI) considers that what the Chief Justice of the Constitutional Court has done can be punished with serious violations with various types of evidence of violations found, starting from administration, juridical aspects to codes of ethics.<sup>6</sup>

From the judge's decision, several parties reported alleged violations of the code of ethics, so in this case the Honorary Council of the Constitutional Court (MKMK) intervened directly. Chairman of the Honorary Council of the

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<sup>5</sup> Fathiyah Wardah, "Akankah Keputusan MKMK Mengembalikan Kepercayaan Publik ke MK?," VOA Indonesia, 7 November 2023, <https://www.voaindonesia.com/a/akankah-keputusan-mkkm-mengembalikan-kepercayaan-publik-ke-mk-/7343790.html>.

<sup>6</sup> Fathiyah Wardah, "Akankah Keputusan MKMK Mengembalikan Kepercayaan Publik ke MK?," VOA Indonesia

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Constitutional Court (MKMK), which was formed at that time, Jimly Asshiddiqie, said that all the constitutional judges who granted lawsuit Number 90/PUU-XXI/2023 had problems. Even <sup>7</sup>though all the judges who decided were considered problematic, Anwar Usman as the Chief Judge who decided on the case was the one with the most problems, receiving fifteen reports.<sup>8</sup>

Julius again believes that the MKMK should be able to confirm and investigate everything that was violated in the decision, whether all the irregularities and ethical violations will lead to the destruction of democracy, which has been rebuilt with great difficulty after the collapse of the New Order in 1998. <sup>9</sup>Because among the rulings of the MKMK Number: 02/MKMK/L/11/2023 regarding Anwar Usman only being dismissed from his position as Chairman of the Constitutional Court even though it had been declared violate the judge's code of ethics and behavior, namely the principle of integrity, the principle of impartiality, the principle of competence and equality, the principle of independence, and the principle of appropriateness and decency as stated in the *Sapta Karsa Hutama* .

However, even though this has been proven, Anwar Usman is still not dismissed as judge. This decision makes the public's trust increasingly diminish with all the violations that have been committed, but they are still trusted to try cases in court. Although on the other hand, the MKMK has its own considerations in making this decision, this is to avoid having another Appeals Panel which could be carried out by Anwar Usman which could be a ploy to maintain his position as chairman of the Constitutional Court.<sup>10</sup>

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<sup>7</sup> "Jimly Asshidiqie Sebut Semua Hakim MK Bermasalah di Putusan Nomor 90: Anwar Usman Paling Banyak - Nasional Tempo.co," diakses 19 November 2023, <https://nasional.tempo.co/read/1792240/jimly-asshidiqie-sebut-semua-hakim-mk-bermasalah-di-putusan-nomor-90-anwar-usman-paling-banyak>.

<sup>8</sup> "MK Honorary Council: From Anwar Usman's alleged lies to the age limit for presidential and vice presidential candidates - What is known ahead of the verdict?," BBC News Indonesia, 6 November 2023, <https://www.bbc.com/indonesia/articles/cv2z39ye819o>.

<sup>9</sup> Fathiyah Wardah, "Akankah Keputusan MKMK Mengembalikan Kepercayaan Publik ke MK?," VOA Indonesia

<sup>10</sup> *Putusan MKMK: Anwar Usman Diberhentikan dari Jabatan Ketua MK, Langgar Etik!*

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According to Julius, if the decision of the Constitutional Court can enable Solo City's Gibran Rakabuming Raka to be nominated as a candidate for Vice President in the 2024 General Election, this is a point of dynastic politics and nepotism between President Joko Widodo, Chief Justice of the Constitutional Court Anwar Usman, and Gibran.<sup>11</sup>

With this MKMK decision, it has actually explicitly explained that there is nepotism in the Constitutional Court decision Number 90/PUU-XXI/2023. However, by not dismissing Anwar Usman as a constitutional judge, there is no guarantee that something similar will not happen again. With various worst possibilities that could happen, this has the potential to be a starting point where people will no longer believe in the democratic process in Indonesia. Of course, this will affect the results of the General Election, the results of General Election disputes and the legitimacy of the new government. Public distrust that occurs in a legal and sociological context can trigger civil disobedience and it is not impossible for horizontal riots to occur.

