

Disparity in Constitutional Court Decisions Regarding the Age Limits for Presidential and Vice-Presidential Candidates (Study of Decision No. 29/PUU-XXI/2023 and Decision No. 90/PUU-XXI/2023 concerning the Age Limit for Presidential and Vice-Presidential Candidates)

Ashari¹, Riska Ari Amalia², Khairul Umam³, Rachman Maulana Kafrawi⁴
Univeristas Mataram

Article Info

Article history:

Accepted : 28 May 2024

Published : 31 May 2024

Keywords:

Disparity, Constitutional Court

Abstract

The aim of this research is to determine the disparity in constitutional court decisions regarding the age threshold for presidential and vice-presidential candidates. This research is a type of normative legal research that uses statutory, conceptual and case approach methods. The results of the research explain that if examined from the aspect of considerations of constitutional court judges in case number 29/PUU-XXI/2023, it is stated that determining the minimum age of the President and Vice President is the domain of law makers (open legal policy), while in case number 90/PUU-XXI/2023 the constitutional court interpreted that the existence of an open legal policy (open legal policy) although it can be accepted in constitutional practice, but in its development the constitutional court could ignore or set aside while giving a re-interpretation of the norm which is an open legal policy, while from the adoption procedure decision in the judge's deliberative meeting held in case Number 29/PUU-XXI/2023, the chairman of the constitutional court, Anwar Usman, did not participate in discussing and deciding to avoid conflicts of interest, while in case Number 90/PUU-XXI/2023 with the same constitutionality issue the chairman The constitutional court participated in discussing and deciding the case with the decision being granted in part, namely being at least 40 years old or having/currently held a position elected through general elections, including regional head elections.

This is an open access article under the [Creative Commons Attribution-ShareAlike 4.0 International License](https://creativecommons.org/licenses/by-sa/4.0/)



Corresponding Author:

Ashari

Universitas Mataram

Email: ashariari05@unram.ac.id

1. INTRODUCTION

The third amendment to the 1945 Constitution resulted in a shift towards a horizontal functional power structure, where the position of state institutions became equal. Each state institution as the administrator of state power carries out functional supervision over other state institutions. The changes carried out aim to perfect the basic rules of state administration in a democratic and modern manner, including through a stricter separation and/or sharing of powers, a stricter and more transparent system of checks and balances, as well as the formation of new state institutions to accommodate developing needs. nation and the challenges of the times.

The 1945 Constitution states that Judicial Power is an independent power to administer justice to uphold law and justice, so that in the exercise of judicial power between decisions and judges are two things that cannot be separated because court decisions are the product of judges, so quality decisions reflect the judge who quality.(Kusyandi 2023, 123)WhatIf judicial power is exercised based on the law or determined rules of the game, it will avoid subjectivity which leads to injustice.

The judge's decision in the courtroom is not just to end a dispute between two or more parties, to grant rights to one party and impose obligations on another party, to punish the guilty or acquit the innocent. Judges' decisions can cause widespread suffering and distrust because they are triggered by unfair processes and decisions and also because there are disparities between one or more relatively similar cases, whether process disparities, legal interpretation disparities, treatment disparities and final decision disparities.

The Constitutional Court judge's decision Number 90/PUU/XXI/2023 related to the review of Law Number 7 of 2017 concerning elections shows the inconsistency of the Constitutional Court in deciding a case. Previously, in the Constitutional Court Decision Number 29-51-55/PUU XXI/2023, the Court explicitly, directly and firmly stated that the age norm in Article 169 letter q of Law 7/2017 is within the authority of the legislators to change it. In fact, whether we realize it or not, these three decisions have closed the space for other actions other than those carried out by legislators.

