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ABSTRACT

Purpose: This research analyzes the shift in the position of the Constitutional Court of Indonesia from the negative legislature to the positive legislature in the context of judicial review authority, particularly based on Decision Number 90/PUU-XXI/2023.

Theoretical Framework: This shift becomes the focus of the research because it has substantial implications for the role of the Constitutional Court in the legal system and democratic order of Indonesia.

Method: This research employs document analysis and case study methods on Decision Number 90/PUU-XXI/2023 to understand the context, considerations, and implications of the shift in the position of the Constitutional Court.

Results: The research findings indicate that the Constitutional Court, in performing its duties as a Negative Legislature, has shifted towards becoming a Positive Legislature, a role traditionally associated with the Executive and Legislative branches. In this study, the researcher delves into whether the change in the role of the Constitutional Court aligns with the constitutional spirit and goals of the Indonesian state, as well as its impact on the legal system and democratic order. The research also explores the implications of this shift on the relationship between the executive, legislative, and judicial powers and how the Constitutional Court maintains a balance between its positive legislative role and the principles of judicial independence.

Conclusions: By gaining a profound understanding of the shift in the position of the Constitutional Court towards a positive legislature, this research aims to contribute to formulating policy recommendations for the Constitutional Court and the government. These recommendations are intended to ensure the sustainability of democracy, the rule of law, and the protection of human rights in Indonesia.

Keywords: negative legislature, positive legislature, judicial review.

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A TRANSFORMAÇÃO DO PAPEL DO TRIBUNAL CONSTITUCIONAL DA INDONÉSIA: DELEGISLATURA NEGATIVA PARA LEGISLATURA POSITIVA NO CONTEXTO DA AUTORIDADE DEREVISÃO JUDICIAL (UM ESTUDO DA DECISÃO NÚMERO 90/PUU-XXI/2023)

RESUMO


Enquadramento Teórico: Esta mudança torna-se o foco da investigação porque tem implicações substanciais para o papel do Tribunal Constitucional no sistema jurídico e na ordem democrática da Indonésia.

Métodos: Esta investigação utiliza métodos de análise documental e de estudo de caso sobre a Decisão Número 90/PUU-XXI/2023 para compreender o contexto, as considerações e as implicações da mudança na posição do Tribunal Constitucional.

Resultados: Os resultados da investigação indicam que o Tribunal Constitucional, no desempenho das suas funções como Legislativo Negativo, evoluiu para se tornar um Legislativo Positivo, função tradicionalmente associada aos poderes Executivo e Legislativo. Neste estudo, o investigador investiga se a mudança no papel do Tribunal Constitucional está alinhada com o espírito constitucional e os objetivos do Estado indonésio, bem como o seu impacto no sistema jurídico e na ordem democrática. A investigação também explora as implicações desta mudança na relação entre os poderes executivo, legislativo e judicial, e como o Tribunal Constitucional mantém um equilíbrio entre o seu papel legislativo positivo e os princípios da independência judicial.

Conclusões: Ao obter uma compreensão profunda da mudança na posição do Tribunal Constitucional no sentido de uma legislatura positiva, esta investigação pretende contribuir para a formulação de recomendações políticas para o Tribunal Constitucional e o governo. Estas recomendações destinam-se a garantir a sustentabilidade da democracia, o Estado de direito e a protecção dos direitos humanos na Indonésia.

Palavras-chave: legislativo negativo, legislativo positivo, revisão judicial.

1 INTRODUCTION

The Constitutional Court of Indonesia has the authority to conduct examinations of laws, both formally and substantively, in the Republic of Indonesia. The decisions issued by the Constitutional Court are final and cannot be appealed (Harijanti & Lindsey, 2006), rendering no other legal recourse available after that (Butt & Lindsey, 2008). Therefore, the role and function of the Constitutional Court of Indonesia are crucial in ensuring the achievement of legal objectives, namely justice, certainty, and utility
However, ironically, there are still instances where parties often do not receive justice, clearly violating the principles of legal principles. The Constitutional Court announced a series of decisions related to the judicial review of Article 169 letter q of Law No. 7 of 2017 concerning General Elections, which regulates the minimum age limit for presidential and vice-presidential candidates. The public has varied responses to these decisions. Public opinion is divided between those who support and those who oppose the Constitutional Court's decision, especially regarding case number 90/PUU-XXI/2023. Numerous comments from the public emerged after the Constitutional Court read out its decision on Monday, October 16, 2023. Among the various decisions announced, one specific decision, namely Constitutional Court Decision Number 90/PUU-XXI/2023, has drawn attention with diverse responses from the public. The ruling granted part of the petition and declared the constitutionality of the age requirement for presidential/vice-presidential candidates, which was previously set at "a minimum of 40 (forty) years."

