
Constitutional Court Decision No. 90/PUU-XXI/2023 In the Dynamic Quo Vadis of Indonesian Law Rechtsstate of Machtstate

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Abstract

The birth of the decision of the Constitutional Court (MK) in adjudicating case Number: 90/PUU-XXI/2023 resulted in suspicion from many parties towards the President as the decider of the Constitutional Court's decision considering that the Chief Justice of the Constitutional Court is the President's brother-in-law or there were indications and/or suspicions that the Constitutional Court was intervened by the Presidential institution, and culminated in the formation of the Constitutional Court Honorary Council (MKMK). The Constitutional Court Judge's decision can be categorised as a decision that has the character of a Rechtsstate (rule of law) or actually confirms the Constitutional Court's decision that has the characteristics of a Machtstate (state of power) and the impact (Social, Political and Institutional Credibility) of the Constitutional Court's Decision on the Independence and Professionalism of the Constitutional Court Judges institutionally. This research uses normative juridical methods using secondary data in the form of literature studies. The aim of this research is to analyse the decisions of Judges and drug consumers as well as the Impact (Social, Political and Institutional Credibility) of Constitutional Court Decisions on the institutional Independence and Professionalism of Constitutional Court Judges. The research results show that the Constitutional Court Decision NO. 90/PUU-XXI/2023 is not in line with the third principle of the rule of law/Rechtsstaat, but the Constitutional Court's decision can be seen as a decision that has the dimension of state power (Machtstate).

INTRODUCTION

The chronology of the birth of the decision that shocked the legal, political and social universe in the political contestation of the Presidential Election in Indonesia at this time, starting from the birth of the decision of the Constitutional Court (MK) in adjudicating case Number: 90/PUU-XXI/2023 filed by a student named Almas Tsaqibbiru Re A. with lawyers Arif Sahudi, Utomo Kurniawan, et al. This application was registered with the Constitutional Court on 3 August 2023. The applicant wants the Constitutional Court to change the minimum age limit for presidential and vice-presidential candidates to 40 years or experience as a Regional Head at both the Provincial and Regency/City Levels (Pramudya et al., 2024).

The Constitutional Court also decided to grant the applicant's petition in part. The Constitutional Court's decision is indicated to open up opportunities for young leaders to contest future presidential elections, at the same time Solo Mayor Gibran Rakabuming Raka is being considered by one of the Presidential Candidates to accompany him in the 2024 Presidential Election (BBC News Indonesia, 2023).

So suddenly this decision became a trending topic everywhere both in the menstrim media and anti menstrim media to social media with very diverse responses (Pros and Cons), which led to the suspicion of many parties against the President as the determinant of the Constitutional Court's decision considering that the Chief Justice of the Constitutional Court is the President's younger brother-in-law or there are indications and or suspicions of the Constitutional Court institution being interfered with by the Presidential institution, and led to the formation of the Honorary Council of the Constitutional Court (MKMK) which until the completion of this writing is still in process.

Based on this decision, Article 169 letter q of Law Number 7 of 2023 Concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2022 Concerning Amendments to Law Number 7 of 2017 Concerning General Elections, changed to "At least 40 years old or have/are currently holding positions elected through General Elections including Regional Head Elections".

The phrase used in the decision is 'or', meaning that in terms of State Administrative Law the candidate requirements are 'alternative' not 'cumulative', meaning that candidates can choose the age of 40 years or have/are currently holding positions elected through General Elections including Regional Head Elections. This is the focus of the problem so that the decision can be interpreted as a decision supporting dynastic politics.

The dynamics of the trial in the decision consisted of 2 (two) Constitutional Court judges expressing a Cooccurring opinion or different reasons and 4 (four) dissenting opinions. Cooccurring opinion is a decision whose ruling is the same as the majority of judges but the legal reasoning is different. Meanwhile, dissenting opinion is a judge's decision that is different from the majority judge's decision, both the legal reasoning and the verdict (Simanjuntan et al., 2023).