It is feared that this condition could become a point of decline for democracy in Indonesia, apart from having an impact on the destruction of the democratic order, it will also damage the state order because the agenda of citizens as the interests of the nation is actually overridden by the interests of group political agendas. The problem of representation is not a trivial problem, but a serious threat to the concept of representation, even though after reform there have been several changes to the state institutional system.<sup>12</sup>

With the problematic decision made by the Constitutional Court Number 90/PUU-XXI/2023 concerning the Age Requirements for Presidential and Vice Presidential Candidates, it raises doubts about the function and role of society as an institution formed to maintain the integrity of democracy in Indonesia, this is because the Court The Constitution is considered to no longer be able to maintain its credibility, accountability and consistency, resulting in abuse of

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<sup>11</sup> Fathiyah Wardah, "Akankah Keputusan MKMK Mengembalikan Kepercayaan Publik ke MK?," VOA Indonesia

<sup>12</sup> Fauzan Khairazi, "Implementasi Demokrasi dan Hak Asasi Manusia di Indonesia," *Jurnal Inovatif* 8, no. 1 (2015): 83.

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authority for family political interests, legal flaws in decisions and even violations of the code of ethics.

Based on the results of the description above, the author wants to examine all the problems that occurred in Decision Number 90/PUU-XXI/2023 as an analysis of the problems of historic conflict decisions from the Constitutional Court which has an important function and role as a guardian of the constitution and guardian of democracy.

## **B. RESEARCH METHODS**

This paper uses a normative juridical research method with a statutory approach.<sup>13</sup> The data source for this research was obtained from primary legal materials, which contain legal regulations and official legal documents. Secondary legal materials contain supporting and explanatory literature from the studies being researched, and tertiary legal materials provide further information from other legal materials such as news and newspapers.<sup>14</sup>

## **C. DISCUSSION**

### **The authority of the constitutional court's decision**

Regulations in the national legal system can become a unified whole if the basis for the formation and implementation of the law is in accordance with the 1945 Constitution. National law does cover a broad scope of law in various fields, but all of these regulations still rely on basic rules, namely the 1945 Constitution.

Based on the constitution, the Indonesian state places supreme sovereignty in the hands of the people. In regulating this sovereignty, so that there is no chaos and overlapping rights and obligations, Indonesia applies that everything that is done must be in accordance with established laws (rule of law). To realize the supremacy of law, in line with these provisions, it is necessary to have an independent judicial power, not related to any other power in carrying out justice.

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<sup>13</sup> Muhaimin, *Metode Penelitian Hukum* (Mataram: Mataram University Press, 2020), 47.

<sup>14</sup> Muhaimin, *Metode Penelitian Hukum*, hal. 56

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The Constitutional Court is one of the judicial institutions in Indonesia which has special duties and authority in state administration as stated in the 1945 Constitution, to safeguard the constitution so that it can be implemented responsibly for the realization of the ideals of the Indonesian nation. The Constitutional Court was born from improvements in Indonesia's past reforms, this proves that with the existence of the Constitutional Court, Indonesia hopes for a stable and better <sup>15</sup>law enforcement system .

The constitution is the basic norms or rules agreed upon by citizens in the life of the nation and state. To ensure that the constitution can run well and that violations do not occur, there must be a legal component that guarantees that there are no regulations that differ from or violate the constitution. This can be done by creating an authority to review regulations in accordance with the existing constitution. This test is very important to carry out due to the many laws that are continuously being made along with developments over time, and changes in power responsibilities. That is why the institution of the Constitutional Court was formed, which in one of its main functions is the guardian of the constitution and guardian of democracy. In this way, the Constitutional Court is also an independent state institution, which is free from ties to other institutions.

The authority of the Constitutional Court is stated in Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which is covered as follows:<sup>16</sup>

- 1) Testing the suitability of statutory regulations to the 1945 Constitution;
- 2) Resolving power disputes between state institutions;
- 3) Deciding on the dissolution of political parties;
- 4) Decide disputes over general election results; And
- 5) Providing a decision in the event of treason or serious violations committed by the president or vice president, taking into account suggestions from the DPR.