In practice, the Constitutional Court has also changed its stance in deciding decisions, but it has never happened this quickly, where changes occur in a matter of days. Such changes do not simply override the previous decision, but are based on very strong arguments after obtaining important facts that have changed in society. The question is, what important facts have changed in society so that the Court changed its stance from the Constitutional Court Decision Number 29-51-55/PUU-XXI/2023 with a ruling of rejection so that it changed to a ruling in favor of a quo Decision. (Gusman 2023, 431)

This can be seen in the comparison of the minimum age limits for presidential candidates in various countries, with the conclusion that a 40-year-old head of state can become President and/or Deputy President as long as it meets certain qualifications. Ridiculously, this comparison was previously used by the Petitioner in Case No. 29/PUU-XXI/2023, whose argument was rejected by the Constitutional Court.

The decision of the constitutional court in reviewing the election law indicates the strong political interests behind the election regulations which always change every five years. For this reason, a number of constitutional law experts believe that the Constitutional Court should not have granted the request. They refer to the principle of open legal policy which has been implemented by the Constitutional Court in various previous law review cases. The principle of open legal policy was introduced for the first time by the Constitutional Court since it was formed in 2003. Constitutional judges have applied this principle in a number of decisions. If the Constitutional Court ignores this principle in the case regarding the age limit for presidential and vice-presidential candidates, constitutional judges could be suspected of violating ethics. For example, Feri Amsari, a constitutional law expert at Andalas University, questioned the reasons why the constitutional judges took different considerations from previous decisions. If the judges give different interpretations, this could be a form of ethical violation. Constitutional judges whose legal way of thinking changes are judges who violate ethics because changes in interpretation are definitely based on interests. (Imam 2024, 83)

The Constitutional Court's decision regarding the age limit for vice presidential candidates, which later became a polemic in society, seemed to strengthen the importance of political judicialization in the judiciary. This political judicialization arises and is inevitable as a result of judges examining and deciding cases that have political nuances so that it concerns the independence of Constitutional Court judges to be free from various political pressures which of course influence decisions.

The role of justice and law enforcement can be realized if the judiciary has power held guided by the specified laws or rules of the game. Such exercise of judicial power will certainly avoid subjectivity which leads to injustice. Injustice will certainly cause the dignity of the Constitutional Court to be damaged. The product produced by the

Constitutional Court is a decision that is used to resolve a problem. Because it is used to resolve problems, in essence the court as a symbol of justice, always promises to provide justice to everyone, especially to those seeking justice (justitiabeln). Based on the background above, the author focuses on examining the causes of the disparity in constitutional court decisions regarding the age threshold for presidential and vice-presidential candidates.

2. RESEARCH METHODS

The research method used in this research is normative legal research, namely research whose study is carried out by examining various literature, books, legislation and other sources. The approach method used is a case approach carried out by examining constitutional court decisions and a statutory approach because what will be studied are various legal regulations which are the focus and central theme of the research. (Marzuki 2013, 133) The statutory approach is carried out by examining statutory regulations relating to the 1945 Constitution of the Republic of Indonesia and Law Number 7 of 2020 concerning the Constitutional Court.

3. RESEARCH RESULTS AND DISCUSSION

Disparity in Constitutional Court Decisions Regarding the Age Limits for Presidential and Vice-Presidential Candidates

