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Legal Review of the Position and Role of Dissenting Opinion and Concuring Opinion in Constitutional Court Judges' Decisions

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Abstract. *Constitutional Court Judges are state officials who have the authority to try judicial processes at the Constitutional Court at the first and final level whose decisions are final. The authority of the Constitutional Court is affirmed in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia. However, in deciding on judicial review applications, Constitutional Court Judges are often found to have different views in interpreting the constitution so that dissenting opinions and concurring opinions arise in deciding cases. The purpose of this study is to determine the legal position and role of dissenting opinions and concurring opinions in the Indonesian legal system and how the judge's consideration process is in making decisions at the Constitutional Court, so the author raises the journal title "Legal Review of the Position and Role of Dissenting Opinions and Concuring Opinions in Constitutional Court Judges' Decisions". The research method uses a normative legal approach, namely by examining primary materials consisting of the 1945 Constitution, Law No. 48 of 2009 on judicial power, Law No. 3 of 2009 concerning the Second Amendment to Law Number 14 of 1985 concerning the Supreme Court, Law Number 24 of 2003 concerning the Constitutional Court, and Constitutional Court Decision Number 90/PUU-XXI/2023 and various official documents containing law, Then examine the secondary legal materials in the form of books, journals, articles, research reports and so on. This study uses 2 approach models, namely implemented with a Statute approach and a conceptual approach. The legal position related to dissenting opinions and concurring opinions is not explicitly regulated in the legal system in Indonesia, but is regulated in Article 14 paragraph (1), (2), (3) of Law Number 48 of 2009 concerning judicial power. Then regulated in Article 30 paragraph (2) and (3) of Law Number 5 of 2004 concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court. In the Constitutional Court Law, Law Number 24 of 2003, it is regulated in Article 45 paragraph (6) and (10) concerning the Constitutional Court, the role of dissenting opinions and*

concurring opinions can be used as a reference for legal reform in Indonesia because they are expert opinions from constitutional court judges in interpreting the constitution. Therefore, the Constitutional Court Regulation No. 90/PUU-XXI/2023 has binding legal force because it is ordered by the 1945 Constitution of the Republic of Indonesia to have the authority to try at the first and final level whose decisions are final.

Keywords: *Conccuring; Dissenting; Opinion.*

1. Introduction

Article 1 paragraph 3 of the 1945 Constitution of the Republic of Indonesia explains that Indonesia is a country of law, so the law is the highest commander in realizing the goals of the Indonesian state, not power. The Constitutional Court is one of the judicial institutions that has been regulated by the 1945 Constitution of the Republic of Indonesia. As a judicial institution that has different authority from other judicial institutions, Constitutional Judges are considered to have more capacity than judges in general because with the decisions of the nine constitutional judges, problems regarding state administration can be resolved. The presence of the Constitutional Court in the structure of the Indonesian state administration is in order to realize a system of separation of powers with the principle of checks and balances. Where each branch controls and divides the power of other branches of power, with the hope that there will be no abuse of power by each independent organ. The main function of the Constitutional Court is as the highest interpreter and guardian of the constitution, so that the 1945 Constitution of the Republic of Indonesia functions properly as the constitution of the state of Indonesia. The Constitutional Court is very important for the Indonesian state administration, and the existence of this institution cannot be ignored. The Constitutional Court can assess policies made by the government as constitutional or unconstitutional through judicial review. So it is expected that general court judges will not apply legislation that is contrary to the constitution in the future. Basically, the authority of the Constitutional Court is to examine judicial review applications against laws with the 1945 Constitution of the Republic of Indonesia. Judicial review is the process of testing the constitutionality of a law. In general, judicial review is practiced using two methods, namely by using formal testing and material testing. Judicial review is a constitutional process that aims to cancel a problematic or unconstitutional law. Formal testing examines the process of developing a law. Formal testing emphasizes the process of forming the law. While the main point of examination is the material content of the law.

Consideration of the constitutionality of a law can be assessed as 1) in accordance with the constitution; 2) not unconstitutional; or 3) unconstitutional.[1]

*Judicial review*in the Constitutional Court aims to achieve constitutional supremacy. Simply put, judicial review is a concept that is closely related to the constitution as a set of highest values and regulations that aim to protect the most valuable instrument. This is what is meant in the terminology of constitutionalism.[2] If there is legislation that conflicts with the objectives of the constitution, the legislation can be considered unconstitutional and no longer has binding legal force.[3]The constitutional compliance and conflict-free categories are two categories that appear similar but actually have different consequences. The criteria of the 1945 Constitution of the Republic of Indonesia are used when an article and/or verse of the Constitution provides clear guidelines in making laws and does not give rise to alternative interpretations. The criteria of not contradicting the 1945 Constitution of the Republic of Indonesia are used when articles and/or verses of the Constitution are not specifically regulated and give rise to alternative interpretations.

The fact is, The Constitutional Court in deciding the judicial review lawsuit is very closely related to constitutional dynamics, in deciding the Constitutional Court is not always unanimous, its decision also opens up opportunities to issue dissenting or concurring opinions from the Constitutional Court judges. Member judges may also disagree and have the freedom to interpret the law in an effort to seek justice. An example of a decision that contains a dissenting opinion and concurring opinion is the Constitutional Court Decision MK No. 90/PUU-XXI/2023 regarding the judicial review of Article 169 letter (q) of Law Number 7 of 2017 concerning General Elections which states, "at least 40 (forty) years old" is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force, as long as it is not interpreted as "at least 40 (forty) years old or has/is currently holding a position elected through general elections including regional head elections". So that Article 169 letter q of Law Number 7 of 2017 concerning General Elections in full reads "at least 40 (forty) years old or has/is currently holding a position elected through general elections including regional head

[1]Mardian Wibowo, 2015 "Assessing the Constitutionality of an Open Legal Policy in the Testing of Laws", Constitutional Court of the Republic of Indonesia, Jakarta p 200-201.