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<sup>15</sup> A Ahmad Fadlil Sumadi, Achmad Edi Subiyanto, dan Anna Triningsih, *Hukum Acara Mahkamah Konstitusi Perkembangan dalam Praktik* (Jakarta: RajaGrafindo Persada, 2020), 5–6

<sup>16</sup> Bambang Sutiyoso, *Hukum Acara Mahkamah Konstitusi* (Bandung: Citra Aditya Bakti, 2006), 9–10.



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In carrying out its duties and authority, the Constitutional Court applies the principle of *checks and balances* so as to place all state institutions in the same legal position, in order to create balance and justice in state administration. The formation of the Constitutional Court allows state institutions to provide performance corrections to each other in implementing state administration.

To maintain the dignity of the Constitutional Court, the constitutional judges appointed are not arbitrary, constitutional judges are expected to have integrity, objectivity, accountability, consistency and good morals. Therefore, the appointment and dismissal of constitutional judges is regulated in Article 24C paragraph (6) of the 1945 Constitution and the establishment of a code of ethics for constitutional judges as stated in Constitutional Court Regulation Number 09/PMK/2006.

To optimize the smooth implementation of the duties and authority of the Constitutional Court, case resolution is regulated and adjusted to the characteristics of each case in the Constitutional Court. In administering justice, the Constitutional Court continues to refer to the principle of judicial power, namely that it is carried out simply and quickly.<sup>17</sup>

### **Legal Review of Constitutional Court Decision Number 90/PUU-XXI/2023**

Every case submitted to a law enforcement agency certainly requires a solution decided by the authorities. For this reason, the judge's decision is very important in a case. With this decision, it is hoped that it can provide legal certainty and justice for each party involved in the lawsuit. To be able to provide legal certainty and justice in a case, of course the judge, as the party with the authority to make a decision, must know the case objectively or the actual facts and the laws that are applied. Therefore, the judge's consideration in making a decision is something that is very important.

The facts in the case will be known to the judge through each court process that is carried out. Therefore, every court procedure is important and

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<sup>17</sup> Bambang Sutiyoso, *Hukum Acara Mahkamah Konstitusi*, hal.10-11.

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will have the potential to violate the fulfillment of the rights of certain parties if it is missed, thereby causing injustice in decision making. So to maintain the dignity of a judge, in positive law in Indonesia every judicial institution has a procedural process and a code of ethics for each judge adapted to the absolute authority and power that is determined.

Judges as people who have the authority to decide cases in court are expected to have integrity, adequate legal knowledge, correct intellectual and morals, so that they can provide decisions that reflect justice, welfare and benefit. The judge's decision is greatly influenced by the judge's own considerations, therefore a judge with all the competencies he has is able to properly consider all aspects so that it can be accepted by all parties and does not deviate from the established legal rules, which is called *legal reasoning*.

Legal reasoning can mean the search for "reason" about the law, or a judge's search for the basis for determining the law to solve a case. Legal reasoning in deciding cases becomes an integral part of court decisions. There are several aspects that must be considered in legal reasoning, namely philosophical, juridical and sociological aspects.<sup>18</sup>

The juridical aspect is consideration of applicable laws. Judges as an extension of the application of law must ensure that the law used to base a case provides benefits and legal certainty so that it can reflect justice in its decisions. The philosophical aspect contains considerations for determining decisions that are based on truth and justice, then the sociological aspect concerns considerations regarding the application of these decisions to the values that exist in society.<sup>19</sup>

The rules for consideration of decisions apply to all judges within the auspices of law enforcement agencies in Indonesia, including the judicial institution of the Constitutional Court. The Constitutional Court was born from the womb of reform to overcome constitutional problems that could not be

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<sup>18</sup> Nur Ifitah Isnantiana, "Legal Reasoning Hakim dalam Pengambilan Putusan Perkara di Pengadilan," *Jurnal Pemikiran Islam* 18, no. 2 (2017): 41.