1. Viewed from the aspect of the judge's considerations

a. Case No29/PUU-XXI/2023

In Indonesia's constitutional history since independence in 1945, the end of the reign of President Soekarno (Old Order) until the first general election under the New Order regime in 1971. In this connection, it has been shown that the 1945 Constitution drafted by the founding fathers of the country does not regulate the boundaries. Minimum age to become a candidate for President and Vice President. For this reason, the People's Consultative Assembly (MPR), which before the Amendment to the 1945 Constitution had the authority to elect the President and Vice President, established the People's Consultative Assembly Decree Number II/MPR/1973 concerning Procedures for Election of the President and Vice President of the Republic of Indonesia (TAP MPR II/1973). Regarding the requirements for native Indonesians, it is regulated in Article 6 paragraph (1) of the 1945 Constitution. Meanwhile, apart from regulating the requirements for native Indonesians for President and Vice President, the age limit for being able to be elected by the MPR as President and Vice President is 40 (forty) years is regulated in Article 1 paragraph (1) letter b TAP MPR II/1973. Furthermore, based on the Consideration of letter b, because TAP MPR II/1973 was deemed no longer in accordance with the dynamics and development of democracy, TAP MPR II/1973 was replaced with Decree of the People's Consultative Assembly Number VI/MPR/1999 of 1999 concerning Procedures for Presidential Nominations and Elections and Vice President of the Republic of Indonesia (TAP MPR VI/1999). Even though there has been a change, the minimum age requirements for the President and Vice President have not undergone any changes to the regulations, namely native Indonesians who are 40 (forty) years old [vide Article 1 paragraph (1) letter b TAP MPR VI/1999].

With regard to the requirements for candidates for President and Vice President, the norms of Article 6 letter q of Law 23/2003 state that candidates for President and candidates for Vice President must meet the requirements of being at least 35 (thirty-five) years old. In its development, Law 23/2003 was replaced by Law Number 42 of 2008 concerning General Elections for President and Vice President (UU 42/2008) as

the legal basis for holding general elections for President and Vice President in 2009 and 2014. In this regard, regulations the age requirements for Presidential and Vice-Presidential candidates have not changed. The norm in Article 5 letter o of Law 42/2008 states that you must be at least 35 (thirty-five) years old. Regulations regarding the minimum age requirements for Presidential candidates and Vice-Presidential candidates have only changed in the 2019 Presidential and Vice-Presidential elections, because in Article 169 letter q of Law 7/2017 it is determined that the requirements for being a Presidential candidate and Vice-Presidential candidate include one of them being at least 40 (forty) year.

Based on careful tracking and tracing of the minutes of amendments to the 1945 Constitution, especially the debate around the President's requirements as stated in the Comprehensive Text on Amendments to the 1945 Constitution of the Republic of Indonesia: Background, Process and Results of Discussions, 1999-2002", Book IV of State Government Power Volume I, Publisher: Secretariat General and Registrar of the Constitutional Court, the Court found the legal fact that the majority of amendments to the 1945 Constitution or factions in the MPR at that time were of the opinion that the minimum age for the President was 40 (forty) years. However, for reasons including the age issue, in the future it is possible that there will be dynamics and there are no ideal benchmarks, so that, because of the age issue, even though you have fulfilled the requirements set out in the Constitution, you cannot register yourself as President, the amendments to the Constitution agree to determine the issue. age is regulated by law. In other words, determining the minimum age for the President and Vice President is the domain of law makers.

The Court found the legal fact that the majority of amendments to the 1945 Constitution or factions in the MPR at that time were of the opinion that the minimum age for the President was 40 (forty) years. However, for reasons including the age issue, in the future it is possible that there will be dynamics and there are no ideal benchmarks, so that, because of the age issue, even though you have fulfilled the requirements set out in the Constitution, you cannot register yourself as President, the amendments to the Constitution agree to determine the issue. age is regulated by law. In other words, determining the minimum age for the President and Vice President is the domain of law makers.

b. Case No90/PUU-XXI/2023

Historically, the 1945 Constitution before the amendment only regulated the constitutional requirements for becoming President, namely being a native Indonesian [vide Article 6 of the 1945 Constitution]. Before the changes (amendments) to the 1945 Constitution did not regulate the minimum age limit for the president. The new President's age requirements appear in the provisions of Article 69 paragraph (3) of the Constitution of the Republic of the United States of Indonesia which states that the President must be an Indonesian who is 30 years old. Likewise, Article 45 paragraph (5) of the 1950 UUDS states "The President and Vice-President must be Indonesian citizens who are 30 years old and so on". Meanwhile, after the amendment to the 1945 Constitution, the spirit of popular sovereignty changed from previously popular sovereignty implemented by the People's Consultative Assembly (MPR) to popular sovereignty implemented according to the Constitution.