[2]Saldi Isra, 2010, Shifting Legislative Functions: Strengthening the Parliamentary Legislation Model in the Indonesian Presidential System, Rajawali Press, Jakarta, p. 293.

[3]The formulation of the phrase "Does not have binding legal force" is the editorial formulation of the Constitutional Court's decision as regulated in Article 57 paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court. State Gazette Number 98, Supplement to State Gazette 4361, 2003.

elections"[4]Before the Constitutional Court Decision Number 90/PUU-XXI/2023 was decided, on the same day the Constitutional Court also decided on another application that also challenged Article 169 letter q of the Election Law, namely Case Number 29/PUU-XXI/2023, Case Number 51/PUU-XXI/2023, and Case Number 55/PUU-XXI/2023. The three cases were declared rejected by the Constitutional Court. The Constitutional Court judges agreed to reject the application and continued to position Article 169 letter q of the Election Law as an open legal policy or open legal policy of the law maker. Constitutional Justice Saldi Isra considered the Constitutional Court Decision Number 90/PUU-XXI/2023 against the three other decisions that also challenged Article 169 letter (q) of the Election Law, as something very unusual. According to him, the Constitutional Court showed a sudden change in stance. This is because in the Constitutional Court Decision Number 29-51-55/PUU-XXI/2023, the Constitutional Court previously stated that the matter of age in the norms of the requested article is the authority of the legislator to change it.[5]However, in the Constitutional Court Decision Number 90/PUU-XXI/2023, the Constitutional Court partially granted the applicant's request. With such a difference in attitude, the Constitutional Court judges are considered to have indirectly interfered in the affairs of the People's Representative Council (DPR) by regulating the minimum age limit for presidential and vice presidential candidates.

The Constitutional Court in its legal considerations of Decision 90/PUU-XXI/2023 further stated that the provisions of Article 169 letter q of Law Number 7 of 2017 concerning General Elections as referred to in the a quo decision shall apply starting from the 2024 Presidential and Vice Presidential Elections and thereafter.[6]Article 10 paragraph (1) of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court states: "The decision of the Constitutional Court is final, namely that the decision of the Constitutional Court immediately obtains permanent legal force from the time it is pronounced and no legal remedies can be taken. The final nature of the decision of the Constitutional Court in this Law also includes binding legal force (final and binding)."[7]The difference in the Constitutional Court's attitude in adjudicating lawsuits related to open legal policies is also considered to position itself as a positive legislator, whereas the Constitutional Court is basically a negative legislator, where it abolishes laws that are contrary to the Constitution. "The Constitutional Court can only state that the law is contrary to or inconsistent

[4]Constitutional Court Decision No. 90/PUU-XXI/2023 Concerning Additional Provisions on Experience in Office from Election Eligibility in Minimum Age Requirements for Presidential/Vice Presidential Candidates

[5]https://news.detik.com/berita/d-6986457/putusan-mk-lengkap-serta-dissenting-opinion-4-hakim-soal-usia-capres-cawapres. Accessed on January 29, 2024, at 23:07 WIB

[6]Ibid

[7]Law No. 8 of 2011 concerning the Constitutional Court

with the constitution and cannot be included in the scope of legislative power (participating in regulation)."[8]With the issuance of Constitutional Court Decision No. 90/PUU-XXI/2023, the Constitutional Court is considered to have stepped beyond its authority by creating a new law that it "thinks" can be beneficial and just. The task of creating the law should be the authority of the House of Representatives, not the Constitutional Court. This is because the Constitutional Court is only given the authority to declare whether a norm or law is in conflict with the 1945 Constitution of the Republic of Indonesia.

Judge in handling a case does not merely refer to existing rules, but a judge is required to explore, follow and understand the legal values and sense of justice that exist in society.[9] Considering that the provisions in Article 169 letter q of Law No. 7 of 2017 have expressly stipulated the age limit for Presidential and Vice Presidential candidates, namely "at least 40 (forty) years old". Regarding the issue of age, the Court in its various decisions has stipulated that the 1945 Constitution does not stipulate a specific age limit for all positions, so that this is an open legal policy from the lawmakers.[10]The definition of a dissenting opinion is an opinion that differs substantively, resulting in a different ruling, for example, the majority of judges reject the application, but the minority of judges grant the application in question and vice versa.[11]whereas a concurring opinion is an opinion/decision written by one or more judges who agree with the majority opinion of the panel of judges on a case, but have different reasons.[12]Jimly Asshidiqie, a decision is considered a concurring opinion if there are arguments from one member of the panel of judges that differ from the majority of other members of the panel of judges, but the opinion does not affect the decision-making. Another opinion says that what is meant by a concurring opinion is an opinion written by a member of the panel of judges or several judges who agree with the opinion of the majority of members of the panel of judges regarding a decision in a case but using different reasons.[13]

In countries that adhere to the continental European system, dissenting opinions are actually unknown. However, along with the development of the times, dissenting opinions have been known and established in the judicial practice that

[8]Adena Fitri Puspita Sari and Purwono Sungkono Raharjo, 2022. "The Constitutional Court as a Negative Legislator and a Positive Legislator," Sovereignty Vol. 1 Number. 4 p. 686.

