

Legal Philosophy Review of The Authority to Add Norms in the Constitutional Court Decision No. 90/PUU-XXI/2023

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Article Info

Received:

Revised:

Accepted:

Keywords:

*Legal Philosophy;
Constitutional Court
Decision; Authority;
Adding Norm.*

Abstract

The Constitutional Court (MK) has a central role in maintaining the constitutionality of laws in Indonesia. One of its important functions is to review laws against the 1945 Constitution. However, the Constitutional Court's review should still respect the authority of the legislative power as the legislator. On the contrary, the addition of provisions occurred in Constitutional Court Decision No. 90/PUU-XXI/2023. The problems raised in this research are the position of Constitutional Court as the guardian of the constitution and the legal philosophy review of the authority to add norms in the a quo decision. The method used is normative juridical with a statutory, conceptual, and philosophy approach. The Constitutional Court did not reflect as the guardian of a quo decision. Then, philosophical analysis of the a quo decision found the following points: 1) in terms of positivism, the Constitutional Court exceeded its authority; 2) the addition of provisions in a quo decision has significant impact on national legislation; and 3) the limitation of the Constitutional Court's authority in adding provisions in its decision.

I. Introduction

The third amendment to the 1945 Constitution passed on November 10, 2001 clearly states in Article 1 paragraph (3) that Indonesia is a state of law. In line with Plato's views developed by his student, Aristotle emphasized the meaning of his teacher's views by stating, a good state is a state governed by a constitution and sovereignty of law.¹ The rule of law is the limitation of state power by law in the sense that all attitudes, behaviors and actions carried out by the rulers and also those carried out by their citizens must be based on the law.² The nature of the rule of law is that state officials as state equipment can only act in accordance with established rules.³ There are three characteristics of the rule of law put forward by Sudargo Gautama, one of which states that the characteristic of the rule of law is the existence of a separation of powers.⁴ Montesquieu as a figure who initiated the theory of separation of powers divides three types of power, legislative, executive and judicial. These three types of power according to Montesquieu are separate starting from their duties and organs.⁵ In Indonesia, the State Institutions holding legislative power are the People's Consultative Assembly, the House of Representatives, the Regional Representative Council. Executive Power Holders are the President and Vice President and their Ministers. State institutions holding judicial power are the Supreme Court, Constitutional Court, Judicial Commission. The separation of powers is of course expected to prevent interference between state organs in the exercise of their respective powers.

Article 1 point 2 of Law No. 12/2011 on the Formation of Laws and Regulations stipulates that Laws and Regulations are written regulations that contain legal norms that are binding in general and are formed or stipulated by state institutions or authorized officials through procedures stipulated in the Laws and Regulations. The House of Representatives holds the power to form laws based on Article 20 paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Each draft law is discussed by the House of Representatives and the President for joint approval. The House of Representatives and the President are authorized to discuss the draft law which will then be approved together. The legislator has the discretion to determine a rule, prohibition, obligation or limitation contained in a legal norm which is the policy

¹ Fikri Hadi, "NEGARA HUKUM DAN HAK ASASI MANUSIA DI INDONESIA The State of Law and Human Rights in Indonesia," *Wijaya Putra Law Review* 1, no. 2 (2022): 170–88.

² Abdul Aziz Hakim, *Negara Hukum Dan Demokrasi Di Indonesia* (Yogyakarta: Pustaka Pelajar, 2015).

³ Nomensen Sinamo, *Hukum Tata Negara Indonesia* (Jakarta: Permata Aksara, 2014).

⁴ Abdul Aziz Hakim, *Negara Hukum Dan Demokrasi Di Indonesia*.

⁵ Sinamo, *Hukum Tata Negara Indonesia*.

choice of the legislator.⁶

The Constitutional Court (MK) has a central role in maintaining the constitutionality of laws in Indonesia. One of its important functions is to review laws against the 1945 Constitution. However, in some cases, the Constitutional Court not only declares a norm constitutional or not, but also adds a new norm in its decision. This phenomenon has caused debate, including in Constitutional Court Decision Number 90/PUU-XXI/2023, where the Court added a norm that was not previously contained in the law under review. It is very clear that the concept of separation of powers in the Trias Politica teaching taught by Montesquieu expects checks and balances between state institutions to supervise and test each other so that each state institution will not exceed the predetermined limits of power.⁷ One of the amendments to the 1945 Constitution is to add the Constitutional Court as one of the judicial power institutions in the judicial power. The Constitutional Court was authorized in the third amendment to the 1945 Constitution. The Constitutional Court is given the authority to hear cases at the first and last level whose decisions are final to test laws against the Constitution,⁸ decide disputes over the authority of state institutions whose authority is granted by the Constitution and decide on the dissolution of political parties and decide disputes about the results of general elections.⁹ One of the authorities of the Constitutional Court is to test the law against the Constitution. This means that the Constitutional Court only tests whether the norms in the law are contrary to the Basic Law or not. The Constitutional Court is only limited to testing and deciding on the contradiction of a norm.¹⁰

Constitutional Court Decision Number 90/PUU-XXI/2023 adjudicates in the case of Testing Law Number 7 of 2017 concerning General Elections against the 1945 Constitution of the Republic of Indonesia, with the decision stating that 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 has no binding law, as long as it is not interpreted as being at least 40 (forty) years old or having / currently occupying an

⁶ Radita Ajie, "Batasan Pilihan Kebijakan Pembentuk Undang-Undang (Open Legal Policy) Dalam Pembentukan Peraturan Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi," *Legislasi Indonesia* 13, no. 02 (2016): 111–12.