These changes have an impact on the requirements for Presidential and Vice-Presidential candidates being more flexible, namely that the arrangements are further regulated in law. In this case, Article 6 letter q of Law 23/2003 concerning the General Election of the President and Vice President determines the requirement of at least 35

(thirty-five) years, as does Article 5 letter o of Law 42/2008 concerning the General Election of the President and Vice President determine the requirement of at least 35 (thirty-five) years. Meanwhile, Article 169 letter q of Law 7/2017 concerning General Elections for President and Vice President requires that candidates for President and Vice President be at least 40 (forty) years old.

Basically, the Court can change its stance in assessing the issue of the constitutionality of a case being examined and tried as long as there are fundamental reasons, including in a quo case, if the Court has a different opinion regarding the age requirements for voters and those elected, in case the age limit for candidates for President and Vice President if there is a fundamental reason for the development of state administration. Apart from that, in relation to legal policy (legal policy or open legal policy) regarding age limits, the Court in several decisions relating to legal policy often takes the position that legal policy can be set aside if it violates the principles of morality, rationality and intolerable injustice.

Likewise, as long as the policy choice does not exceed the authority of the legislator, does not constitute an abuse of authority, and does not clearly conflict with the 1945 Constitution, then such policy choice can be declared unconstitutional or conditionally unconstitutional by the Court. Apart from that, norms relating to legal policy are something that are not explicitly regulated in the Constitution because if they are explicitly regulated in the constitution, then the law cannot regulate norms that are different from constitutional norms.

In several recent decisions, the Court reinterpreted and set aside open legal policy, such as in cases related to retirement age limits and minimum age limits for state administrators because the Court considered that the norm whose review was requested violated one of the principles of being able to override or ignore open legal policy. such as violations of the principles of morality, rationality and injustice that are intolerable, do not exceed authority, do not constitute an abuse of authority, and/or conflict with the 1945 Constitution as stated in Constitutional Court Decision Number 112/PUU-XX/2022 in testing the minimum age for leaders of the Eradication Commission Corruption, and also in essence in the Constitutional Court Decision Number 70/PUU-XX/2022 concerning testing the retirement age limit for prosecutors, and also the Constitutional Court Decision Number 121/PUU-XX/2022 regarding testing the retirement age limit for Registrars at the Constitutional Court. Moreover, both the DPR and the President acted as information givers in the hearing of Case Number 29/PUU-XXI/2023, Case Number 51/PUU-XXI/2023, and Case Number 55/PUUXXI/2023 (without intending to judge the cases in each case number In essence, the legal facts in the trial in question show that the DPR and the Government have left it entirely up to the Court to decide regarding the a quo article (Article 169 letter q of Law 7/2017) [vide Minutes of Case Hearing Number 29/PUU-XXI/2023; Case Number 51/PUU-XXI/2023; Case Number 55/PUU-XXI/2023, dated 1 August 2023, so whether we like it or not, the Court must assess and adjudicate the norms questioned by the applicant based on law, the constitution and justice, including based on Pancasila, the 1945 Constitution, principles of justice and human rights (HAM).

Although the existence of an open legal policy is acceptable in constitutional practice, in its development, such as in several of the Court's decisions mentioned above, the Court can ignore/override it while re-interpreting the norm which constitutes the open legal policy. If an article, norm, or law that applies positively is then asked for its constitutionality to be tested before the Constitutional Court, then the open legal policy of the legislators ceases (exhausted). In order to further provide an opportunity for the Constitutional Court to examine, adjudicate and decide on 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.

The difference in the attitude of the Constitutional Court in these two cases indicates an inconsistency in the attitude and legal construction of the Constitutional Court in dealing with the same case at the same time. Typically, differences in attitudes in a short time occur due to changes in context or extraordinary scientific and philosophical developments, a condition termed disruption, or what Kuhn called revolution.