The decision reflects a shift in the role of the Constitutional Court of Indonesia, particularly in the context of a transition from a negative legislature to a positive legislature. This shift has become a central topic of discussion following the Constitutional Court Decision Number 90/PUU-XXI/2023, which substantially changes the paradigm and authority of the Constitutional Court in judicial review. Since its establishment in 2003 (Crouch, 2012), the Constitutional Court has been recognized as an institution playing the role of a negative legislature, meaning a body that imposes limitations on laws produced by the legislative body. However, the dynamics of legal development and the demands of the times have increasingly involved the Constitutional Court in positive legislative functions, especially after controversial decisions that have altered the direction of constitutional interpretation.

This shift is also related to a global phenomenon demanding the sustainability of the concepts of democracy and human rights protection (So, 2012). The Constitutional Court, as the guardian of the Constitution, faces pressure to actively engage in developing legal norms that align with democratic principles and human rights (Rosser & Curnow, 2014). In the context of Indonesia, this change can also be understood as a response to dynamic social and political changes (Butt, 2015). The emergence of controversial issues related to constitutional rights requires the Constitutional Court to play a more proactive
role in rendering decisions capable of bridging the imbalance between societal interests and government policies.

Regarding Constitutional Court Decision Number 90/PUU-XXI/2023, this study will deeply examine the context, considerations, and impact of this shift on the legal system and democratic order in Indonesia. A better understanding of this decision is crucial as it will influence policy direction, legal norms, and constitutional interpretations in the future. The study also seeks to explore whether the shift in the Constitutional Court's role towards a positive legislature aligns with the spirit of the constitution and the goals of the Indonesian state and whether this transition contributes positively to enhancing the protection of citizens' constitutional rights.

With this change, the Constitutional Court needs to carry out its positive legislative role without compromising the principles of independence and judicial autonomy. This shift opens up a discussion about the boundaries of the Constitutional Court's authority in formulating legal norms and its impact on the relationship between the executive, legislative, and judicial branches in Indonesia. Through a profound understanding of this shift in the Constitutional Court's position, it is hoped that it can provide a formulation of policy recommendations for the Constitutional Court and the government to maintain a balance between the principles of democracy, the rule of law, and the protection of human rights in Indonesia.

2 THEORETICAL FRAMEWORK

The existence of the Constitutional Court holds significant importance in the legal and constitutional domain of Indonesia. Through one of its authorities, which is to evaluate the compatibility of laws with the Constitution, the Constitutional Court can maintain the consistency of national legal politics, ensuring that all legal regulations, especially laws, align with and do not violate the principles laid out in the 1945 Constitution of the Republic of Indonesia (UUD 1945) (Ardiansyah & Handoko, 2018; Butt, 2018). In other words, the Constitutional Court acts as a supervisor to prevent the inclusion of legal provisions that exceed the boundaries established by the Constitution (Girsang et al., 2018; Hendrianto, 2018).

The Constitutional Court is a constitutional judicial institution with a central role in safeguarding the integrity of Indonesia's legal system (Sudrajat, 2018), particularly by examining laws in accordance with the 1945 Constitution of the Republic of Indonesia
The existence of the Constitutional Court is crucial in upholding the principles of democracy, the rule of law, and the protection of human rights (Gumbira, 2019; Lindsey, 2018). The Constitutional Court bears a significant responsibility in evaluating laws by referring to the principles enshrined in the 1945 Constitution. This function is not only to ensure the alignment of laws with the constitution but also as an effort to maintain a balance of power among various government institutions (Satrio, 2018; Hastuti, 2019).