<sup>19</sup> Andreas Eno Tirtakusuma, "Modifikasi Pelaksanaan Putusan Pengadilan," *Jurnal Hukum dan Bisnis* 6, no. 1 (2020): 19.

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resolved during the New Order era, such as law enforcement and human rights, democracy and other constitutional problems.<sup>20</sup>

Based on the authority of the judiciary, the Constitutional Court can carry out judicial reviews of laws that conflict with the Constitution, adjudicate at the first and final level and decisions that are final and binding. Given the nature of this decision, a decision made by the Constitutional Court will have a big impact and be difficult to change.

However, in the constitutional judges' consideration of the constitutional court decision number 90/PUU-XXI/2023 there were several irregularities in determining their decision. The basic legal considerations explained in the decision also gave rise to controversy over differences of opinion from the nine constitutional judges who handled this case. Even the nine constitutional judges who took part in handling this case felt confused about the decision made by Chief Constitutional Judge Anwar Usman.

This is because the review of Article 169 Letter q of Law Number 7 of 2017 is not the first time this has been proposed, there have been several similar petition cases before. This case is listed in case Number 29/PUU-XXI/2023, Number 51/PUU-XXI/2023, and case Number 55/PUU-XXI/2023, but it always ends in rejection of the application. But for some reason, the Constitutional Court decision Number 90/PUU-XXI/2023 provides different considerations, even though the time span between this decision and the previous one was not that long. The Constitutional Court seems to have turned a corner to give a different meaning to this petition compared to the previous case.

The problem with the judge's considerations is increasing due to the proximity of the momentum of the 2024 election. Gibran Rakabuming Raka, as the object being defended in submitting a request for material review regarding the age limit for President and Vice President candidates, is the nephew of Anwar Usman. This has increasingly created a sense of injustice and suspicion among the public, with indications that Anwar Usman granted this request

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<sup>20</sup> “Quo vadis Mahkamah Konstitusi • Metro Times News.”

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based on personal and political interests so that his nephew could participate in the 2024 democracy party.

From the decision in case Number 90/PUU-XXI/2023, it was deemed that the existing aspects of the judge's considerations were not fulfilled. This can be seen from the many controversies that occurred as a result of this decision. This decision does not reflect justice because there is *a conflict of interest* in it, the decision made is inconsistent with the opinion of the majority of judges in reviewing Article 169 Letter q of Law Number 7 of 2017 concerning General Elections, thus giving rise to legal uncertainty.

The benefits arising from this decision are also considered minimal, this can be proven by the many parties who consider this decision to be problematic due to the many irregularities in decision making, which ended in a violation of the judge's code of ethics which resulted in Anwar Usman being dismissed as chief judge in this case being sanctioned for violating so serious that he was dismissed from the position of Chief Justice of the Constitutional Court. This situation does not reflect an improvement in the quality and performance of the Constitutional Court, which is getting better at protecting the constitution and guarding the course of democracy, but it is increasingly deteriorating the supremacy of law in Indonesia.

From the description explained above, we can understand that the Constitutional Court Decision Number 90/PUU-XXI/2023 is considered a problematic decision, we can conclude this in several problems:

1. Overruling of the Constitutional Court Decision
2. Constitutional Court Positive Legislator
3. Open Legal Policy
4. Conflict of Interest ( *Conflict of Interest* )
5. *Concurring and Dissenting Opinions*
6. Formal Legal Defects

This decision adds to one of the dark decisions made in the history of the judicial institution of the Constitutional Court. This decision has the impact of tarnishing the reputation of the Constitutional Court in terms of

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accountability, consistency and *public trust* in justice in the Indonesian government.

a) Overruling of the Constitutional Court Decision

Overruling is a change in the judicial stance of a court that is different from the previous judicial stance, where this is legally done in the context of seeking constitutional truth.<sup>21</sup>The review of Article 169 letter q of Law Number 7 of 2017 concerning General Elections is not the first time it has been submitted to a judicial review by the Constitutional Court, there have been several petition cases that have submitted material review of the same regulation, namely case Number 29/PUU-XXI/2023, Number 51 /PUU-XXI/2023, Number 55/PUU-XXI/2023 which ended with a decision to reject the applicant's application because the Constitutional Court reasoned that the case being requested was an Open Legacy Policy whose authority was held by the legislators. This is because the age limit for presidential and vice presidential candidates has never been stipulated in the Constitution.

