

CONSTITUTIONALITY OF THE CONSTITUTIONAL COURT DECISION NUMBER 90/PUU-XXI/2023 FROM THE PERSPECTIVE OF CONSTITUTIONAL LAW AND FIQH SIYASAH DUSTURIYAH

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Abstract

From the time it was decided until the decision was made, the Constitutional Court's ruling Number 90/PUU-XXI/2023 concerning the age restriction for presidential and vice-presidential candidates generated a great deal of controversy. This study aims to examine the Constitutional Court's ruling Number 90/PUU-XXI/2023 from the standpoints of Fiqh Siyasah Dusturiyah (Islamic state politics) and constitutional law. The constitutionality of the Constitutional Court's ruling Number 90/PUU-XXI/2023 and the perspective of Fiqh Siyasah Dusturiyah on its constitutionality constitute the research problem and its formulation. A descriptive analysis method combined with a juridical-normative approach was the methodology employed in this study. This study draws on original materials, including court rulings and statutes, as well as secondary sources, including books and journals about constitutional law and Fiqh Siyasah Dusturiyah. The findings demonstrated that the Constitutional Court's ruling Number 90/PUU-XXI/2023 was unconstitutional and did not follow the separation of powers and justice principles found in Fiqh Siyasah Dusturiyah. This study demonstrated the significance of maslahat, equitable legal interpretation, and adherence to the constitution's and Fiqh Siyasah Dusturiyah's tenets in formulating constitutional political policy.

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Abstrak

Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 terkait batas usia calon presiden dan wakil presiden menimbulkan banyak kontroversi. Penelitian ini bertujuan untuk menganalisa putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 dari perspektif hukum konstitusi dan Fiqh Siyasah Dusturiyah.. Rumusan masalah penelitian ini: (1) Bagaimanakah konstitusionalitas putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023, (2) bagaimanakah pandangan Fiqh Siyasah Dusturiyah terhadap konstitusionalitas putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023. Penelitian ini menggunakan metode normatif. Hasil penelitian menunjukkan bahwa putusan Mahkamah Konstitusi No.90/PUU-XXI/2023 inkonstitusional berdasarkan hukum acara mahkamah konstitusi dan putusan ini tidak sesuai dengan prinsip keadilan dan prinsip pembagian kewenangan dalam Fiqh Siyasah Dusturiyah. Penelitian ini menunjukkan pentingnya penafsiran hukum yang adil, maslahat, dan kepatuhan terhadap prinsip-prinsip Fiqh Siyasah Dusturiyah dan konstitusi dalam menentukan kebijakan politik ketatanegaraan.

INTRODUCTION

One government agency that plays a significant role in defending the Indonesian constitution is the Constitutional Court. Law No. 24 of 2003 on the Constitutional Court lays forth the court's responsibilities and authority. According to Law No. 24 of 2003, the Constitutional Court can review laws that violate the Republic of Indonesia's 1945 Constitution, decide disputes about state institutions' power, decide whether to dissolve political parties, and disputes about the outcome of general elections.¹ Jimly Asshiddiqie stated that the Constitutional Court is widely used in countries with government democratic systems and extensively utilized in nations with democratic political systems.²

In essence, the Constitutional Court stands as an oversees institution whether there is a deviation from constitutional principles in making regulations and laws.³ The Constitutional Court and its tenets are indispensable, particularly for nations that adopt a democratic form of government. As such, the Constitutional Court's exercise of its jurisdiction under Article 24C paragraph (1) UUD 1945 must be grounded in constitutional principles.

The ability to review laws that violate the 1945 Constitution is a crucial aspect of the Constitutional Court's powers. This is demonstrated by comparing the law to the 1945 Constitution. Law Number 7 year 2017 on Elections, Article 169, is examined in Decision No.90/PUU-XXI/2023. Law Number 7 of 2017 has addressed a number of topics pertaining to the holding of general elections, from preparation and execution to oversight and dispute settlement.⁴

The 2024 general election was centred on the Constitutional Court's ruling, which was a judicial review of Law Number 7 of 2017 regulating General Elections. The age requirement for presidential and vice presidential candidates was the subject of testing in Law Number 7 of 2017 concerning Elections. The applicant argued that the age limit provisions were discriminatory or not based on constitutional principles that guarantee the right to participate in government. The General Election was held on February 14, 2024, concurrently with the legislative General Election and the presidential General Election. Ultimately, the petition was approved after the judges of the Constitutional Court gave it some thought. Since Law Number 7 of 2017 restricted the political rights of the Indonesian people and gave young people political space, it was ultimately deemed to be in violation of the 1945 Constitution.

¹ Indonesia, "Pasal 10 ayat 1 Undang-Undang No.24 tahun 2003 Tentang Mahkamah Konstitusi," JDIH BPK, 2003, <https://peraturan.bpk.go.id/Details/44069/uu-no-24-tahun-2003>

² Sirajuddin, Winardi, *Dasar-Dasar Hukum Tata Negara Indonesia* (Malang: Setara Press, 2015), 32.

³ Putra Perdana Ahmad Saifulloh, "Penafsiran Pembentuk Undang-Undang Membentuk Kebijakan Hukum Terbuka Presidential Threshold Dalam Undang-Undang Pemilihan Umum Yang Bersumber Dari Putusan Mahkamah Konstitusi," *Jurnal Rechts Vinding: Media Pembinaan Hukum Nasional* 11, no. 1 (2022): 153, <https://doi.org/10.33331/rechtsvinding.v11i1.867>.

⁴ Sholehudin Zuhri, "Proses Politik Dalam Pembentukan Regulasi Pemilu: Analisis Pertarungan Kekuasaan pada Pembentukan Undang-Undang Nomor 7 Tahun 2017 tentang Pemilu," *JWP (Jurnal Wacana Politik)* 3, no. 2 (2018): 94, <https://doi.org/10.24198/jwp.v3i2.17670>.

There are a few factors that we need to pay close attention to in relation to the realities that existed both before and after the Constitutional Court's ruling Number 90/PUU-XXI/2023 regulating the age restriction for presidential and vice presidential candidates. The Constitutional Court's ruling has sparked debate among the public and legal community on a number of grounds. Law Number 7 of 2017 addressing elections regulates the age of presidential and vice presidential candidates, stating that "The requirements to become a presidential candidate and vice presidential candidate are: q. at least 40 (forty) years old." So the sound of this law is then submitted as a request for judicial review of the law, which requests that the sound of Article 169 letter q of Law Number 7 of 2017 be interpreted as "at least 40 years old or experienced as a regional head at both the provincial and district/city levels".

There are numerous serious issues with ethical violations and the judges' inconsistent rulings on the Constitutional Court when we examine the procedure used to reach the Court's judgement Number 90/PUU-XXI/2023. These challenges are clearly explained by the applicant's legal status, the complaint's content, the arguments made by constitutional judges, and the role that constitutional judges play in making decisions. We can infer from the arguments raised that the Constitutional Court's decision can be criticised for its material aspects, methods, and discrepancies with other instances pertaining to the same subject.⁵

Judges of the Constitutional Court frequently exhibit two personalities when making decisions. They can be judicial activists, who interpret the Constitution and add new standards, or they can be judicial retrains, who repeal laws that are thought to be unconstitutional under the 1945 Constitution without establishing new ones. In Constitutional Court Decision Number 90/PUU-XXI/2023, judges acted as positive legislators or engaged in judicial activism by amending Law Number 7 of 2017 to include new election-related standards. In contrast, the Constitutional Court used judicial retrains in Constitutional Court Decision Number 46 of 2016 by declaring that the petition was not within the court's jurisdiction because it was within the legislative body's jurisdiction as the legislator.⁶

As a democracy, Indonesia gives the people's voice top priority when it comes to making political decisions, whether that opinion is expressed directly or through elected representatives chosen in general elections. Political freedom, human rights, and the rule of law are the hallmarks of a democracy, which is a system of governance where the people themselves have the authority.⁷ One of the primary tools of a democratic nation is the general election, which is a procedure whereby the electorate selects representatives to serve in the government and then expects the elected officials to carry out their mandates as directed by the entire populace.

⁵Kiswondari, "Pakar Hukum Sebut Putusan MK 90 Injak-injak Rasa Keadilan Masyarakat," *SindoNews*, 2023, <https://nasional.sindonews.com/read/1258235/13/pakar-hukum-sebut-putusan-mk-90-injak-injak-rasa-keadilan-masyarakat-1700658672>

⁶Adena Fitri Puspita Sari, Purwono Sungkono Raharjo, "Mahkamah Konstitusi Sebagai Negative Legislator Dan Positive Legislator," no. 4 (2022): 685–686.

⁷Suhartini, "Demokrasi dan Negara Hukum," *Jurnal De Jure*, Vol 11, No. 1(2019): 68.