⁷ Ellydar Chaidir, *Sistem Pemerintahan Negara Republik Indonesia Pasca Perubahan Undang-Undang Dasar 1945* (Yogyakarta: Total Media, 2008).

⁸ Khairul Fahmi et al., *Dinamika Perlindungan Hak Konstitusional Warga; Mahkamah Konstitusi Sebagai Mekanisme Nasional Baru Pemajuan Dan Perlindungan HAM* (Pustaka Masyarakat Setara, 2013).

⁹ Andy Wiyanto, "Pertanggungjawaban Presiden Dan Mahkamah Konstitusi," *Jurnal Konstitusi* 7, no. 3 (2010): 209–32.

¹⁰ Retno Widiastuti and Ahmad Ilham Wibowo, "Pola Pembuktian Dalam Putusan Pengujian Formil Undang-Undang Di Mahkamah Konstitusi Pattern of Evidence in Decisions on Formal Review of Laws in The," n.d.

office elected through general elections including regional head elections. So that Article 169 letter q of Law Number 7 of 2017 concerning general elections reads “at least 40 (forty) years old or have / are currently occupying positions elected through general elections including regional head elections. The Constitutional Court in Decision Number 90/PUU-XXI/2023 not only ruled that Law Number 7/2017 on General Elections is contrary to the Constitution, but the Constitutional Court also added a phrase in the form of as long as it is not interpreted as being at least 40 (forty) years old or having / currently occupying an office elected through general elections including regional head elections. The Constitutional Court Decision Number 90/PUU-XXI/2023 not only gives the meaning of the contradiction of a law to the Constitution but also provides a new order in its decision. This is precisely the problem that the extent to which the constitutional court has the authority and is reviewed with legal philosophy to add new norms in its own decision.¹¹

Based on the background that has been compiled, the problem formulations raised are 1) how the Constitutional Court as the guardian of the constitution in the Constitutional Court Decision Number 90/PUU-XXI/2023; and 2) how the legal philosophy review of the authority to add norms in the Constitutional Court Decision Number 90/PUU-XXI/2023.

2. Research Method

The research method used in this research is normative juridical with a statutory approach, conceptual approach, and philosophical approach. The statutory approach is a research approach that uses legal materials as the main research material.¹² The laws and regulations used in this research are the 1945 Constitution of the Republic of Indonesia, Law No. 7 of 2017 concerning Elections (Election Law), and MKRI Decision No. 90/PUU-XXI/2023. Conceptual approach is a research approach that prioritizes concepts and theories that live in legal science.¹³ The theories used in answering the problems of this research are constitutional theory, the concept of the Constitutional Court, and the theory of judicial review. Philosophical approach is an approach used in normative juridical research methods using legal philosophy as the main material. The data collection technique used is the literature study technique. Literature studies use literature as the main

¹¹ Abdul Ghofur Anshori, *Filsafat Hukum* (Ugm Press, 2018).

¹² Peter Mahmud Marzuki, *Penelitian Hukum: Edisi Revisi* (Prenada Media, 2017).

¹³ Bahder Johan Nasution, “Metode Penelitian Ilmu Hukum, Mandar Maju, Cetakan Kesatu” (Bandung, 2008).

research material to answer the research problems raised. The data analysis technique used to answer research problems is descriptive prescriptive by prioritizing research suggestions as research outputs.¹⁴

3. Results and Discussion

Constitutional Court As the Guardian of the Constitution in the Constitutional Court Decision Number 90/PUU-XXI/2023

The Constitutional Court is a new state institution established by the 3rd Amendment to the 1945 Constitution of the Republic of Indonesia. This state institution has the authority to review the constitution and other authorities as stipulated in Article 24C paragraph (1) of the 1945 Constitution which reads that the Constitutional Court has the authority to review laws against the 1945 Constitution, examine disputes over the authority of state institutions whose authority is regulated in the 1945 Constitution, resolve election disputes, and dissolve political parties. However, there is another authority of the Constitutional Court contained in paragraph (2) which is authorized to hear impeachment cases.¹⁵ The context of all these authorities has the consequence that the Constitutional Court is the protector of the constitution.

The constitutional court mechanism itself is a new thing adopted in the Indonesian constitutional system with the establishment of the constitutional court. The constitutional court in Indonesia is an independent court that adjudicates the enforcement of the Constitution actually implemented in the daily administration of the state. Testing of legal products and steps of state institutions in accordance with the Constitution or not is a new mechanism after the amendment of the 1945 Constitution of the Republic of Indonesia.¹⁶ Prior to the amendment, there was no such testing process. The constitutional authority of the constitutional court itself is a manifestation of the checks and balances mechanism that places all state institutions in the same level and position, so that they can monitor and balance each other in the practice of the state.¹⁷ The existence of the constitutional court is clearly a progressive step to examine and evaluate the

¹⁴ Depri Liber Sonata, "Metode Penelitian Hukum Normatif Dan Empiris: Karakteristik Khas Dari Metode Meneliti Hukum. FIAT JUSTISIA: Jurnal Ilmu Hukum, 8 (1), 15--35," *C:/Users/User/Downloads/283-Article Text-1238-2-10-20151116. Pdf*, 2014.

