

Legal Review of The Judge's Dissenting Opinion Regarding the Age Limit for Presidential Candidates and Vice-Presidential Candidates in Constitutional Court Decision Number 90/Puu-XXI/2023

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Abstract

The Constitutional Court has handed down a decision regarding the age limit for presidential and vice presidential candidates on October 16, 2023, namely decision Number 90/PUU/XII/2023. This decision will take effect in 2024 and has permanent legal force so that its implementation will have an impact on all Indonesian citizens, including Gibran Rakabuming Raka, who are under 40 years old and can nominate as presidential/vice presidential candidates. This gave rise to pros and cons among academics and society because the chairman of the Constitutional Court at that time was Anwar Usman, who is the family of Gibran Rakabuming Raka. However, in the Constitutional Court's decision there were differences of opinion or dissenting opinions among the judges handling the case. This research aims to find out how the judge's dissenting opinion occurred in the decision and what the legal consequences of the decision will be after it has permanent legal force if it contains formal defects or violations of the judge's code of ethics because it contains an element of interest. The method used in this research is normative juridical using a case approach and a statutory approach. The results of this research are that dissenting opinions can be an alternative correction for errors in court decision making. The majority vote of judges is considered fair if the decision is clear, but this does not necessarily mean that the decision is completely correct. The legal consequences of the decision of the Constitutional Court Number 90/PUU-XXI/2023 remain final and have permanent legal force, even though the process that occurs during the trial process in a case at the Constitutional Court, whether there are defects or violations of the code of ethics, does not affect the decision that has been determined because it is absolute or inkrah. And the violation of the judge's code of ethics in the Constitutional Court Decision Number: 90/PUU-XXI/2023 concerning the age limit for presidential and vice-presidential candidates does not affect the validity of the decision, which means the decision is final, must continue to be implemented in accordance with existing provisions..

Keywords: Law, Dissenting Opinion of Judges, Constitutional Court, Judges' Decision.

1. INTRODUCTION

Recently, the Constitutional Court has come to public attention for the exercise of its authority in examining laws against the Basic Law. The decision issued by the Constitutional Court (MK) Number: 90/PUU-XXI/2023 on the judicial review of Article 169 letter (q) of Law Number 7 of 2017 concerning General Elections is allegedly full of conflicts of interest. The age limit for

presidential candidates or vice presidents was previously stated in Article 169 letter q of Law Number 7 of 2017 concerning General Elections, which is at least 40 years old. In the decision of the Constitutional Court Number: 90 / PUU-XXI / 2023 there is a change to be at least 40 (forty) years old or have / are occupying positions elected through general elections including regional head elections.

Law enforcement and justice are one of the important factors in Indonesia because it is a state of law. The term state of law owned by Indonesia means that the state is enforced on the basis of law. However, there is a difference in the use of the term rule of law. Term *Rule of Law* used by countries that use the system *Anglo Saxon*. Unlike countries that adhere to the Continental European system, the term used is "*Rechtstaat*", nevertheless, "state of law" refers to a state governed by law and whose government is governed according to the rules of the legal game (*Rule of the Game*), government based on law (*Government Under Law*), not based on human desires (*Government by Law, Not by Men*), and power (*Maschstaat*). (Qamar, 2018)

One of the decisions of the Constitutional Court (MK) that attracts public attention in 2023 is the enactment of Decision Number: 90/PUU-XXI/2023 concerning the age limit for presidential candidates (candidates) and vice presidential candidates (vice president) to become a hot discussion issue among the general public, academics and practitioners. The issuance of the ruling is considered fraught with conflicts of interest. This is influenced because the decision was made right during the registration period for the upcoming 2024 presidential candidate and vice president, there is a vice president who is under 40 years old and between these candidates has a family relationship with a sitting constitutional court judge as well as being involved in the determination of decision Number 90 / PUU-XXI / 2023. The survey results show that the majority of people who know the head of the Constitutional Court as the uncle of one of the vice presidents under the age of 40 feel that the decision Number: 90/PUU-XXI/2023 is unfair.

The existence of violations of the law felt by various groups encourages various elements to report violations of the code of ethics of MK judges, including alleged violations of the code of ethics in the determination of the Constitutional Court decision Number: 90 / PUU-XXI / 2023 to the Honorary Panel of the Constitutional Court (MKMK) for follow-up.