Depending on a nation's legal system and the ideals that its society and its institutions uphold, different constitutional principles apply. Popular sovereignty, just and equitable governance, the separation of powers, human rights, the rule of law, social justice, minority protection, and open and accountable governance are a few general constitutional principles. Because a state of law cannot be deemed a constitutional state without putting the constitutional principles into practice, the aforementioned principles are a reflection of the points listed in Pancasila as the foundation of the Indonesian state and must be taken into consideration by institutions or bodies that make laws.⁸

Based on the aforementioned issues, the researcher wishes to examine the steps taken by the applicant, the decision-makers, and the final ruling to determine whether the decision was deemed unconstitutional for violating the relevant and presidential elections. The unconstitutionality of the decision will then be linked to Fiqh Siyasah Dusturiyah, which is the Islamic legal science that governs constitutional politics or state administration and governs the creation of laws in accordance with sharia and the public interest. The research will then compare whether the constitutional court's procedures adhere to the principles of Fiqh Siyasah Dusturiyah when deciding on laws and choosing heads of state. *Fiqh Siyasah Dusturiyah* ensures that governance and legislation run following Islamic values and law, intending to achieve justice, public good, and public welfare.⁹

The Constitutional Court's ruling No.90/PUU-XXI/2023 will be examined in this study using Fiqh Siyasah Dusturiyah, which the researcher believes is compatible with Indonesia's current constitutional law and has a connection to legislative actions taken by the government to control society. Fiqh Siyasah Dusturiyah also emphasises the creation, application, and enforcement of laws in accordance with Islamic teachings in order to achieve justice and the good of the public.¹⁰

The checks and balances mechanism did not perform as intended in this study due to a lack of oversight of judicial power, particularly in the Constitutional Court. Assuring transparency so that every action and decision of the judiciary can be monitored and evaluated, preventing abuse of power so that no one institution or individual has absolute power, protecting individual rights by ensuring that policies will not violate human rights, and maintaining a balance of power by ensuring that each branch of government runs its function effectively without being dominated by other branches are all reasons why this function is so important. All of these factors can increase public confidence in the government.

Based on the explanation of the issues arising from the Constitutional Court Decision Number 90/PUU-XXI/2023, the researcher wants to analyse the constitutionality of the decision using constitutional law and Fiqh Siyasah Dusturiyah.

⁸Jimly Asshiddiqie, *Gagasan Konstitusi Sosial* (Jakarta: LP3ES, 2015), 5.

⁹Hamzah Kamma et al, *Fiqh Siyasah Simpul Politik Islam Dalam Membentuk Negara Madani* (Sumatera Barat: Mafy Media Literasi Indonesia, 2023), 2.

¹⁰ Wahyu Abdul Jafar, "Fiqh Siyasah Dalam Perspektif Al-Qur'an Dan Al-Hadist," *AL IMARAH: JURNAL PEMERINTAHAN DAN POLITIK ISLAM* 3, no. 1 (2018): 18, <https://doi.org/10.29300/imr.v3i1.2140>.

Based on the aforementioned, the researcher believes that Fiqh Siyasah Dusturiyah is the science that is closest to the Indonesian government system and is thought to be able to overcome the problems that arise in the Indonesian government system. Thus, the researcher adopted the term "*Constitutionality Of The Constitutional Court Decision Number 90/Puu-Xxi/2023 From The Perspective Of Constitutional Law And Fiqh Siyasah Dusturiyah*"

By the research title raised above, the researcher makes a formulation of the problems, as follows: (1) How is the constitutionality of Constitutional Court Decision Number 90/PUU-XXI/2023? (2) How does *Fiqh Siyasah Dusturiyah* view the constitutionality of Constitutional Court Decision Number 90/PUU-XXI/2023?

By the background and subject matter above, the objectives to be achieved in this study are: (1) To determine the suitability of the process of determining the decision of the Constitutional Court Number 90/PUU-XXI/2023 with constitutional principles. (2) To find out the view of *Fiqh Siyasah Dusturiyah* on the constitutionality of the Constitutional Court's decision Number 90/PUU-XXI/2023.

RESEARCH METHODS

In writing this research, the type of research that used by the researcher is normative legal research or what is called by juridical-normative, namely library research. The main object of research is the Constitutional Court Decision No.90/PUU-XXI/2023 which is relating to changes or to test the minimum age limit for presidential and vice presidential candidates. For the purposes of data collection in this study, the data source used in this thesis there are primary data which is consists of the books of constitution and *fiqh siyasah dusturiyah*. So, secondary data that consists of thesis, journal and governments website that talks about constitution and *fiqh siyasah dusturiyah*. The data collection method used in this research is document study or also called literature review, by collecting data from various literatures such as books, journals, articles, and documents relevant to the Constitutional Court Decision Number 90/PUU-XXI/2023. The data analysis method used to examine the constitutionality in the Constitutional Court Decision No.90/PUU-XXI/2023, as well as the causes that resulted in the problem is descriptive-qualitative analysis, which is a way of analyzing data by examining decision texts as well as laws and regulations or other legal sources.

DISCUSSION

1. Constitutionality of Constitutional Court Decision Number 90/PUU XXI/2023 According to Constitutional Law

1.1. Examining Law Number 7 of 2017 on General Elections

The Constitutional Court as one of the judicial institutions in Indonesia whose main task is to guard the constitution consists of 9 judges with 1 chief judge, 1 deputy chairman, and 7 constitutional judges. The Constitutional Court in the case of Law Examination against the 1945 Constitution held a series of proceedings, starting from panel sessions and plenary sessions in terms of preliminary examinations, trial examinations, RPH, and decision-making sessions. In a panel session, the Constitutional Court is attended by at least 3 Constitutional Court judges, and in a plenary session,

namely a session to examine, hear and decide on a PUU case, it must be attended by 9 judges or at least 7 judges, as well as in the Consultative Meeting of Judges or RPH.¹¹

Anwar Usman, the Chief Justice of the Constitutional Court of the Republic of Indonesia, in cases Number 29/PUU-XXI/2023, Number 50/PUU-XXI/2023, and Number 51/PUU-XXI/2023 chose not to attend the hearing on the grounds of avoiding conflicts of interest, so 8 Constitutional Court judges continued the three cases without the Chief Justice Anwar Usman. Anwar Usman, the chief judge of the Constitutional Court, should have done the same thing with petition Number 90/PUU-XXI/2023, namely immediately resigning from the trial when he found out that the party who would benefit from petition Number 90/PUU-XXI/2023 was related to him.¹²

However, at the examination session as well as decision-making related to petition Number 90/PUU-XXI/2023, constitutional judge Anwar Usman was present and participated, raising doubts about the independence and objectivity of the Constitutional Court. Decision Number 90/PUU-XXI/2023 can be declared invalid due to indications of violations by Anwar Usman, namely related to conflicts of interest in determining decision Number 90/PUU-XXI/2023. In fact, the decision is still decided and applies until the 2024 elections.

The Decision of the Honorary Council of the Constitutional Court Number 2/MKMK/L/11/2023 indicates that the chief judge of the Constitutional Court has committed a serious violation of the code of ethics in Decision Number 90/PUU-XXI/2023, then the chief judge of the Constitutional Court Anwar Usman filed a lawsuit with the State Administrative Court regarding allegations of violations of the code of ethics and requested that his position be returned. In Law Number 7 of 2020 Article 23 paragraph 2 letters (b) and (d) concerning the Constitutional Court, it is stated that a constitutional judge is dishonorably dismissed if, (b) commits an act of disgrace and (d) violates the oath or promise of office.¹³ Based on this law, requests for dismissal for violations committed in article 23 paragraph 2 can be made after a defense by the person concerned before the Honorary Council of the Constitutional Court. With this, Constitutional Judge Anwar Usman should be dismissed from his position, and decision Number 90/PUU-XXI/2023 should not have binding legal force, because the indications of violations that caused the decision cannot be constitutionally recognized. Based on the law, requests for dismissal for violations committed in Article 23 paragraph 2 can be made after a defense by the person concerned before the Honorary Council of the Constitutional Court. With this, Constitutional Judge Anwar Usman should be dismissed from his position, and decision Number 90/PUU-XXI/2023 should not have

¹¹ Indonesia, "Pasal 1 Peraturan Mahkamah Konstitusi Nomor 2 Tahun 2021 Tentang Tata Beracara Dalam Perkara Pengujian Undang-Undang," MKRI, 2021, https://s.MahkamahKonstitusi.id/public/content/Peraturan_Mahkamah_Konstitusi/394_210420014128.pdf

¹² Indonesia, "Pasal 17 ayat 3 Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman," JDIH BPK, 2009, <https://peraturan.bpk.go.id/Details/38793/uu-no-48-tahun-2009>

¹³ Indonesia, "Undang-Undang Nomor 7 Tahun 2020 tentang Perubahan Ketiga atas Undang-Undang Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi," JDIH BPK, 2020, <https://peraturan.bpk.go.id/Details/147335/uu-no-7-tahun-2020>

binding legal force, because the indications of violations that caused the decision cannot be constitutionally recognized.