[9]Siti Malikhatun Badriyah, 2022, Legal Discovery System in Prismatic Society Sinar Grafika, Jakarta, p. 29.

[10]Constitutional Court Decision No. 90/PUU-XXI/2023 Concerning Additional Provisions on Experience in Office from Election Eligibility in Minimum Age Requirements for Presidential/Vice Presidential Candidates

[11]Imam Mahdi, 2011, Indonesian Constitutional Law, Teras, Yogyakarta, p 294.

[12]Siti Aminah and Uli Parulian Sihombing, 2011, Understanding Dissenting Opinions in the Judicial Review Decision on the Blasphemy Law, (The Indonesian Legal Resource Center, Jakarta, p. 30.

[13]Jimly Asshiddiqie, 2012, Procedural Law for Testing Laws, Sinar Grafika, Jakarta, p 201

has been carried out by the Supreme Court of the Republic of Indonesia. In Indonesia, dissenting opinions were first born without a formal legal basis because of the developing practices of judges. The case of the Constitutional Court's decision that exceeded its authority, raised questions about how the constitutional court judges interpreted the lawsuit for judicial review in deciding the age requirements for presidential and vice presidential candidates whether or not they were in conflict with the 1945 Constitution, and how the validity and legal force of the Constitutional Court's decision contained cases of dissenting opinions and concurring opinions.

Normatively, the Constitutional Court's decision should be final and binding. However, if the decision is considered to have exceeded its authority (unconstitutional), its validity and legal force can be a matter of debate.Based on the background above, the author is interested in raising a discussion on the issue of the Legal Position and Role of Dissenting Opinion & Concuring Opinion in the development of the legal system in Indonesia and what considerations the Constitutional Court judges had in deciding the Constitutional Court Decision No. 90/PUU-XXI/2023.

2. Research Methods

The approach method used in this study is a normative legal approach, namely research conducted by examining library materials or secondary materials as basic materials for research by conducting searches for regulations and literature related to the problem being studied. This research method uses 2 (two) methods, namely the Statute approach and the conceptual approach. The Statute approach is a study that prioritizes legal materials in the form of laws and regulations as basic reference materials in conducting research, while the conceptual approach is a study of legal concepts, such as sources of law, legal functions, legal institutions and so on. There are 3 types of data sources for this study, namely the type of primary legal materials (laws and regulations), secondary (literature books, articles, journals, etc.) and tertiary (internet, dictionaries, etc.) Data analysis in this study uses descriptive analysis, namely conducting an analysis of the legal position and role of dissenting opinion and concurring opinion in the legal system in Indonesia.

3. Results And Discussion

3.1. Positionlaw and the role of dissenting opinions and concurring opinions in the legal system in Indonesia

In the legal system in Indonesia, the purpose of the law itself should have the principle of protecting in maintaining the values of justice, certainty and usefulness. In order to realize this principle, there needs to be legal certainty regulated by law. Dissenting opinion is an opinion that differs substantially so that it produces a different ruling, for example, the majority of judges reject the application, but the minority of judges grant the application in question and vice

versa.[14]A concurring opinion is an opinion/decision written by one or more judges who agree with the majority opinion of the panel of judges on a case, but have different reasons.[15]The legal status regarding dissenting opinions and concurring opinions is not explicitly regulated in the legal system in Indonesia, but rather the Dissenting Opinion and Concurring Opinion mandate it to be further regulated by law.

At the normative level, dissenting opinions are regulated in Article 14 of Law 48 of 2009 concerning Judicial Power which states that: (1) Decisions are made based on a confidential deliberation session of judges. (2) In the deliberation session, each judge is required to submit written considerations or opinions on the case being examined and become an integral part of the decision. (3) In the event that a unanimous consensus cannot be reached in the deliberation session, the dissenting opinion of the judge must be included in the decision. Then, regarding dissenting opinions in the cassation level examination at the Supreme Court, it is regulated in Article 30 paragraph (2) and (3) of Law Number 5 of 2004 concerning Amendments to Law Number 14 of 1985 concerning the Supreme Court as follows: (1) In the deliberation session, each supreme court judge is required to submit written considerations or opinions on the case being examined and become an integral part of the decision. (2) In the event that a unanimous consensus cannot be reached during the deliberation session, the dissenting opinion of the supreme court justice must be included in the decision. The legal basis for dissenting opinions in the Constitutional Court's decision is regulated in Article 45 paragraph (6) and (10) of Law Number 24 of 2003 concerning the Constitutional Court, which states that (6) if the deliberation of the plenary session of the constitutional court justices cannot produce a decision, the deliberation is postponed until the next plenary session of the constitutional court justices. (10) If a unanimous consensus is not reached during the decision, the dissenting opinion of the members of the Panel of Judges must be included in the decision.

Judges in deciding cases should adhere to the applicable statutory provisions to fulfill a sense of justice.[16]Enforcement dissenting opinion, in line with the spirit of openness. If the reading of the verdict by the panel of judges is open, the process of forming the verdict should also be open. Implementation dissenting opinion not only necessary as a means of controlling judges, but also for the development of

[14]Imam Mahdi, 2011, Indonesian Constitutional Law, Teras, Yogyakarta, p. 294.