Ni'matul Huda and Riri Nazriyah mentioned that although the Constitutional Court has been very productive in examining and deciding cases *judicial review*, not a few people are often disturbed by several decisions of the Constitutional Court that are considered to attract attention, namely sometimes there are several decisions related to the law that are tested where the decision decides more than the petitioner's application or commonly known as the *ultra petita* law, even the view arises that the Constitutional Court not only acts as *Negative legislators* but also has entered the area *positive legislators*. (Huda, 2011)

The conflict of interest that affects the decision of the Constitutional Court Number: 90/PUU-XXI/2023 is contrary to the principle of independence of judges stipulated in the code of ethics and conduct of Constitutional Court judges which refers to "*The Bangalore Principles of Judicial Conduct 2002*" which has been accepted by both countries that adopt the "*Civil Law*" and "*Common Law*" systems.

Integrity and beautiful personalities such as professional, fair, honest, irreproachable and experienced in the field of law are a must possessed by judges and constitutional judges. If the judge is related by blood or blood to the litigants, the judge is required to recuse himself from the trial. Same When a judge has a husband or wife relationship despite being divorced, with the chairman, one of the member judges, prosecutors, advocates, or clerks. (Anam, 2022)

This controversial thing happened in one of the Constitutional Court rulings in the run-up to the 2024 general election and became a hot topic among jurists, especially in the field of Constitutional Law. The decision was determined by the Constitutional Court on October 16, 2024, namely case number 90/PUU-XXI/2023, (Argawati, 2023) It is said to be controversial, because in

the decision-making process there are various kinds of differences of views, especially within the panel of constitutional judges, namely *Dissenting opinion* of four (four) judges. There was a judge who expressed a different opinion (*Dissenting opinion*) on the grounds that the Petitioner has no legal standing (*Legal Standing*), then two judges were found who elaborated that the case filed was a *Opened Legal Policy*, it is not a question of unconstitutionality of norms. Furthermore, a judge has a different opinion (*Dissenting opinion*), i.e. have the view that the petitioner's application is declared void.

The Constitutional Court according to Jimly Asshiddiqie in carrying out its duties has 5 (five) functions in addition to its main function as a guardian of the constitution. The function of the establishment of the Constitutional Court is to be the highest interpreter of the constitution, have the right to supervise or have control over decisions made based on the democratic system and strive to uphold the constitutional rights of citizens and defend human rights. (Siahaan, 2006)

All decisions determined by the Constitutional Court should be obeyed and implemented by litigants because the duties and functions of the Constitutional Court include institutions that are allowed to interpret the constitution. Because building loyalty to every decision of the Constitutional Court can be said to be a defiance of the constitution itself. (M. Nggilu, 2019)

2. RESEARCH METHODS

This research uses normative juridical methods, namely research in the field of law that provides concepts to principles and norms. By using an approach *Statute Approach* or a statutory approach. A method that examines existing regulatory issues. (Muhaimin, 2020): The approach in this study is the Legislation Approach (*Statute Approach*), conceptual approach (*Conceptual Approach*). The legislative approach is carried out by reviewing and reviewing legislation and regulations related to the legal problems faced while the conceptual approach is an approach that departs from the views and doctrines that develop in legal science to find ideas that give birth to relevant legal understandings, concepts, and principles, as a basis in building a legal argument in solving the legal issues faced and research its implementation in practice. (Soemintro, 1990)

The approach used is the *statute approach* relating to the Constitutional Court and its procedural law (especially regarding *dissenting opinion*) and the conceptual approach relating to doctrines or principles of *dissenting opinion* which then becomes a conceptual description of the ideas developed. The legislative approach is an approach taken by examining the law. The results of data analysis are then concluded so as to produce a clear picture and obtain answers to the problems formulated)

3. RESULTS AND DISCUSSION

3.1 *Dissenting Opinion* of the Constitutional Court

Dissenting opinion in a decision determined by constitutional judges is a submission that has been made by many constitutional judges since the beginning of the Constitutional Court establishment. Even the continuity of Indonesian law has experienced a lot of progress with the institution of the Constitutional Court itself. (Yani, 2018)

