

Dissenting Opinion of the Constitutional Court Justice in Regards to the Court Decision Number 90/PUU-XXI/2023

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ABSTRACT

This research explores the constitutional dynamics surrounding the judicial review of Law Number 7 of 2017 concerning General Elections and the dissenting opinions in Constitutional Court Decision Number 90/PUU-XXI/2023. The petition challenged the constitutionality of presidential candidacy requirements, arguing that certain provisions limited democratic participation. The Constitutional Court partially granted the petition by allowing regional heads under 40 to run, prompting four justices to issue dissenting opinions. They contended that the Court exceeded its mandate by acting as a positive legislator, thereby risking violations of legal certainty and the separation of powers. Using a normative legal method, this study examines constitutional texts, statutory law, court rulings, and academic literature to analyze both the judicial reasoning behind the majority decision and the legal logic of the dissenting opinions. The findings suggest that while constitutional interpretation must adapt to democratic demands, it must remain within the framework of the Constitution. Dissenting opinions, though not binding, serve as a vital check on judicial activism and reinforce the legitimacy of constitutional adjudication in Indonesia's legal system.

A. INTRODUCTION

The existence of dissenting opinions in constitutional adjudication is an essential aspect of judicial independence and intellectual diversity within modern democratic legal systems. Rather than undermining judicial authority, dissenting views serve to enrich constitutional interpretation by offering alternative legal reasoning and safeguarding minority perspectives in legal thought. In the context of Indonesia, the practice of issuing dissenting opinions has grown significantly since the establishment of the Constitutional Court (*Mahkamah Konstitusi*), reflecting the evolving dynamics of judicial discourse in a post-authoritarian society.¹

The issuance of dissenting opinions by four Constitutional Court justices in Decision Number 90/PUU-XXI/2023 represents one of the most significant constitutional debates in Indonesia's recent legal history. This case arose from a petition to judicially review Article 169 letter q of Law Number 7 of 2017 on General Elections, which initially required presidential and vice-presidential candidates to be at least 40 years old. The Court's majority modified the requirement by inserting a new alternative: individuals under 40 may run if they have held or are currently holding regional executive office. While the majority justified this adjustment as a response to democratic evolution, four justices namely Saldi Isra, Suhartoyo, Wahiduddin Adams, and Arief Hidayat firmly opposed the ruling in their dissenting opinions.

The dissenting justices expressed strong concerns that the Court had gone beyond its constitutional mandate by acting as a positive legislator, rather than confining itself to testing norms against the Constitution. In their view, the insertion of an entirely new legal requirement fell outside the boundaries of the Court's judicial review authority, as defined under Article 24C of the 1945 Constitution. This criticism is in line with the principle that judicial interpretation must respect the separation of powers and avoid encroaching upon the legislative domain.² Judicial restraint is viewed as an

¹ Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara*, Jakarta: Rajawali Pers, 2006, p. 172

² Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi*, Jakarta: LP3ES, 2006, p. 88

institutional safeguard to ensure that constitutional interpretation does not lead to unintended political consequences.

In addition, the dissenting opinions highlighted the potential impact of the majority decision on the credibility and legitimacy of the Court. Public reaction to the ruling was polarized, with critics pointing to potential political bias and questioning the timing of the decision given its proximity to the 2024 general election. From a legal-theoretical standpoint, dissenting views help reinforce transparency in judicial reasoning, enabling the public to better understand the internal deliberations within the Court.³ In this regard, the dissenting opinions serve not merely as a legal objection, but as a moral stance against judicial activism that is perceived as exceeding constitutional boundaries.