[15]Siti Aminah and Uli Parulian Sihombing, 2011 Understanding Dissenting Opinions in the Judicial Review Decision of the Blasphemy Law, The Indonesian Legal Resource Center Jakarta, p. 30.

[16]Indra Sukma Putra, Sri Wahyuningsih Yulianti, Bintoro Adi Wicaksono, 2015 "Analysis of Dissenting Opinion Decisions based on the Criminal Procedure Code (KUHAP) in Fraud Cases (Study of Supreme Court Decision Number: 2253 K/Pid/2012), Verstek, Vol 3, No 3, pp 5-6.

legal education. By knowing the differences of opinion among judges who are members of the panel of judges, academics can conduct studies.[17]

Implementation dissenting opinion in line with the spirit of openness. By including the judge's opinion, the public's right to obtain information is optimally granted. Public access to obtain court decisions should also be increased. Although dissenting opinion implemented, but if the public still has difficulty obtaining copies of court decisions as it does now, the policy is meaningless. Because the public still has difficulty finding out the different opinions of judges.[18] The existence of dissenting opinion This makes the public now have new hopes that court decisions will be of better quality. Because, judges can no longer hide their thoughts in their decisions. By analyzing the decisions, the public will easily be able to find which judges have been contaminated and which are still pure with legal opinions that prioritize a sense of justice. Dissenting opinion will encourage other judges to have a choice in determining the verdict in the same case. This will encourage the birth of a more permanent jurisprudence.[19]

Dissenting opinions play an important role in enriching legal discussions and providing alternative views to the majority decision. In cases that have dissenting opinions, the opinions often contain in-depth analysis and strong arguments, which can provide a different perspective on the issues at hand. By applying the principle of mutatis mutandis, arguments from dissenting opinions in previous cases can be reused to support arguments in new cases that have similar substance, although with some adjustments necessary according to the specific context of the case.

Settings about dissenting opinion in the 1945 Constitution of the Republic of Indonesia it is not explicitly mentioned. In the Chapter on Judicial Power, there is no article that mentions this different opinion. The provisions in Article 24 paragraph (1) only mention the judicial power which is an independent power to organize trials to uphold law and justice. Furthermore, in paragraph two it is stated that judicial power is implemented by two institutions, namely the Supreme Court and the Constitutional Court. The mechanism for decision making, including those containing different opinions, is part of procedural law. In the treasury of legal science, procedural law (formal law) is law that contains procedures aimed at maintaining material law.[20]In the 1945 Constitution of the Republic of Indonesia, the regulation of procedural law related to procedural law for each judicial

[17]Sunarmi 2007 "Dissenting Opinion as a Form of Transparency in Judicial Decisions". Jurnal Equality. Vol. 12 No. 2. p. 150.

[18]Ibid.

[19]Ibid., 152.

[20]Constitutional Court Procedural Law Drafting Team, Constitutional Court Procedural Law, Secretariat General of the Constitutional Court, p 14.

authority is further regulated by law.[21]The provisions of Article 24 C paragraph (6) of the 1945 NRI Constitution state "The appointment and dismissal of constitutional judges, procedural law and other provisions are regulated by law.". With such a formulation of norms, there is a mandate from the Constitution to regulate provisions related to the Constitutional Court in a separate law.

As a follow-up to the mandate given by the Constitution, a law was made that regulates the existence of the Constitutional Court, namely Law Number 24 of 2003 concerning the Constitutional Court (UUMK). In the UUMK, the position, constitutional judges, the authority of the Constitutional Court, and the procedural law applicable to the Constitutional Court are regulated. The procedural law of the Constitutional Court is regulated in Chapter V starting from Article 28 to Article 85 including the procedural law for testing laws. Specifically, the decision-making issue is regulated in the seventh part of this chapter. Decision-making, as regulated in the procedural law, begins with deliberation on the case being petitioned. The deliberation process begins with each judge expressing his/her opinion on a case in a deliberation session (judge's deliberation meeting).[22]Not just verbal opinions, but the opinions or considerations of the judges must be conveyed in writing.[23]The next stage is to seek unanimous consensus in deliberation.[24]However, if a unanimous consensus is not reached despite earnest efforts, then the decision will be made by majority vote.[25]It is also explained in the UUMK that the role of the chairman of the session is very significant in the event of a balanced vote in decision making. In this context, the chairman becomes decision maker whether a case of judicial review is rejected or granted or partially granted or even cannot be accepted (not a universally accepted expression).[26]In the end, if there are still differences of opinion among the judges, then the judge who has a different opinion can include his (different) opinion in the decision. According to Jimly, the inclusion of different opinions in this decision is something that must be done if the understanding of the provisions is interpreted in a "plain".[27]However, in practice, this is difficult to realize.

Explicitly, there is no regulation about dissenting opinion. the phrase used in the UUMK is "different opinions of the panel of judges". According to Jimly, different opinions are divided into two, namely dissenting opinion And concurrent opinion

[21]Article 24 B paragraph (5) regulates the mandate for regulating procedural law for the Supreme Court and the judicial environment below it. Meanwhile, procedural law for the Constitutional Court is regulated in Article 24 C paragraph (6).

[22]Article 45 paragraph (5) of the UUMK

[23]Ibid.

[24]Article 45 paragraph (4), (6).

[25]Article 45 paragraph (7).

[26]Article 45 paragraph (8).

