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The Judicialization of Politics on the Testing of the Constitutionality of the Age Limits of Presidential and Vice Presidential Candidates by the Constitutional Court

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Abstract: The phenomenon of the Judicialization of Politics within the Constitutional Court can be seen in the differences in several decisions of the Constitutional Court in reviewing the constitutionality of Law Number 7 of 2017 concerning General Elections regarding the minimum age limits for presidential and vice presidential candidates. Decisions Number 29/PUU-XXI/2023, 50/PUU-XXI/2023, 51/PUU-XXI/2023, and 90/PUU-XXI/2023 have the same outline of the petition but have different results. The research method used is juridical-normative legal research to fully view the phenomenon of judicialization of politics within it. The open legal policy decisions in the three decisions are different from one other decision so that this should be appropriate to return to the legislators as a whole and not the territory of the Constitutional Court.

Keywords: The Judicialization of Politics, Open Legal Policy, Constitutional Court

INTRODUCTION

The constitutional court was established as a solution to enforce the constitution constitutionally so that it is called the guardian of the constitution and the sole judicial interpreter of the constitution.¹ The constitutional court is given the authority to provide interpretations of constitutional texts so that they have legal force that is recognized by all elements of the state or referred to as constitutional judicial review². In line with what Hans Kelsen stated in General Theory of Law³ that the Constitutional Court is “a special court that called ‘constitutional court’” or special courts called constitutional courts which are not integrated with the Supreme Court or Supreme Court as is the case in the United States.

The development of judicial review is currently in the spotlight because of the dependence on the courts to resolve problems related to political controversies and several other phenomenal policies. Constitutional reform has involved the Constitutional Court with

¹ Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, (Jakarta: Sinar Grafika, 2012), 2nd printed, p.130.

² Vicki C. Jackson and Mark Tushnet, *Comparative Constitutional Law*, (New York: New York Foundation Press, 1999), p.456.

³ Hans Kelsen, *General Theory of Law and State*, (Newyork: Russell & Russell, 1961), p.156.

cases that will test the dignity of the Constitutional Court institution and the independence of the institution itself. The Constitutional Court's authority to adjudicate these controversies has made the court a political institution.⁴ This phenomenon is defined by legal experts as a phenomenon of “*judicialization of politics*” or “*political judicialization*”. Alec Stone Sweet provides an understanding of this phenomenon that: “*Judicialization of politics is the intervention of constitutional judges in legislative processes, establishing limits on law-making behavior, reconfiguring policymaking environments, and sometimes, drafting the precise terms of legislation*”⁵

This definition states that the judicialization of politics is an expansion of the institution of judicial power to adjudicate cases regarding public policy that have a political element in order to limit the authority of law makers. This phenomenon occurs because it is a logical consequence that Constitutional Law is another form of politics.⁶ Constitutional reform has led to the Constitutional Court adjudicating various reviews of controversial laws that are heavily political. Some of them are laws relating to the age limit for presidential and vice presidential candidates which emerged at the time of the 2024 General Election (PEMILU).⁷ Various pros and cons emerged as a reaction to the Constitutional Court's testing of the constitutional age limit for presidential and vice presidential candidates. The Constitutional Court was previously faced with testing the age limit and term of office of constitutional judges themselves in the Constitutional Court Decision Number 96/PUU-XVIII/2020 concerning the review of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. This decision ended in an open legal policy.

The tests related to the age limit for public office have also occurred at various ages for public office before, including one that has become controversial, namely testing the age limit for leaders of the Corruption Eradication Commission (KPK) institution.⁸ The Constitutional Court granted the request by providing an alternative because it saw discrimination in it, but regarding the minimum limit it still returned to the policy of the legislators as an open legal policy. Open Legal policy then became one of the various concepts of the Constitutional Court's decision to return norms to the legislators, where this term is interpreted as the freedom of the legislators to form legal policies as long as this is not specifically regulated in the constitution.⁹ In general, the existence of Open Legal policy is a consequence of maintaining the doctrine of parliamentary supremacy and is in accordance with the construction of negative legislators and positive legislators expressed by Hans Kelsen.¹⁰

Returning to the issue of the age limit for presidential and vice presidential candidates, it is a constitutional issue that is full of importance in the momentum of the 2024 election. This

⁴ Ran Hirschl, “The Judicialization of Mega-Politics and The Rise of Political Courts”, *Annual Review Political of Science*, Faculty of Law and Department of Political Science University of Toronto, Toronto, 2008, p.2.

⁵ Alec Stone Sweet, *Governing with Judges : Constitutional Politics in Europe*, ((New York : Oxford University Press, 2002), p. 32.

⁶ Ran Hirschl, “Judicialization of Pure Politics Worldwide”, *Fordham Law Review*, Faculty of Law and Department of Political Science University of Toronto, Toronto, 2006, p.723.

