

## LEGAL ANALYSIS OF CONSTITUTIONAL COURT DECISION NUMBER 90/PUU-XXI/2023 AS A FORM OF EXPANSION OF POSITIVE LEGISLATOR AUTHORITY FROM THE PERSPECTIVE OF LEGAL JUSTICE

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### Abstract

*The Constitutional Court Decision No. 90/PUU-XXI/2023 concerning the age requirement for presidential and vice-presidential candidates has generated extensive constitutional debate in Indonesia. As the guardian of the 1945 Constitution, the Constitutional Court is expected to uphold legal certainty and constitutional consistency. However, this decision introduces a new interpretation by adding normative meaning to Article 169 letter q of Law No. 7 of 2017 on General Elections, raising questions regarding the limits of judicial authority. This article aims to analyze the ratio decidendi of Decision No. 90/PUU-XXI/2023 within the framework of open legal policy and to examine the extent to which the Constitutional Court has exercised its authority in adding legal norms. This study employs normative juridical research using statutory and conceptual approaches, supported by primary, secondary, and tertiary legal materials. The findings indicate that the decision reflects a shift in the Constitutional Court's role toward norm creation, which deviates from its function as a negative legislator and undermines legal certainty and the principle of justice.*

### Intisari

*Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 tentang persyaratan usia bagi calon presiden dan wakil presiden telah memicu perdebatan konstitusional yang luas di Indonesia. Sebagai penjaga Konstitusi 1945, Mahkamah Konstitusi diharapkan untuk menjunjung tinggi kepastian hukum dan konsistensi konstitusional. Namun, putusan ini memperkenalkan interpretasi baru dengan menambahkan makna normatif pada Pasal 169 huruf q Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu, sehingga menimbulkan pertanyaan mengenai batasan kewenangan yudisial. Artikel ini bertujuan untuk menganalisis ratio decidendi Putusan Nomor 90/PUU-XXI/2023 dalam kerangka kebijakan hukum terbuka dan untuk menguji sejauh mana Mahkamah Konstitusi telah menjalankan kewenangannya dalam menambahkan norma hukum. Studi ini menggunakan penelitian yuridis normatif dengan pendekatan statutori dan konseptual, yang didukung oleh*

### Kata kunci:

Putusan Mahkamah Konstitusional; Kebijakan Hukum Terbuka; Legislator Positif; Otoritas Yudisial; Keadilan Hukum..

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bahan hukum primer, sekunder, dan tersier. Temuan tersebut menunjukkan bahwa keputusan tersebut mencerminkan pergeseran peran Mahkamah Konstitusional ke arah pembentukan norma, yang menyimpang dari fungsinya sebagai pembuat undang-undang negatif dan merusak kepastian hukum serta prinsip keadilan.

**Keywords:** Putusan- Mahkamah Konstitusi – Positive Legislator.

## 1. Introduction

Constitutional Court Decision Number 90/PUU-XXI/2023 concerning the age limit requirements for presidential and vice-presidential candidates has given rise to widespread and ongoing constitutional polemics in the discourse on constitutional law in Indonesia (Rizki & Hakim, 2024). This decision not only has an impact on changing the meaning of Article 169 letter q of Law Number 7 of 2017 concerning General Elections, but also raises a fundamental debate regarding the limits of the Constitutional Court's authority as the guardian of the constitution (Takatelide et al., 2025). The addition of norms through a conditional constitutional decision is seen as an unusual step because the Court does not simply declare a norm constitutional or unconstitutional, but also contributes to the creation of new normative meanings not previously formulated by lawmakers. This situation raises serious questions about the consistency of the application of the principle of separation of powers and the Constitutional Court's position within the state system. Furthermore, this polemic also relates to the principles of legal certainty and legal justice, as changes to norms through judicial review decisions have the potential to create uncertainty for election organizers and the public (Hanssen, 1999; Kelley, 2008). In the context of constitutional democracy, decisions that directly impact the national leadership recruitment mechanism should be placed within a framework of judicial prudence to avoid creating precedents that undermine the legitimacy of constitutional justice.