2. Viewed of decision-making procedures

The decision of the Constitutional Court is a binding and final decision. Therefore, such decisions must be based on philosophical values and have the value of binding legal certainty, which is based on the values of justice. So that the decisions of the Constitutional Court always uphold the values of justice and lead to fairness and legal certainty; Justice is the main substance that ideally determines the decisions of the Constitutional Court. This substantive justice contains the spirit of realizing juridical interests related to humanity, not merely formal interests. (Faqih 2016, 115)

Regarding testing the age limit for presidential and vice-presidential candidates, there are several oddities including:

a. The trial scheduling seemed long and delayed

The post-trial hearing process for revision of the application leading to a trial examination with the agenda of hearing statements from the DPR and the President seems too long, even taking up to 2 (two) months, namely in Case Number 29/PUU-XXI/2023 and 1 (one) month in Case Number 51/PUU-XXI/2023 and Case Number 55/PUU-XXI/2023. Although this does not violate procedural law, whether regulated in the law on the Constitutional Court or the Constitutional Court Regulations. However, delaying the a quo case has the potential to delay justice and ultimately negate justice itself (justice delayed, justice denied).

b. Judge deliberation meeting

In the procedural law of the constitutional court it is explained that in making a decision every judge of the constitutional court is obliged to convey considerations or opinion written on the petition, the decision is taken in a deliberative meeting of judges attended by at least 7 constitutional judges. Decisions taken are carried out by deliberation to reach consensus, if a unanimous consensus is not reached then the meeting is postponed until the next deliberative meeting and after it is carried out seriously it turns out that a unanimous consensus is not reached then the decision is taken by majority vote. In the event that the Judges' Deliberative Meeting cannot make a decision by majority vote, the final vote of the Chairman of the RPH is decisive. (Constitution 2010, 129)

The judge's deliberation meeting held in case Number 29/PUU-XXI/2023, chairman of the constitutional court, Anwar Usman, did not participate in discussions and decisions to avoid conflicts of interest because there were indications that a relative of the chairman of the constitutional court was proposed in the 2024 presidential election contest by one of the political parties, However, in case Number 90/PUU-XXI/2023 with the same constitutionality issue, the chairman of the constitutional court participated in discussing and deciding the case with the decision being granted in part, namely being at least 40 years old or having/currently held a position elected through general elections including regional head elections. .

Thus, the examination of case Number 90/PUU-XXI/2023 which was attended by Anwar Usman resulted in the decision being formally flawed, meaning that the process of examination, deliberation by judges and decision making was carried out using incorrect procedures. The trial process that should be carried out when a petition is suspected of having a conflict of interest with a judge is that the judge concerned must withdraw from the case. The non-participation of the judge is very important to maintain the judge's neutrality and independence because if a case is heard by a judge who has an interest it will result in considerations or decisions that are not objective. (Permadi 2023, 126)

Constitutional court judges are bound by a code of ethics that has been established for this purpose in examining cases related to families that have the potential for conflicts of interest. The code of ethics for constitutional court judges clearly states that constitutional court judges are obliged to resign. As explained in the Law on Judicial Power, it is stated that a judge is obliged to resign from the trial if he is related by blood or marriage to the third degree, or by a husband or wife even though they are divorced, with the chairman, one of the member judges, a prosecutor, an advocate, or clerk.

- c. Case Number 90/PUU-XXI/2023 was withdrawn but continued.

Law Number 24 of 2003 as amended by Law Number 7 of 2020 concerning the constitutional court in article 35 explains that the Petitioner can withdraw the application before or during the Constitutional Court examination and the withdrawal means that the application cannot be submitted again. For this reason, as a legal consequence of withdrawing a case, the applicant cannot cancel the withdrawal and a case that has been revoked or withdrawn cannot be resubmitted.