⁷ Ahead of the Constitutional Court Deciding on the Age Limit for Presidential and Vice Presidential Candidates, Counting the Days to Registration for the Presidential Election, [Jelang MK Putuskan Batas Usia Capres-Cawapres, Menghitung Hari Menuju Pendaftaran Pilpres \(kompas.com\)](#), accessed on October 15 2023 at 11.08 WIB

⁸ See the Constitutional Court Decision Number 112/PUU-XVIII/2022 concerning the review of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 concerning the Corruption Eradication Commission.

⁹ Mardian Wibowo, *Menakar Konstitusionalitas Sebuah Kebijakan Hukum Terbuka Dalam Pengujian Undang-Undang*, Jurnal Konstitusi, Vol. 12 No. 02, June 2015, p. 210-215

¹⁰ I. D. G Palguna, *Mahkamah Konstitusi Dasar Pemikiran, Kewenangan, dan Perbandingan dengan Negara Lain*, (Jakarta : KonPress, 2018), p.118.

was also clearly stated by one member of the constitutional judges, Saldi Isra, who stated that this test was a political setting and should not be submitted to the Constitutional Court but it was completed. on the revision of the Election Law in Parliament.¹¹ This phenomenon has previously been in line with what was stated by Hirschl, namely that the litigation process by political actors as a deliberate transfer of the determination of controversial political issues to the court, which is referred to as “*a hegemony preserving maneuver*”¹² or loosely translated as hegemony maneuver. This is done to minimize the risk of public rejection of controversial public policies created by branches of political power.

Judicialization of Politics in various aspects can be interpreted as a transformation of resolving political problems through legal instruments, namely the courts. Based on these aspects, it can be seen that the Judicialization of Politics can open up opportunities for legal mechanisms through courts to resolve problems that are the strength of other branches of power. So this country will be in a transition period towards juristocracy (*transition of juristocracy*).¹³ Problems arise when the Constitutional Court as an independent judicial authority must be faced with political problems that will make the public highlight these problems. In fact, it is a logical consequence that the Constitutional Court is often characterized as a political court because judicial review is traditionally understood as a political action to declare a provision unconstitutional by a special court containing judges selected by parliament and other political institutions, and not by ordinary courts which dominated by judges who have technical legal abilities.¹⁴

Constitutional Court Decision Number 53/PUU-XIV/2016, the MK stated in its legal considerations that with regard to the "family of positions" of constitutional judges, especially with regard to age limits, terms of office and periodization of terms of office, it is the authority of legislators (open legal policy) to determine it. This is permitted as long as it does not violate the restrictions on the principles of open legal policy, including the principle of rationality. Because this determination is within the authority of the legislator, its enactment also falls within the authority of the legislator.¹⁵ When the author was conducting research, the Constitutional Court's decision regarding testing the constitutionality of the age limit for presidential and vice-presidential candidates was read out. The Constitutional Court's decision is Decision Number 29/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections submitted by the Indonesian Solidarity Party represented by Giring Ganesha Djumaryo (General Chair) and Dea Tunggaesti (Secretary General) Anthony Winza Probowo, et al. In the end, the Constitutional Court decided to reject all of the applicant's requests with one of the legal considerations being the possibility that there would be dynamics in the future and would trigger various other requests related to the minimum age limit requirements for other public positions to the Constitutional Court so that this issue was a law-making policy that open or open legal policy.¹⁶

¹¹ Constitutional Court Judges Also Suspect Political Settings Behind the Lawsuit on the Minimum Age Limit for Vice Presidential Candidates, [Hakim MK Pun Curigai Setting Politik di Balik Gugatan Batas Minimal Usia Cawapres | Republika Online](#), accessed on October 15 2023 at 11.10 WIB

¹² Ran Hirschl in Jasdeep Rhandawa, “Understanding Judicialization of Mega-Politics: The Basic Structure Doctrine and Minimum Core”, p. 5

¹³ Lihat Ran Hirschl, *Judicialization of Pure Politics worldwide*, op.cit., p. 727.

¹⁴ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Durham and London: Duke University Press, 1989), p.3.

¹⁵ See Constitutional Court Decision Number 96/PUU-XVIII/2020 concerning judicial review of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, p. 146

¹⁶ See Constitutional Court Decision Number 29/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections

At the same time, the Constitutional Court granted some of the requests submitted by UNS students regarding the age limit for presidential and vice-presidential candidates with the phrase “q. must be at least 40 (forty) years old or have/are currently holding positions elected through general elections including regional head elections”.¹⁷ The increasingly massive phenomenon of testing various laws relating to general elections indicates the massive phenomenon of political judicialization in the Constitutional Court. The parties tend to move the policy-making advocacy space from the parliament building, which targets law-forming actors, to the trial rooms at the Constitutional Court (MK). Judges and the judiciary are increasingly being drawn into resolving political matters, which should be the responsibility of political actors.¹⁸