As a constitutional judicial institution, the Constitutional Court plays a strategic role in maintaining the continuity of democracy in Indonesia (Martitah, 2019). Its ability to examine laws and uphold the rule of law serves as a crucial foundation to prevent the abuse of power and protect human rights (Andriyan, 2020; Artina, 2020). In practical terms, the Constitutional Court serves as a guardian of democratic principles by ensuring that every enacted law aligns with the spirit and values contained in the 1945 Constitution. Thus, the Constitutional Court is not merely a judicial institution but also a guardian of the constitutional principles that form the basis of the state (Yusa, 2020; Badriyah, 2021). The existence of the Constitutional Court reflects Indonesia's commitment to a legal-based government and the promotion of democratic values (Huda, 2021; Satriawan, 2021). By having an institution like the Constitutional Court, Indonesia strengthens its legal foundation, ensures the protection of its citizens' rights, and reinforces a political system based on democratic principles.

The role of the Constitutional Court in upholding social justice and humanity is a key aspect in ensuring the realization of these principles. Through its authority to test laws against human rights standards, the Constitutional Court contributes to shaping a just and civilized society (Wiratraman, 2022). Additionally, the Constitutional Court also plays a strategic role in resolving electoral disputes (Dressel, 2018). In the national political context, the ability of the Constitutional Court to deliver fair decisions in electoral disputes has a significant impact on the legitimacy of election results. The decisions of the Constitutional Court not only establish a strong legal foundation but also help maintain political stability by instilling confidence in the public regarding the democratic process (Butt, 2022).

The dual role of the Constitutional Court as a guardian of human rights and a mediator in electoral disputes underscores its importance in the national political context. By providing a solid legal foundation (Nurhayati, 2022), the Constitutional Court plays a
role in upholding democratic principles and instilling confidence in citizens that every political process is conducted fairly and in accordance with the applicable rules (Pradana, 2018). Therefore, the Constitutional Court is not merely a judicial institution but also a crucial pillar in the development of a just society, maintaining political stability, and ensuring that human rights remain a primary focus in every legal and political process in Indonesia (Shalihah, 2022).

The Constitutional Court not only has the task of examining laws but also has the authority to review government regulations. This emphasizes the crucial role of the Constitutional Court in ensuring that government policies align with constitutional principles (Widiastuti, 2022). In the context of national political dynamics, conflicts of authority between state institutions can arise. The Constitutional Court functions as a mediator capable of resolving these authority disputes, thus maintaining a balance of power among the executive, legislative, and judicial branches (Satrio, 2018). The Constitutional Court's ability to review the dissolution of political parties also has a significant impact on protecting citizens' political rights (Warjiyati, 2022). The examination of the dissolution of political parties by the Constitutional Court serves as a barrier preventing potential abuse of power, which could threaten political diversity in Indonesia (Wicaksono, 2022). Thus, the Constitutional Court not only functions as a judicial institution but also as a guardian of constitutional principles that support stability and democracy in the country.

The Constitutional Court only plays a role in testing laws but also provides interpretations of provisions in the 1945 Constitution. In its task of clarifying aspects that may be a source of ambiguity, the Constitutional Court actively contributes to maintaining the consistency and integrity of the Constitution. Serving as a guardian of the system of checks and balances (Anggono, 2023; Faiz, 2023), the Constitutional Court plays a critical role in reducing the risk of power abuse at all levels of government. This not only creates a healthy political environment but also one that is responsive to the needs of the community, forming the basis for ethical and effective governance practices (Salura, 2018).

The decisions of the Constitutional Court not only impact the fate of individual cases but also establish legal precedents that influence the direction of national politics as a whole. Thus, the role of the Constitutional Court is not limited to legal aspects alone; it
serves as a crucial pillar in shaping policies and the development of Indonesia, providing a solid legal foundation to support progress and sustainable stability.