In case Number 90/PUU-XXI/2023, the applicant's attorney, on his own initiative, withdrew the application on 26 September 2023 which was accepted by the clerk of the constitutional court on 29 September 2023 and the following day, namely the next day. Namely, Saturday 30 September 2023, via a letter dated 29 September 2023, the applicant canceled the 'case withdrawal' on the grounds that there was incorrect information received regarding the sending of the application revision file. The applicant's legal action of withdrawing the case unilaterally on his own initiative without coordinating with the principal applicant reflects unprofessionalism and undermines the dignity of the judiciary.

4. CONCLUSION

Disparity in constitutional court decisions in case number 29/PUU-XXI/2023 and Decision Number. 90/PUU-XXI/2023 concerning the Age Threshold for Presidential and Vice Presidential Candidates indicates that there is an inconsistency in the attitude of constitutional court judges in the judge's deliberation meeting held in case Number 29/PUU-XXI/2023, the chairman of the constitutional court, Anwar Usman, did not participate in discussing and deciding to avoid a conflict of interest due to indications that a relative of the chairman of the constitutional court was proposed in the 2024 presidential election contest by one of the political parties, however in case Number 90/PUU-XXI/2023 with the same constitutionality issue the chairman of the constitutional court participated in discussing and deciding the case with The decision is partially granted, namely those who are at least 40 years old or who have/are currently holding positions elected through general elections, including regional head elections.

5. ACKNOWLEDGEMENT

Alhamdulillah, I would like to express my thanks to the presence of Allah SWT, the Most Gracious, Most Merciful God for all His grace and gifts, so that this writing can be completed. The completion of this article cannot be separated from the help and support from various parties. Therefore, with a heart that is as sincere as possible and full of gratitude, I express infinite gratitude and highest appreciation to the leadership of the Faculty of Law, Social Sciences and Political Science, University of Mataram, who has allowed and motivated me to write.

5. REFERENCES

- Faqih, M. "Nilai-Nilai Filosofi Putusan Mahkamah Konstitusi Yang Final dan Mengikat." *Jurnal Konstitusi*, Vol.7, No. 3 (2016):
- Gusman, Delfina. "Menguji Kenegarawanan Hakim Konstitusi Melalui Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023." *Nagari Law Review*, Vol 7, No. 2 (2023)
- Imam, Aditya Perdana dan Muhammad. "Judisialisasi Politik Dalam Putusan MK Terkait Ambang Batas Usia Cawapres Dalam Pilpres 2024." *Jurnal Pengawasan Pemilu* (Bawaslu DKI Jakarta), 2024
- Konstitusi, Tim Penyusun Hukum Acara Mahkamah. *Hukum Acara Mahkamah Konstitusi*. Jakarta: Sekretariat Jendral dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, 2010.
- Kusyandi, Adi. "Disparitas Putusan Hakim Pidana Berkualitas Yang mencerminkan Rasa Keadilan Dalam Sistem Hukum Indonesia." *Jurnal Yustitia* (Faculty Of Law Universitas Wirodola) Vol.9, No. 1 (2023):
- Marzuki, Peter Mahmud. *Penelitian Hukum*. 8. Jakarta: Prenada Media Group, 2013.
- Permadi, Heru. "Konflik Kepentingan Dalam Putusan MK Nomor 90/PUU-XXI/2023." *MAKSIGAMA*, Vol. 17, No. 2 (2023):
- Undang-Undang Dasar 1945
- Undang-Undang 48 Tahun 2009 Tentang Kekuasaan Kehakiman
- Undang-Undang Nomor 24 Tahun 2003 Tentang Mahkamah Konstitusi sebagaimana diubah dengan Undang-Undang Nomor 7 Tahun 20220

<https://perludem.org/2023/10/17/tafsir-serampangan-inkonsistensi-logika-dan-konflik-kepentingan-mahkamah-konstitusi-dalam-putusan-no-90-puu-xxi-2023/>

<https://umsida.ac.id/kata-pakar-umsida-soal-putusan-mk-no-90-tahun-2023/>

<https://www.mkri.id/index.php?page=web.Berita&id=19660&menu=2>