If we look back regarding the process of determining decision No.90/PUU-XXI/2023, we can see the irregularities that arise behind the decision, among others, we can describe them as follows:¹⁴

Table 1. 1 The Process Of Examining Law No.7 of 2017 On Election

No.	Day/Date	Description
1	9 March 2023	PSI applied to lower the age limit for presidential and vice presidential candidates to 35 years old.
2	2 May 2023	The Garuda Party is proposing to add the requirement of experience as a state official to the requirements to serve as president or vice president.
3	5 May 2023	5 The Regional Head filed a petition with the same subject matter as the petition filed by the Garuda party
4	3 August 2023	Almas Tsaqibbiru submitted a request to add the requirement of experience as a regional head to serve as president or vice president
5	29 August 2023	Final hearing of PSI, Garuda Party, and 5 regional heads' petitions
6	05-Sep-23	Preliminary examination of Almas Tsaqibbiru's petition
7	12-Sep-23	Almas Tsaqibbiru's application has been amended to reflect his experience as a regional leader at the district/city and provincial levels.
8	19-Sep-23	RPH (Application of PSI, Garuda Party, 5 regional heads)
9	21-Sep-23	RPH I Almas Tsaqibbiru application
10	29-Sep-23	Almas Tsaqibbiru's application withdrawn

¹⁴ Tracking Perkara, "Pengujian Materiil Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum," MKRI, 2023, <https://tracking.mkri.id/index.php?page=web.TrackPerkara&id=90%2FPUU-XXI%2F2023>

11	30-Sep-23	Almas Tsaqibbiru's application was re-entered
12	3 October 2023	Confirmation hearing of Almas Tsaqibbiru's petition by the Constitutional Court
13	5 October 2023	RPH II application for Almas Tsaqibbiru
14	9 October 2023	RPH III application for Almas Tsaqibbiru
15	16 October 2023	Reading of decision No.29/PUU-XXI/2023 filed by PSI was rejected
		The reading of decision No.50/PUU-XXI/2023 filed by Garuda Party was rejected
		The reading of decision No.51/PUU-XXI/2023 submitted by 5 regional heads was rejected
		The reading of decision No.90/PUU-XXI/2023 filed by Almas Tsaqibbiru was partially accepted
16	25 October 2023	The Prabowo-Gibran pair registered with the KPU as a presidential and vice presidential candidate pair with serial number 2.

It should be noted that in the case of judicial review, several criteria must be fulfilled so that a person or party can be declared to have legality in applying, the main criterion of the applicant is a person who feels his constitutional rights are impaired by the applicable law.¹⁵ At this point a student named Almas Tsaqibbiru as the applicant does not have the right reasons so that it can be declared to have suffered a loss of constitutional rights, because in the previous application submitted by PSI, the Garuda party, as well as 5 regional heads with similar subject matter rejected by the Constitutional Court, These applications include, as previously explained, application Number 29/PUU-XXI/2023, application Number 51/PUU-XXI/2023, and application Number 55/PUU-XXI/2023. These three applications have similar characteristics to application Number 90/PUU-XXI/2023 but all three previous applications were rejected by the

¹⁵ Indonesia, "Article 51 of Law No.24 of 2003 concerning the Constitutional Court," JDIH BPK, 2003, <https://peraturan.bpk.go.id/Details/44069/uu-no-24-tahun-2003>

Constitutional Court. In essence, the legal standing of the three petitions filed first is considered to be closer to the requirements and criteria for applicants stipulated in Article 51 of Law Number 24 on the Constitutional Court, namely as individual parties or private legal entities whose constitutional rights are harmed by Law Number 7 of 2017 on Elections. This raises the view that the Constitutional Court is inconsistent with every application it decides, so the application submitted by Almas Tsaqibbirru is considered an anomaly carried out by the Constitutional Court to achieve certain goals.

According to the Constitutional Court's ruling on petition Number 90/PUU-XXI/2023, the petition was partially granted. The Court's ruling divided the judges into four groups, with two of them having different reasons (concurring opinion): constitutional judges Enny Nurbaningsih and Daniel Yusmic, and four of them having different opinions (dissenting opinion): constitutional judges Wahiduddin Adams, Saldi Isra, Arief Hidayat, and Suhartoyo.¹⁶

Wahiduddin Adams responded to petition Number 90/PUU-XXI/2023 by stating that the court in the process of examining, adjudicating, and deciding cases should focus on the concept of *judicial restraint*, as well as that in the history of Indonesia, matters relating to the requirements to become a candidate for president and vice president are generally carried out by the legislature, as well as regarding the age limit set with a certain minimum number of 40 years as well as a person's political practice is not included in the constitutional requirements for candidates for president and vice president. Based on the response of constitutional judge Wahiduddin Adams, this is a form of open legal policy which is the duty of the legislator.

A different opinion was expressed by the constitutional judge Saldi Isra and also the constitutional judge Arief Hidayat who rejected petition Number 90/PUU-XXI/2023, constitutional judge Saldi Isra stated that the Constitutional Court in the decision Number 90/PUU-XXI/2023 should be consistent on issues that are not regulated in detail in the constitution as the authority of the legislators so that they are not decided directly by the Constitutional Court judges. Saldi Isra also stated that the Constitutional Court should refrain from entering into the authority that should belong to the legislators, so that it does not seem to choose which ones can be used as *open legal policy* and which ones are not *open legal policy*.

Arief Hidayat, a constitutional judge, shares Saldi Isra's view that the minimum age limits for presidential and vice-presidential candidates are an open legal policy that is within the legislators' jurisdiction. Arief Hidayat described the application Number 90/PUU-XXI/2023 and several previous applications as having various peculiarities, including the scheduling of hearings that seemed long and delayed, the discussion in the RPH related to application Number 29/PUU-XXI/2023, Number 51/PUU-XXI/2023, and Number 55/PUU-XXI/2023, which were discussed in the RPH. The discussion in the RPH related to application Number 29/PUU-XXI/2023, Number 51/PUU-

¹⁶ Hukum Online, "2 Hakim Konstitusi Ini Punya Alasan berbeda Soal Syarat Batas Usia Capres dan Cawapres," 2023, https://www.hukumonline.com/berita/a/2-hakim-konstitusi-ini-punya-alasan-berbeda-soal-syarat-batas-usia-capres-cawapres-lt652f43457ec21/?utm_source=chatgpt.com

XXI/2023, and Number 55/PUU-XXI/2023 was not attended by the chairman of the Constitutional Court, then in application Number 90/PUU-XXI/2023 the chairman of the Constitutional Court was present to discuss and decide the case, then the next oddity was that case Number 90/PUU-XXI/2023 which was submitted at that time was withdrawn by the applicant but the discussion of the case continued. Therefore, the two Constitutional Court judges rejected petition Number 90/PUU-XXI/2023 for the reasons explained above.

Suhartoyo, a constitutional judge, contended that the petitioners' legal standing was dubious and that they had no direct stake in the nomination of the president and vice president, in contrast to the two previous judges who said they dismissed the petition because it was an open legal policy that was within the legislator's authority.¹⁷ Therefore, Constitutional Judge Suhartoyo argued that the Constitutional Court should not grant legal standing to the applicant and did not accept the application submitted by the applicant.

The Constitutional Court ruled in Almas Tsaqibbirru's petition, Number 90/PUU-XXI/2023, that it was within its jurisdiction to review the matter since it tested the law's validity in relation to the 1945 Constitution. The Court considers that about the case of the age limit of the president and vice president, there is no appropriate way to determine the appropriate age of the president and vice president, also in the 1945 Constitution often a regulation is not specifically regulated but only provides principles that become the benchmark of a regulation.¹⁸

In terms of the constitutionality test of laws against the 1945 Constitution, the Constitutional Court essentially functions as a negative legislator, emphasising that it has the power to declare laws unconstitutional but not to create new regulations. However, it can overrule several decisions pertaining to open legal policy, which is the legislator's authority, if a regulation is deemed to violate the morality, rationality, and intolerable injustice principles.¹⁹

In petition Number 90/PUU-XXI/2023, the main point of the petition discusses the age requirement as stipulated in Article 169 letter q of Law Number 7 of 2017, namely "at least 40 years old", which the applicant requested to add the requirement of experience as a regional head at both the provincial and district/city levels, which is considered an open legal policy. If the Constitutional Court states that cases that are open legal policy which can be handled by the Constitutional Court as long as regulation is

¹⁷ Based on Article 51 paragraph (1) of the Constitutional Court Law, an applicant is one who considers his/her constitutional rights and/or authorities granted by the 1945 Constitution to be impaired, namely: a. Individual Indonesian citizen; b. Customary law community unit as long as it is still alive and in accordance with the development of society and the principles of the Unitary Republic of Indonesia as regulated by law; c. Public or private legal entity; or d. State institution.