[27]Jimly Asshiddiqie, 2012 Procedural Law on Testing Laws, Sinar Grafika, Jakarta, p. 201.

or consenting opinion.[28]A decision is considered as competing if there is an argument from a member of the panel of judges that differs from the majority of the other members of the panel of judges but does not result in a difference in the verdict.[29]On the other hand, a decision is said dissenting if the opinion of a member of the panel of judges differs from the opinion of the majority of the other members of the panel of judges and the difference is not merely in terms of reasoning, but also touches on the verdict.[30]

Further explanation of the UUMK is contained in the Constitutional Court Regulation (PMK). In relation to the procedural law for testing laws, the Constitutional Court has issued PMK number 6 PMK of 2005. Specifically, the provisions regarding dissenting opinions are regulated in Article 32 paragraph (6). The full text of the provisions in this article is "The opinion of a Constitutional Judge that differs from the decision is included in the decision, unless the judge concerned does not wish it". With such a regulation, it can be interpreted that a judge may have a different opinion in a judges' deliberation meeting (RPH) but his opinion is not included in the decision.

Although the UUMK does not differentiate between decisions dissenting with competing, but it is different in terms of its manifestation in the Constitutional Court's decision. The Constitutional Court's decision distinguishes the two types of decisions by using the phrase "different reasons" to refer to competing opinion sand the phrase “different opinions” to refer to dissenting opinion.[31]In terms of naming, these terms have a weakness because neither of them contains any distinguishing characteristics between the two.

The arrangement of different opinions in this legislation has opened up opportunities for deliberation among fellow MK judges during the RPH. The diverse composition of the judges' personnel creates wide open room for interpretation, including for using reasoning different. This condition creates a need for competent judges who can use all their thinking power to present all arguments in the reasons for deciding it (ratio decidendi). Thus, the decision will present arguments from others (others) although it is not legally binding. A deconstructive reading method can be used for the regulations being tested or for the norms that are the touchstone. However, the meaning of the norm needs to be continuously discussed, not only by judges but also by lawyers and related parties. In this way, more perspectives will emerge, thus minimizing the dominance of certain interpretations of a text.

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[28]Ibid., p. 200.

[29]Ibid.

[30]*Ibid*.

[31]See the Constitutional Court decisions number 016/PUU-VI/2008, 021-022/PUU-V/2007, 93/PUU-X/2012, 140/PUUVII/2009, 138/PUU-VII/2009, 120/PUU-VII/2009, 27/PUU-VII/2009. Here Jimly in his book on procedural law on judicial review does not discuss it, and says there is no equivalent word to refer to dissenting or concurring opinion.

The role of dissenting opinion and concurring opinion in the legal system in Indonesia is in line with the spirit of openness. The debate on the Constitutional Court's decision containing dissenting opinion certainly needs to be resolved academically through scientific and in-depth study. Dissenting opinion is a legacy of the contemporary justice system that can be a reference for judges in conducting legal reasoning, because dissenting opinion is a description of the judge's argumentation in a particular case. Not a few experts say that dissenting opinion can be an alternative for future legal reform, because it contains original ideas that are different from the nature of decisions that are sometimes still casuistic.

Dissenting opinion as an alternative in the context of legal reform cannot be separated from the background of constitutional judges. Constitutional judges are statesmen who master the constitution and state administration, so that their expertise cannot be removed, even though they hold the position of constitutional judge who is bound by regulations related to their institution. The expertise is manifested in every decision taken which is based on considerations based on their knowledge and experience in the field of constitution and state administration. This shows that dissenting opinions should not only be used as 'ornaments' of the court, but rather as the most important part of the procedural law at the Constitutional Court.

The dissenting judge's opinion is concrete evidence that the constitutional judge interprets based on his/her expert background. The arguments presented are always related to his/her individual interpretation of a case. Although it is currently not binding, the dissenting opinion contains the judge's knowledge derived from his/her experience in the constitutional and state administration fields. Therefore, the author considers that the dissenting judge's opinion is part of an expert opinion, which can be the key to the development of law in Indonesia.

3.2.Legal Analysis Dissenting Opinion and Concurring Opinion in Constitutional Court Decision Number 90/PUU/XXI/2023

Constitutional Court Decision Number 90/PUU/XXI/2023 is a decision of the Constitutional Court regarding the judicial review of Law Number 7 of 2017 concerning General Elections, specifically Article 169 letter q regarding the provisions on the minimum age limit for presidential and vice presidential candidates. The Constitutional Court Decision granted the petition of some of the applicants and stated that the provisions of Article 169 letter q of Law Number 7 of 2017 concerning General Elections are contrary to the 1945 Constitution of the Republic of Indonesia insofar as they are not interpreted to include experience in office from being elected in general elections or regional head elections as stated in the following decision:

To judge:

Granting the Applicant's request in part;

Declaring Article 169 letter q of Law Number 7 of 2017 concerning General Elections (State Gazette of the Republic of Indonesia of 2017 Number 182, Supplement to the State Gazette of the Republic of Indonesia Number 6109) which states, "at least 40 (forty) years old" is contrary to the 1945 Constitution of the Republic of Indonesia and has no binding legal force, as long as it is not interpreted as "at least 40 (forty) years old or has/is currently holding a position elected through general elections including regional head elections". So that Article 169 letter q of Law Number 7 of 2017 concerning General Elections in full reads "at least 40 (forty) years old or has/is currently holding a position elected through general elections including regional head elections"

Ordering the publication of this decision in the State Gazette of the Republic of Indonesia as appropriate.