The mechanism for determining decisions by the Judges of the Constitutional Court (MK) is carefully outlined in Law No. 23 of 2023 concerning the Constitutional Court, particularly in Section Seven which delineates the procedural framework. The process unfolds through several distinct stages: Firstly, the Constitutional Court bases its decisions on the tenets of the 1945 Constitution of the Republic of Indonesia, weighing the presented evidence and the convictions of the judges involved; Secondly, any decision to grant a petition must be substantiated by a minimum of two pieces of evidence, ensuring a robust foundation for the court's rulings; Thirdly, the decisions rendered by the Constitutional Court are required to encapsulate the factual revelations unearthed during the trial, coupled with the legal rationales underpinning the verdict; Fourthly, the decision-making process takes place through deliberations within a plenary session overseen by the chairperson, where consensus among the judges is sought; Fifthly, during these plenary sessions, each judge is mandated to furnish written considerations or opinions pertinent to the case at hand, fostering a comprehensive examination of all perspectives; Sixthly, should initial deliberations fail to yield a decision, the session is adjourned until the next plenary session, affording further time for reflection and discussion; Seventhly, in cases where consensus proves elusive, decisions are determined by a majority vote, ensuring the collective will of the court prevails; Eighthly, if a majority consensus remains unattainable, the decisive vote rests with the chairperson, resolving any impasse; Ninthly, the timing of the court's decision is meticulously managed; it may be

pronounced on the same day or deferred to a later date, with requisite notification provided to all involved parties; and Lastly, in instances where unanimity remains unachievable, dissenting opinions from members of the Panel of Judges are incorporated into the final decision, ensuring transparency and accountability. In essence, the decision-making process by Constitutional Court Judges adheres closely to the statutory guidelines, thereby upholding principles of transparency and fairness in every judicial determination.

Even though the status of the Constitutional Court's decision which is categorised as procedurally flawed cannot change the Constitutional Court's Final and Binding decision which is clearly regulated in the Constitution Article 24 C of the 1945 Constitution, which states: "The Constitutional Court has the authority to hear at the first and final level whose decisions are final to test laws against the Constitution, decide disputes over the authority of State institutions whose authority is given by the Constitution, decide on the dissolution of political parties, and decide disputes about the results of general elections" (Putra, 2018).

Article 10 paragraph (1) letter (a) Law Number 24 Year 2003 on the Constitutional Court "The Constitutional Court has the authority to hear cases at the first and final instance whose decisions are final to test laws against the 1945 Constitution of the Republic of Indonesia;" Article 10 Paragraph (1) is strengthened in the explanation which states that the decision of the Constitutional Court immediately obtains permanent legal force from the time it is pronounced and no legal remedies can be taken. The final nature of the decision of the Constitutional Court in this Law also includes binding legal power.

In this case, it is clear that the Constitutional Court Judges who stated that Article 169 letter q of Law Number 7 of 2023 is contrary to the 1945 Constitution are 4 (four) Judges even though 2 (two) Judges expressed a Cooccurring opinion and added to the decision of the Chief Justice of the Constitutional Court so that those who decided the principle of Article 169 letter q to be 'the minimum age limit for presidential and vice presidential candidates to be 40 years old or experienced as Regional Heads both at the Provincial and Regency / City Levels' were 5 (five) Judges. In the process of making this decision, the position of the Chief Justice of the Constitutional Court as the swami of the President's younger brother (younger brother-in-law) is considered to have the potential for a conflict of interest (Conflict of interest) The Chief Justice of the Constitutional Court is considered unethical and contrary to the law, especially in Article 17 (5) of Law Number 48 of 2009 concerning Judiciary. In the provisions of the article, Judges must resign from the trial if they have a direct or indirect interest in the case, but unfortunately this regulation is specifically for Judges under the Supreme Court, not for Constitutional Court Judges.

In addition, the Chief Justice of the Constitutional Court has the potential to violate several principles stipulated in the Code of Ethics and Conduct of Constitutional Judges, including the Principle of Impartiality. Impartiality is a principle inherent in the nature of the function of constitutional judges as parties who are expected to provide solutions to every case submitted to the Court. Impartiality includes a neutral attitude, accompanied by a deep appreciation of the importance of balance between interests related to the case.