¹⁸ Indonesia, "Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," Rumah Pemilu, 2023, https://rumahpemilu.org/wp-content/uploads/2023/10/putusan_Mahkamah_Konstitusiri_9332_1697427438.pdf

¹⁹ Indonesia, "Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," Rumah Pemilu, 2023, https://rumahpemilu.org/wp-content/uploads/2023/10/putusan_Mahkamah_Konstitusiri_9332_1697427438.pdf

considered to violate the principles of morality, rationality, and intolerable injustice, then application Number 90/PUU-XXI/2023 submitted by Almas Tsaqibbirru does not include these three conditions and is not an intolerable case so it is fatal if it is not handled by the Constitutional Court. Therefore, the Constitutional Court should reject petition Number 90/PUU-XXI/2023 and hand over the authority to the legislator as the result of the Constitutional Court's decision on petition Number 29, 51, 55/PUU-XXI/2023 filed previously with the similar petition.

The difference of opinion between the Constitutional Court judges shows the complexity of the issues at hand, the effort to balance between formal and substantial requirements of candidate capability is shown by the majority opinion which adds an alternative age by considering experience as a regional head. Meanwhile, the opinion that rejected petition Number 90/PUU-XXI/2023 emphasized that the Constitutional Court should maintain its role and function as the guardian of the constitution and not be involved in creating new norms that should be the authority of the legislature. Opinions that rejected the petition saw the importance of maintaining public trust in the constitutional judicial process specifically carried out by the Constitutional Court, by being consistent in every decision. Meanwhile, the Constitutional Court, which accepted the petition, considered that to provide opportunities for the younger generation to participate in electoral contestation so that they could be nominated as president or vice president, also considering that the age limit of the president or vice president is not regulated in the 1945 Constitution, the Constitutional Court decided to accept petition Number 90/PUU-XXI/2023 by adding the requirement of experience in serving as a position elected through general elections as an alternative to the age limit for presidential and vice presidential candidates.

According to the table above, Almas Tsaqibbirru's application was withdrawn on 9 September 2023 for no apparent reason. Then, on 30 September 2023, which was supposed to be a holiday, the application was re-filed. However, the clerk was asked to come to work. In the procedural law of the Constitutional Court, a hearing to determine the revocation must be conducted on the application that was revoked by the applicant. However, in this case, the Constitutional Court did not issue a determination but continued to process the application after the applicant withdrew it. In essence, an application can be withdrawn by the applicant before or after the examination is conducted, however, an application that has been withdrawn by the applicant cannot be resubmitted. This is written in Law Number 24 of 2003 Article 35 paragraphs (1) and (2) concerning the Constitutional Court, so based on the case above, Almas Tsaqibbirru's application should not be re-entered and if the application continues, the decision issued regarding the application is considered unconstitutional because it violates the applicable law.²⁰

On 3 October 2023 we can also see that the Constitutional Court conducted a confirmation that is hearing regarding the application of Almas Tsaqibbiru, at this hearing

²⁰ Indonesia, "Undang-Undang No.24 Tahun 2003 Tentang Mahkamah Konstitusi," JDIH BPK, 2011, <https://peraturan.bpk.go.id/Details/39183/uu-no-8-tahun-2011>

the applicant Almas Tsaqibbiru stated that the revocation of the previous application was not the will of the applicant but the will of the applicant's attorney. In essence, the confirmation hearing does not exist in the procedural law of the Constitutional Court, but the Constitutional Court still carried out the hearing in application Number 90/PUU-XXI/2023.²¹

The Constitutional Court judges conducted repeated deliberations, which are generally only held once per case. Repeated RPH usually occur if the petition filed is an important case, there is convincing evidence and the applicant provides sufficient arguments to make repeated meetings necessary, while the application for evidence provided by the applicant is limited to Identity Card, Photocopy of Law Number 7 of 2017, Constitutional documents, as well as the absence of extraordinary arguments given by the applicant so that the application can be said to be a crucial case.²²

Based on the cycle of the process of determining Decision Number 90/PUU-XXI/2023, it was found that several times the Constitutional Court judges conducted RPH without a hearing, whereas based on the procedural law of the Constitutional Court after the implementation of RPH, a plenary session should be held to hear testimony from related parties including presenting witnesses/experts, but in Decision Number 90/PUU-XXI/2023 this was not done by the Constitutional Court.²³

On 16 October 2023, the Constitutional Court issued a decision, namely decision Number 29/PUU-XXI/2023, Number 50/PUU-XXI/2023 and decision Number 51/PUU-XXI/2023, in which the three applications were rejected, while in application Number 90/PUU-XXI/2023, whose decision was partially granted, experienced a change in the editorial of the decision where previously the applicant applied by adding an alternative experience as a regional head at the provincial/district/city level, but in the partially granted decision the verdict was changed to "... has/is currently holding the position of regional head at the provincial level or the district/city level".

Another thing to note, that on 22 January 2024 Almas Tsaqibbiru as the applicant for decision No.90/PUU-XXI/2023 filed a lawsuit for default to the Solo City District Court, this lawsuit was filed by the applicant Almas Tsaqibbiru to Gibran Rakabuming Raka as the object he requested in decision Number 90/PUU-XXI/2023 regarding the age limit for presidential and vice presidential candidates. This lawsuit was registered with case number 2/Pdt.G.S/2024.PN Skt. which sued Gibran Rakabuming Raka regarding default, in which case Almas Tsaqibbiru as the applicant for verdict Number 90/PUU-XXI/2023 who has submitted an application related to the age limit of presidential and vice presidential candidates who propose an alternative to the age limit set out in Law Number 7 of 2017, namely being at least 40 years old and the

²¹ Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* (Jakarta: Konstitusi Press, 2006), 136-169.

²² Indonesia, "Salinan Putusan Mahkamah Konstitusi No.90/PUU-XXI/2023 tentang Batas Usia Calon Presiden dan Wakil Presiden," MKRI, 2023, https://mkri.id/public/content/persidangan/putusan/putusan_mkri_9332_1697427438.pdf

²³ Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, 136-169.

applicant adds an alternative to the age limit, namely being at least 40 years old or having/being in office as a regional head both at the provincial/district/city level.²⁴

A case can be declared as the default if there is negligence or failure of a party to fulfill the obligations agreed upon in an agreement. Article 1234 of the Civil Code states that an obligation which is to give something, to do something, or not to do something.²⁵ Almas Tsaqibbiru's lawsuit is considered difficult to accept legally because there is no binding evidence or agreement underlying the lawsuit, the lawsuit when viewed from a different perspective, is more like an expression of dissatisfaction with the decision issued by the Constitutional Court.

However, the main request submitted by the applicant is that at least there is good faith in the form of gratitude given by Gibran, because the applicant has provided an opportunity for him to run in the presidential and vice presidential elections in the 2024 elections. Seeing the lawsuit filed by Almas Tsaqibbiru to Gibran Rakabuming Raka related to default harms the public's view, especially for people who do not understand civil law, who consider that the lawsuit filed by Almas Tsaqibbiru indicates a transaction behind application Number 90/PUU-XXI/2023, even though there is no clear evidence that the case is a default case.

With the many contradictions in Decision Number 90/PUU-XXI/2023 plus the inconsistency of the Constitutional Court judges in their position as *negative* or *positive legislators* in determining decisions related to open *legal policy*, which should be the task of the legislators, resulting in a decrease in public trust in the Constitutional Court and giving the view that in Decision Number 90/PUU-XXI/2023, the Constitutional Court judges are inconsistent in their position as *negative legislators* related to cases related to *open legal policy*, thus allowing the public to assume that in Decision Number 90/PUU-XXI/2023, which is closely related to the 2024 General Election, there are various kinds of fraud and injustice committed by the government.

1.2. Conformity With Formal Law

If a decision is in accordance with the constitution's tenets, it is deemed constitutional; if it is not, it is deemed unconstitutional. The principles used in constitutional decisions vary depending on the country and legal system in force, but several general principles are often used in constitutional decisions. The general principles include the supremacy of the constitution, which firm and clear provisions, separation of powers, protection of human rights, justice and legal equality, consistency,

²⁴ Regional Kompas, "Gibran digugat wanprestasi oleh Almas Tsaqibbiru ke PN kota Solo," Kompas.com, 2024, <https://regional.kompas.com/read/2024/02/01/101954978/gibran-digugat-wanprestasi-oleh-almas-tsaqibbiru-ke-pn-kota-solo-ini>

²⁵ Indonesia, "Kitab Undang-Undang Hukum Perdata," Hukum Online, 1847, <https://learning.hukumonline.com/wp-content/uploads/2020/12/Kitab-Undang-undang-Hukum-Perdata.pdf>

and precedent, in accordance with the social context and changing times, based on law, and transparency.²⁶

These principles are the basic reference in every decision made by the Constitutional Court, this must be constitutional and not deviate which from the principles of the constitution which is in line with the ideals of independence stated in the preamble of the 1945 Constitution. Constitutional decisions contain all elements of justice, and expediency, based on the results of deliberation and consensus and are determined based on correct procedures according to the procedural law of the Constitutional Court.²⁷

In assessing a decision issued by the Constitutional Court, it can be done by considering the legal process, namely the decision-making process, whether in making a decision, the Constitutional Court carries out the correct legal procedures according to the procedural law of the Constitutional Court, the substance of the decision, and its compatibility with the constitution, so that it can assess whether a decision is constitutional or unconstitutional.