The practice of Judicialization of Politics in various issues regarding the interests of various parties, especially in this research, the Age Limit for Presidential Candidates and Vice Presidential Candidates, is a complex problem that must be resolved so that the same dynamics do not occur in the future, thus potentially making the judicial space a space for holding political problems. which should be resolved by political actors themselves. Departing from these various phenomena, the researcher arrived at the research title **"The Judicialization Of Politics In Testing The Constitutionality Of The Age Limits Of Presidential And Vice Presidential Candidates By The Constitutional Court"**

RESEARCH PROBLEMS

Based on this, the researcher will describe the main problems in the form of research questions : (1) How is the Open Legal Policy Decision in the Examination of Age Limit Cases for Public Positions by the Constitutional Court? (2) What is the practice of Judicialization of Politics in Testing the Constitutionality of the Age Limit for Presidential Candidates and Vice Presidential Candidates by the Constitutional Court?

RESEARCH METHODS

This research uses juridical-normative legal research. This type of research uses the concept where law is what is written in statutory regulations or conceptualized as rules or norms that become standards of behavior that are considered appropriate.¹⁹ The juridical-normative research examined is legal aspects, legal principles, legal rules regarding the case of testing the constitutionality of the age limit for presidential candidates and vice presidential candidates through the decision of the Constitutional Court Number 29/PUU-XXI/2023, 51/PUU-XXI/2023, 55/ PUU-XXI/2023, and 90/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections. The approach used is the Legislative Approach or one of which refers to the 1945 Constitution of the Republic of Indonesia.²⁰ Not only is the approach using the Statute Approach, the Conceptual Approach and the Case Approach also one of the approaches used by researchers to implement existing doctrines so that they can be implemented in this research.

¹⁷ See Constitutional Court Decision Number 90/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections

¹⁸ Titi Angraini, *Melampaui Batas Usia*, Media Indonesia accessed via [Melampaui Batas Usia \(mediaindonesia.com\)](https://mediaindonesia.com) on October 16 2023 at 15:22 WIB

¹⁹ Amiruddin and Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Raja Grafindo Persada, 2012), p.118

²⁰ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Prenadamedia Group, 2015), p.137

RESULT AND DISCUSSION

1. Open Legal Policy Decision in the Examination of Age Limit Cases for Public Positions by the Constitutional Court

a. The Constitutional Court as an Executor of Judicial Power in Indonesia

Constitutional reform found its starting point with the presence of a judicial authority other than the Supreme Court, namely the Constitutional Court. The presence of the Constitutional Court after the amendment to the 1945 Constitution of the Republic of Indonesia is a desire of the state to make the institution of judicial power more independent and testing of laws or judicial review is not limited to regulations under the law against laws alone.²¹ Historical experience has placed the centralization of legal products only on its creators, namely the DPR and the President, the birth of judicial review is a breath of fresh air which has become a solution in a special judicial body, namely the Constitutional Court, to enforce the constitution constitutionally. This special institution is in accordance with the ideas of Hans Kelsen who was the pioneer of the establishment of the constitutional court in Austria. Hans Kelsen stated: *“There may be a special organ established for this purpose, for instance, a special court, as so-called ‘constitutional court’ or the control of the constitutionality of statutes, the so called ‘judicial review’ may be conferred upon the ordinary court, and especially upon the supreme court”*²² Hans Kelsen said that the Constitutional Court is a special court which is different from the Supreme Court.

Basically, judicial power can be conceptually divided into two parts, namely the court of law and the court of justice.²³ From a theoretical point of view, the presence of the Constitutional Court is idealized as a court of law while the Supreme Court remains in its position as a court of justice.²⁴ Even though the implementation of Article 24C of the 1945 Constitution of the Republic of Indonesia does not place these two institutions in their original place because the Constitutional Court not only acts as a court of law but also as a court of justice in deciding General Election Results Disputes (PHPU), while the Supreme Court also does not only act as a court of justice because it also has judicial review authority for statutory regulations under the Law.²⁵ The development of state institutions is currently increasingly widespread and complex. This institution is not simply said to be divided into executive, legislative and judicial branches of power. The complexity of the development of branches of state power is accompanied by the complexity of constitutional problems and disputes between state institutions. The Constitutional Court is often characterized as a political court because judicial review is traditionally understood as a political action to declare a provision unconstitutional by a special court containing judges selected by parliament and other political institutions, and not by ordinary courts dominated by judges who have technical legal skills.²⁶

²¹ Drafting Team, *Comprehensive Text on Amendments to the 1945 Constitution of the Republic of Indonesia 1945: Background, Process and Results of Discussions 1999-2002 Book VI Judicial Power*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2010), p. 27

²² Hans Kelsen, *General Theory of Law and State*, (New York: Russell & Russell, 1961), p.156

²³ Saldi Isra, Titik Singgung Wewenang Mahkamah Agung dengan Mahkamah Konstitusi (Authority connectivity of Supreme Court and Constitutional Court), *Jurnal Hukum dan Peradilan*, Vol. 4 No.1 Maret 2015, p.18

²⁴ Yuliandri, *Pembagian Wewenang dan Pertanggungjawaban Kekuasaan Kehakiman Pasca Amandemen UUD 1945*, in Mohammad Fajrul Falaakh (Penyunting), *Gagasan Amandemen UUD 1945 Suatu Rekomendasi*, (Jakarta: Komisi Hukum Nasional, 2008), p. 62.