One significant application of the principle of impartiality is evident in the realm of constitutional law, particularly concerning the conduct of constitutional judges. According to this principle, a constitutional judge is obligated to recuse themselves from the examination of

a case under certain circumstances, barring any hindrance to the fulfillment of a quorum required for the hearing. Such circumstances arise when the judge, for any of the following reasons, cannot or is perceived as unable to maintain impartiality: firstly, when there exists an evident bias against one of the parties involved; and secondly, when the judge or their family members hold a direct interest in the outcome of the decision. Adhering to this application ensures the integrity and fairness of the judicial process, upholding the fundamental tenets of justice and equity within the constitutional framework (Chandranegara, 2021).

While there are 4 (four) Judges who dissenting opinion, based on the decision mechanism of the Constitutional Court Judges which is clearly regulated in Law No. 23 of 2023 concerning the Constitutional Court Article 45 specifically Paragraph (7) which states "In the event that the deliberation of the plenary session after earnest efforts cannot reach unanimous consensus, the decision shall be taken by majority vote". But the implementation of Paragraph (7) above is on condition that it must have carried out the trial mechanism in accordance with Paragraphs (4) to Paragraph (8) of the law in question, meaning that in carrying out decisions in the Constitutional Court procedurally in accordance with Article 45, it is not allowed to directly implement Paragraph (7) before implementing the previous Paragraphs (1-6).

The social and political impact of the Constitutional Court's decision shook the political universe of the Presidential Election, causing prejudice against the Constitutional Court which seemed to accommodate the interests of the ruling elite (Political Dynasty) so it is natural that there is a question, *quo Vadis* (where are you going) the Constitutional Court's decision Rechtsstate (state of law) or Machtstate (state of power) considering the multiple interpretations or pros and cons of this decision getting responses from many circles that are very extraordinary. This is the dynamics of decision-making in the Constitutional Court of the Republic of Indonesia which is an interesting theme in this journal.

Based on the background of the problems described above, to be able to limit the discussion, the author can formulate the problem, namely; whether the decision of the Constitutional Court Judge can be categorised as a decision characterised by Rechtsstate (state of law) or instead confirms the Constitutional Court's decision which is characterised by Machtstate (state of power)? And what is the Impact (Social, Political and Institutional Civility) of the Constitutional Court Decision on the Independence and Professionalism of Constitutional Court Judges institutionally?

METHODOLOGY

The approach method in this research is to use a normative juridical approach, which is a legal research method that examines library materials or secondary data; thus this research method is also often called doctrinal legal research, research that comes from secondary data, legal principles, positive legal principles from library materials (Sholahuddin Al-Fatih, 2023). This research also utilises the Case Approach, laws and regulations and court decisions. This research also uses a Case Approach The case approach is carried out by examining the decision of the Constitutional Court case Number: 90/PUU-XXI/2023. The decision has been decided by the Constitutional Court which has permanent force or *inkracht*. The main study in this case

approach is the ratio decidendi or reasoning of the Judge to arrive at a decision. The ratio decidendi or reasoning is needed both for practice and academic studies (Fianni, 2022). The legal materials used are legal regulations related to the decision of the Indonesian Constitutional Court (MK), including the 1945 Constitution Article 24C, Law Number 24 of 2003, Constitutional Court case decision Number: 90/PUU-XXI/2023. The method of collecting legal materials was carried out through literature studies from various relevant sources, including legal literature and laws and regulations. The method of analysing legal materials used is a comprehensive and directed analysis. (El-Kassas et al., 2021)

RESULTS AND DISCUSSION

1. The decision of the Constitutional Court Judges can be categorised as a decision characterised by a Rechtsstate (State of Law) or instead confirms the Constitutional Court's decision which is characterised by a Machtstate (State of Power)

a. Categorise decisions that are characterised as Rechtsstate or The Rule of Law

A decision is a statement by a judge as a state official pronounced in front of a trial with the aim of ending or resolving a case or dispute between interested parties. Meanwhile, Sudikno Mertokusumo states that a Judge's Decision is a statement by a Judge as a state official authorised to do so, pronounced in court and aims to end or resolve a case or problem between parties. It is not only what is spoken that is called a decision, but also a statement that is written down in written form and then pronounced by the Judge at trial. A draft (written) decision does not have the force of a decision before it is pronounced in court by the Judge (Agustin et al., 2022).