3 RESEARCH METHODS

This study employs the applied research method known as the normative juridical method. This approach involves the analysis of legal regulations (statute approach) and the application of an analytical approach. The normative method was chosen because this research is related to the analysis of legal rules, which is the focus and core of the study. The legislative approach will be applied to explore regulations relevant to the research theme, such as Article 24C of the 1945 Constitution of the Republic of Indonesia and Law Number 24 of 2003 concerning the Constitutional Court. The research materials used include:

1) Primary legal materials: Primary legal materials are legislative regulations that have a binding nature and are directly related to the research focus. Some examples of primary legal materials include the 1945 Constitution of the Republic of Indonesia, Law Number 24 of 2003 concerning the Constitutional Court, and Law Number 48 of 2009 concerning Judicial Power.

2) Secondary legal materials: Secondary legal materials refer to legal materials that provide explanations or interpretations of primary legal materials. In the context of this research, secondary legal materials used include journals, theses, dissertations, as well as books discussing constitutional theory and law.

3) Tertiary legal materials: Tertiary legal materials are legal materials that add information to primary and secondary legal materials, such as dictionaries and internet websites discussing issues related to the Constitutional Court.

4 RESULTS AND DISCUSSION

4.1 POSITION OF THE CONSTITUTIONAL COURT (JUDICIAL REVIEW)

Judicial review is related to the validity of regulation within the hierarchy of legislation. The Judicial Review process also experiences limitations in authority, where the review can only be carried out according to the judicial mechanism that allows testing by the court (Judicial Review), legislative body (Legislative Review), Executive Institution (Executive Review), or other authorized institutions to conduct evaluations.
Conducting Judicial Review is part of the Constitutional Court's authority to evaluate material aspects between one law and another.

The Constitutional Court, in examining laws, is stipulated in Article 29, paragraph (1), letter a, which states, "examining laws against the 1945 Constitution of the Republic of Indonesia." The Constitutional Court functions as a Negative Legislature, which means it can annul or nullify laws formulated by the Positive Legislature (Legislative, Executive). In this context, the Constitutional Court cannot add or articulate the petitum from the petitioner or respondent during the examination of laws against the Constitution. Although the basis for Constitutional Court judges to decide a case can be based on their beliefs, it must not contradict the Constitution of the Republic of Indonesia in 1945.

The common distrust in the conventional judicial institutions' ability to effectively uphold and execute the functions of constitutional enforcement has led to the necessity for a separate constitutional institution. This institution is tasked with overseeing the validity of laws. It has the authority to annul them if they are found to conflict with the Constitution, which serves as the fundamental legal norm. This principle emphasizes that the constitution must not violate norms, ensuring that justice in Indonesia is guaranteed.

Although not frequent, there have been instances where decisions of the Constitutional Court are not always in line with the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945), which serves as the primary guide for Indonesia's legal system. Philosophically, the establishment of the Constitutional Court aims to create a constitutional system in Indonesia that emphasizes the principle of functional separation of powers and applies mechanisms of checks and balances. This is done gradually to replace the concept of power distribution and the integral understanding of state institutions, arguing that this change is necessary to enhance the quality of the governance system.

1. Indonesia is a country that adopted a legal system based on Pancasila and the 1945 Constitution. The main goal of this nation is to achieve an organized, clean, prosperous, and just social and state order.
2. As part of the judicial power, the Constitutional Court plays a significant role in efforts to uphold the Constitution and the principles of the rule of law in accordance with the duties and authority mandated by the 1945 Constitution.
3. According to the regulations stipulated in the 1945 Constitution (Article 24C), the appointment and dismissal of constitutional judges, legal procedures,
and other regulations are governed by laws. The Constitutional Court is part of an independent judicial power to oversee the course of justice, with the aim of upholding law and justice. The Constitutional Court functions alongside the Supreme Court and the subordinate courts in the judicial system.

4.2 IMPLICATIONS OF THE SHIFT IN POSITION OF THE CONSTITUTIONAL COURT AS A POSITIVE LEGISLATURE IN DECISION NUMBER: 90/PUU-XXI/2023

The Constitutional Court, as a negative legislature, can only eliminate existing norms. In a law that conflicts with the 1945 Constitution, the Constitutional Court is not allowed to add new norms to the law, as this is the actual authority of the legislative institution. In Decision Number 90/PUU-XXI/2023, the operative clause at point two (2) is as follows:

“The provision of Article 169 letter q of Law Number 7 of 2017 concerning General Elections (State Gazette of the Republic of Indonesia Year 2017 Number 182, Additional State Gazette of the Republic of Indonesia Number 6109), which states, “is at least 40 (forty) years old,” is declared to be in conflict with the 1945 Constitution of the Republic of Indonesia and does not have legal binding force, as long as it is not interpreted as “being at least 40 (forty) years old or having ever/currently held a position elected through general elections, including regional head elections.” Thus, Article 169 letter q of Law Number 7 of 2017 concerning General Elections is amended to read “is at least 40 (forty) years old or has ever/currently held a position elected through general elections, including regional head elections”.