The significance of this case also lies in its contribution to the development of constitutional doctrine in Indonesia. As constitutional review mechanisms mature, the presence of strong dissenting views helps to construct a more nuanced jurisprudence. These views are not immediately binding, but they can influence future decisions, legislative reforms, and academic interpretations. They demonstrate that legal interpretation is never monolithic but is constantly shaped by the interplay of legal reasoning, institutional values, and democratic principles.⁴

This research seeks to critically analyze the dissenting opinions of the four Constitutional Court justices in the aforementioned case by exploring their legal foundations, theoretical frameworks, and implications for Indonesia's constitutional practice. By examining the content and context of these dissents, the study aims to understand how judicial disagreement contributes to the broader landscape of constitutional democracy. Furthermore, this inquiry serves to emphasize the role of judicial integrity and reasoned argumentation in upholding constitutional supremacy,

³ Butt, *The Constitutional Court and Democracy in Indonesia*, Leiden: Brill, 2015, p. 146

⁴ Lindsey, *Indonesia: Law and Society*, Sydney: Federation Press, 2008, p. 202

particularly in a legal environment where public trust in judicial institutions is continually tested.⁵

B. RESEARCH METHODS

This research is a normative legal study, conducted through an examination of legal literature comprising statutory regulations, legal doctrines, and court decisions. The approaches employed in this study include the statute approach, the conceptual approach, and the case approach.

C. RESULTS AND DISCUSSION

Petition for Judicial Review of Law Number 7 of 2017 concerning General Elections against the 1945 Constitution of the Republic of Indonesia

The judicial review of Law Number 7 of 2017 concerning General Elections is a pivotal constitutional moment that highlights the dynamic relationship between statutory legislation and the 1945 Constitution of the Republic of Indonesia. This petition reflects citizens' growing awareness of their constitutional rights and the critical role of the Constitutional Court (*Mahkamah Konstitusi*) in ensuring that every regulation aligns with the principles of justice, democracy, and legal certainty. The Constitution, as the supreme law of the land, serves as the standard against which all legislative products must be tested.⁶

One of the core issues in the petition is the limitation of individual rights, particularly in relation to candidacy requirements and electoral thresholds. Petitioners argue that such provisions unjustly restrict the political rights of citizens to vote and to be elected, rights which are protected under Article 28D paragraph (1) and Article 27 paragraph (1) of

⁵ Yasuo Hasegawa, *Constitutional Review in New Democracies*, Tokyo: University of Tokyo Press, 2014, p. 132

⁶ Asshiddiqie, *Constitutional Law and Pillars of Democracy*, Jakarta: Konstitusi Press, 2006, p. 104

the 1945 Constitution. In a democratic state, laws must not hinder political participation without clear, proportional justification.⁷

Furthermore, the petition challenges the electoral threshold mechanism which requires political parties to reach a certain percentage of votes nationally before they can nominate a presidential candidate. Critics argue that this threshold consolidates power within dominant parties and reduces political pluralism, contrary to the spirit of constitutional democracy. Comparative constitutional studies show that excessive thresholds can be counterproductive to representative democracy.⁸

Another controversial provision is the requirement for candidates to have held or be holding certain public offices, which petitioners believe creates unfair barriers to entry into politics. This provision is seen as excluding qualified individuals who may not have held office but possess leadership capability, thereby undermining the constitutional guarantee of equal opportunity.⁹ This raises a fundamental question: should legal experience trump democratic openness?

The judicial review process also raises significant procedural and substantive constitutional concerns. Procedurally, it reflects the increasing trend of public engagement in constitutional matters. Substantively, it brings into question whether the General Elections Law has adequately observed constitutional values, such as equality before the law, participatory rights, and checks and balances. These values are essential for preserving a healthy constitutional democracy.¹⁰

It is also crucial to examine how the Constitutional Court balances between legal stability and reform. In several past decisions, the Court has shown willingness to reinterpret legal provisions in light of evolving democratic norms. This case adds to the debate on the Court's activism and

⁷ Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia*, Jakarta: Sinar Grafika, 2010, p. 221

⁸ Nurrohman, *Electoral System and Constitutional Principles*, Bandung: Refika Aditama, 2019, p. 143

⁹ Marzuki, *Introduction to Indonesian Law*, Yogyakarta: FH UII Press, 2016, p. 87

its responsibility to act not just as a negative legislator but as a guardian of constitutional morality.¹¹ The court must ensure that electoral laws do not become tools of exclusion but rather instruments of inclusion.