However, in a very short period of time the Constitutional Court provided a meaning of understanding and stance that was very different from the previous petition in case Number 55/PUU-XXI/2023 which was expressed in the Plenary Session of the Constitutional Court open to the public on Monday, 16 October 2023 at 12.50 WIB with The decision rejected the applicant's application in its entirety, while case Number 90/PUU-XXI/2023 was also pronounced on Monday, 16 October 2023 17.40 WIB with the decision partially granting it. With the legal consideration that, the provisions in Article 169 letter q of Law 7/2017 are contrary to Article 28D paragraph (3) because it is a form of moral violation because it is considered to have discriminated against different age groups who should be given the opportunity so that the open legal policy for law makers ceased (exhausted) and became the authority of the Constitutional Court.

b) Constitutional Court Positive Legislator

The Constitutional Court normatively acts as a negative legislature, whose function is to revoke norms in the constitution as stated by James B.

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<sup>21</sup> Ninon Melatyugra, Uumbu Rauta, dan Indirani Wauran, "Overruling Mahkamah Konstitusi Republik Indonesia terkait Isu Korupsi," *Jurnal Konstitusi* 18, no. 2 (2021): 369.

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Thayer in his article "The Origin and Scope of The American Doctrine of Constitutional Law". This theory states that the court must limit its authority and ability so that it can refrain from judging or making policies that are not within its authority. The Constitutional Court itself has the authority to review laws only limited to testing the constitutional value of laws both from a formal and material perspective. Meanwhile, legality testing is only carried out by the Supreme Court.<sup>22</sup>

In the opinion of former Constitutional Court Judge, Laica Marzuki, regarding the Constitutional Court's shift as a positive legislature, "let the Constitutional Court make decisions that are regulatory in nature, as innovation or renewal in accordance with the sense of justice that exists in society, this is what is called judicial activism." In making positive legislative decisions, the Constitutional Court considers aspects of justice and community benefit, urgent situations and fills the *rechtvacuum* to anticipate chaos.

The constitutional basis for issuing a positive legislative decision is Article 24 paragraph (1) of the 1945 Constitution which states that "judicial power is an independent power to administer justice to uphold law and justice." Thus, in upholding law and justice, the Constitutional Court must be able and brave to break through normative aspects in order to pursue substantive justice.<sup>23</sup>

In the Constitutional Court decision Number 90/PUU-XXI/2023, instead of anticipating conditions so that chaos does not occur, it is the starting point for the chaos and controversy that occurred. This indirectly suggests that the decision given by the Constitutional Court contained things that were incorrect, too hasty and unreasonable so that the resulting decision had an impact on chaos.

#### c) Open Legal Policy

Open legal policy is when the 1945 Constitution as the highest legal norm does not regulate or does not clearly provide limitations to a rule. So, in

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<sup>22</sup> Adena Fitri Puspita Sari dan Purwono Sungkono Raharjo, "Mahkamah Konstitusi Sebagai Negative Legislator dan Positive Legislator," *Sovereignty: Jurnal Demokrasi dan Ketabanan Nasional* 1 (2022): 684.

<sup>23</sup> "Quo vadis Mahkamah Konstitusi • Metro Times News."

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the view of the Constitutional Court, Open Legal Policy is a policy regarding the provisions in certain articles in the law which are within the authority of the law makers.<sup>24</sup>

However, if an article, norm, or law that has positive effect is then requested to have its constitutionality reviewed before the Constitutional Court, then the open legal policy of the legislators ceases (exhausted), then gives the Court the opportunity to examine, adjudicate, and decide the issue of the constitutionality of norms in laws, the outcome of which may be that the norm being tested remains constitutional or unconstitutional or conditionally constitutional/unconstitutional, in part or in whole.