Related *Dissenting opinion* Indeed, there is no regulation that explicitly regulates specifically about *Dissenting opinion*, although there is a phrase used and the Constitutional Court Law is the use of the phrase "*opinions of different members of the panel of judges*". This is classified into two categories by Jimly Asshiddiqie, namely: *Dissenting opinion* and *concurrent opinion or consenting opinion*. (Asshiddiqie, 2012)

Constitutional Court Decision Number 90/PUU-XXI/2023 according to Prof. Dr. Muchamad Ali Safa'at, S.H., M.H there are four problems, namely: Adding norms is not included in testing existing laws to be judged constitutional or unconstitutional; The decision of the Constitutional

Court cannot be separated from the political atmosphere because this decision is entering the stage of nominating the president and vice president; The decision of the Constitutional Court Number 90/PUU-XXI/2023 was decided not unanimously because there was *Dissenting opinion* and *Concurring Opinion* between judges; The considerations of several judges are set forth in *Dissenting opinion* and *Concurring Opinion* which is unusual in a number of Constitutional Court rulings. (Setiawan, 2023)

Mahfud MD argues that the Constitutional Court decision Number 90/PUU-XXI/2023 is fundamentally wrong, according to him the Constitutional Court is a *negative legislator institution* so theoretically it should not decide the case. Bivitri Susanti (constitutional expert) explained, in addition to the conflict of interest of one of the constitutional judges and cases related to the age of presidential and vice presidential candidates, there were three other violations that influenced the decision, namely: *The applicant's legal standing is unusual; The lawsuit was withdrawn but re-entered over the weekend: Case Number: 90/PUU-XXI/2023 was withdrawn, but it was re-entered at the weekend and immediately discussed by the Constitutional Court; two opinions of the Constitutional Court judges are considered to agree, even though it refused.*

The legal activity of a judge opens up space for different interpretations of a judge. Dissent or *Dissenting opinion* It was a practice that developed in natural law countries, but was later adopted in countries where dissent was seen as strengthening independent courts. Judges have the discretion to interpret a case individually, although they are still bound by existing principles and rules. It also shows that decisions are not taken through compromise, which according to Dyson Heydon can only happen in courts that always "force" decisions to be unanimous. (Heydon, 2013)

Dissenting opinion is also rapidly increasing in the constitutional courts of Eastern and Central European countries, not only in ordinary courts, especially in judicial proceedings. The concept of statutory supervision must be distinguished from administrative or legislative supervision. (Saimatupang, 2019)

Dissenting Opinion that occurred in Case Number 90/PUU-XXI/2023, namely from Constitutional Judge Saldi Isra, argued that changes or additions to the requirements for presidential and vice presidential candidates should be carried out through *the mechanism of legislation review*, reviewing the laws requested by the applicants, and not throwing the "hot ball" into court. Unfortunately, the court took the simplistic and obvious nature of this open law policy and used it as a "political weight" in its decisions. If this approach to resolving cases continues, then the Saldi Isra Constitutional Court is very concerned and worried that the Court will enter vortex in deciding various political issues, which in turn will weaken public trust and legitimacy in the Court.

Furthermore, *the dissenting opinion* of Constitutional judge Arief Hidayat stated that determining the minimum age for presidential and vice presidential candidates is a simple matter and is considered simple because the 1945 Constitution does not regulate it firmly. Therefore, it is classified as an open legal policy whose regulation is left to the discretion of lawmakers.

Then Constitutional judge Suhartoyo also expressed a *dissenting opinion* by not granting the right to the applicant to run on the grounds that the applicant is not a legal subject with a direct interest in running for president and vice president, so that the applicant is irrelevant to ask to interpret the norms of Article 169 letter q of Law 7/2017 for the benefit of other parties, as further in his petition petition.