According to Constitutional Law experts Denny Indrayana and Zainal Arifin Muchtar in their petition against the Constitutional Court's decision Number 90/PUU-XXI/2023 regarding the age limit for presidential and vice-presidential candidates is considered unconstitutional because it violates constitutional principles, from the decision-making process to the outcome of the decision itself, this decision is considered a form of judicial activism that exceeds the constitutional authority of the Constitutional Court.²⁸

The Constitutional Court as the guardian of the Constitution has the authority to examine laws against the 1945 Constitution. However, in Decision Number 90/PUU-XXI/2023, the Constitutional Court does not only act as an interpreter of norms but adds requirements that are not explicitly regulated in Law Number 7/2017 concerning elections. This potentially violates the principle of separation of powers set out in the constitution, where the legislative function should be the responsibility of lawmakers.

Law Number 24 of 2003 concerning the Constitutional Court and Constitutional Court Regulation Number 2 of 2021 concerning Procedure in Law Review Cases both explain the procedural law of the Constitutional Court, which should be relied upon when the Court makes decisions. However, in the process of determining decision Number 90/PUU-XXI/2023, there were many contradictions in the Constitutional Court which led to allegations of formal violations of law, including violations of the code of ethics committed by Constitutional Court judge Anwar Usman regarding conflicts of interest. As explained in the Decision of the Honorary Council of the Constitutional Court

²⁶ PusdikMKRI, "Prinsip-prinsip Konstitusi Yang menjadi Acuan Putusan," Pusat Pendidikan Pancasila dan Konstitusi, 2023, <https://pusdik.mkri.id/index.php?page=web.DownloadMateri&id=305#>

²⁷ PusdikMKRI, "Landasan Hukum dan Konstitusi Dalam Memberikan Putusan," Pusat Pendidikan Pancasila dan Konstitusi, 2023, <https://pusdik.mkri.id/index.php?page=web.DownloadMateri&id=305#>

²⁸ Indonesia, "Putusan Mahkamah Konstitusi Nomor 145/PUU-XXI/2023," MKRI, 2023, https://www.mkri.id/public/content/persidangan/putusan/putusan_mkri_9535_1705386293.pdf

Number 5/MKMK/L/11/2023 that as a constitutional judge must have an ethical feeling that arises from his conscience so that he takes the initiative to resign from a case that he feels he cannot make a decision fairly and objectively, especially in cases related to him or himself or his family has a direct interest in the case being decided.²⁹

The application with registration number Number 90/PUU-XXI/2023 is a petition that filed by a student of the Faculty of Law at Surakarta University, Almas Tsaqibbirru, who considers that he has the rights and/or obligations as an applicant as stipulated in Law Number 24 of 2003 concerning the Constitutional Court with qualifications, namely as an individual Indonesian citizen who considers that there is a loss of his constitutional rights due to the enactment of Law Number 7 of 2020 concerning Elections. The applicant's Legal Standing in case Number 90/PUU-XXI/2023 is questionable because basically, the applicant does not have a direct interest in the application he filed.

The fact that the applicant withdrew the application and then re-entered this application a day later, then this application continued without a hearing to determine the withdrawal of the application by the Constitutional Court was considered not in accordance with the provisions in the procedural law of the Constitutional Court. As stipulated in Article 22 letters 1 to 5 of the Constitutional Court Regulation Number 2 of 2021, an application withdrawn by the applicant cannot be resubmitted with the same subject matter, and the Constitutional Court should conduct a hearing to determine the withdrawal of the application in a plenary session that is open to the public.³⁰ Based on the fact that the hearing to determine the revocation of petition Number 90/PUU-XXI/2023 was not scheduled by the Constitutional Court, it indicates that the procedure for determining decision Number 90/PUU-XXI/2023 is not in accordance with the procedural law of the Constitutional Court as regulated in Law Number 24 of 2003 concerning the Constitutional Court and Constitutional Court Regulation Number 2 of 2021. Also, application Number 90/PUU-XXI/2023 was withdrawn and then re-entered with an application for revocation on 30 September 2023, knowing that this date was a holiday, but the Constitutional Court asked the clerk to come to work and application Number 90/PUU-XXI/2023 was still processed.³¹

Furthermore, on 3 October 2023, the Constitutional Court held a confirmation hearing to cancel the revocation of Almas Tsaqibbirru's petition.³² The confirmation hearing is basically not contained in the procedural law of the Constitutional Court as

²⁹ Indonesia, "Putusan MKMK No.5/MKMK/L/11/2023," MKRI, 2023, https://s.mkri.id/public/content/mkkm/mkkm_putusan_1699362723_f298cdead7a49cdd8837.pdf

³⁰ Indonesia, "Putusan Mahkamah Konstitusi Nomor 2 tahun 2021 Tentang Tata Beracara Dalam Perkara Pengujian Undang-Undang," MKRI, 2023, https://s.mkri.id/public/content/pmk/394_210420014128.pdf

³¹ Tracking Perkara, "Pengujian Materiil Undang-Undang Nomor 7 Tahun 2017 tentang Pemilihan Umum," MKRI, 2023, <https://tracking.mkri.id/index.php?page=web.TrackPerkara&id=90%2FPUU-XXI%2F2023>

³² MKRI, "Mahkamah Konstitusi Gelar Sidang Konfirmasi Pembatalan Pencabutan Permohonan Uji UU Pemilu," Humas MKRI, 2023, <https://www.mkri.id/index.php?page=web.Berita&id=19613&menu=2>

stipulated in Law Number 24 of 2003 concerning the Constitutional Court and Constitutional Court Regulation Number 2 of 2021, but the Constitutional Court still conducts a confirmation hearing related to application Number 90/PUU-XXI/2023. This indicates that the Constitutional Court did not follow the procedure for examining the law in accordance with the procedural law of the Constitutional Court and also indicates the uncertainty of the application submitted by Almas Tsaqibbirru, who in the confirmation hearing stated that the revocation of the application was not his wish but his attorney. Therefore, he re-entered the previously withdrawn application with a request for cancellation of revocation related to application Number 90/PUU-XXI/2023.

Constitutional Judges Anwar Usman, Guntur Hamzah, and Manahan Sitompul are among the judges who have expressed their opinions that the Constitutional Court should grant the decision in Decision Number 90/PUU-XXI/2023. Constitutional Judges Enny Nurbaningsih and Daniel Yusmic have expressed concurring opinions, while Constitutional Judges Saldi Isra, Arief Hidayat, Suhartoyo, and Wahiduddin Adams have consistently rejected the request.³³

In summary, we can describe the difference of opinion of the Constitutional Court judges in Decision Number 90/PUU-XXI/2023 as 50:50 or an equal ratio of votes between accepting and rejecting, this is if the chairman of the Constitutional Court Anwar Usman resigns from case Number 90/PUU-XXI/2023. So if there is an equal ratio of votes between accepting and rejecting, as explained in Article 67 paragraph 6 of the Constitutional Court Regulation Number 2 of 2021, the vote of the deputy chairman of the Constitutional Court Saldi Isra, who in Decision Number 90/PUU-XXI/2023 stated that he rejected the application, will be accepted and the decision will be won by the vote that rejected the application.³⁴ However, the chairman of the Constitutional Court Anwar Usman in decision Number 90/PUU-XXI/2023 chose to participate in the determination of the decision instead of resigning from case Number 90/PUU-XXI/2023. Based on the regulation of the Constitutional Court Number 9 of 2006 number 5 letter b states that constitutional judges must resign from a case that is considered to cause partisanship, as well as constitutional judge Anwar Usman in the determination of decision Number 90/PUU-XXI/2023, which is the subject of the petition, requesting Gibran Rakabuming Raka to obtain his right to be elected in the 2024 Election contestation by the applicant named Almas Tsaqibbirru, it should be noted that Gibran Rakabuming Raka is the son of President Joko Widodo who has a relative relationship with the chief constitutional judge Anwar Usman.