In the legal considerations of the Constitutional Court decision Number 90/PUU-XXI/2023, the provisions in Article 169 letter q of Law 7/2017 are contrary to Article 28D paragraph (3) because it is a form of moral violation because it is deemed to have discriminated against different age groups that should be given chance. That is the reason why the Constitutional Court continues to decide this case. It is feared that the boundaries of open legal policy criteria that can be handled by the Constitutional Court and which must be handled by legislators are unclear, which could lead to overlapping authority and confusion in the legal case resolution system.

d) Conflict of Interest ( *Conflict of Interest* )

There is a conflict of interest during the review of Article 169 letter q of the Election Law, as mentioned in Constitutional Justice Arief Hidayat's *dissenting opinion in Decision Number 90/PUU-XXI/2023*.<sup>25</sup> What violates the judge's impartiality in deciding on a matter is that there is a conflict of interest in this decision which of course causes the resulting decision to be not based on justice.

An assessment like this, of course, will not come out without a certain basis. This is because there is a lot of confusion in the decision-making considerations given which tend to provide benefits and opportunities for Gibran Rakabuming Raka as the object being defended in the petition

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<sup>24</sup> Iwan Satriawan dan Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 564.

<sup>25</sup> "Putusan MK Soal Syarat Usia Capres-Cawapres Dinilai Cacat Prosedural | Mahkamah Konstitusi Republik Indonesia," diakses 9 Desember 2023, <https://www.mkri.id/index.php?page=web.Berita&id=19837&menu=2>.

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submitted. Anwar Usman as Gibran Rakabuming Raka's uncle seems to be giving his nephew a shortcut to being able to participate in the 2024 general election as Vice President.

This was further strengthened by the intervention of the Honorary Council of the Constitutional Court (MKMK) in responding to reports of violations of the code of ethics committed in deciding this case. Chief Judge MKMK Jimly Asshiddiqie said that there were 21 reports of alleged ethical violations by MK judges received by the MKMK. Of that number, the Chief Justice of the Constitutional Court, Anwar Usman, was the judge who was reported the most. Each complaint submitted to the MKMK can contain the names of one or more judges who are suspected of violating the code of ethics. Jimly detailed that Anwar Usman's name appeared 15 times. Under Anwar, judge Manahan Sitompul and judge Guntur Hamzah were named in five reports. Judges Saldi Isra and Arief Hidayat appeared in four complaints. Judges Enny Nurbaningsih and Daniel Yusmic were mentioned in three reports. The names of judges Suhartoyo and Wahiduddin Adams appear in one report. <sup>26</sup>In the pronouncement of MKMK Decision Number 02/MKMK/L/11/2023 which was held in the Plenary Courtroom of Building I MK on Tuesday, 7 November 2023 by MKMK Chairman Jimly Asshiddiqie accompanied by MKMK Members Wahiduddin Adams and Bintan R. Saragih, reported Anwar Usman in one of the rulings was that he was given the sanction of being dismissed from the position of Chief Justice of the Constitutional Court.

e) *Concurring or Dissenting Opinion*

Article 45 paragraph (1) of the Constitutional Court Law only recognizes the term dissenting opinion. Meanwhile, Constitutional Court Regulation 2/2021 differentiates between different opinions (dissenting) for different reasons (concurring opinion). Different reasons (concurring opinions) can be interpreted when a judge grants an agreement but for different reasons.

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<sup>26</sup> "Majelis Kehormatan MK: Dari dugaan kebohongan Anwar Usman sampai batas usia capres-cawapres - Apa saja yang diketahui jelang putusan?" BBC News Indonesia, 6 November 2023, <https://www.bbc.com/indonesia/articles/cv2z39ye819o>.



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Meanwhile, a dissenting opinion is a judge who does not agree with the majority of judges in deciding a case.