In reviewing the Constitutional Court's decision at point two (2), from the perspective of constitutional law, it is observed that the Constitutional Court no longer holds the position of a Negative Legislature. In Indonesian legal theory, the Negative Legislature has the authority to review laws without adding substance to articles or interpretations, which shifts to the authority of the Positive Legislature as the designer and formulator of the laws of the Republic of Indonesia. This shift has caused a disturbance in society as it moves towards a Positive Legislature.

The object of dispute listed with the Constitutional Court registry by the petitioner is in Article 167 letter (q), which states ‘a minimum age of 40 (forty) years.’ However, in the ratio decidendi of the Constitutional Court Judge in Decision Number 90/PUU-XXI/2023, the main consideration of the petitioner is as follows:
“Considering that, after a thorough examination of the Petitioner's application, as detailed in the Case Background section, the constitutional issue that the Constitutional Court must address is whether the addition of the alternative requirement "or has experience as a regional head at the provincial or district/city level" to the provision of Article 169 letter q of Law Number 7 of 2017, as stated in the petition of the application a quo, is in conflict with the 1945 Constitution. As argued by the Petitioner, regional heads elected through elections based on the people's sovereignty have an equal opportunity to participate in the democratic implementation of the presidential and vice-presidential elections.”

The judge's considerations in deciding a case requested by this petitioner, from the perspective of positive law theory in Indonesia, indicate that the Constitutional Court is deemed to have shifted its authority based on the 1945 Constitution. This shift is due to reasoning that does not align with the general principles, leading to legal ambiguity in Indonesia. The study's findings reveal several anomalies in some decisions of the Constitutional Court that examined the constitutionality of Article 169 letter (q) of the Election Law. There is a perspective that the decisions made by the Constitutional Court are considered final and cannot be challenged through other legal means. There are four inconsistencies in the Constitutional Court's decisions regarding the constitutionality of the age limit for presidential/vice-presidential candidates, especially as contained in Constitutional Court Decision Number 90/PUU-XXI/2023.

The decision of Constitutional Court Number 90/PUU-XXI/2023 is considered to have added a new norm, which should contradict the original concept of the Constitutional Court, namely to examine existing norms to assess their constitutionality or unconstitutionality. Conversely, in this Constitutional Court Decision, the case application is granted to add a new norm that did not previously exist or was not regulated. Academically, Constitutional Court Decision Number 90/PUU-XXI/2023 is considered inconsistent with the original concept of the Constitutional Court, which functions to examine existing norms. Its function should be to assess whether these norms are in accordance with the constitution or not. In this context, if the norm under scrutiny is the age requirement of 40 years, then the Constitutional Court should decide whether the age of 40 is in accordance with the Constitution or not.

Actually, in this Constitutional Court Decision, the requirement of a minimum age of 40 is considered constitutional. However, there has been a development that in case Number 90/PUU-XXII/2023, there is a request to add a new requirement, so the age of 40 is not the subject of examination. The affirmation that the age of 40 is constitutional has actually been expressed in the Constitutional Court Decision issued on Monday. It is
essential to note that Constitutional Court decisions cannot be separated from the political context, as the country was entering the stage of registration for presidential and vice-presidential candidates at that time. Interestingly, in the Constitutional Court Decision, it is explicitly mentioned that certain parties will benefit from the decision. The Constitutional Court Decision Number 90/PUU-XXI/2023 cannot be divorced from the political context, as it is related to the deadline for the registration of presidential and vice-presidential candidates. Therefore, the analysis certainly involves considering who will benefit from this decision, and there are concerns that this may be one of the agendas to support the approval of the vice-presidential candidate.