¹⁵ Magdalena E J Sarkol, "Kewenangan Mahkamah Konstitusi Dalam Menguji Undang-Undang Terhadap Undang-Undang Dasar Tahun 1945," *LEX ADMINISTRATUM* 3, no. 7 (2015).

¹⁶ Dian Agung Wicaksono, "Dynamics of Granting Legal Standing to the Indigenous Community in Constitutional Review of Law: Dinamika Pemberian Kedudukan Hukum Pemohon Bagi Masyarakat Hukum Adat Dalam Pengujian Undang-Undang," *Jurnal Konstitusi* 20, no. 3 (2023): 494–513.

¹⁷ Sunarto Sunarto, "Prinsip Checks and Balances Dalam Sistem Ketatanegaraan Indonesia," *Masalah-Masalah Hukum* 45, no. 2 (2016): 157–63.

performance of state institutions, especially in the process of maturing the politics of nation and state.¹⁸ This is important because all state institutions at the constitutional level run and are politically responsible. However, with the existence of the constitutional court, all state institutions are held accountable juridically through the constitutional court through the checks and balances mechanism.¹⁹

All disagreements regarding the implementation of the democratic agenda must be resolved through legal channels. This is important because if it is resolved through the political process, the resolution will be ambiguous and uncertain for justice seekers.²⁰ This context is closely related to the laws passed by the DPR, which essentially reflect the will of the majority of the people through indirect democracy that occurs in the DPR together with the President who has discussed and approved the draft law as regulated in Article 20 paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which reads that "Every draft law is discussed by the House of Representatives and the President for mutual approval." This context shows that the process of approving draft laws is carried out by those who have a mandate from the people through general elections to form and pass laws.²¹ However, the context of this law is not always in line with the will of the people as reflected in the 1945 Constitution as the social contract of the Indonesian people. This is what gave rise to the concept of judicial review of laws against the 1945 Constitution.

The context of this testing authority did not originate from the establishment of the Constitutional Court in 1940 in Austria, but came from the theoretical framework of the Marbury case developed by Chief Justice John Marshall at that time. The opinion of John Marshall is reinforced by Alexander Hamilton's syllogism in The Federalist No. 78 which states that:²²

"The interpretation of the laws is the proper and peculiar province of the courts. A constitution is in fact, and must be, regarded by the judges as a fundamental law. It therefore belongs to them to ascertain its meaning

¹⁸ Irmayadi Sastra and others, "CHECK AND BALANCES KEKUASAAN LEMBAGA NEGARA GUNA MENATA PEMERINTAHAN YANG BAIK (GOOD GOVERNMENT)," *JHR (Jurnal Hukum Replik)* 5, no. 2 (2017): 184–99.

¹⁹ Ibnu Sina Chandranegara, "Architecture of Indonesia's Checks and Balances," *Const. Rev.* 2 (2016): 270.

²⁰ Jamil Jamil and others, "Evaluasi Penyelesaian Sengketa Proses Pemilihan Umum Dalam Perspektif Konstruksi Hukumnya," *Perspektif* 25, no. 1 (2020): 12–19.

²¹ Rajab Ahirullah and Muhtar Said, "Urgensi Checks and Balances Dalam Pembentukan Undang-Undang Di Indonesia," *Advances In Social Humanities Research* 1, no. 9 (2023): 1015–31.

²² Alexander Hamilton, James Madison, and John Jay, *The Federalist: With Letters of Brutus* (Cambridge University Press, 2003).

as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought of course to be preferred; or in other words, the constitution ought to be preferred to the statute, the intention of the people to the intention of their agents."

Hamilton's analysis tends to be a hierarchical argument, namely the position of basic law (basic law) is higher than the law itself. The substance of this formal argument Hamilton inserts a substantive argument explaining that the constitution is higher than the law. According to him, the constitution reflects "the intention of the people", while the law shows "the intention of their agents". Hamilton explained again that:

"Not does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that where the will of the legislature declared in its statutes, stands in opposition to that of the people declared in the constitution, the judges ought to be governed by the latter, rather than the former. They ought to regulate their decisions by the fundamental laws, rather than by those which are not fundamental."

Based on the above statement, Hamilton tends to give a substantive rather than formal statement, which Hamilton gives the conception that the people's will to the constitution is higher than the position of the legislature and judicial power. His conclusions converge on that judges should be subject to a product of the will of the people expressed in the constitution rather than the will of the legislator expressed in the law. Thus, judges can ignore laws that are deemed incompatible with the provisions of the constitution (unconstitutional).