Several previous studies have discussed the role of the Constitutional Court in judicial review, particularly in the context of its position as a negative legislator and the tendency toward judicial activism in certain decisions (Alatas et al., 2024; Harahap, 2025). The literature generally positions conditional constitutional interpretation as a crucial instrument for the Constitutional Court to protect citizens' constitutional rights and avoid legal vacuums. From this perspective, the Court is seen as having a progressive role in

responding to social and political dynamics that cannot always be anticipated by lawmakers. However, a number of academics have also criticized the excessive use of conditional interpretation as potentially shifting the Court's role toward that of a positive legislator, an institution that actively shapes legal norms (Radjak & Ahmad, 2025). This shift is considered to risk weakening the principle of judicial restraint and blurring the boundaries between judicial authority and legislative authority (Kishan, 2024). Although the discourse on judicial activism and judicial restraint has been quite developed, most research remains general in nature and has not specifically examined Constitutional Court Decision No. 90/PUU-XXI/2023 in relation to the principle of legal justice. Consequently, there are still limited studies directly linking this decision to its normative implications for legal certainty and the legitimacy of the Constitutional Court's authority.

This study aims to analyze the ratio decidendi of Constitutional Court Decision No. 90/PUU-XXI/2023 from the perspective of the Constitutional Court's constitutional authority, particularly in its application of the concept of open legal policy. This analysis focuses on how the Court interprets its authority in judicial review and the extent to which the decision reflects a shift in the Court's role from a negative legislator to a positive legislator (Kishan, 2024). Furthermore, this study aims to assess the legal implications of the decision on the principles of legal justice and legal certainty in the Indonesian constitutional system. By examining the legal basis used by the Court, this study seeks to assess the consistency of the decision with previous jurisprudence and the basic principles of a democratic rule of law. This objective is important because Constitutional Court Decision Number 90/PUU-XXI/2023 not only impacts a specific norm but also has the potential to influence future patterns of judicial review. Therefore, this study aims to provide a more comprehensive understanding of the limits of the Constitutional Court's authority in formulating and interpreting legal norms.

The study of Constitutional Court Decision No. 90/PUU-XXI/2023 is crucial because it has the potential to set a constitutional precedent in the practice of judicial review in Indonesia. In a constitutional democracy, Constitutional Court precedent plays a strategic role in shaping the direction of constitutional interpretation and state administration practices. If the expansion of the Court's authority through the addition of norms is left without clear boundaries, it could create an imbalance in the separation of powers system and obscure the function of law-making. Furthermore, this situation has the

potential to reduce the level of legal certainty because legal norms can change through court decisions without going through a participatory and transparent legislative process. Therefore, a critical analysis of this decision is necessary to ensure that the Constitutional Court continues to fulfill its role proportionally as a guardian of the constitution, rather than as a maker of legal policy. This research is expected to contribute to formulating the normative limits of the Constitutional Court's authority so that constitutional enforcement remains in line with the principles of justice, legal certainty, and democracy.

Although numerous studies have been conducted on judicial activism and the Constitutional Court's role as a negative legislator, there remains a lack of in-depth studies examining Constitutional Court Decision No. 90/PUU-XXI/2023 as a concrete manifestation of the Court's shift toward a positive legitimacy, emphasizing the perspective of legal justice. Most previous studies have focused more on theoretical or political aspects of law, without directly linking them to the normative implications for legal certainty and the legitimacy of the Constitutional Court's authority. This study fills this gap by offering a juridical analysis that systematically places the decision within the framework of the Constitutional Court's constitutional authority. Thus, this research not only enriches academic discourse on the role of the Constitutional Court but also makes a practical contribution to the development of constitutional law, particularly in formulating clearer parameters for the use of the open legal policy doctrine and the principle of judicial restraint in the practice of judicial review in Indonesia.

## 2. Research Methods

This research uses a research method that views law as norms or rules contained in statutory regulations and court decisions (Wibowo et al., 2026). Normative legal research aims to examine the consistency, conformity, and normative implications of a legal norm in relation to applicable constitutional principles.