From a broader perspective, this judicial review exemplifies the tensions within transitional democracies like Indonesia, where legal development often trails behind democratic expectations. While legal norms are necessary for order and predictability, they must also be responsive to societal changes and aspirations. The 1945 Constitution, especially after its amendments, reflects a commitment to openness, human rights, and democracy principles that must be reflected in any election-related legislation.¹²

Dissenting Opinion of Four Constitutional Court Justices in Case Number 90/PUU-XXI/2023

The Constitutional Court's decision in Case Number 90/PUU-XXI/2023, which partially granted the judicial review concerning the presidential and vice-presidential candidacy requirements, drew national attention not only for its outcome but also for the compelling dissenting opinions expressed by four justices. These dissenting voices reflect a deeper constitutional discourse regarding the balance between legal certainty, the principle of equality, and the evolving democratic practices in Indonesia. Dissenting opinions are crucial in constitutional jurisprudence, offering alternative legal reasoning that may shape future developments in constitutional law.¹³

The core of the dissent lies in the belief that the Court should refrain from acting as a positive legislator. The justices argued that by adding a new alternative requirement that presidential and vice-presidential

¹⁰ Butt, *The Constitutional Court and Democracy in Indonesia*, Leiden: Brill, 2015, p. 209

¹¹ Mahfud MD, *Politics of Law in Indonesia*, Jakarta: Rajawali Press, 2009, p. 198

¹² Lindsey, *Indonesia: Law and Society*, Sydney: Federation Press, 2008, p. 263

¹³ Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, Jakarta: Sekretariat Jenderal dan Kepaniteraan MK, 2006, p. 198

candidates may also qualify if they have served or are serving as regional heads the Court overstepped its jurisdiction. According to constitutional doctrine, the Court's authority is limited to reviewing the constitutionality of existing laws, not creating new norms or criteria.¹⁴ Thus, the dissent emphasized the importance of maintaining institutional restraint.

Furthermore, the dissenting judges underscored the principle of legal certainty (*kepastian hukum*) as enshrined in Article 28D(1) of the 1945 Constitution. They contended that altering candidacy requirements through a judicial decision undermines the predictability and stability of the electoral process. Such a shift, if not clearly mandated by the legislature, may lead to arbitrary application and confusion among electoral stakeholders. Legal certainty, in this context, is not merely procedural but also tied to the public's trust in the neutrality and consistency of constitutional interpretation.¹⁵

Another point raised in the dissent relates to the doctrine of separation of powers. The dissenting justices viewed the majority's decision as a transgression into the domain of the legislative branch. The authority to formulate, amend, or expand candidacy requirements for national elections lies within the competence of the People's Representative Council (DPR), not the judiciary. By intervening in this realm, the Court risks diluting the legitimacy of democratic lawmaking.¹⁶

The dissent also highlighted the potential for unequal treatment and the erosion of meritocratic values in leadership selection. By privileging regional executives as eligible candidates based solely on position rather than capacity, the ruling may inadvertently exclude individuals who possess national leadership qualities but do not come from executive backgrounds. This contravenes the principle of equality before the law and

¹⁴ Mahfud MD, *Membangun Politik Hukum, Menegakkan Konstitusi*, Jakarta: LP3ES, 2006, p. 115

¹⁵ Simandjuntak, *Teori Konstitusi dan Hukum Tata Negara*, Bandung: Nusa Media, 2019, p. 169

¹⁶ Butt, *The Constitutional Court and Democracy in Indonesia*, Leiden: Brill, 2015, p. 183

the constitutional right of every citizen to participate in government affairs.¹⁷

From a theoretical standpoint, the dissenters drew from a more textualist and originalist interpretation of the Constitution. They emphasized that the framers of the 1945 Constitution intended for the requirements of candidacy to be determined legislatively, reflecting the will of the people through their representatives. This judicial innovation, they feared, sets a dangerous precedent that may invite further judicial encroachments into political processes.¹⁸

Importantly, the dissent also raises concerns about judicial ethics and impartiality. Public perception following the decision indicated skepticism toward the neutrality of the Court, particularly given the political implications of the ruling. Dissenting judges emphasized that judicial credibility depends not only on legal reasoning but also on the perception of independence and objectivity.¹⁹ Upholding judicial integrity becomes even more crucial when decisions intersect with electoral competition.