Then when looking at the theoretical framework of the issue of the constitutionality of Section 13 of the 1789 Judiciary Act put forward by Chief Justice John Marshall, it becomes the legal basis for the plaintiff in taking mandamus efforts to the Supreme Court of the United States.²³ In this decision, Marbury asked the Supreme Court to issue an order (*mandamus*) to the government to issue a decree of his appointment as a judge that was held by James Madison as Secretary of States. Although in the end, the decision did not grant Marbury's request, but rather invalidated the section on the grounds that the provisions of section 13 were contrary to the constitution. The context of this case calls for a very central role to be played by the United States Supreme Court in

²³ Hamilton, Madison, and Jay.

testing the constitutionality of a law against the constitution of a country.²⁴

A previous view requires that the Supreme Court's steps in assessing the constitutionality of a law are also closely related to its role in assessing a concrete case.²⁵ Such as the authority possessed by the Constitutional Court whose decision is final and binding. This does not necessarily mean that the Constitutional Court's decision is necessarily true. The truth of the Constitutional Court's decision is only presumptive, where the decision must be considered correct only to the extent that there are no more legal remedies.²⁶ Other government bodies in responding to the Constitutional Court's decision must also be critical, such as following it if it is right, and not following it if it is wrong. This understanding in principle has been expressed by Justice Robert H. Jackson, the Supreme Court of the United States, when explaining the concept of "final". In *Brown v. Allen* (1953), Justice Jackson stated: "*We are not final because we are infallible, but we are infallible only because we are final.*"²⁷ Thus, the position of the Constitutional Court in initiating the constitutionality of a law must be interpreted as such and has a very central position in the Indonesian constitutional system.

The Constitutional Court was established to guard and supervise so that the constitution as the highest norm is carried out properly in the administration of state life in accordance with the principles of the rule of law. This concept correlates with the position of the Constitutional Court as the guardian of the constitution which implies that the Constitutional Court is the only institution authorized to protect the constitution and its interpretation is considered authentic to the articles in the constitution.²⁸ This has given rise to the concept that the Constitutional Court is present as a counterweight to the arrogance of the government and regulators who are not in accordance with the ethics of the institution and with the 1945 Constitution as its foothold. The formation of laws and the entire constitutional process will basically continue to have elements of political interests in it, therefore this balancing institution is very necessary. No wonder the nickname for the Constitutional Court is The Guardian of the

²⁴ Meidiana Meidiana, "Integrasi Pengujian Peraturan Perundang-Undangan Oleh Mahkamah Konstitusi," *Undang: Jurnal Hukum* 2, no. 2 (2019): 381–408.

²⁵ Said Sampara, "Fungsi Pengawasan Mahkamah Agung Dalam Penyelenggaraan Peradilan Yang Imparsial," *Al-Ishlah: Jurnal Ilmiah Hukum* 20, no. 1 (2017): 18–28.

²⁶ Dedy Syahputra and Zulman Subaidi, "Kedudukan Dan Mekanisme Pengisian Hakim Mahkamah Konstitusi Dalam Sistem Ketatanegaraan Indonesia," *REUSAM: Jurnal Ilmu Hukum* 9, no. 1 (2021).

²⁷ Keith E Whittington, "Political Foundations of Judicial Supremacy: The President, the Supreme Court, and Constitutional Leadership in US History," *Political Foundations of Judicial Supremacy*, 2007.

²⁸ Heru Setiawan and Fifiana Wisnaeni, "Rekonseptualisasi Kewenangan Mahkamah Konstitusi Dalam Upaya Memaksimalkan Fungsi Mahkamah Konstitusi Sebagai the Guardian of Constitution" (Fakultas Hukum, 2017).

Constitution.²⁹

When viewed from a historical perspective, the idea of establishing the Constitutional Court is based on serious efforts to provide protection for the constitutional rights of citizens and the spirit of upholding the constitution as the *grundnorm* or highest norm,³⁰ which means that all laws and regulations that have a hierarchy below the constitution must follow the provisions in the constitution and must not conflict with it. The constitution is a form of delegation from the people to the state in the administration of the state and government.³¹ Thus, the constitution must be maintained and guarded in terms of enforcement and implementation. This also relates to all forms of deviation from it, both by holders of power and the rule of law under the constitution against the constitution, being a concrete form of denial of the holders of state sovereignty, namely the people themselves.

When juxtaposed with Constitutional Court Decision No. 90/XXI-PUU/2023, the concept of guardian of constitution is completely invisible. As is known, the decision tested Article 169 letter q of Law No. 7/2017 on General Elections by changing the age limit for vice-presidential candidates from “at least 40 (forty) years old”, to “at least 40 (forty) years old or has / is currently holding an office elected through general elections including regional head elections”. The concept of a constitutional protector here is not visible at all, this is due to several reasons. First, the Constitutional Court experienced a very rapid change of stance, even only about 1 (week) after deciding a case with the same object of dispute (Article 169 letter q of the Election Law). Second, the composition of constitutional judges who accepted and rejected seemed gray and did not reflect the legal certainty of the decision (5 (five) judges accepted and 4 (four) judges rejected). Third, there was pressure from outside the Court in deciding the case.

The context of the Court experiencing a very rapid change on the same case can be seen in the dissenting opinion of Constitutional Judge Saldi Isra who explained that there were 3 (three) cases before Decision No. 90/PUU-XXI/2023 which had the object of dispute of Article 169 letter q of the Election Law, namely the case contained in Decision No. 29-51-55/PUU-XXI/2023 in which the entire

²⁹ A Ahsin Thohari, “Mahkamah Konstitusi Dan Pengokohan Demokrasi Konstitusional Di Indonesia,” *Jurnal Legislasi Indonesia* 6, no. 3 (2018): 95–108.

³⁰ Agnes Fitryantica, “Harmonisasi Peraturan Perundang-Undangan Indonesia Melalui Konsep Omnibus Law,” *Gema Keadilan* 6, no. 3 (2019): 300–316.