²⁵ Saldi Isra, *Titik Singgung Wewenang Mahkamah Agung dengan Mahkamah Konstitusi (Authority connectivity of Supreme Court and Constitutional Court)*,... p.19

²⁶ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Durham and London: Duke University Press, 1989), p.3

The essence of the establishment of the Constitutional Court Institution lies in the task of judicial review carried out by this state institution. The concept of judicial review is actually seen as the result of the modern development of a democratic government system which is based on the ideas of the rule of law, the principle of separation of power, as well as the protection and promotion of human rights (the protection of fundamental rights).²⁷ Judicial review initially had two main tasks, namely: first, ensuring the functioning of the democratic system in a balanced relationship between legislative, executive and judicial powers so that there is no concentration of power by one branch of power over other powers. Second, protect every individual citizen from abuse of power by state institutions that harms the basic rights guaranteed in the constitution.²⁸ However, the idea of constitutional submission has now developed widely, its practice and acceptance in each country has differences that cannot be separated from the historical context of that country's journey.

The constitution is indeed the highest law in a country because the constitution is a national document and a sign of the maturity of the nation's independence which is also a tool that contains the political system and legal system that is to be realized.²⁹ Therefore, its implementation must be responsible in accordance with the will of the people (the constitution for the people, not the people for the constitution), and the ideals of democracy, namely freedom and equality (justice). The Constitutional Court not only protects the constitutional articles as they sound, but also corrects their application which is reflected in the laws made by the House of Representatives (DPR) and the President with the touchstone of the constitution through its critical and dynamic interpretation.³⁰

b. Open Legal Policy in Decisions on Age Limits for Public Offices

The Constitutional Court with its various decisions has experienced several developments in it. Some of the resulting decisions are considered *ultra petita*, as well as some decisions that make constitutional judges go beyond their position as negative legislators. One of the various decisions produced by the Constitutional Court is the existence of a new term in legal science, namely the existence of an open legal policy. The term Open Legal Policy in the legal discipline does not have a standard terminology basis, this term is a new term and was relatively unknown before.³¹ Several Constitutional Justices Abdul Mukhtie Fajar and I Dewa Gede Palguna referred to the Constitutional Court Decision Number 072-073/PUU-II/2004³² explained that the concept of open legal policy first appeared in embryo in this decision.³³ According to Mukhtie Fadjar, the open law policy emerged when the 1945 Constitution of the Republic of Indonesia ordered the regulation of certain norms in the form of a law but only provided an outline, while the law that was formed had to provide more detailed rules. This detailed choice was an open

²⁷ Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), p.8

²⁸ Jimly Asshiddiqie, *Hukum Tata Negara dan Pilar-Pilar Demokrasi*, (Jakarta : Konstitusi Press, 2006), p.318

²⁹ Sri Soemantri, "Fungsi Konstitusi Dalam Pembatasan Kekuasaan", (Jurnal Hukum, Volume 3, Nomor 6, 1996), p. 3

³⁰ Fadjar A. Mukhtie, *Sang Penjaga atau Pengawal Konstitusi ? (Sebuah Catatan Ringan Setahun MKRI)*, dalam *Buku Menjaga Denyut Konstitusi*, (Jakarta: Konstitusi Press, 2004), p.38

³¹ Mardian Wibowo, "Menakar Konstitusionalitas sebuah Kebijakan Hukum Terbuka dalam Pengujian Undang-Undang", *Jurnal Konstitusi*, Vol.12 No.02, Juni 2015, p.210

³² Putusan MK Nomor 072-073/PUU-II/2004 tentang Pengujian UU Nomor 32 Tahun 2004 tentang Pemerintahan Daerah

³³ Mardian Wibowo, *Dissertation "Makna Kebijakan Hukum Terbuka dalam Putusan Pengujian Undang-Undang di Mahkamah Konstitusi*, Brawijaya University, 2017, p.145

or free area for the law makers in determining as long as it is still within the framework regulated by the 1945 Constitution of the Republic of Indonesia.³⁴

In complex constitutional developments, the Constitutional Court has several times been faced with testing the constitutionality of minimum and maximum age limits for various public positions. In the Constitutional Court decision No.29/PUU-XXI/2023, various decision data related to age limits are taken into legal consideration in deciding the a quo case:

1. Constitutional Court Decision Number 15/PUU-V/2007³⁵ stated in a plenary session open to the public on 27 November 2007, the Court's legal considerations regarding the minimum age requirements for regional head candidates include the following:
“ ... In relation to age criteria, the 1945 Constitution does not specify a specific minimum age limit as a generally applicable criterion for all government positions or activities. This means that the 1945 Constitution leaves the determination of the age limit to the legislators to regulate it. In other words, the 1945 Constitution considers this to be part of the legal policy of the law makers. For this reason, the minimum age requirements for each government position or activity are regulated differently in various laws and regulations...”
2. Constitutional Court Decision Number 37-39/PUU-VIII/2010³⁶ which was stated in a plenary session open to the public on October 15 2010, regarding the minimum and maximum age limits for the leadership of the Corruption Eradication Commission :
“...In relation to age criteria, the 1945 Constitution does not specify a certain minimum or maximum age limit as a generally applicable criterion for all government positions or activities. This means that the 1945 Constitution leaves the determination of the age limit to the legislators to regulate it. In other words, the 1945 Constitution considers this to be part of the legal policy of those who formed the law. For this reason, the minimum age requirements for each government position or activity are regulated differently in various laws and regulations according to the characteristics of the needs of each position;”
3. Constitutional Court decision Number 49/PUU-IX/2011³⁷ which was said in a plenary session open to the public on 18 October 2011 regarding the minimum age requirements for constitutional judges “...that in relation to the age criteria the 1945 Constitution does not specify a certain minimum age limit for occupying all government positions and activities. This is an open legal policy, which can be changed at any time by the legislators in accordance with the demands of existing development needs. This is entirely within the authority of the legislators which, whatever their choice, is not prohibited and does not conflict with the 1945 Constitution. Thus, the Petitioners' argument regarding the minimum age requirement is legally groundless;”

Various decisions relating to age limits, whether for regional heads, constitutional judges, heads of institutions, and so on, were decided clearly by the Constitutional Court as decisions that constitute open legal policy. Although open law policies are also excluded by the Constitutional Court in several cases, including³⁸ :

³⁴ Ibid

³⁵ Constitutional Court Decision Number 15/PUU-V/2007 concerning review of Law Number 32 of 2004 concerning Regional Government, p.56

³⁶ Constitutional Court Decision Number 37-39/PUU-VIII/2010 concerning Review of Law Number 30 of 2002 concerning the Corruption Eradication Commission, p.59

³⁷ Constitutional Court Decision Number 49/PUU-IX/2011 concerning Review of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court

³⁸ Decision Number 29/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections, p.217-219

1. The policy choice does not exceed the authority of the legislator and does not constitute an abuse of authority, and does not clearly conflict with the provisions of the 1945 Constitution of the Republic of Indonesia.
2. Legal policy products that form laws cannot be cancelled, unless they clearly violate morality, rationality and intolerable injustice.
3. Does not cause institutional problems, namely it cannot be implemented, causes legal deadlock, and hinders the implementation of the performance of the state institutions concerned which ultimately results in constitutionality losses for citizens.
4. The Court is of the opinion that although the minimum and maximum ages for filling public positions do not explicitly conflict with the constitution, if the norms implicitly raise issues of injustice and are discriminatory, they are related to substantive requirements, for example those who have previously or are currently in office and have a good track records related to integrity

The Constitutional Court, in its polemic on determining the age limit for presidential and vice-presidential candidates, was faced with a very political polemic. Instead of this decision being very simple, it contains complexity that is in the spotlight of all Indonesian society. The open legal policy contained in Decision Number 29-51-55/PUU-XXI/2023 seems to be in vain when faced with Decision Number 90/PUU-XXI/2023 in the same case. The open legal policy embedded in the age limit for presidential and vice presidential candidates is no longer the fundamental legal logic of decision Number 90/PUU-XXI/2023, but there are other conditions which are taken into legal consideration by the Constitutional Court. In this regard, the court provided the logic for the existence of public positions in the form of elected officials³⁹ and appointed officials so that this is assumed to be something that can justify the Court to decide on the a quo case. According to the Court, this could lead to unacceptable injustice.⁴⁰

This unacceptable justice was not explicitly explained further by the Constitutional Court, the Court only emphasized the argument that when the age limit must be combined with other alternative conditions which are the will of the people or the will of the people, in this case elected officials, can be said to have fulfilled the degree requirements. minimum maturity and experience (minimum degree of maturity and experience) to occupy a higher position in a position elected in the general election in addition to the requirement of being 40 (forty) years old. The petition submitted by the applicant in decision Number 90/PUU-XXI/2023 is relatively the same as other applicants but is a completely different decision. This simple matter related to age limits turns out to be very complex when faced with political realities. Borrowing the statement of constitutional judge Wahiduddin Adams in his dissenting opinion Decision Number 90/PUU-XXI/2023 that "In my belief, this petitum should be juridically and technically very simple to be decided by the Court, but it seems as if it has become very complex as a result of too large a dose. The use of non-judicial aspects which are contextually difficult to deny greatly envelopes the dynamics of the trial in this case;"⁴¹