So formally, the decision of the Constitutional Court Number 90/PUU-XXI/2023 is declared invalid or unconstitutional because it is not in accordance with and violates the procedure for testing the Law as regulated in the procedural law of the

³³ Indonesia, "Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023," Rumah Pemilu, 2023, https://rumahpemilu.org/wp-content/uploads/2023/10/putusan_mkri_9332_1697427438.pdf

³⁴ Indonesia, "Peraturan Mahkamah Konstitusi Nomor 2 Tahun 2021 Tentang Tata Beracara Dalam Perkara Pengujian Undang-Undang," MKRI, 2021, https://s.mkri.id/public/content/pmk/394_210420014128.pdf

Constitutional Court contained in Law Number 24 of 2003 concerning the Constitutional Court.

2. Siyasah Dusturiyah's View of the Constitutionality of the Constitutional Court Decision Number 90/PUU-XXI/2023

2.1. Conformity with Islamic Principles

Sovereignty generally means the highest power in a state. In Islam, the highest sovereignty belongs to Allah (Sharia), not in the hands of the people as in Western democracy. Islam rejects Western-style theocracy (which makes the leader a representative of God), but also rejects the absolutism of human power. M. Natsir combines the principles of democracy and Islamic values. He calls this system "Theistic Democracy": democracy that is bound by divine values. Popular sovereignty is important, but must be within the framework of Sharia. Democracy in Islam must not violate the boundaries of Islamic morality and law (hudud). The main principles according to Natsir: monotheism, sharia law, deliberation (shura), protection of rights, and justice. Prof. Jimly also emphasized that sovereignty in Indonesia is the sovereignty of the people that comes from the sovereignty of God.³⁵

The 1945 Constitution recognizes divine values in the state system (as in the first principle of Pancasila). According to Jimly, all state institutions are the embodiment of the sovereignty of the people and must work accountably, participatively, and in accordance with legal principles. The Islamic concept of the state is known as Islamic Nomocracy: A state based on divine law, principles: trust, deliberation, justice, welfare, and protection of human rights. The ideal Islamic state is not a rigid theocracy, but a just state of law. Islam teaches sovereignty as a trust based on God's law. M. Natsir and Jimly both reject extremism from both the absolute secular and theocratic authoritarian directions. They agree that the Indonesian state can accommodate Islamic and democratic values in a complementary framework.

In the book *Al-Ahkamus-sulthaaniyyah wal-wilaayaaatud-diiniyyah* of Imam Al-Mawardi, it is stated that a supreme judge is an official whose authority is specialized within the general territorial scope. A state leader should be someone who is good morals and behavior, well educated from a good experience, is someone who forgives and speaks with his knowledge.³⁶

A chosen leader also has certain conditions such as competence (*Kafa'ah*), namely physical, mental, and intellectual ability to lead, to be fair in carrying out his mandate and not acting arbitrarily, and also to make decisions that bring mutual benefit. Prophet Muhammad, in delivering his da'wah and communicating with his people at that time, used communication principles based on the verses of the Qur'an, namely using words that influence and touch the heart, easy and pleasant speech, noble and dignified speech,

³⁵ Ria Rahmawati, Muhammad Agus Setiawan, "Konsep Kedaulatan dalam Islam: Pandangan M. Natsir dan Jimly Ashshiddiqie," *Journal Of Indonesian Comparative Of Syariah Law*, Vol 1, No 2 (2018): 25-26, <https://doi.org/10.21111/jicl.v1i2.3873>

³⁶ Imam Al-Mawardi, *Al-Ahkamus-Sulthaaniyah Wal-Wilaayaatud-diiniyyah*, 21-22.

good and polite speech, honest, straight and right on target speech, the communication strategy of the Prophet Muhammad SAW was not just tactics, but included: ethics and politeness, accuracy of content and delivery, balance between clarity, gentleness, and honesty.³⁷

The model of the prophet Muhammad's preaching in regulating the life of society in Medina is by Brothering Muhajirin and Anshar with the aim of building solidarity and unity, the Prophet brothered the immigrants (Muhajirin) and the natives of Medina (Anshar). Forming the Medina Charter which is the first written constitution in Islamic history. Its contents regulate the rights and obligations of all communities, including non-Muslims, and state that all disputes are submitted to Allah and His Messenger. The Prophet's method of preaching is by: Bil hikmah: with wisdom, Mau'izhah hasanah: good advice, Mujjadi billati hiya ahsan: dialogue in the best way, Uswah hasanah: good example, Bashirah: preaching with a sharp conscience and intellect.³⁸ Likewise, government institutions that should be fair in all matters related to the decision to be determined, in the decision of the Constitutional Court decision No.90 / PUU-XXI / 2024 show that the government's lack of attention to the principle of justice that should be applied in various matters related to the determination of decisions, to benefit all the people.

Likewise, government institutions that should be fair in all matters related to the decisions to be determined, in the decision of the Constitutional Court Decision Number 90 / PUU-XXI / 2024 show that the government's lack of attention to the principle of justice that should be applied in various matters related to the determination of decisions, to benefit all the people.

The Constitutional Court's decision allow the limit age of presidential or vice-presidential candidates to be changed with the condition of 'experience as a regional head' can be analyzed from the perspective of *Kafa'ah*. In *Siyasah Dusturiyah*, the emphasis on competence is prioritized over age, as long as the leader or government can carry out their duties properly and in a *maslahat* manner. However, this policy can cause debate if it does not have objective criteria related to the experience and quality of prospective leaders.

In Decisions Number 29/PUU-XXI/2023, Number 50/PUU-XXI/2023, and Number 51/PUU-XXI/2023, the Constitutional Court declared that it had rejected the case; however, in Decision Number 90/PUU-XXI/2023, it declared that it had partially accepted the petition, which essentially dealt with the same issue regarding the age limit for presidential and vice presidential candidates. Every decree issued by the government should bring *maslahat* to every individual citizen, if the Constitutional Court's decision aims to expand opportunities for young leaders who have sufficient capacity and experience, then this decision can be considered as *maslahat*. It can support the regeneration of national leadership by involving young leaders who are more progressive

³⁷ Eni Zulaiha, "Prophet Muhammad's Communication Strategy Perspective of Tafsir Maudu'i al- Wajiz," *International Journal of Nusantara Islam (IJNI)*, Vol 12, No 1, (2024): 83-87, <https://journal.uinsgd.ac.id/index.php/ijni/index>

³⁸ Mubasyaroh, "Da'wah Model Of Prophet Muhammad In Madina," *Qudus International Journal of Islamic Studies*, Vol 2, No 1, (2014): 54-56.

and innovative. However, if this decision is elitist or accommodates certain political interests, then it is contrary to the principle of *maslahat*. In *siyasah dusturiyah*, leaders must be free from personal and group interests.

Basically, every decree issued by the government should bring *maslahat* for every individual citizen, decision No.90/PUU-XXI/2023 issued by the Constitutional Court caused a lot of controversy and had a negative impact on both government institutions and society, as this decision resulted in increasing public doubts about government institutions due to decision No.90/PUU-XXI/2023 which was born from a violation of the code of ethics committed by Constitutional Court judges.

Based on the cycle of the determination of Decision No.90/PUU-XXI/2023 described above, it can be noted that the Constitutional Court judges several times conducted Consultative Meetings of Judges related to the determination of Decision No.90/PUU-XXI/2023 without an open hearing attended by witnesses and experts. This is basically not in accordance with Islamic principles that prioritize deliberation to obtain an agreement by listening to the opinions of experts related to the field being studied.

In *Siyasah Dusturiyah*, important policies or decisions should involve deliberation to hear the aspirations of the people, the decision of the Constitutional Court which has a major impact on the election of leaders should involve wider public discussion. If this decision is considered not transparent or lacks public participation, then this can be criticized from the perspective of *shura'* in *Siyasah Dusturiyah*.

Constitutional Court Judge Anwar Usman as the chairman of the Constitutional Court is also the uncle of Gibran Rakabuming Raka decision Number 90/PUU-XXI/2023 stated that he accepted the application. The public believes that the Constitutional Court chairman's actions are unethical, and ruling Number 90/PUU-XXI/2023 contains indications of a conflict of interest. Gibran Rakabuming Raka has the chance to advance in the 2024 election contest as the second-place presidential and vice-presidential candidate pair alongside Prabowo Subianto, even though Constitutional Court chairman Anwar Usman was found to have violated the code of ethics in the decision of decision Number 90/PUU-XXI/2023.

Every decision issued by a Constitutional Court judge must be in accordance with the values contained in the constitution if the decision violates the principles of the constitution and is not in accordance with the basic values contained in the Indonesian constitution then the decision cannot be established and used as a guide for the people of Indonesia. This is in line with the principle in Islamic constitutional law which is guided by *shari'ah* as a source of law enforcement, so if the decision is contrary to *shari'ah* then the decision should not be used because it is contrary to *shari'ah*. Therefore, the decision of the Constitutional Court should not violate the basic principles of the constitution in accordance with the basic principles contained in *shariah*, namely in determining the decision should pay attention to the value of justice, benefit, based on deliberation consensus, avoid conflicts of interest and in accordance with Islamic *shariah*.