³¹ Yuniar Riza Hakiki and Taufiqurrahman Taufiqurrahman, “The Idea of Structuring National Legislation Based on The Ratio of Decidendi & Obiter Dictum Constitutional Court Decision,” *Jurnal Konstitusi* 20, no. 1 (2023): 78–99, <https://doi.org/10.31078/jk2015>.

decision, the Constitutional Court held the stance that Article 169 letter q of the Election Law was the authority of the legislators to change it, or the object of dispute was declared an open legal policy which only the legislators had the authority to change it. Meanwhile, in Decision No. 90/PUU-XXI/2023, the Court actually changed course by using the ruling to grant the Petitioner's request in part. The context of the Court's change of direction has occurred in several previous cases, but not as quickly as in Decision No. 90/PUU-XXI/2023. This is actually ambiguous and was even said to be a strange and extraordinary event by Constitutional Judge Saldi Isra.³²

Then regarding the composition of the judges who decided case no. 90/PUU-XXI/2023. There were 5 (five) judges who accepted the decision and 4 (four) judges who rejected it. However, in the camp of judges who accepted this case, there was a gray area in accepting the petition from the applicant. This is clearly explained in the dissenting opinion of Constitutional Judge Saldi Isra, who explained that the average of the constitutional judges who accepted this case tended to accept the position of the governor's regional head only rather than the wording of Article 169 letter q of the Election Law contained in the verdict. In his dissenting opinion, Constitutional Judge Saldi Isra also gave the opinion that only about 3 (three) judges accepted that this verdict should be limited to public positions elected as governors only, not to other positions elected in general elections as granted by the Court. If so, the Court should have rejected this case with the composition of judges who rejected more dominant than judges who accepted. Then the Constitutional Court, according to Constitutional Judge Saldi Isra, has made a leap of argumentation that makes the Court seem to move too far from what has been requested by the Petitioner.

Then, the Constitutional Court's decision has political content in it. This can be seen from the position of the Chief Justice of the Constitutional Court, who was closely related to the President of the Republic of Indonesia at that time. This context becomes interesting when looking at MKMK Decision No. 2/MKMK/L/2023, which dismissed Constitutional Judge Anwar Usman from his position as Chief Justice of the Constitutional Court. Moreover, in the MKMK Decision, the reported judge was definitely proven to have violated the principle of impartiality, application point 5 letter b and the principle of integrity, application point 2 contained in Sapta Karsa Utama. Thus, Constitutional Judge Anwar Usman was sanctioned with dismissal.

³² Mahkamah Konstitusi Republik Indonesia, *Putusan No. 90/PUU-XXI/2023* (Jakarta: Sekretariat Jenderal & Kepaniteraan Mahkamah Konstitusi RI, 2023).

From the entire explanation above, it can be said that the Constitutional Court does not reflect the guardian of the constitution at all. This is very unfortunate considering that the Constitutional Court is a balancing institution for constitutional power and makes all positions of constitutional state institutions balanced. This condition is a lesson for political life in Indonesia which hopefully will not happen again in the future. The context of the Constitutional Court as the guardian of the constitution must be maintained, both by the community and the actors who take part in the Court itself, namely the constitutional judges and the state civil apparatus assigned there.

Legal Philosophy Review of the Authority to Add Norms in the Constitutional Court Decision Number 90/PUU-XXI/2023

Legal philosophy has a background of emergence from 3 (three) things. First, rationalism in the 18th century where natural law or natural law prioritizes reason and overrides historical facts, especially in the national condition of a nation. The universal and eternal nature of natural law influences the way of thinking that everything that exists in this world is the will of the Creator (taken for granted). The discourse on justice, equality among people, ethics and morality had its momentum, giving rise to famous philosophers including Palto, Aristotle, Augustine, and others.³³

However, later, this school was eroded and criticized by the second school, namely Legal Positivism because the flow of nature does not have legal certainty. Legal positivism departs from rational logic that emphasizes that the law must be written, systematized and made by the state which leads to a prohibition for judges to interpret the law other than what has been written.³⁴ This is because the law is considered to solve all legal problems that exist in life. The position of law is considered a powerful medicine in treating all problems. However, legal positivism has been criticized for only prioritizing state formality and legal certainty. This understanding seems to turn a blind eye to the essence of justice. For the sake of legal certainty, justice can be put aside. However, this concept is not completely abandoned because it is widely adopted in the existing legal system in Indonesia which still uses legal certainty in addition to the existence of legal expediency and justice.³⁵

The positivism aspect of law was conveyed by H.L.A. Hart who said that law

³³ Anshori, *Filsafat Hukum*.

³⁴ Irham Nugroho, "Positivisme Auguste Comte: Analisa Epistemologis Dan Nilai Etisnya Terhadap Sains," *Cakrawala: Jurnal Studi Islam* 11, no. 2 (2016): 167–77.