The Constitutional Court Decision Number 90/PUU-XXI/2023 was not unanimously taken because there were differences of opinion among the judges, as reflected in the existence of dissenting opinions and concurring opinions from various panels of judges. Some judges argued that the case should be granted, while others argued it should be rejected or even that it should not have been accepted in the first place. This diversity of opinions raises questions about which opinion should be followed when viewed from a non-legal standpoint. However, from a legal perspective, the majority opinion of the judges becomes the reference that must be followed. Furthermore, there are some other irregularities, especially concerning the considerations of some judges revealed in dissenting opinions and concurring opinions, which are considered unusual compared to some previous Constitutional Court decisions.

Interestingly, some aspects considered abnormal or irregular are explained through dissenting opinions by constitutional judges. In it, several unusual or irregular things are highlighted, including in the decision-making process, trial proceedings, and the course of the case. From the mix-up of cases to the lack of hearings from the government and the DPR as the drafters of the law, even though such situations are permissible in the context of testing laws. However, when the petitioner's case is eventually granted, especially when it captures public attention, the trial process becomes retributive and competitive. Even the majority judge stated that this is a different issue. Responding to the issue of open legal policy in the Constitutional Court Decision, which theoretically can change, but according to them, changes in Constitutional Court decisions should not occur in a very short time. Changes in Constitutional Court decisions can be caused by the evolution of society (Liman & Rifai, 2023), changes in theories, or changes in arguments that may nullify or undermine previous arguments (Perdana, 2023).
In theory, court decisions, including those of the Constitutional Court, can change, but such changes occur when there are substantially different conditions (Huabil et al., 2022). Changes in Constitutional Court decisions happen when there is stronger argumentation to overturn previous arguments, influenced by the gradual evolution of society (Abustan, 2023). Argumentation cannot be swiftly altered; the development of arguments involves changes in theories and other factors, requiring a significant amount of time. Substantial changes in decisions are a natural occurrence but usually require a significant amount of time (Asrun, 2023). If changes occur rapidly, questions may arise regarding allegations of intervention from parties with specific interests (Sidin, 2023). Swift changes raise indications of interference or specific interests.

In the context of the judiciary, this is considered unusual as it contradicts the usual practices of the judicial system, involving a time-consuming process of change. This is attributed to shifts in society, changes in theoretical frameworks, and other factors. Legal decisions rarely reflect the inner existence of the lawmakers. As a society, we can only perceive it through the logical reasoning contained within (Sunarmi et al., 2023). However, in yesterday's hearing, many expressions of feelings or inner existence were revealed, including how a previously rejected lawsuit can be accepted and the issue regarding the involvement of the Chief Justice of the Constitutional Court.

5 CONCLUSION

The Constitutional Court, which has the authority to review laws against the constitution, should, in deciding a case, such as Decision Number 90/PUU-XXI/2023, avoid providing reasoning through considerations (Ratio decidendi) that could shift the Constitutional Court's authority from Negative Legislature to Positive Legislature. This is crucial because Constitutional Court decisions are final and binding, meaning there is no legal recourse afterward. It should be remembered that the Constitutional Court's function is to fulfill substantial justice. However, if there is a shift in authority, justice, certainty, and usefulness could be jeopardized.

Based on the previous discussion, it can be concluded that Decision Number 90/PUU-XXI/2023 raises several questions and controversies. There are various anomalies and differences of opinion among the judges, as seen through dissenting and concurring opinions. Some aspects highlighted include the decision-making process, the course of the trial, and changes in the substance of the decision, which were considered
uncommon in previous Constitutional Court decisions. Understanding that changes in the
substance of a decision, although theoretically possible, typically require a significant
amount of time and are influenced by changes in society and the evolution of legal
theories. However, rapid changes in this context raise questions about intervention or the
interests of involved parties.

The involvement of the Chief Justice of the Constitutional Court, who previously
declared a conflict of interest but participated in this decision, also draws attention. This
adds complexity and uncertainty regarding the integrity and independence of the
Constitutional Court. Overall, this decision underscores the importance of vigilance and
a deep understanding of legal processes, especially when anomalies or differences of
opinion among the judges arise.
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