The approaches used in this research include a statutory approach and a conceptual approach (Suhaimi, 2018). A statutory approach was used to analyze the provisions of Article 169 letter q of Law Number 7 of 2017 concerning General Elections and its relevance to the 1945 Constitution of the Republic of Indonesia. Meanwhile, a conceptual approach was used to examine the concepts of open legal policy, positive legislature, and the principle of legal justice within the context of the Constitutional Court's authority.

The legal sources used consisted of primary legal materials in the form of the 1945 Constitution of the Republic of Indonesia, related laws, and Constitutional Court Decision Number 90/PUU-XXI/2023. Secondary legal materials included legal textbooks, scientific journal articles, and the opinions of relevant legal experts. Tertiary legal materials were used as supporting material to clarify legal terms and concepts. The analysis of legal materials was conducted qualitatively using legal reasoning and systematic interpretation methods to draw prescriptive conclusions regarding the status and implications of Constitutional Court Decision Number 90/PUU-XXI/2023 from a legal justice perspective.

### **3. Analysis and Discussion**

#### **The Constitutional Court as Guardian of the Constitution and the Limits of its Authority**

The Constitutional Court (MK) is a state institution that exercises judicial power together with the Supreme Court as stated in Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia (Basuki, 2014; Rajab et al., 2025). In the Indonesian constitutional system, the Constitutional Court (MK) is designed as an institution that guards the constitution (guardian of the constitution), playing a strategic role in ensuring the effective implementation of the constitutional supremacy. This function is not only interpreted as the authority to annul laws that conflict with the 1945 Constitution, but also as a mechanism for constitutional oversight of state administration practices. Through its authority to review laws, resolve disputes over the authority of state institutions, disband political parties, and resolve disputes over general election results, the Constitutional Court plays a role in maintaining the stability of the constitutional democratic system. In this context, the Constitutional Court's decisions have binding force and broad impact, not only legally but also politically and socially. Therefore, every use of the Constitutional Court's authority must be placed within a framework of caution and consistency with the principles of the rule of law, so that the function of guarding the constitution does not transform into the dominance of judicial power in the constitutional system.

As the guardian of the constitution, the Constitutional Court is theoretically positioned as a negative legislator, namely an institution whose authority is limited to testing and canceling legal norms that conflict with the constitution (Kurniawati & Liany, 2019; Rabbani et al., 2026; Sari & Raharjo, 2022). The negative concept of legislators emphasizes that the Constitutional Court does not have a constitutional mandate to form new legal norms, because the legislative function lies exclusively with the House of Representatives together with the President as the legislator (Abela et al., 2024; Kirasa et al., 2025). This limitation is a consequence of the principle of separation of powers, which is the foundation of a democratic state based on the rule of law. Within this framework, the Constitutional Court's role is to ensure that legislative products remain within the constitutional framework, not to replace or take over the function of lawmakers. Therefore, the Constitutional Court's decisions should be oriented toward assessing the constitutionality of the norms being reviewed, rather than formulating alternative, regulatory norms. If this limitation is not consistently maintained, there is a risk of overlapping authority between branches of government, which could ultimately disrupt the balance of the constitutional system.

However, in the practice of judicial review, the Constitutional Court frequently employs a conditional constitutional decision approach, declaring a norm constitutional as long as it is interpreted under certain conditions. This approach is often understood as an instrument to protect citizens' constitutional rights and prevent a legal vacuum resulting from the total revocation of a norm. To some extent, conditional interpretation can be justified as part of the interpretative function of constitutional judges. However, problems arise when such interpretation goes beyond this interpretative function and results in the addition of substance to norms not previously regulated by the lawmakers. At this point, conditional constitutional interpretation has the potential to shift the Constitutional Court's position from that of a negative legislator to a positive legislator. This expanded role has given rise to serious debate in constitutional law doctrine, as it can blur the lines between judicial and legislative functions and undermine the principle of judicial restraint, which should be the primary guideline for constitutional judges.