³⁹ According to Jimly, all officials appointed for political considerations must be based on and within the framework of implementing the principle of popular sovereignty. Because it is the people who essentially hold sovereignty or the highest power in the field of state politics. Officials who are appointed based on such considerations are usually referred to as elected officials. See Jimly Asshiddiqie, *Perihal Undang-Undang*. (Jakarta: Rajawali Persada, :2010), p.373

⁴⁰ Decision Number 90/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections, p.57

⁴¹ Dissenting opinion Decision Number 90/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections, p.88

2. The Practice of Judicialization of Politics in Testing the Constitutionality of the Age Limits for Presidential Candidates and Vice Presidential Candidates by the Constitutional Court

a. The Phenomenon of Judicialization of Politics in the Constitutional Court

The development of judicial review is currently in the spotlight because of the dependence on the courts to resolve problems related to political controversies and several other phenomenal policies. Constitutional reform has involved the Constitutional Court with cases that will test the dignity of the Constitutional Court institution and the independence of the institution itself. The MK's authority to adjudicate these controversies has made the court a political institution.⁴² This phenomenon is defined by legal experts as a phenomenon of “*judicialization of politics*” or “*political judicialization*”. Alec Stone Sweet provides an understanding of this phenomenon that : “*Judicialization of politics is the intervention of constitutional judges in legislative processes, establishing limits on law-making behavior, reconfiguring policymaking environments, and sometimes, drafting the precise terms of legislation*”⁴³

This phenomenon has previously been in line with what was stated by Hirschl, namely that the litigation process by political actors as a deliberate transfer of the determination of controversial political issues to the courts was referred to as “a hegemony preserving maneuver”⁴⁴ or freely translated as hegemony maneuver. This is done to minimize the risk of public rejection of controversial public policies created by branches of political power. Judicialization of Politics in various aspects can be interpreted as a transformation of resolving political problems through legal instruments, namely the courts. Based on these aspects, it can be seen that the Judicialization of Politics can open up opportunities for legal mechanisms through courts to resolve problems that are the strength of other branches of power. So this country will be in a transition period towards jurisdiction.⁴⁵

Rachel Sieder provides three aspects that can identify the presence of judicialization of politics in a country, which are often found in Latin American countries. these three aspects are:

1. Expansion of the field of social and political life articulated in legal language through legal institutions;
2. Expansion of the number and legal instruments available for use in political struggle;
3. Increasing frequency of use of language and legal instruments in political strategies in determining public policy.⁴⁶

These three aspects generally illustrate that the judicialization of politics can be interpreted as a transformation of the resolution of political problems from political mechanisms through political institutions to resolution through legal instruments in court institutions. Some of the Judicialization of Politics cases that have been tested by the Constitutional Court include the Review of Government Regulations in Lieu of Laws (Perppu) Perpu Number 4 of 2009 concerning Amendments to Law Number 30 of 2002 concerning the Corruption Eradication Commission. Perpu Number 4 of 2009 regulates

⁴² Ran Hirschl, “The Judicialization of Mega-Politics and The Rise of Political Courts”, *Annual Review Political of Science*, Faculty of Law and Department of Political Science University of Toronto, Toronto, 2008, p.2.

⁴³ Alec Stone Sweet, *Governing with Judges : Constitutional Politics in Europe*, ((New York : Oxford University Press, 2002), p. 32.

⁴⁴ Ran Hirschal dalam Jasdeep Rhandawa, “Understanding Judicialization of Mega-Politics : The Basic Structure Doctrine and Minimum Core”, p. 5

⁴⁵ See Ran Hirschl, *Judicialization of Pure Politics worldwide*, op.cit., p. 727.

⁴⁶ Rachel Sieders, “Cultures of Legality: Judicialization and Political Activism in Latin America”, *Legal Studies Research Paper Series Paper No. 1118*, Cambridge University Press, 2010, p. 13

the mechanism for replacing the leadership of the Corruption Eradication Commission. The existence of a Constitutional Court decision stating that it has the authority to review Perpu, which by its nature is a political decision, indicates that the Constitutional Court is a forum adopted or used by political communities to resolve political problems.⁴⁷

b. Judicialization of Politics in Testing the Constitutionality of Age Limits for Presidential Candidates and Vice Presidential Candidates