Decision Number 90/PUU-XXI/2023 has its own impact because it contains the existence of *Dissenting opinion* which can affect the level of legal awareness of the community. *Dissenting opinion* According to Jimly Asshiddiqie, it is fundamental differences of opinion that result in different decisions. (Asshiddiqie, 2006)

3.2 Legal Effects of Constitutional Court Decision Number 90/PUU-XXI/2023

As a result of the law in the Constitutional Court Decision Number 90/PUU-XXI/2023 concerning the age limit for presidential candidates and vice presidents, there is a disability that leads to violations of the code of ethics by MK judges during the trial process of the Constitutional Court decision Number: 90/PUU-XXI/2023. This is proven by the issuance of the MKMK decision on 4 reports of violations of the code of ethics in the process of determining the decision of the Constitutional Court Number: 90 / PUU-XXI / 2023 concerning the age limit for presidential candidates and vice presidents. The MKMK decision on reports of violations of the code of ethics by the Constitutional Court judges in the case of judicial review of the age limit of presidential candidates and vice presidents are: 1) Decision Number: 2/MKMK/L/11/2023; 2) Decision Number: 3/MKMK/L/11/2023; 3) Decision Number: 4/MKMK/L/11/2023 4) Decision Number: 5/MKMK/L/11/2023. The essence of the four rulings is that all Constitutional Court judges who set decisions related to the age limit for presidential candidates and vice presidents are proven to have violated the code of ethics. Chief Justice Anwar Usman was found to have violated the code of ethics and others they were collectively found to have violated the code of ethics and conduct of Constitutional Judges as stated in Sapta Karsa Utama, Principles of Propriety and Civility

The existence of violations in the process of determining the decision of the Constitutional Court Number: 90 / PUU-XXI / 2023 concerning the age limit for presidential candidates and vice presidents raises questions whether with errors or defects in the process of determining the decision of the Constitutional Court is valid / not, as well as the implementation of the decision of the Constitutional Court whether it remains valid.

Nevertheless, the Constitutional Court's decision applies *Res judicata principle*. According to Soedikno Mertokusumo, *Principles of Res Judicata Pro Veritate Habetur* means that what the judge decides must be considered right. (Soemintoro, 1990) Therefore, the process that occurs during the trial process in cases in the Constitutional Court, both the existence of defects and violations of the code of ethics, does not affect the decision that has been determined because it is absolute or inkrah. However, the influence of mistakes by MK judges affects the Constitutional Court judges themselves.

The neglect of conflicts of interest and the mutual influence of decisions between judges in making decisions in Constitutional Court Decision Number: 90 / PUU-XXI / 202 shows the absence of independence of judges so that it refers to violations of the principle of independence in Sapta Karsa Utama. And the violation of the judge's code of ethics in Constitutional Court Decision Number: 90 / PUU-XXI / 2023 concerning the age limit for presidential candidates and vice presidents does not affect the enforceability of the decision, which means that the decision is final, must still be implemented in accordance with the provisions in the legislation, whether you like it or not. Violations of the judge's code of ethics affect the judge. Based on existing problems, the rules related to the inability of Constitutional Court judges to decide cases related to certain interests related to family should be regulated more clearly and firmly. And a solution is needed for the Constitutional Court's decision which in the process was born from violations of the code of ethics or other legal problems to be corrected by a positive institution of legislators, in this case the DPR or a review by the Constitutional Court itself without involving judges who violated the previous code of ethics.

4. CONCLUSION

Dissenting opinions actually have real value in ensuring that decisions have achieved clarity, certainty, accuracy and legal quality. As the opinion of a constitutional judge who is an expert in the field of constitutional law, *dissenting opinion* can be an alternative correction for court

decision making errors. A majority vote of judges is considered fair if the decision is clear, but not necessarily the decision is completely correct. It is proven in the decision of the Constitutional Court Number 90/PUU-XXI/2023, although the judge's decision granted some of the petitioners' applications, there were formal defects and indications of violations of the judge's code of conduct and code of ethics.

As a result of the law, the decision of the Constitutional Court Number 90/PUU-XXI/2023 remains final and has permanent legal force, although however, the process that occurs during the trial process in cases in the Constitutional Court, both the existence of defects and violations of the code of ethics, does not affect the decision that has been determined because it is absolute or *inkrah*. And the violation of the judge's code of ethics in Constitutional Court Decision Number: 90 / PUU-XXI / 2023 concerning the age limit for presidential candidates and vice presidents does not affect the enforceability of the decision, which means that the decision is final, must still be implemented in accordance with the provisions in the legislation, whether you like it or not.

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