³⁵ Icha Cahyaning Fitri, Dominikus Rato, and Bayu Dwi Anggono, "PUNGUTAN OTORITAS JASA KEUANGAN TERHADAP INDUSTRI KEUANGAN DIPANDANG DARI ALIRAN POSITIVISME HANS KELSEN," *Jurnal Yustisiabel* 8, no. 1 (2024): 80–88.

must be seen from both its external and internal aspects. From its external aspect, the law is seen as an order from the authorities, as defined by Austin. On the other hand, when looking from the internal aspect, namely the attachment to the order and the ruler inwardly.³⁶ In looking at legal material, Hart argues that legal material is derived from moral principles, including principles from certain realities of life. Nevertheless, like the adherents of Legal Positivism, Hart distinguishes strictly between law (in the sense of *das Sein*) and morals (*das Sollen*).³⁷ As for what is called law, it only concerns the formal aspect. This means that a law can be called a law, even though materially it is not worth obeying because it contradicts moral principles.³⁸

In the viewpoint of legal positivism, the Constitutional Court in Constitutional Court Decision No. 90/PUU-XXI/2023 has exceeded the authority given to it. As is known, the authority of the Constitutional Court is regulated in Article 24C paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia, which reads that "The Constitutional Court has the authority at the first and last levels whose decisions are final to test laws against the Constitution, decide disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties, and decide disputes about the results of general elections." The context of authority is further interpreted as an obligation mentioned in paragraph (2), which is obliged to give a decision on the opinion of the House of Representatives regarding alleged violations by the President and / or Vice President according to the Constitution.³⁹ The whole of this authority is restrictive, especially since this testing authority does not change the provisions of the articles in the law which should be the authority of the legislators, not the authority of the Constitutional Court.⁴⁰ This is also closely related to Article 169 letter q of the Election Law which is the object of dispute in Constitutional Court Decision No. 90/PUU-XXI/2023 which is the authority of the legislators. This was also conveyed in Constitutional Court Decision No. 29/PUU-XXI/2023 which decided that Article 169 letter q of the Election Law is the domain of the legislators in terms of the minutes of amendments to the 1945 Constitution of the Republic of Indonesia, which reads that:

"Based on the careful tracing and retracing of the minutes of the 1945 Constitution

³⁶ Sukarno Aburaera, Muhadar, and Maskun, *Filsafat Hukum: Teori Dan Praktik, Sustainability (Switzerland)*, vol. 11 (Jakarta: Kencana, 2019).

³⁷ Mario Julyano and Aditya Yuli Sulistyawan, "Pemahaman Terhadap Asas Kepastian Hukum Melalui Konstruksi Penalaran Positivisme Hukum," *Crepido* 1, no. 1 (2019): 13–22.

³⁸ Nugroho, "Positivisme Auguste Comte: Analisa Epistemologis Dan Nilai Etisnya Terhadap Sains."

³⁹ Zairin Harahap, "Menyoal Kewenangan Mahkamah Konstitusi Menguji Perppu," *Jurnal Yudisial* 7, no. 3 (2014): 311–28.

⁴⁰ Ari Wuisang, "Kewenangan DPR Dalam Ratifikasi Perjanjian Internasional Pasca Terbitnya Putusan Mahkamah Konstitusi No. 13/PUU-XVI/2018," *PALAR (Pakuan Law Review)* 5, no. 2 (2019).

amendment above, the Court finds legal facts that the majority of the 1945 Constitution modifiers or factions in the MPR at that time were of the opinion that the minimum age of the President was 40 (forty) years. However, on the grounds that, among other things, the age issue in the future may have dynamics and there is no ideal benchmark, so that it should not be because of the age issue even though it has met the requirements stipulated in the Constitution, it cannot register as President, so the Constitutional amendment agreed to determine the age issue regulated by law. In other words, the determination of the minimum age of the President and Vice President is the domain of the legislators."

From this paragraph, it can be found that actually the regulation of the age of the vice-presidential candidate falls into the realm of lawmakers, not into the realm of judicial power to change the substance of the article.⁴¹ It can be said that the Constitutional Court through Constitutional Court Decision No. 90/PUU-XXI/2023 has exceeded the authority given to it by the Basic Law, as well as the authority of the legislators who should be authorized by positive law to change or further regulate the age threshold provisions of the Vice President.⁴² Thus, the Constitutional Court has violated the law itself by adding a new norm that was not formulated by the legislators in Article 169 letter q of the Election Law through Constitutional Court Decision No. 90/PUU-XXI/2023.

Then when looking at the theory of natural law, legal provisions come from natural knowledge (based on reason) and knowledge of faith (based on divine revelation). This distinction is used by Aquinas in explaining the differences between philosophy and theology in the viewpoint of the philosophical theory of natural law. However, there is an interpretation of Aquinas from Friedmaan that illustrates Aquinas' thinking by stating that:⁴³

"Since the world is governed by God-ordained provisions, all societies throughout the universe are governed by reason derived from God. God's law is above all things. Nevertheless, not all of God's law is accessible to man. This kind of part is incomprehensible to man, and is expressed through eternal law as the incarnation of God's wisdom, which governs all actions and movements. Natural Law is a part of God's law, a part that is revealed in the mind of nature. Man, as a reasonable being, applies this part of God's Law to human life, so that he can distinguish between good and bad. This comes from the principles of eternal law, as revealed in

⁴¹ Dachran Busthami, "Kekuasaan Kehakiman Dalam Perspektif Negara Hukum Di Indonesia," *Masalah-Masalah Hukum* 46, no. 4 (2017): 336–42.

⁴² Romi Librayanto et al., "Penataan Kewenangan Mahkamah Konstitusi Dalam Memperkuat Independensi Kekuasaan Kehakiman," *Amanna Gappa*, 2019, 43–66.

⁴³ Aburaera, Muhadar, and Maskun, *Filsafat Hukum: Teori Dan Praktik*.