Simply put, a judge's verdict is the final decision declared by a judge from an examination in court. Generally, a decision contains sanctions in the form of punishment against the defeated party in a court trial. Likewise, as regulated in procedural law, that Court Decisions are only valid and have legal force if they are pronounced in open court for the public.

In the implemented order, there is a special classification of judgements in civil courts that are handed down in Court proceedings consisting of:

- 1) Court Decisions Based on the Time of Imposition, there are 2 (two) types of decisions based on the time of their imposition, namely:
 - a) Interim Judgement, which is a judgement handed down before the final judgement which is intended to enable or facilitate the continuation of case examination;
 - b) Final Decision, which is a decision that aims to end and resolve an ongoing case at a certain judicial level, namely the court of first instance, the court of appeal and the supreme court (Maulidya et al., 2023).
- 2) Court Decisions based on the Classification of Decisions by Nature, consists of:
 - a) Declaratory Judgement (Declaratory): Declaratory judgement is a judgement that only confirms or states a state of law. For example, that Stephen is the legally adopted son of Alex and Rina.

- b) **Constitutive Judgement (Constitutive):** Constitutive (Regulatory) Decisions are decisions that can negate a state of law. law or create a new legal situation. For example, Alex's divorce from Rina, or PT Mencari Cinta sejati being declared bankrupt by a commercial court decision.
 - c) **Condemnatory Judgement:** Condemnatory (punishing) decisions are decisions that punish the defeated party in the trial to fulfil obligations (achievements). In general, this condemnatory decision occurs because the binding relationship between the plaintiff and the defendant originates from an agreement or law (Saifulloh, 2022).
- 3) Court decisions based on the presence of the parties can be categorised into:
- a) The Gugur verdict is a verdict rendered because the plaintiff did not attend the hearing on the appointed day after being properly summoned by the court bailiff. In this decision the judge may declare that the plaintiff's claim is void and the plaintiff is ordered to pay court costs.
 - b) Verstek decision is a decision rendered by the judge if on the first day of the trial that has been determined the defendant does not attend the trial without a valid reason even though it has been properly summoned by the court bailiff. Against this verstek decision, the defendant can file an appeal where the appeal is known as.
 - c) Contradictory verdict is a verdict based on the presence of the parties during the reading of the final verdict. Therefore, there are two types of contradictory verdicts, when the verdict is pronounced the parties are present and when the verdict is pronounced one of the parties is not present (Prasetiawan et al., 2022).

Regarding the decision of the Constitutional Court judge Number: 90/PUU-XXI/2023, in general there are 3 (three) terms that we can understand, namely:

- 1) Unanimous means a court judgement that is decided by the unanimous vote of the judges hearing the case;
- 2) Concurring opinion means when the opinion of a judge follows / agrees with the opinion of the majority of judges regarding the ruling, but he only states that he differs in his legal reasoning;
- 3) Dissenting Opinion means when a judge disagrees with the majority of judges, both on legal considerations and the ruling. The judge's opinion is contained in the decision in full and placed before the verdict.

In connection with the explanation above, the birth of the Constitutional Court's decision Number: 90/PUU-XXI/2023, can be interpreted as part of the idea of a state of law (Rechtsstate) or The Rule Of Law which is built by developing legal instruments through the Constitutional Court's decision as a functional system to laden the candidates for President and Vice President with justice, the Constitutional Court's decision is an effort to organize the superstructure and infrastructure of political institutions that are orderly and regular, by building a rational and impersonal legal culture and awareness in the life of society, nation and state.

The theory of the rule of law or Rechtsstaat or nomocracy or state of law is a concept of state administration based on law (Juanda & Juanda, 2023; Kamran & Putri, 2023). Every

action of state administrators must be based on applicable law, this is the ratio decidendi or reasoning of the Constitutional Court Judges on Constitutional Court Decision Number: 90/PUU-XXI/2023 regarding the requirements for candidates for President and Vice President based on the Case Approach as a result of examining the Constitutional Court's case decision. The conception of the rule of law, which was previously only contained in the Explanation of the 1945 Constitution, is formulated explicitly in Article 1 paragraph (3) which states, "The State of Indonesia is a State of Law." In the concept of the State of Law, it is idealized that the commander in the dynamics of state life is law, not politics or economics.