The Constitutional Court's decision was decided by the following 9 (nine) Constitutional Justices:

List of Names

Panel of Judges of the Constitutional Court

No.	Name	Information
1.	Anwar Usman	Chairman and member
2.	Isra's Balance	Member
3.	Mr. Guntur Hamzah	Member
4.	Manahan MP Sitompul	Member
5	Daniel Yusmic P. Foekh	Member
6	Enny Nurbaningsih	Member
7	Wahiduddin Adams	Member
8	English	Member
9	The Suhartoyo	Member

Regarding the Constitutional Court Decision Number 90/PUU/XXI/2023, there are different views, namely dissenting opinions and concurring opinions which state agreement with the majority opinion and which state disagreement from each member of the panel of judges as follows:

Member Name List

Panel of Judges with Dissenting Opinion

And Concurring Opinion

Dissenting Opinion	Concurring Opinion
Wahiduddin Adams	Enny Nurbaningsih
Isra's Balance	Daniel Yusmic P. Foekh
English	-
The Suhartoyo	-

The following is a description and legal analysis of the dissenting opinion and concurring opinion from each panel of judges in the Constitutional Court Decision Number 90/PUU/XXI/2023.

1. Dissenting Opinion of the Constitutional Court Judge

a. Judge Wahiduddin Adams

Based on the petitum in the applicant's application, the Court should focus on the concept of the independence of the judicial power to "not do something" or judicial restraint. This has been guaranteed by Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia which provides a guarantee of independence for branches and perpetrators of judicial power (judicial independence). This principle is a manifestation of the supremacy of the constitution and the implementation of a constitutional democratic state.[32]Judicial restraint emphasizes that the Court should limit itself in interfering with policies that are within the legislative authority, maintaining the balance of power and respecting the principle of separation of powers.

In the applicant's petitum, there are three crucial issues related to Article 6 paragraph (1) and Article 6 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. These issues include age limits, certain minimum figures, and/or experience as requirements for presidential and vice presidential candidates. Typologically, these three things are a form of open legal policy.[33]This means that the determination of age limits, minimum figures, and experience is a policy that should be regulated by lawmakers through a legislative process that involves public participation and comprehensive consideration.

If the Court grants the applicant's request, this will create an inconsistency in the requirements for presidential and vice presidential candidates determined by the judicial authority, while other requirements are determined by the legislative authority. This incongruity can be considered a form of privilege that gives rise to

[32]Dissenting Opinion of Constitutional Justice Wahiduddin Adams on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 88

[33]Dissenting Opinion of Constitutional Justice Wahiduddin Adams on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 90-91

injustice, contrary to Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia which guarantees equality before the law.[34]Thus, the Court's intervention in policies that are within the legislative domain can disrupt the balance of the legal and constitutional systems.

The Court should exercise judicial power with the principle of "freedom to do nothing," or judicial restraint. However, in this case, the Court granted the petitioner's request, which can be considered as the practice of "legislating or governing from the bench" without sufficient grounds.[35]This shows that the Court has exceeded its authority by entering into the realm of legislative power, which should have the authority to determine the requirements for presidential and vice presidential candidates. This action is contrary to the principle of people's sovereignty as regulated in Article 1 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which emphasizes that the highest power lies in the hands of the people and is implemented through democratically elected institutions.

b. Judge Saldi Isra

The Constitutional Court has changed its position on the judicial review case of Article 169 letter q of Law Number 7 of 2017 concerning General Elections. In the Constitutional Court Decision on Case Number 29-51-55/PUU-XXI/2023, the Court rejected the petition. However, in the Constitutional Court Decision on Case Number 90/PUU-XXI/2023, the verdict changed to granting the petition.[36] This change indicates dynamics in the interpretation of the law by the Court and the possibility of new considerations or changes in views among the constitutional judges regarding the substance of the petition.

There is interest in the alternative model requested by the applicant in case number 90/PUU-XXI/2023. In the discussion of case number 29-51-55/PUU-XXI/2023, several Constitutional Justices have agreed and positioned Article 169 letter q of Law Number 7 of 2017 concerning General Elections as an open legal policy.[37]This consensus shows that the majority of judges at that time saw that the determination of age requirements was the authority of the legislator, not the judicial domain. This view reflects that the regulation of age requirements is a discretion for legislators.

Previously, the Constitutional Court has been consistent in previous decisions that the issue of age has become a jurisprudence and is the realm of lawmakers as an

[34]Dissenting Opinion of Constitutional Justice Wahiduddin Adams on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 93

[35]Dissenting Opinion of Constitutional Justice Wahiduddin Adams on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 93-94

[36]Dissenting Opinion of Constitutional Justice Saldi Isra on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 95.

[37]Dissenting Opinion of Constitutional Justice Saldi Isra on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 96

open legal policy.[38]This consistency shows that the Court respects the principle of separation of powers by leaving specific policy on age to the legislature. This approach also reflects the Court's belief in a legislative process that involves public participation and consideration of various stakeholders.

Several previous Constitutional Court decisions related to open legal policy include Constitutional Court Decision Number 15/PUU-V/2007, Constitutional Court Decision Number 37-39/PUU-VIII/2010, Constitutional Court Decision Number 49/PUU-IX/2011, Constitutional Court Decision Number 56/PUU-X/2012, and Constitutional Court Decision Number 29-51-55/PUU-XXI/2023.[39]These decisions show that the Constitutional Court has repeatedly emphasized the principle of open legal policy, especially in terms of policies that should be determined by lawmakers. This consistency shows the Court's efforts to remain within the corridor of the separation of powers and not enter the realm of authority of other institutions.