*natural law, which is the source of human law. But Thomas Aquinas established a fourth category, which seems to be in the same relationship with human law as the relationship between eternal law and natural law. This he called *lex divina*, the positive law established by God in the Gospel for all mankind. All laws established by human authority, i.e. positive law, must fall within these limits. The hierarchy of legal values, perhaps the *lex divina*, is the explanation of God's written reason. The lowest becomes positive law which is valid only to the extent that it does not contradict natural law, and of course eternal law. Human law is part of the smallest sphere of God's dominion; there is no separation between belief and reason; on the contrary, reason is part of the manifestation of belief."*

Basically, according to Aquinas, there are 4 (four) kinds of law, namely: (1) *lex aeterna* (law from God directly that cannot be impregnated by human senses); (2) *lex divina* (law of God's ratio that can be impregnated by human senses); (3) *lex naturalis* (natural law, which is the incarnation of *lex aeterna* into human ratio); and (4) *lex positivist* (application of *lex naturalis* in human life in the world).⁴⁴

Then in general, the flow of natural law is basically divided into 2 (two) kinds, namely: (1) irrational natural law school, and (2) rational natural law school. The irrational school of natural law believes that universal and eternal laws come directly from God.⁴⁵ Meanwhile, the rational school of natural law assumes that universal and eternal laws come from human reason. These two views reflect how natural law is seen as an integral and important part of the hierarchy of legal values. The discourse on the concept of rational and irrational natural law essentially remains on the same corridor, where the essence of nature becomes the center in finding the essence of natural law itself. This concept meets morality based on the provisions desired by God to the realm of the implementation of the law itself (*das sein*).⁴⁶

According to the concept of natural law theory itself, Constitutional Court Decision No. 90/PUU-XXI/2023 which adds new provisions to the Election Law is accepted by the concept of natural law theory if it is morally acceptable and fulfills substantive justice. The natural law approach can support the action of adding norms carried out by the Constitutional Court through Decision No. 90/PUU-XXI/2023, but still in accordance with generally accepted moral principles in fulfilling substantive justice that can only be felt by the community. This is important because the corridor

⁴⁴ Anshori, *Filsafat Hukum*; Inge Dwisvimiar, "Keadilan Dalam Perspektif Filsafat Ilmu Hukum," *Jurnal Dinamika Hukum* 11, no. 3 (2011): 522–31.

⁴⁵ Andri Yanto, *Mazhab-Mazhab Hukum: Suatu Pengantar Memahami Dimensi Pemikiran Hukum* (Penerbit Segap Pustaka, 2021).

⁴⁶ Aulia Rahmat, "Rasionalisasi Hukum Alam Oleh Hugo Grotius: Dari Humanisasi Menuju Sekularisasi," *Undang: Jurnal Hukum* 2, no. 2 (2019): 433–70.

of morality according to natural law theory comes from God and its implementation can only be felt by the community. When the addition of the article turns out to fulfill the wishes of the community and is still within the corridor of morality, then it can be done.

Furthermore, in terms of the critical legal school which embodies a legal theory that demands that the doctrinal approach is flawed, with abstract principles such as independence, freedom of contract and property rights can cause contradictions in various ways. Those who believe in critical legal theory use empiricist techniques in assessing the reality of law such as sociological techniques, anthropological techniques, and ideology in the legal order. The emphasis of this theory bridges normative ideas and social structures that exist in society. The concept of this theory focuses on the role of law in contributing to the balance and perpetuating the existing social order.⁴⁷

When looking at the concept that exists in Constitutional Court Decision No. 90/PUU-XXI/2023, the essence of critical legal theory can be seen from the accommodated role of the younger generation at the implementative level who are allowed to run for Vice Presidential Candidate if they are under 40 (forty) years old. This concept reflects the reality that exists in Indonesian society. As is known, much of the Indonesian population is starting to be dominated by the younger generation who are starting to be literate about the country's political development. In addition, this exists in the legal reasoning section 3.14.2 of the Constitutional Court Decision a quo which states that the decision is intended to provide the widest possible opportunity for the younger generation to compete in the general elections of the President and Vice President with the following:

"That is, through the decision a quo, the Court actually wants to state that in the case a quo, namely in relation to the election of the President and Vice President, the principle of providing opportunities and eliminating restrictions must be applied by opening wider, fairer, rational, and accountable contestation space to the nation's best sons and daughters, including the millennial generation while giving the weight of fair legal certainty in the framework of a living constitution. Thus, if one of the two conditions is met, then an Indonesian citizen must be deemed to meet the age requirements to be nominated as a candidate for President and Vice President."

From this passage, it can be understood that the decision accommodates the social realities that occur in society and fulfills the concept of critical legal theory by

⁴⁷ Tanius Sebastian, "Anti-Positivisme Ronald Dworkin: Menalar Hukum Sebagai Moralitas," *Undang: Jurnal Hukum* 6, no. 1 (2023): 269–308.

accommodating the younger generation in competing in the national arena through the general elections for President and Vice President. However, the decision will still be more legally certain when it seeks to overcome structural bias in the legal system, as long as the action aims to empower vulnerable groups. Thus, the Constitutional Court's step in adding authority in the a quo decision can be a progressive step when viewed from the perspective of critical legal theory.