This shifting role is clearly reflected in Constitutional Court Decision Number 90/PUU-XXI/2023 concerning the judicial review of Article 169 letter q of Law Number 7 of 2017 concerning General Elections. In this ruling, the Constitutional Court not only

assessed whether the age limit provisions for presidential and vice-presidential candidates were in conflict with the 1945 Constitution, but also added a new interpretation that expanded the age requirement with certain additional criteria. This additional interpretation substantively changed the norms established by the lawmakers. This situation raises fundamental questions regarding the constitutional legitimacy of the Constitutional Court's actions, especially when the norms being reviewed had previously been stated as part of the lawmakers' open legal policy in previous Constitutional Court decisions. This inconsistency raises concerns about legal certainty and jurisprudential consistency, which are essential elements of a state based on the rule of law.

The shift in the Constitutional Court's role from a negative legislator to a positive legislator has significant implications for the principles of legal certainty, legal justice, and the separation of powers. As the guardian of the constitution, the Constitutional Court should maintain the stability of the state system through consistent, measured decisions based on the principle of judicial restraint. If the Constitutional Court repeatedly creates or adds new norms through judicial review decisions, this has the potential to create legal uncertainty for both lawmakers and the public. Furthermore, the dominance of judicial power in the legislative realm can disrupt the balance between branches of power and undermine the democratic legitimacy of lawmaking. Therefore, strengthening the limits of the Constitutional Court's authority is crucial to ensure that its constitutional oversight function remains in line with the principles of a democratic rule of law and ensures ongoing legal justice.

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

The Constitutional Court's authority to review laws against the 1945 Constitution of the Republic of Indonesia has again become a public spotlight following the issuance of Constitutional Court Decision Number 90/PUU-XXI/2023 concerning the review of the age limit requirements for presidential and vice presidential candidates. This decision emerged in a sensitive political and constitutional context, considering that the review was conducted ahead of the 2024 Presidential and Vice Presidential Elections. The judicial review application was filed by Almas Tsaqibbirru Re A, a student at the Faculty of Law, Surakarta University, who questioned the constitutionality of Article 169 letter q of Law Number 7 of 2017 concerning General Elections. The applicant argued that the

minimum age limit provision of 40 years limits the constitutional rights of citizens to be elected to public office, thus being deemed contrary to the principle of equality before the law and government. This argument is linked to the constitutional guarantees in Article 27 paragraph (1), Article 28D paragraph (1), and Article 28D paragraph (3) of the 1945 Constitution. Thus, this case not only touches on the technical aspects of candidacy requirements, but also raises fundamental issues regarding the scope of protection of citizens' political rights in Indonesia's constitutional democratic system.

In its ruling, the Constitutional Court granted the applicant's petition in part by declaring Article 169 letter q of Law Number 7 of 2017 concerning General Elections to be inconsistent with the 1945 Constitution and not legally binding unless interpreted to mean that the age requirement can also be met by someone who has held or currently holds a position elected through a general election, including regional head elections. The formulation of this ruling indicates that the Court did not completely overturn the a quo norm, but rather carried out a conditional constitutional interpretation that added new criteria to the age requirements for presidential and vice-presidential candidates. This normative approach is intended to maintain the validity of the norm while aligning it with the constitutional values interpreted by the Court. However, this additional interpretation actually results in a change in the substance of the norms previously formulated by the legislators. Therefore, this decision raises questions about the boundary between legitimate constitutional interpretation and the creation of new legal norms through court decisions.

Constitutional Court Decision Number 90/PUU-XXI/2023 sparked widespread constitutional debate because the Court was deemed not only to have tested the constitutionality of norms but also to have entered the realm of legal norm formation. Criticism of this decision intensified when linked to the Court's inconsistency in ruling on cases with similar substance. Prior to the a quo decision, the Court had ruled on a petition for judicial review of Article 169 letter q through Decision Number 29-51-55/PUU-XXI/2023, rejecting the petition. In that decision, the Court expressly stated that determining the age limit for presidential and vice-presidential candidates is an open legal policy within the authority of the lawmakers. The Court's differing stances within a relatively short period of time raise questions about the consistency of legal reasoning and the stability of jurisprudence. This inconsistency has the potential to create legal

uncertainty and undermine public confidence in the Constitutional Court's decisions as the guardian of the constitution.