The issue of age limits should not be resolved by the courts. The political question doctrine put forward by Louis Henkin in his book "Is There a 'Political Question' Doctrine" (1976) states that certain issues, including age limits, are the domain of the political and legislative process, not the judiciary. John Serry in his book "Too Young to Run?: A Proposal for an Age Amendment to the US Constitution" (2011) also states that the issue of minimum age requirements for political office cannot be determined through the mechanism of judicial review.[40]Both views emphasize that resolving age policy issues is best done through political and legislative mechanisms that allow for broad public participation and debate.

c. Judge Arief Hidayat

Determining the minimum age requirement for presidential and vice presidential candidates is included in the open legal policy, considering that the 1945 Constitution of the Republic of Indonesia does not explicitly regulate it.[41]Therefore, the formation of provisions regarding the minimum age is the authority of the legislators to determine it based on their considerations and discretion. This reflects the principle that policies that are not explicitly regulated by the constitution can be adjusted to the dynamics and needs of society through the legislative process.

[38]Dissenting Opinion of Constitutional Justice Saldi Isra on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 96

[39]Dissenting Opinion of Constitutional Justice Saldi Isra on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 104-105

[40]Dissenting Opinion of Constitutional Justice Saldi Isra on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 105

[41]Dissenting Opinion of Constitutional Justice Arief Hidayat on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 107

The Constitutional Court in its various decisions has affirmed the position of open legal policy regarding the determination of minimum or maximum age limits. Some previous decisions relevant to the open legal policy are:[42]

a. Decision Number 15/PUU-V/2007 dated 27 November 2007, which relates to the minimum age requirement for regional head candidates. In this decision, the Court emphasized that the determination of age is an open legal policy.

b. Decision Number 51-52-59/PUU-VI/2008 dated 18 February 2009, in which the Court is of the opinion that open legal policy products stipulated by lawmakers cannot be revoked unless they are proven to violate morality, rationality and intolerable injustice.

b. Decision Number 37-39/PUU-VIII/2010 dated 15 October 2010, which relates to the minimum and maximum age limits for the leadership of the Corruption Eradication Commission (KPK). This decision shows that age limits are part of legal policy that can be regulated by lawmakers.

d. Judge Suhartoyo

The applicant does not have legal standing because the norm of Article 169 letter q of Law Number 7 of 2017 in the petition of his application is not for his own benefit.[43]In law, legal standing refers to the right of a person or entity to file a petition or lawsuit before a court. In this case, because the petition does not concern the applicant's personal interests, it does not meet the legal standing requirements set out

The legal considerations of the dissenting opinion in case number 29/PUU-XXI/2023 and case number 51/PUU-XXI/2023 are mutatis mutandis and are an inseparable part of the legal considerations in the dissenting opinion in the decision on the applicant's application in case number 90/PUU-XXI/2023.[44]The mutatis mutandis principle means that the rules applicable in one case also apply in other cases with necessary adjustments. In this case, the arguments and considerations expressed in the dissenting opinion in previous cases are considered relevant and are re-applied with appropriate adjustments in case number 90/PUU-XXI/2023

In analyzing dissenting opinion and concurring opinion in Constitutional Court Decision Number 90/PUU-XXI/2023, it is necessary to re-understand the meaning of the two terms. Dissenting opinion is the opinion of a judge who disagrees with or rejects the decision of the majority of other judges. The judge who gives a dissenting opinion has a fundamental difference of opinion from the majority

[42]Dissenting Opinion of Constitutional Justice Arief Hidayat on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 108-109

[43]Dissenting Opinion of Constitutional Justice Suhartoyo on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 120

[44]Ibid

decision and puts forward conflicting reasons and legal arguments.[45]Meanwhile, a concurring opinion is a judge's opinion that agrees with the decision of the majority of other judges, but with different legal reasons or considerations. The judge who gives a concurring opinion agrees with the final result of the decision, but has a legal view or argument that is different from the majority of judges.

2. Concurring Opinion of the Constitutional Court Judges

a. Judge Enny Nurbaningsih

The issue of age limits is an open legal policy. In its various decisions, the Constitutional Court maintains that the 1945 Constitution of the Republic of Indonesia does not set a specific age limit for holding a position.[46]This shows that the Constitutional Court gives the legislators the freedom to set the age limit according to the needs and social context in force. As part of an open legal policy, this age limit is an issue that can be discussed and changed according to the dynamics of politics and law that are developing.

The House of Representatives (DPR) and the President have provided their statements and fully submitted to the Constitutional Court regarding the age limit. In their statements, the DPR and the President emphasized that the age limit is an open legal policy so that it remains the authority of the lawmakers by involving public participation to decide it. However, what the applicant is questioning is not just the minimum age limit. The applicant is asking for another alternative, namely "At least 40 (forty) years old or experienced as a Regional Head at both the Provincial and Regency/City levels".[47]This request reflects the need to consider practical experience in addition to age in qualifying for certain positions. So that experience can be an alternative in a competency indicator that is equivalent to age. The Constitutional Court considers it necessary to provide additional meaning to the minimum age requirement, without eliminating the requirement which is part of the open legal policy. The Court decided to add an alternative requirement, namely "at least 40 (forty) years old or experienced ...". This approach is similar to that applied in the Constitutional Court Decision Number 112/PUU-XX/2022.[48]Thus, the Court provides flexibility for candidates who have relevant experience even though their age has not reached the minimum limit set.