Even though the Constitutional Court has the status of an independent judicial institution, it must be faced with political issues that will make the public highlight this problem. In fact, it is a logical consequence that the Constitutional Court is often characterized as a political court because judicial review is traditionally understood as a political action to declare a provision unconstitutional by a special court consisting of judges selected by parliament and other political institutions, and not by ordinary courts which dominated by judges who have technical legal abilities.⁴⁸ The Constitutional Court in Indonesia is currently faced with testing the minimum age limits for presidential and vice-presidential candidates which are tested by various community groups and individuals against the Constitutional Court. The decision issued is decision 29-51-55-90/PUU-XXI/2023 which is entirely related to article 169 of Law Number 7 of 2017 concerning General Elections. Interestingly, of the four decisions, 3 of them were rejected by the Constitutional Court, namely Decision Number 29-51-55/PUU-XXI/2023 and decision number 90/PUU-XXI/2023 which were declared granted in part, namely with the phrase "aged at least 40 (forty) years" is contrary to the 1945 Constitution of the Republic of Indonesia and does not have binding legal force, as long as it is not interpreted as "at least 40 (forty) years of age or has/is currently holding a position elected through general elections including regional head elections".⁴⁹

This decision is interesting because the assumption of a conflict of interest is very strong in testing the constitutionality of the minimum age limits for presidential and vice presidential candidates. The reason is that when the testing of this article was carried out there were many political readings which have now been clearly declared as having a direct effect, namely the advancement of Gibran Rakabuming Raka as Mayor of Solo as Prabowo Subianto's vice presidential candidate.⁵⁰ The debate among legal and political experts is increasingly intense because Gibran Rakabuming Raka is the eldest son of President Joko Widodo and the nephew of the Chief Constitutional Justice, Anwar Usman. Although in the press conference Anwar Usman rejected the existence of a conflict of interest in the Constitutional Court.⁵¹ Even before this decision was hammered by the Constitutional Court, one of the constitutional justices, Saldi Isra, reminded him that this review was a political setting and should not be left to the Constitutional Court but should be completed in the revision of the Election Law in Parliament.⁵²

⁴⁷ Indra Perwira, Refleksi Fenomena *Judicialization of Politics* pada Politik Hukum Pembentukan Mahkamah Konstitusi dan Putusan Mahkamah Konstitusi, *Jurnal Konstitusi*, Vol.13, No.1, Maret 2016. P. 41

⁴⁸ Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, (Durham and London: Duke University Press, 1989), p.3.

⁴⁹ Constitutional Court Decision number 90/PUU-XXI/2023,.. p.58

⁵⁰ Prabowo announces Gibran as Vice Presidential Candidate, What are the Political and Legal Consequences?, accessed via [Pilpres 2024: Prabowo umumkan Gibran sebagai bakal cawapres, apa saja konsekuensi politik hingga hukumnya? - BBC News Indonesia](#), on 23 Oct 2023 at 09:23

⁵¹ Anwar Usman Denies Involvement in Conflict of Interest in Constitutional Court Decision, accessed via [Anwar Usman Bantah Terlibat Konflik Kepentingan dalam Putusan MK \(kompas.com\)](#), on 24 Oct 2023 at 09:28

⁵² Constitutional Court Judges Also Suspect Political Settings Behind the Lawsuit on the Minimum Age Limit for Vice Presidential Candidates, [Hakim MK Pun Curigai Setting Politik di Balik Gugatan Batas Minimal Usia Cawapres | Republika Online](#), accessed on October 15 2023 at 11.10 WIB

Decision number 90/PUU-XXI/2023 has resulted in various dynamics even between members of the constitutional judges and each other. There are 2 (two) different reasons (concurring opinions), namely Constitutional judges Enny Nurbaningsih and Constitutional judges Daniel Yusmic P. Foekh and 4 (four) different opinions (dissenting opinions), namely Constitutional judges Wahiduddin Adams, Constitutional judges Saldi Isra, Constitutional judges Arief Hidayat, and Constitutional judges Suhartoyo⁵³

Constitutional judge Saldi Isra in his dissenting opinion wrote "...I am confused and really confused about where to start with this dissenting opinion. Because, since setting foot as a Constitutional Judge in this Court building on April 11 2017, or around six and a half years ago, this is the first time I have experienced a "strange" event that is "extraordinary" and can be said to be far from the limits of reasonable reasoning: the Court changed his stance and attitude in just an instant."⁵⁴ If we analyze this phenomenon using Rachel Sieder's thinking, which provides three aspects that can identify the presence of judicialization of politics, then this falls into the category of using the Constitutional Court in order to expand the number and legal instruments available to be used in political struggle efforts.⁵⁵

The practice of Judicialization of politics in its aspirations is an expansion of the judiciary's authority to try cases regarding public policy that have a political element in order to limit the authority of law makers. This phenomenon occurs because it is a logical consequence that Constitutional Law is another form of politics.⁵⁶ However, if this practice is used to legitimize certain groups then this is an injury to the spirit of the birth of the Constitutional Court. Constitutional Justice Wahiduddin Adams in his dissenting opinion also stated that the addition of conditions made by the Constitutional Court could potentially be activated as a deliberate advantage (privilege) which in the end becomes an unfair legal certainty that is in conflict with Article 28D paragraph (1) The 1945 Constitution of the Republic of Indonesia.⁵⁷

This privilege is real and directly enjoyed by one of the political party coalitions in legitimizing the candidate they will nominate, namely the eldest son of the President of the Republic of Indonesia, Gibran Rakabuming Raka. It became a special note when the petition made by the applicant in Decision number 90/PUU-XXI/2023 mentioned the name Gibran Rakabuming Raka in providing legal reasons why the relevant article had to be decided by the Constitutional Court. Gibran Rakabuming Raka's name is mentioned in the Application 8 (eight) times accompanied by the applicant's admiration for the Mayor of Solo. This tendency can certainly be read clearly politically and is confirmed by the declaration of the appointment of Gibran Rakabuming Raka as vice presidential candidate which was legitimized by the Constitutional Court decision.