Competence, leadership qualities, and integrity should remain the top priorities, not just age or administrative experience. If these aspects are not fulfilled, then this decision can be criticized for potentially contradicting the principles of *siyasah dusturiyah*,

especially in safeguarding the interests of the people, justice, and the mandate of leadership.

In line with this, Abu Yahya Badrussalam in his study of the book *Fiqh Ad-Da'wah* quoted from Ibn Taymiyyah in his book, *Al-Istiqomah* stated "*To judge something is mashlahat or mafsadah, the scale is shari'a.*" So in this case the government should consider the principles of shari'a in its decisions because the *maslahat* of something exists because of the correct application of *shari'a*.

In *Siyasah Dusturiyah*, the territory of a judge's office is divided into 2 areas of authority, namely the general and the special area, where in the general area, the judge is free to act to decide cases within the entire scope of his area of office while in a special area, a judge is free to act as long as the case is his area of authority and not the area of authority of another position, for example, the duties of a judge include resolving disputes and hostilities, so, in this case, the judge is free to act to exercise his authority in resolving disputes and hostilities either through peaceful means or through legal channels. A judge is deemed to have violated the law if he or she acts outside the authority vested in him or her.

In his book *Al-Abkamus-sulthaaniyyah wal-wilaayaaatud-diiniyyah*, Al-Mawardi explained that there are at least ten tasks that are the authority of a judge, one of which is a judge should examine the benefit of his duty area and prevent crime as well as a judge is responsible for examining witnesses and choosing representatives, in this case a judge must rely on the value of the benefit in every decision as well as in choosing representatives of the people a judge expressly recognize if they are right and if they betray then expressly a judge must punish him.

Every dispute that arises within the Jurisdiction of a judge and requires his/her judgment and decision, in this case the judges should equalize the handling of the dispute so that both parties to the dispute get the justice they deserve and do not reduce the rights of those who are entitled to it. Therefore, a judge must be a neutral person, not a family member of the parties to the dispute, and has nothing to do with the case he is handling.

In *Siyasah Dusturiyah*, the formation of laws must be carried out through deliberations involving representatives of the people and *ahlul balli wal aqdi*, the Constitutional Court whose position as a judicial institution does not have the criteria mentioned in *Siyasah Dusturiyah* as a legislator.³⁹ Therefore, the Constitutional Court Decision Number 90/PUU-XXI/2023 which is considered an open legal policy that is the authority of the legislators should not be determined by the Constitutional Court because the subject matter of the petition is the duty and authority of the legislators. In *Siyasah Dusturiyah*, it is affirmed regarding the separation of duties and mandates between the legislative institution, namely the legislator and the judicial institution, namely the institution that oversees the implementation of the law so that it is always in accordance with the principles of *sharia*.

³⁹ Imam Al-Mawardhi, *Al-Abkaamus-Sulthaaniyah Wal-Wilaayaatud-diiniyyah*, 37.

2.2. Justice and Shari'ah Compliance

The examples and struggles of the caliphs, as well as the moral and spiritual lessons from their leadership in building a strong and just Islamic society, can be seen during the leadership of Abu Bakar Ash-Shiddiq. Abu Bakar Ash-Shiddiq was the first caliph in Islamic history after the death of the Prophet Muhammad SAW. His name is widely known for his loyalty, firmness, and humility in leadership. Abu Bakar was the first man to convert to Islam. He always confirmed and supported the Prophet Muhammad SAW, even in the Isra' Mi'raj event which was hard for many people to believe. Abu Bakar Ash-Shiddiq was a leader who prioritized deliberation and unity as proven by appointing Umar bin Khattab as his successor, Abu Bakar involved his companions in deliberation. He did not impose his will in an authoritarian manner.⁴⁰

A king or leader is a representative of Allah on earth. Therefore, power is not merely worldly glory, but a great mandate that will be held accountable in the afterlife. Al-Ghazali emphasized that justice is the essence of government. Injustice will damage the order of society and cause the wrath of Allah. Imam Ghazali reminded that greed for wealth and power can damage the hearts of leaders and lead them to destruction. He called for a simple and ascetic life even in a position of power. Kings are advised to always listen to scholars and pious people who sincerely give advice for the good of the people and not just seek praise. Successful leadership is not only about political power, but must also be accompanied by noble morals, honesty, and compassion for the people.⁴¹

Basically, Islamic values are clearly stated in the basic points of the Republic of Indonesia, namely Pancasila, which contains values that become the ethical and moral foundation of nationalism. Pancasila provides a guideline to understand the importance of unity because there lies the values of harmony among citizens born from the implementation of ethical and moral values contained therein in order to realize an advanced and dignified Indonesia.⁴²

Pancasila as the foundation of the Indonesian state, provides important points in life, especially matters relating to justice. The second principle of Pancasila emphasizes that ethics and morals are important in a dignified national life, without ethics and morals that are well implemented by all Indonesian citizens, the ideals of Pancasila are difficult to achieve. With a good and strong moral foundation, the Indonesian nation will become a just nation with a good democracy and will not fall into the working method known as "the ends justify the means" as applied by radical communists.⁴³

There are 10 points of appreciation and practice of Pancasila in the second principle, namely, recognizing and treating humans in accordance with their dignity as creatures of God Almighty, recognizing equality of status, equal rights and human

⁴⁰ Imam Syamsuddin Muhammad Bin Ahmad Bin Utsman Adz-dzahabii, *Sairu al-a'laam an-nubala'a: sairu khulafaur-rasyidiin*, (Beirut: Ar-Resalah, 1996), 7-11.

⁴¹ Abi Hamid Muhammad, *At-Tibr al-Masbuk fi Nashihat al-Muluk*, (Beirut: Dar-Al-Kutub Al-Ilmiyah, 1988), 14-18.

⁴² Muhammad Mona Adha and Erwin Susanto, "Kekuatan Nilai-nilai Pancasila dalam Membangun Kepribadian Masyarakat Indonesia," *Al-Adabiya*, Vol 15 No.1 (2020) : 125.

⁴³ Nurcholis Majid, *Islam Kemodernan dan Keindonesiaan* (Bandung: Mizan Pustaka, 2013), 134.

obligations without discrimination, developing mutual love, mutual tolerance, non-arbitrary attitudes, and upholding human values, carrying out humanitarian activities, defending truth and justice and developing respect and respect for other nations.⁴⁴

In line with the points above, a Constitutional Court judge as the holder of judicial power also often referred to as the guardian of the constitution, in carrying out his obligations must rely on the foundation of the Indonesian state, namely Pancasila and practice every value contained in each of the Pancasila precepts.

Also as an implication of the application of the second principle in Pancasila, namely the realization of the fifth principle which is the ideals of the Pancasila of the Indonesian nation, namely social justice for all Indonesian people, this social justice is then the purpose of the formation of the Indonesian state. If all the precepts of Pancasila are applied properly, it will create an independent state with an independent government system as well.

When looking at the history of Islamic government during the time of Caliph Umar Bin Khattab, he emphasized that the mandate of a judge is to maintain justice for all people so that no weak person feels oppressed by the policies set by a judge, and no powerful person revels in the suffering of the weak so that all are equal before the law. In a hadith narrated by Ibn Hibban:

وَعَنْ جَابِرٍ قَالَ: سَمِعْتُ رَسُولَ اللَّهِ صَلَّى اللَّهُ عَلَيْهِ وَسَلَّمَ يَقُولُ: كَيْفَ تُقَدَّسُ أُمَّةٌ لَا يُؤْخَذُ مِنْ شَدِيدِهِمْ لِضَعِيفِهِمْ؟ (رواه ابن حبان)

Jabir said: I heard the Messenger of Allah (peace and blessings be upon him) say: "How can an Ummah be honourable if the rights of the weak are not demanded from the strong?" (Riyawat Ibn Hibban)⁴⁵

Each judge has his own jurisdiction so that no one takes over the jurisdiction of another. This ensures that the government continues to run efficiently and that there is no interference from other parties regarding the duties carried out by a particular jurisdiction.

Based on the facts that exist along with the determination of the Constitutional Court Decision No.90/PUU-XXI/2023, there are many indications of injustice as well as non-compliance of the Constitutional Court judges with Pancasila as the basis of the state, as well as the principles of Islamic constitutional law in *Siyasah Dusturiyah*. The number of infractions made by the judges of the Constitutional Court in reaching judgment No.90/PUU-XXI/2023 serves as evidence of this. In order to enact Constitutional Court judgment No.90/PUU-XXI/2023, Anwar Usman, the head of the Constitutional Court, was charged for breaking the code of ethics.