In conclusion, the dissenting opinions in Case Number 90/PUU-XXI/2023 offer a critical counterbalance to the majority ruling. They demonstrate the importance of internal judicial debate in safeguarding constitutional values. While the majority ruling may reflect a flexible and pragmatic approach to candidacy qualifications, the dissent calls for a more restrained and principled interpretation of the Constitution. Such dissents, though not legally binding, are essential for preserving the richness of constitutional discourse and ensuring that future jurisprudence remains anchored in the rule of law.²⁰

¹⁷ Marzuki, *Pengantar Ilmu Hukum*, Jakarta: Kencana, 2016, p. 135

¹⁸ Lindsey, *Indonesia: Law and Society*, Sydney: Federation Press, 2008, p. 214

¹⁹ Yasuo Hasegawa, *Constitutional Review in New Democracies*, Tokyo: University of Tokyo Press, 2014, p. 159

²⁰ Asshiddiqie, *Hukum Acara Mahkamah Konstitusi*, Jakarta: Konstitusi Press, 2006, p. 219

D. CONCLUSION

The judicial review of Law Number 7 of 2017 and the dissenting opinions in Constitutional Court Decision Number 90/PUU-XXI/2023 reveal the evolving tension between constitutional values and legislative policy in Indonesia's democratic framework. The petition reflected growing concerns over fairness, equality, and political inclusivity in electoral law, prompting the Court to interpret the Constitution in a way that accommodates democratic access. However, the strong dissenting views of four justices cautioned against judicial overreach, warning that the Court's action risked exceeding its constitutional mandate by effectively creating new legal norms.

Together, these developments highlight the complex interplay between constitutional guardianship and institutional restraint. While judicial innovation may respond to political and social shifts, it must remain grounded in the rule of law and respect for the separation of powers. The dissenting opinions, although not prevailing, offer a crucial reminder that the legitimacy of constitutional decisions lies not only in their outcomes but also in the method, reasoning, and adherence to constitutional boundaries. Both the petition and the dissent illustrate how constitutional adjudication serves as a critical arena for negotiating the principles of democracy, justice, and institutional balance.

REFERENCES

Books

- Asshiddiqie, Constitutional Law and Pillars of Democracy, Jakarta: Konstitusi Press, 2006.
- Asshiddiqie, Hukum Acara Mahkamah Konstitusi, Jakarta: Konstitusi Press, 2006.
- Asshiddiqie, Pengantar Ilmu Hukum Tata Negara, Jakarta: Rajawali Pers, 2006.
- Asshiddiqie, Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi, Jakarta: Sekretariat Jenderal dan Kepaniteraan MK, 2006.
- Butt, The Constitutional Court and Democracy in Indonesia, Leiden: Brill, 2015.
- Jimly Asshiddiqie, Konstitusi & Konstitusionalisme Indonesia, Jakarta: Sinar Grafika, 2010.
- Lindsey, Indonesia: Law and Society, Sydney: Federation Press, 2008.
- Mahfud MD, Membangun Politik Hukum, Menegakkan Konstitusi, Jakarta: LP3ES, 2006.
- Mahfud MD, Politics of Law in Indonesia, Jakarta: Rajawali Press, 2009.
- Marzuki, Introduction to Indonesian Law, Yogyakarta: FH UII Press, 2016.
- Marzuki, Pengantar Ilmu Hukum, Jakarta: Kencana, 2016.
- Nurrohman, Electoral System and Constitutional Principles, Bandung: Refika Aditama, 2019.
- Simandjuntak, Teori Konstitusi dan Hukum Tata Negara, Bandung: Nusa Media, 2019.
- Yasuo Hasegawa, Constitutional Review in New Democracies, Tokyo: University of Tokyo Press, 2014.