The Constitutional Court was once again tested by a decision that was closely related to the dignity of constitutional judges. This decision is a very political decision and has a tendency to privilege and legitimize certain groups in smoothing their political paths. Even though the Constitutional Court was born as a solution to enforce the constitution constitutionally, it is called the guardian of the constitution and the sole judicial interpreter of the constitution.⁵⁸

⁵³ Constitutional Court Decision number 90/PUU-XXI/2023,.. p.58

⁵⁴ Constitutional Court Decision number 90/PUU-XXI/2023,.. p.95

⁵⁵ Rachel Sieders, "Cultures of Legality: Judicialization and Political Activism in Latin America",.. p.13

⁵⁶ Ran Hirschl, "Judicialization of Pure Politics Worldwide", *Fordham Law Review*, Faculty of Law and Department of Political Science University of Toronto, Toronto, 2006, p.723.

⁵⁷ Constitutional Court Decision number 90/PUU-XXI/2023,.. p.93

⁵⁸ Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, (Jakarta: Sinar Grafika, 2012), 2nd printed, p.130.

The constitutional court in a rule of law state is an institution of judicial power that is independent or has institutional independence. In line with what was conveyed by I Dewa Gede Palguna that in a legal state there are 9 characteristics that must be present in it, some of which are “*constitutionalism, an independent judiciary, law must be fairly and consistanly applied ...*”⁵⁹

The doctrine of constitutionalism, which is defined as the limited government, is not easily implemented in our constitution. The Constitutional Court as the bulwark of the constitution has in fact broken its hammer in the face of politics. This has a big impact on the lack of independence of constitutional judges who should be independent from politics between the two other branches of power, namely the legislative and executive powers. the judiciary was even named “*The least dangerous (branch) to the political rights of the constitution*”.⁶⁰ The Constitutional Court is always envisioned as an institution in which the hopes of society reside. This institution is even the only institution that has statesmanship requirements where the definition of a statesman is not simple, Manuel L. Quezon, President of the Philippines (1935-1944), stated “*My loyalty to my party ends when my loyalty to my country begins*”.⁶¹

CONCLUSION

- a. Open Legal Policy is one of the models for decisions by the Constitutional Court in adjudicating cases that fall under the authority of policy makers, in this case the People's Representative Council. Various decisions related to age limits always end with the Open Legal Policy decision. However, the Constitutional Court partially granted Decision Number 90/PUU-XXI/2023 and provided alternative conditions which should be within the authority of policy makers.
- b. The phenomenon of the judicialization of politics or judicialization of the courts is a practice that occurs in the relationship between legislators and branches of judicial power. This phenomenon occurs as a transformation in resolving political problems through legal instruments, namely the courts. This phenomenon of the judicialization of politics is testing the constitutionality of the age limit for presidential candidates and vice presidential candidates as contained in the Constitutional Court Decision Number 29-51-55-90/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections. Various dynamics occur due to different decisions between Decision Number 29-51-55/PUU-XXI/2023 and Decision Number 90/PUU-XXI/2023.

RECOMMENDATION

1. The Constitutional Court remains consistent in deciding cases regarding age limits for public office using the concept of open legal policy.
2. The public examines Decision Number 29-51-55-90/PUU-XXI/2023 concerning Review of Law Number 7 of 2017 concerning General Elections by providing academic notes of the a quo decision
3. Include age limits for presidential and vice presidential candidates in the Constitution through the 1945 Amendment to the Republic of Indonesia Constitution

⁵⁹ I Dewa Gede Palguna, Mahkamah Konstitusi. Dasar Pemikiran, Kewenangan, dan Perbandingan dengan Negara Lain, (Jakarta: Konstitusi Press, 2018), p.34-41

⁶⁰ Alexander Hamilton dalam Daniel Wirls, The Federalist Papers and Institutional Power in American Political Development, (New York: Palgrave Macmillan, 2015), p.26.

⁶¹ It was stated by Jimly Asshiddiqie that “..constitutional judges must have finished with themselves because they are the only officials referred to by the 1945 Constitution as statesmen” in Suara Pemuda, 2 February 2017, p.6. Quoted via Achmad Edi Subiyanto, Hakim Konstitusi : Kekuasaan Kehakiman dan Pengisian Jabatan, (Depok : Rajawali Pers, 2019), h.13

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