Thus, there are several points derived from the theories discussed above. First, based on legal positivism, the authority of the Constitutional Court (MK) should be limited to testing the constitutionality of norms that have been regulated in the 1945 Constitution. Legal positivism emphasizes that law must be understood as a set of written rules sourced from a legitimate authority, so the Constitutional Court does not have the authority to create or add new norms. The addition of norms by the Constitutional Court can be considered as a deviation from its main function, which is to keep the law in line with the constitution. This has the potential to cause serious problems related to the principle of separation of powers which is the basis of the modern legal system. Under the principle of separation of powers, the legislature has the exclusive authority to make laws, while the judiciary has the role of overseeing the implementation of laws. When the Constitutional Court adds norms, the action can be interpreted as a takeover of the legislative function, which exceeds the limits of its authority. In addition, this can lead to legal uncertainty because the resulting norms are not formal legislative products. This uncertainty has the potential to undermine public confidence in the legal system and judicial institutions. Therefore, to maintain the balance of power and legal legitimacy, the Constitutional Court must limit its role to normative testing without creating new norms. In this context, prudence and adherence to basic constitutional principles are very important so that the authority of the Constitutional Court remains within the corridor in accordance with Article 24C paragraphs (1) and (2) of the 1945 Constitution.

Second, the addition of norms by the Constitutional Court (MK) in Constitutional Court Decision No. 90/PUU-XXI/2023 can have a significant impact on the legislative process in the future. Legislators need to evaluate in depth how the Constitutional Court's decision to add new norms affects the substance of laws and regulations that are being or will be drafted. This requires legislators to be more careful in drafting laws so as not to conflict with the Constitutional Court's decision that has taken effect. In addition, this normative Constitutional Court decision can create new restrictions for legislators in establishing legal rules, thus affecting their space in carrying out the legislative function. On the other hand, the additional norms from the Constitutional Court could set a precedent that affects the pattern of lawmaking in the future, both in

terms of content and legal framework used. Legislators must also consider the impact of the decision on the stability and continuity of the national legal system. Therefore, closer coordination between the legislature and the judiciary is needed to ensure that legislation produced remains in accordance with constitutional principles and the needs of society.

Third, the role of the Constitutional Court (MK) in the legal system is often debated, especially when it comes to the limits of its authority. Constitutional Court Decision No. 90/PUU-XXI/2023 which added or created new norms raises fundamental questions about whether the role of the Constitutional Court should be limited to “interpreting” the constitution, or can also act as a “creator” of norms under certain conditions. As a judicial institution, the main function of the Constitutional Court is to ensure that laws must be in accordance with the constitution, without entering the area of legislation which is the exclusive authority of the legislature as stipulated in Article 20 paragraph (1) of the 1945 Constitution. However, in practice, there are situations where the Constitutional Court's decision is considered to resemble the establishment of a new norm that was not previously regulated, giving rise to the view that the Constitutional Court exceeds the limits of its role as regulated by attribution in the 1945 Constitution. This triggers a discussion on whether such a move is necessary for the sake of substantive justice or whether it risks violating the principle of separation of powers. Therefore, it is important to define a clear boundary between constitutional interpretation and norm creation so that the Constitutional Court's role remains in accordance with its juridical function without damaging the balance between the branches of state power.

4. Conclusion

The conclusions of this study are as follows:

- a. The Constitutional Court (MK) as the guardian of the constitution has a central role in maintaining and ensuring that state administration is in accordance with the basic principles of the constitution. However, a number of the Court's decisions, including Decision No. 90/PUU-XXI/2023, have raised doubts about its consistency and integrity as the guardian of the constitution. The rapid change of stance, the composition of judges that does not reflect legal certainty, and indications of political content show the challenges in maintaining the independence and accountability of the Constitutional Court. This situation shows that the Constitutional Court does not fully reflect the principle of checks and balances that should be its main foundation. Therefore, it is important for all elements, both the public and the internal Constitutional

Court, to maintain the dignity of this institution so that it continues to function as a fair and responsible counterweight to power. The sustainability of the Constitutional Court's credibility as the guardian of the constitution requires a shared commitment to integrity and professionalism in carrying out its constitutional mandate.

- b. The dynamics of legal philosophy debate between the schools of natural law and legal positivism in the context of Constitutional Court Decision No. 90/PUU-XXI/2023. Legal positivism emphasizes the importance of legal certainty through authoritative written norms, while natural law emphasizes morality and substantive justice. The Constitutional Court's decision to add new norms to the Election Law was debated because it was considered to exceed its authority under Article 24C of the 1945 Constitution, which limits its role as a tester of the constitutionality of norms, not a creator of rules. From a natural law perspective, the addition of norms is acceptable if it fulfills moral and substantial justice, while critical legal theory views this move as a progressive response to social realities that allow younger generations to engage in politics. However, this move triggers discussions about the limits of judicial authority and the importance of maintaining the principle of separation of powers for the stability and legitimacy of the legal system. From several theoretical explanations, there are several points of philosophical analysis of the authority to add norms. First, based on legal positivism, the authority of the Constitutional Court (MK) should be limited to testing the constitutionality of norms that have been regulated in the 1945 Constitution. Second, the addition of norms by the Constitutional Court (MK) in Constitutional Court Decision No. 90/PUU-XXI/2023 can have a significant impact on the legislative process in the future. Third, the role of the Constitutional Court (MK) in the legal system is often the most important factor in the legislative process.

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