This inconsistency becomes even more problematic when viewed within the framework of the Constitutional Court's pre-existing jurisprudence. In various previous decisions, the Court has consistently emphasized that the regulation of age limits for public office is part of the open legal policy of lawmakers. This stance can be traced to Constitutional Court Decisions Number 15/PUU-V/2007, Decisions Number 37-39/PUU-VIII/2010, Decision Number 49/PUU-IX/2011, and Decision Number 56/PUU-X/2012. In these decisions, the Court firmly positions itself as a negative legislator who respects the discretion of lawmakers. Moreover, in Decision Number 29-51-55/PUU-XXI/2023, the Court reiterated that the issue of age is not a matter of constitutionality, but rather a matter of legislative policy choice. Therefore, the change in stance in Decision Number 90/PUU-XXI/2023 gives the impression that the Court is overriding established jurisprudence without providing adequate and convincing legal arguments.

In addition to the issue of jurisprudential inconsistencies, the applicant's legal standing is also a crucial issue that requires more in-depth analysis. The applicant alleges a potential loss of constitutional rights as a citizen due to the enactment of the age limit norm for presidential and vice-presidential candidates. However, the Court did not comprehensively outline the causal relationship between the norm being reviewed and the constitutional loss experienced by the applicant, whether actual or potential. Under the Constitutional Court's procedural doctrine, proving legal standing is a fundamental prerequisite to ensuring that judicial review of laws is not abstract or speculative. The absence of a rigorous analysis of legal standing has the potential to lower the standard of constitutional review and open up space for petitions motivated more by political interests or hypothetical assumptions, rather than actual constitutional loss.

Furthermore, Constitutional Court Decision Number 90/PUU-XXI/2023 indicates a shift in the Court's role from a negative legislator to a positive legislator. In fact, Article 57 paragraph (2) letter a of the Constitutional Court Law normatively limits the Constitutional Court's authority to only the annulment of statutory norms, not the creation of new legal norms. Although the Court has used conditional interpretation to prevent legal vacuums in practice, the application of this approach should remain within a

framework of prudence and judicial restraint. Furthermore, the norm being tested in this case has repeatedly been stated as an open legal policy. Therefore, the use of conditional interpretation in the *a quo* decision raises questions about the Court's consistency in applying the limits of its own authority.

More broadly, Constitutional Court Decision No. 90/PUU-XXI/2023 reflects the internal tension between judicial activism and judicial restraint in constitutional court practice in Indonesia. The Court's inconsistency in determining the limits of open legal policy creates the impression of a double standard or cherry-picking jurisprudence. This situation not only impacts legal certainty but also has the potential to undermine the principles of legal justice and the balance of the separation of powers system. If this trend continues, the Constitutional Court risks creating problematic and difficult-to-control constitutional precedents in future judicial review practices.

### **Open Legal Policy and the Shifting Role of the Constitutional Court**

The concept of open legal policy refers to the policy space that is constitutionally given to legislators to determine certain normative choices, as long as they do not clearly conflict with the Constitution (Darmawan & Wijaya, 2024; Satriawan & Lailam, 2019; Sukma, 2020). In the context of judicial review, the Constitutional Court consistently positions certain issues, including the determination of age limits for public office, as part of an open legal policy within legislative authority. This doctrine is intended to maintain a balance between the function of constitutional review and the principle of separation of powers in a democratic state governed by the rule of law.

In line with this concept, the position of the Constitutional Court in the Indonesian constitutional system is basically as a negative legislator (Laksono et al., 2025; Rahman et al., 2024). This means that the Court only has the authority to declare a norm contrary to the 1945 Constitution and has no binding legal force, without creating or adding new norms. The Constitutional Court's position as a negative legislator is a consequence of the principle of judicial restraint, which requires the court to refrain from taking over the function of lawmaking. This principle is crucial for maintaining legal certainty, consistency of jurisprudence, and the legitimacy of constitutional court decisions.