Provinces and districts/cities have different hierarchies, so that provincial and district/city government affairs are carried out according to their respective authorities to regulate and manage them themselves based on existing provisions.

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[46]Concurring Opinion of Constitutional Justice Enny Nurbaningsih on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 59-60.

[47]Concurring Opinion of Constitutional Justice Enny Nurbaningsih on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 60-62.

[48]Concurring Opinion of Constitutional Justice Enny Nurbaningsih on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 62-63

The governor, as a representative of the central government, has more complex responsibilities than the regent or mayor.[49]The experience of a governor in administering regional government affairs covers a wider scale and more complex issues compared to the experience of a regent or mayor. Therefore, experience as a governor can be considered a significant qualification in meeting the requirements for a particular position.

In its decision, the Constitutional Court should have granted part of the applicant's petition, namely the requirement of "being at least 40 (forty) years old or having experience as a governor, the requirements for which are determined by the law maker".[50]This decision shows that the Court gives due regard to practical experience in government as a valid alternative to the age requirement, thus allowing for a variety of backgrounds to qualify for a particular position. This reflects the Court's commitment to maintaining the flexibility and relevance of position requirements in accordance with the needs and developments of society.

b. ConcurrentOpinion of Constitutional Justice Daniel Yusmic P. Foekh

The theory of separation of powers put forward by Charles-Louis de Secondat, Baron de La Brède et de Montesquieu, in his book "The Spirit of The Laws" (1748), states that state power is divided into three branches, namely legislative, executive and judiciary.[51]This division aims to ensure that no branch of government has complete dominance over the others, thus creating a system of checks and balances that is essential to maintaining democracy and preventing abuse of power. This principle is an important foundation in understanding the role and function of the Constitutional Court in the Indonesian legal system.

Regarding the age limit requirement which is within the authority of the legislator (open legal policy), the Constitutional Court has relaxed this provision by providing the alternative of "having experience or being experienced" as implemented in Constitutional Court Decision Number 112/PUU-XX/2022.[52]The Court recognized the importance of experience in filling public office, and thus provided more flexibility in the interpretation of age limits, allowing younger but experienced candidates to qualify for certain positions.

[49]Concurring Opinion of Constitutional Justice Enny Nurbaningsih on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 64-65

[50]Concurring Opinion of Constitutional Justice Enny Nurbaningsih in Constitutional Court Decision Number 90/PUU-XXI/2023, p. 70

[51]Concurring Opinion of Constitutional Justice Daniel Yusmic P. Foekh in Constitutional Court Decision Number 90/PUU-XXI/2023, p. 72.

[52]Concurring Opinion of Constitutional Justice Daniel Yusmic P. Foekh in Constitutional Court Decision Number 90/PUU-XXI/2023, p. 76

The applicant's application in case number 90/PUU-XXI/2023 is different from case number 51/PUU-XXI/2023 and case number 55/PUU-XXI/2023.[53]In case number 90/PUU-XXI/2023, the applicant requested that Article 169 letter q of Law Number 7 of 2017 concerning General Elections be interpreted as "at least 40 (forty) years old or have experience as a state administrator". State administrators include legislative, executive, and judicial institutions that are elected through a direct election mechanism. Meanwhile, in case number 90/PUU-XXI/2023, the petitum submitted by the applicant is more specific, namely for the position of regional head at both the provincial and district/city levels. This application shows that the applicant wants recognition of practical experience in local government as a qualification equivalent to the minimum age limit.

Article 169 letter q of Law Number 7 of 2017 concerning General Elections is contrary to the 1945 Constitution of the Republic of Indonesia and does not have conditional binding legal force as long as it is not interpreted as "at least 40 (forty) years old or experienced as a regional head at the provincial level".[54]This decision shows that the Constitutional Court provides an alternative interpretation that considers practical experience as an important factor in determining the eligibility of presidential and vice presidential candidates. The Court seeks to maintain a balance between formal requirements and practical relevance in meeting constitutional needs and the aspirations of the community.

In the context of the Constitutional Court Decision Number 90/PUU-XXI/2023, it is necessary to conduct an analysis of the concurring opinions and dissenting opinions submitted by the constitutional judges. This analysis is important to comprehensively understand the legal considerations underlying the decision from the perspective of open legal policy.

4. Conclusion

Based on the description of the research results and discussion, here are some conclusions regarding this topic, namely the legal position of dissenting opinions and concurring opinions is not explicitly regulated in Indonesian law but has been explained in the Judicial Power Law, the Constitutional Court Law, the Supreme Court Law in judges carrying out a constitutional interpretation decision process, the role of dissenting opinions and concurring opinions can be used as reference material for building a positive legal system in Indonesia because the judge's opinion in interpreting the constitution includes expert opinions which are very important. The analysis of the Constitutional Court decision Number 90 / PUU / XXI / 2023 has become a debate among Constitutional Court judges and the public regarding the interpretation of the constitution regarding the age limits for presidential and vice presidential candidates in the 2024 election, however, the

[53]Concurring Opinion of Constitutional Justice Daniel Yusmic P. Foekh on Constitutional Court Decision Number 90/PUU-XXI/2023, p. 86

[54]Concurring Opinion of Constitutional Justice Daniel Yusmic P. Foekh in Constitutional Court Decision Number 90/PUU-XXI/2023, p. 87

polemic did not reduce the binding legal force on the implementation of the election because it is in accordance with the theory of legal certainty

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