The idea of the rule of law is built by developing the legal system itself as a functional and equitable system, developed by organizing the supra-structure and infra-structure of political, economic and social institutions that are orderly and regular, and fostered by building a rational and impersonal legal culture and awareness in the life of society, nation and state. For this reason, the legal system needs to be built (law making) and enforced (law enforcing) properly, starting with the constitution as the highest legal position (Rumyantsev et al., 2020).

According to Constitutional law expert, AV Dicey explained the principle of the rule of law or Rechtsstaat. According to Dicey, to be called a state of law, first there must be the rule of law, that the law is above all things (Bunga, 2021). Not development above the law, but law above development. Second, to be called a state of law, there must be equality before the law, all citizens can take part in law and government without exception. Third, to be called a state of law, there must be a legal process, a judicial process that is truly fair, as the embodiment of all the people.

With regard to the Constitutional Court's decision on the Application for Material Test of Article 169 Letter (q) of Law No. 7/2017 on General Elections Against the 1945 Constitution, it can be seen as a decision that is not in line with the third principle of the rule of law / Rechtsstaat state according to AV Dicey's opinion, considering that the Constitutional Court's decision is considered contrary to the sense of justice of the community and as a decision that can be interpreted as having the dimensions of the political interests of certain dynastic groups.

b. Characterised by Machtstate (State of Power)

Independent judicial power institutionally and processively has been validated by legal provisions both nationally and internationally, through this power it is expected to produce a quality judge's decision so that it becomes an important reference in determining the legal compliance (obay) of the community. In general, the judge's decision can be classified into 2 (two) streams, namely:

- 1) The Conservative School is a judge's decision based solely on the provisions of written law (statutory regulations) or people often say that judges are the mouthpiece of the law; and
- 2) Progressive flow is a judge's decision that is not solely based on written law, but the judge must also base it on the knowledge and empirical experience he has experienced (Sutrisno et al., 2020).

A court decision that can be interpreted as a decision with the dimensions of a state of power (Machtstate) is a decision that fulfils the requirements of a state of power including: 1)

The supreme law of and in the state is the will of the ruler; 2) the ruler is not related to a fixed procedure, but the purpose and will of the ruler that justifies the procedure/formality (H. Gunarto & Gulo, 2022).

Julius Stahl states the term "The Rule of Law" includes: 1. Supremacy of Law. 2. Equality before the law. 3. Due Process of Law. The four principles of 'rechtsstaat' developed by Julius Stahl above can basically be combined with the three principles of 'Rule of Law' developed by A.V. Dicey to characterise the characteristics of the modern State of Law today. In fact, by "The International Commission of Jurists", the principles of the rule of law are added to the principle of a free and impartial judiciary (independence and impartiality of judiciary) which is increasingly felt to be absolutely necessary in every democratic country. The principles that are considered important characteristics of the rule of law according to the International Commission of Jurists are: 1. The state must be subject to the law. 2. The government respects the rights of individuals. 3. A free and impartial judiciary.

The principle of an independent and impartial judiciary is the central point of the concept of a legal state that adheres to the Rule of law where the law is upheld impartially, referring to the Constitutional Court's decision Number: 90/PUU-XXI/2023, based on the analysis and decision of the MKMK, the decision contained partiality so that the MKMK imposed a verdict on the Judges of the Constitutional Court.

With regard to the Constitutional Court's decision on the Application for Material Test of Article 169 Letter (q) of Law No. 7/2017 on General Elections against the 1945 Constitution, it can be seen as a decision with the dimensions of the state of power (Machtstate) considering that the decision of the Constitutional Court Honour Council (MKMK) has confirmed the decision-making process as a Constitutional Court decision based on ethical violations with practical political dimensions of the judges who decided it. Even though the MKMK's decision cannot change the Constitutional Court's decision considering that the Constitutional Court's decision is Final and Binding which is clearly stated in Article 24 C of the 1945 Constitution.