⁴⁴ Kemhan, "45 Butir Pedoman Penghayatan dan Pengamalan Pancasila," Kementerian Pertahanan Republik Indonesia, 2014, <https://www.kemhan.go.id/renhan/2014/11/20/45-butir-pedoman-penghayatan-dan-pengamalan-pancasila.html>

⁴⁵ Al-Hafidz Ibnu Hajar Al-Asqalaanii, *Bulughul Maram Min Adillati Al-Ahkam*, (Jakarta: Darul Kutub Al-Islamiyyah, 1996), 261.

Further indications of non-compliance by the Constitutional Court can be seen from the lengthy trial process with repeated meetings of judges without an open hearing with experts present so that the decision is considered to violate the principle of deliberation for consensus contained in the fourth principle of Pancasila and the principle of *siyasah dusturiyah* which also emphasizes the importance of deliberation in every government policy determination.

There were also several other things related to the procedural law of the Constitutional Court that were violated by the Constitutional Court, including the trial process which took a long time, *the legal standing* of the applicant which was considered not in accordance with the provisions of an applicant for judicial review of the Law against the Constitution because the reason for the applicant as a person who was harmed by constitutional rights was irrelevant to the provisions as an applicant, there were indications of a conflict of interest because the chairman of the Constitutional Court Anwar Usman, who is also Gibran Rakabuming Raka's uncle, participated in the process of determining decision No.90 /PUU-XXI/2023, the lack of consistency of the Constitutional Court judges as positive legislators and negative legislators in every decision that is determined, the previously revoked application is still continued without a hearing to determine the revocation of the previous application, the confirmation hearing of the application is still processed even though the confirmation hearing basically does not exist in the procedural law of the Constitutional Court.

One of the principles of justice in Islam is not to treat oneself or someone based on lineage, or blood. Imam Qurthubi says justice must be applied when a person testifies, including testimony against himself. Bearing witness against oneself means recognizing and exercising the rights given to one. In addition, Allah tells us how important it is to be fair to our parents, as doing good to them is a very important obligation in Islam.⁴⁶ Because it is usually family relationships that bring about fanaticism and are therefore prone to overreaction, in the case of rulings it is usually these relationships that are usually where the tendency is to take sides. So whoever carries out the mandate as a ruler or government, should be fair and not discriminate between one and the other, as well as pay attention to every regulation that is set to bring *mashlahat* for all people.

2.3. Ethics of a Judge According to *Fiqh Siyasah Dusturiyah*

Al-Mawardi in his book *Al-abkam As-Sulthaniyah* mentions several criteria of requirements that must be owned by a *qadhi* or a judge, where the requirements are mentioned that a judge should be a man who has reached puberty, it is not true if a woman becomes a judge because women are only allowed to be judges on the testimony of a woman. The next requirement is that the judge should have the ability to reason, namely good knowledge, intelligence and far from being negligent. A judge must be a Muslim who is trustworthy and can be trusted with all his obligations, as well as guarding

⁴⁶ Islam Nu, "Tafsir Surat An-Nisa' Ayat 135: Keadilan Sebagai Pilar Utama Dalam Islam," NuOnline, 2024, <https://islam.nu.or.id/tafsir/tafsir-surat-an-nisa-ayat-135-keadilan-sebagai-pilar-utama-dalam-islam-wFZTx>

himself against haram acts, avoiding despicable acts, having knowledge of shari'a, and must not delay cases when being litigated.

Al- Mawardi also discussed the importance of the division of labour in the government structure. He supported the concept of delegation of power, where the caliph could appoint representatives or officials to take care of various aspects of government such as the military, economy, and judiciary. This was important to ensure that governance remained efficient and not centralized in one individual. The area of the office of a judge is divided into two namely the general area and a special area, the general area of office is a judge is free to act in the entire scope of his office, then Al-Mawardi divides the authority into the following ten tasks:⁴⁷

- a) Resolving disputes and hostilities, either by peaceful means between the two parties or through legal channels.
- b) Requesting a right from a party who is withholding the right of another, then delivering it to the party who is entitled to it.
- c) Being a guardian of a person who is prohibited from transacting on his own due to insanity or childhood, limits the actions of a person who needs to be limited in his actions due to his ignorance or because he is unable to maintain the property of others.
- d) Handling waqf assets, protecting, developing, and collecting and distributing the proceeds to the rightful beneficiaries.
- e) Executing a will based on the conditions of the person who made the will.
- f) Marrying a widow to someone of equal status.
- g) Giving had for those who should receive it.
- h) Checking on the welfare of his duty area and preventing crimes from occurring in his duty area.
- i) Examining witnesses, choosing representatives, recognizing when they are right, and replacing when they betray.

The judge should be equal in handling human legal matters between the weak and the strong, fair in ruling between the powerful and the common people, and not follow his lust in reducing the rights of those who are entitled. A judge should also not rule in favor of one of the parents or their children, as this may lead to a presumption of partiality. So a judge must be neutral and not included in the case.

During the caliphate of Umar Bin Khattab, he once said when handing over his office to Abu Musa Al'Ashari' that the office of qadhi is a strong obligation and sunnah that must be followed, he also mentioned the conditions and rulings on the appointment of qadhi. He said that in cases where a *qadhi* is responsible for it, there is no point in talking about rights unless they are protected and applied. Also, to prevent a respected person from using his position to influence the decision of a *qadhi*, and a weak person from getting equal justice, a *qadhi* must treat all people equally whether before the law, in justice, or in a council. This is because, in essence, Muslims are equal to each other except those who have been sentenced to flogging, have given false testimony, or are suspects because of lineage or loyalty.⁴⁸

Al-Mawardi's views on *fiqh siyasah* provide an important foundation for understanding the way Islamic law can be applied in modern government structures. Based on his ideas, there is a basis for further discussion of Islamic constitutions in the

⁴⁷ Imam Al-Mawardi, *Al-Ahkamus-Sulthaaniyah Wal-Wilaayat-diniyyah*, 144-146.

⁴⁸ Ibid., 147.

modern era, especially as many Muslim states seek to strike a balance between Islamic values and modern state practices. Al-Mawardi's theories are considered relevant in contemporary debates on Islamic political structures and are often used as references in the literature on the Islamic state.

Based on some of the descriptions above, we can conclude that based on Al-Mawardi's thoughts related to *Siyasah Dusturiyah*, explain that the division of power is very important in the government structure to ensure that the government remains efficient and not centered on one individual. This proves that the Constitutional Court judges should be consistent in their duties, namely as a *Negative Legislator*, which has the authority to cancel laws or regulations that are contrary to the Constitution without adding new norms. So a Constitutional Court judge should not enter into duties and authorities that are not the territory and do not enter other areas of power including the making of new laws which is the duty of the House of Representatives.

From this, we can conclude that constitutional law affirms professionalism in government, which means that under any circumstances, a Constitutional Court judge must rely on the constitution as the basis of the Indonesian state without seeing and taking any advantage of his position. In *Siyasah Dusturiyah*, it is also explained that good governance is oriented towards justice, benefit, separation of powers, and impartiality. A judge must be a person who can protect himself from all acts that violate the principles of the constitution and *Siyasah Dusturiyah*. He must also be neutral and impartial to anyone in court, and maintain his attitude and professionalism as a judge.

CLOSING

Constitutional Court Decision Number 90/PUU-XXI/2023 is considered unconstitutional because in its determination several constitutional principles which have been violated by the Constitutional Court judges. The reason is that the benchmark for the unconstitutionality of the decision is the Indonesian state foundation Pancasila, the 1945 Constitution, and also the procedural law of the Constitutional Court. There was a serious ethical violation committed by the chairman of the Constitutional Court Anwar Usman related to a conflict of interest because in the decision the chief judge who is also Gibran's uncle participated in the decision, The petition was revoked and then resubmitted without a hearing to determine the revocation. The Confirmation hearing, to confirm that the petition is still being processed by the Constitutional Court, which is not contained in the procedural law of the Constitutional Court. The Judges' Consultative Meeting was conducted repeatedly without a hearing to present expert witnesses.

According to *Siyasah Dusturiyah*'s perspective The fundamentals of the science of Islamic constitutional law outlined in Imam Al-Mawardi's *Al-Ahkamu Ash-Sulthaniyah* are not in line with Decision Number 90/PUU-XXI/2023. Due to the lack of public discussion and the inclusion of an expert in the trial process, Constitutional Court Decision No. 90/PUU-XXI/2023 goes against the principles of justice and benefit found in *fiqh siyasah dusturiyah*. The Court also exercised authority that should have been reserved for the legislative body in this decision, which is thought to favour some parties and not treat all citizens equally.

The Constitutional Court in every decision should adhere to constitutionalism and the code of ethics of the Constitutional Court as stipulated in Law Number 48 of 2009 concerning judicial power. The Constitutional Court in its decisions should rely on Islamic principles contained in the Science of *Siyasah Dusturiyah*, because Islamic principles are essentially in line with the values of constitutionalism contained in the constitution of the Unitary State of the Republic of Indonesia.

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