However, in Constitutional Court Decision Number 90/PUU-XXI/2023, the Court not only assessed the constitutionality of Article 169 letter q of Law Number 7 of 2017 concerning General Elections but also added a new interpretation to the norm. This action indicates a shift in the Court's role from a negative legislator to a positive legislator, as the Court actively shapes norms not previously formulated by lawmakers. This shift is problematic given that the issue of age limits has consistently been positioned as open legal policy in various previous Court decisions.

From a normative perspective, the author believes that this shift in role is constitutionally unjustifiable. When the Court overrides the established doctrine of open legal policy and establishes new norms through judicial review decisions, the Court not only exceeds its authority but also creates legal uncertainty. Inconsistent application of the open legal policy has the potential to give the impression that the Court is applying changing standards in deciding cases, thereby weakening the Court's role as a consistent and predictable guardian of the constitution.

The legal implications of Constitutional Court Decision No. 90/PUU-XXI/2023 extend beyond changing the requirements for presidential and vice-presidential candidacy but also impact the governance of state constitutional authority. If the Constitutional Court continues to expand its role as a positive legislator without clear boundaries, the principles of separation of powers and legal certainty are potentially eroded. Therefore, the application of the principle of judicial restraint and respect for the open legal policy of lawmakers are crucial to maintaining legal justice and the integrity of the constitutional system in Indonesia. This research offers novelty by analyzing Constitutional Court Decision No. 90/PUU-XXI/2023 not only as a question of changing the age requirements for presidential and vice-presidential candidates, but also as an indicator of the shift in the Constitutional Court's role from a negative legislator to a positive legislator in the context of implementing an open legal policy. Unlike previous research that tends to frame the decision solely within the framework of judicial activism or the dynamics of legal politics, this research positions the issue specifically within the relationship between the limits of the Constitutional Court's constitutional authority, the consistency of jurisprudence, and the principle of legal justice.

This research's novelty also lies in its emphasis on normative analysis of the long-term legal implications of the Constitutional Court's inconsistency in applying the open legal policy doctrine. This research demonstrates that Constitutional Court Decision No. 90/PUU-XXI/2023 has the potential to create problematic constitutional precedents if not limited by the principle of judicial restraint. Thus, this research contributes to strengthening the discourse on constitutional law by offering an evaluative framework for assessing the limits of the Constitutional Court's legitimate role in maintaining legal justice and legal certainty within Indonesia's constitutional democratic system.

#### 4. Conclusion

Based on the discussion, this study found that Constitutional Court Decision Number 90/PUU-XXI/2023 indicates a shift in the Constitutional Court's role in judicial review, particularly in the interpretation of Article 169 letter q of Law Number 7 of 2017 concerning General Elections. The Court not only assessed the constitutionality of the norm but also added new meaning to the age requirements for presidential and vice-presidential candidates. However, the regulation of age limits has consistently been positioned as an open legal policy under the authority of lawmakers. Therefore, changes to the norm should be implemented through legislative mechanisms, not through judicial review decisions.

The legal implication of this decision is the emergence of legal uncertainty due to inconsistent application of the open legal policy doctrine and the principle of judicial restraint. The addition of norms through Constitutional Court decisions has the potential to blur the boundaries between judicial and legislative authority, and undermine the principles of legal certainty and legal justice in the constitutional system. This situation also indicates the lack of clear boundaries in the Constitutional Court's practice regarding the distinction between its role as a negative legislator and its tendency to act as a positive legislator.

Furthermore, Constitutional Court Decision No. 90/PUU-XXI/2023 has direct implications for the Constitutional Court's authority as the guardian of the constitution. If the trend of norm formation through judicial review decisions continues without clear parameters, the principle of separation of powers and the legitimacy of the Constitutional

Court's authority are potentially eroded. Therefore, consistency in jurisprudence and strengthening of the principle of judicial restraint are needed so that the Constitutional Court continues to carry out its functions proportionally in upholding the constitution, legal certainty, and justice in a democratic state governed by law.

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