2. The Impact (Social, Political and Institutional Civility) of the Constitutional Court Decision on the Independence and Professionalism of Constitutional Court Judges

a. Social Impact

Social impact is a change that occurs in people and society as a result of the decision of the Constitutional Court which is considered not independent and not professional (Nurdzakiyyah et al., 2022). In general, it can present distrust or distrust of law enforcement institutions, especially Judges of the Constitutional Court and institutionally the Constitutional Court of the Republic of Indonesia, a social impact that is no less destructive befalls the Vice-Presidential candidate who is favoured by the decision, this is as stated by one of the Constitutional Law experts, Deni Indrayana, published in Tempo.co. Jakarta 8 November 2023 that Gibran became the vice president from the results of an unethical decision ..., these various opinions have become one of the negative factors in the implementation of the 2024 Presidential Elections, this is a picture of the social impact due to the Court's judicial decisions that are not independent and disproportionate. This opinion is in line with the results of a survey that has a negative tone towards the Constitutional Court's decision. The survey was conducted

on 6 to 12 November 2023 by Idopol Survey in collaboration with the Faculty of Law, Universitas Brawijaya Malang, related to public opinion after the Constitutional Court Decision Number: 90 / PUU-XXI / 2023, survey findings include 51.45% disagreeing with the Constitutional Court's decision and those who agree are only 19.92%, and 62.1% of the public who know about the Constitutional Court's decision regarding changes in the 2024 presidential and vice presidential candidate requirements.

Even in the research, 46.69% of the public agreed that former Constitutional Court Chairman Anwar Usman was found guilty of violating ethics by MKMK and 21.13% of the public disagreed. Interestingly, 43.39% of the public agreed that MKMK's decision would result in Gibran Rakabuming Raka failing to become Prabowo Subianto vice president, 25.81% disagreed and 30.81% did not answer. This picture further strengthens public perceptions about the social and political problems of the Constitutional Court Decision Number: 90/PUU-XXI/2023.

Political Impact is the effect of a decision, action, or event on public opinion or public attitude towards the substance of the decision (Sunarso, 2022). One opinion is in accordance with the political analysis of Saiful Mujani Research and Consulting (SMRC) researcher Saidiman Ahmad, who analysed the impact of the decision of the Honorary Court of the Constitutional Court (MKMK) which said there was a problem in the decision-making of the age limit for presidential and vice-presidential candidates at the Constitutional Court (MK). He considered that if the issue of decision-making was widespread, it could have an impact on the electability of the Prabowo Gibran pair, although this opinion still had to be proven (Hutajulu, 2023).

b. The Impact of the Constitutional Court's Institutional Credibility

The impact of the Institutional Credibility of the Constitutional Court is the effect of a decision, action, or event on public opinion or public attitudes towards the institution of the Constitutional Court (Jessee et al., 2022). This is one of them in line with the opinion of Hidayat Nur Wahid (HNW) that public trust in the Constitution and the Constitutional Court Institution as the Guardian of the Constitution has declined sharply, even to the point of arising sarcasm that is very tendentious in the community over the institution of the Constitutional Court as the Family Court or the nephew Court (Belia, 2023).

This condition is clearly very sad because the Constitutional Court was actually established in the Reformation era and was expected to be a credible judicial institution, to implement the Constitution, to realise the ideals of Reform, among others, for law enforcement by eradicating KKN (corruption, collusion and nepotism), not to open the door to the return of nepotism as a result of the granting of a material test regarding the age of the vice president according to the Constitutional Court's decision.

CONCLUSIONS

Thus, the Constitutional Court's decision regarding the judicial review of the age of candidates for President and Vice President for the 2024 presidential election, which allows the involvement of young candidates under the age of 40, has a significant impact. However, the decision is inconsistent with the third principle of the rule of law or Rechtsstaat, and is more

visible as a manifestation of state power (Machtstate), especially with the confirmation of the Honorary Panel of the Constitutional Court regarding ethical violations and practical political dimensions in the decision-making process. The impact, both socially and politically, could present distrust of law enforcement agencies, especially Constitutional Court Judges, as well as the Constitutional Court of the Republic of Indonesia as a whole. Moreover, if the controversy over the decision-making process becomes widespread, it could have a negative impact on the electability of the Prabowo-Gibran pair, as well as reduce the credibility and trust of the public in the constitution and the role of the Constitutional Court as the guardian of the constitution. Therefore, it is important to address this issue with transparency and appropriate action to ensure the integrity of the institution and rebuild public trust in the principles of justice and the rule of law.

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