In the case of the Constitutional Court decision number 90/PUU-XXI/2023 according to constitutional judge Arief Hidayat in his opinion when reviewing Article 169 letter q. The decision was taken with a composition that has never happened before. The composition is as many as 3 (three) judges granting it in part by interpreting the fixed age requirement of 40 years as long as it is interpreted as experience as an elected state official, for example, experience as Governor/Regent/Mayor, as many as 2 (two) judges granted in part for different reasons related to their considerations, namely only limited experience as Governor whose criteria were left to the legislators, as many as 1 (one) judge had a different opinion (Dissenting Opinion) by stating that the Petitioner did not have legal standing (legal standing). ), as many as 2 (two) judges were of the opinion that this case was not a matter of unconstitutionality of norms, but was an opened legal policy, as many as 1 (one) judge had a different opinion (Dissenting Opinion), namely that the applicant's petition was declared invalid.

With the ruling that changes Article 169 letter q of Law Number 7 of 2017 concerning General Elections which originally read "**at least 40 (forty) years of age**" to "**at least 40 (forty) years of age or has/is currently holding office who are elected through general elections including regional head elections**". Even if we take the opinion of the majority of judges "partially granting it", then the point of agreement should be on the Governor's position alone and this is certainly an irregularity in the decision given.

f) Formal Legal Defects

A formal legal defect can be interpreted as a decision that is not made in accordance with applicable legal procedures. So that this error means that the decision made is not considered legally valid.<sup>27</sup>

In Article 17 Paragraph (4) of the Judicial Power Law, it is stated, "The chairman of the panel, member judge, prosecutor or clerk is obliged to resign from the trial if they are related by blood or marriage to the third degree, or by

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<sup>27</sup> Tri Jata Ayu Pramesti S.H dan Hukumonline, "Arti Cacat Hukum," 7 Juli 2018, <https://www.hukumonline.com/klinik/a/arti-cacat-hukum-lt556fa8a2b1100/>.

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a husband or wife relationship even though they are divorced from the other party. judge or advocate.”

Then, Article 17 Paragraph (5) of the Judicial Power Law also states, "A judge or clerk is obliged to resign from the trial if he has a direct or indirect interest in the case being examined, either of his own free will or at the request of the litigants."

Then, Article 17 Paragraph (6) of the Judicial Power Law states, "In the event of a violation of the provisions as referred to in paragraph (5), the decision is declared invalid and the judge or clerk concerned is subject to administrative sanctions or punished in accordance with the provisions of statutory regulations. -invitation."

With this regulation, Anwar Usman, as the uncle of Gibran Rakabuming Raka, should, according to Article 17 paragraph (4), paragraph (5) and paragraph (6) of the Judicial Power Law, state that in principle every judge, including constitutional judges, must resign from adjudicating a cases involving the interests of his family, if not, then the resulting decision will be invalid or not meet formal requirements.

#### **D. CONCLUSION**

Based on the duties and authorities of the Constitutional Court as stated in Article 24C paragraph 1 and, one of the authorities given to the Constitutional Court is to decide on the first and final level in the context of reviewing laws that are not in accordance with the Constitution.

The Constitutional Court's decision in the judicial review case Number 90/PUU-XXI/2023 concerning the age limit provisions for Presidential and Vice Presidential candidates, Article 169 Letter q of Law Number 7 of 2017 concerning General Elections, is considered to be in conflict with the Constitution. So it was changed to "**be at least 40 (forty) years old or have/are currently holding positions elected through general elections, including regional head elections** ." This means that anyone can nominate for President or Vice President if two criteria are met. The first is over 40 (forty)

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years old , the second has been or is currently elected in the general election and is currently holding office.

In connection with the decision of the Constitutional Court Number 90/PUU-XXI/2023, requests for judicial review of a statutory regulation or differences of opinion are commonplace in democratic countries, especially Indonesia which has many variations and differences but is united in the ideals of the nation. . However, different points of view are different from doing something wrong. An action is considered wrong if it does not comply with the rules that have been made properly and correctly. The Constitutional Court Decision Number 90/PUU-XXI/2023 is considered to be a wrong decision. This is because there are many problems that arise as a result of this decision, which tarnishes the dignity of the Constitutional Court and harms this country's democracy.

Therefore, it is important for the Constitutional Court to maintain the independence, consistency, accountability and credibility of the Constitutional Court so that it does not raise questions from the public with this decision. So that it can carry out legal supremacy optimally in accordance with the duties and authority given.

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