

Informal Constitutional Change in Indonesia

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Abstract

The interpretation of the constitution by the Constitutional Court marks the occurrence of informal changes to the constitution as a result of the dialectic between the constitutional document (the 1945 Constitution) and certain primary forces of constitutional change. This study employs four approaches: the conceptual approach, the statutory approach, the case approach, and the comparative approach. This study concludes that several articles in the 1945 Constitution, following the amendments, have changed ius constituendum, as the norms that apply as ius constitutum are those that have evolved through the method of constitutional interpretation by the Constitutional Court. It is this ius constitutum that functions as a quasi-constitution.

I. Introduction

One of the important elements regulated in the constitution is the provision regarding changes to the constitution itself. Codified constitutions¹ apply formal rules of amendment that authorize political actors to change the constitutional text under specific procedures set out in the constitution. Such rules may provide for the obligation to amend the constitution through majority approval of parliament (legislators);² majority approval of the electorate,³ or joint parliamentary and electoral approval.⁴ The constitution may also

¹ The author assumes that all constitutions are written, it is just that they are codified or not. For example, comparing the constitutions of the United States and the United Kingdom. While the US Constitution is codified in one master text, the UK Constitution is in written text but disaggregated. See further in Ricard Albert, *How Unwritten Constitutional Norms Change Written Constitutions*, Dublin University Law Journal, *Fourcoming*, 2015, pp. 2.

² Bjorn Erik Rasch and Roger D Congleton, *Amendment Procedures and Constitutional Stability*, in Roger D Congleton and Birgitta Swedenborg (eds), *Democratic Constitutional Design and Public Policy*, (MIT Press, 2006), p. 325. 325.

³ See Chapter XV, Articles 127-129, of the Chilean constitution (1980); Part E, Article 112 of the Norwegian Constitution (1814); Article V of the United States Constitution (1789).

⁴ As in Australia, it is regulated in Chapter VIII, Article 128 of the Australian Constitution (1900); the Japanese Constitution (1947) regulates it in Chapter IX, Article 96; the Constitution of Mauritius (1958), in Chapter V, Part II, Article 47 paragraph (3).

set material limitations on the values that cannot be amended,⁵ including limitations on the time and duration of the process of amending the Constitution.⁶ The system in the constitution can also provide for disabling the constitutional amendment procedure in times of emergency.⁷ Formal amendment rules therefore provide a roadmap for how and when to amend the constitutional text, who can amend it? Where should it be initiated and established? And what material in the constitutional text can be changed?⁸

Rigid procedures for constitutional change also result in the lack of expression of constitutional values in state practice.⁹ Studies of constitutional change ultimately observe more of the development of the constitution through informal changes as part of constitutional practice.¹⁰ The position of the constitution as *lex superior* will experience serious problems if it undergoes changes outside the procedures set out in the constitution itself.

The interpretation of the constitution is one of the important avenues for informal changes to the constitution. Theoretically, this is also recognized by K.C. Wheare. In his thoughts K.C. Wheare states that changes to the constitution can be made in four ways, namely by *some primary forces* that are very influential (*some primary forces*), formal changes (*formal amendment*), interpretation by the judiciary (*judicial interpretation*) and *usage and convention* (*usage and convention*).¹¹

In Wheare's view above, constitutional interpretation is carried out by judicial institutions

⁵ For example, the Constitution of France (1958) provides for changes to the republic in Chapter XVI, Article 89; the Constitution of Germany (1949) provides for changes to the federal form in Chapter VII, Article 79 (3); the Constitution of Portugal (1978) provides for secularism in Chapter IV, Part II, Article 288 (C).

⁶ As in the Constitution of Cape Verde, which regulates a maximum of five years for the amendment process to be carried out since the agreement to amend the Constitution is stipulated, stipulated in Chapter VI, Part III, Article 309 paragraph (1) of the Constitution of Cape Verde (1980); The Constitution of Costa Rica (1949) in Chapter XVII, Article 195 paragraph (3) regulates the maximum time until the Constitutional Commission succeeds in drafting an amendment to the Constitution; while the Constitution of South Korea (1949) limits the time in order to propose changes to the Constitution, in Chapter X, Article 129.

⁷ The Belgian Constitution (1994), in Chapter VIII, Article 196 regulates that constitutional changes cannot be made during times of emergency, attack, and war; the Luxemborg Constitution (1868) in Chapter XI, Article 115 regulates that constitutional changes cannot be made during representation; while the Spanish Constitution (1978), Chapter V, Article 116 regulates that during war, emergency, and urgency, constitutional changes cannot be made.

⁸ Ricard Albert, *Constitutional Amendment Making, Breaking, and Changing Constitutions*, (New York: Oxford University Press, 2019), pp. 4.

⁹ Ricard Albert, *The Expressive Function of Constitutional Amendment Rules*, *Revista De Investigações Constitucionais*, vol. 2, n. 1, January 2015, pp. 8-9.

¹⁰ *An informal constitutional amendment occurs "when political norms change, or courts (possibly responding to political pressures) 'interpret' or construct the constitution so as to bring it in line with policy preferences".* Some similar views can be found in, Tom Ginsburg and Eric A Posner, *Subconstitutionalism*, *Stanford Law Review*: 2010, vol. 62, p.1583-1600. Compare also David A. Strauss, *The Living Constitution*, (New York: Oxford University Press, 2010), pp. 120-139.

¹¹ K.C. Wheare, *Modern Constitutions* (London: Oxford University Press, 1958).

by judges through a judicial process to interpret a text in the constitution.¹² This judicial interpretation is carried out due to changes in conditions or legal developments in society which result in the meaning of the text in the constitution becoming inadequate to explain developments that occur in society.¹³

Defining constitutional change informally has proven difficult in the perspective of Indonesia, which prioritizes written law.¹⁴ The tradition of unwritten norms is difficult to merge with the tradition of written law as is the case in Indonesia. These definitional challenges have grown more complicated in recent years, as the development of constitutional democracy in Indonesia has given rise to the phenomenon of the *interplay* between constitutional law and politics. This gap has emerged and developed alongside the practice of constitutional review in Indonesia. This concept gives rise to a quasi-constitution in the practice of constitutional interpretation in Indonesia.

The quasi constitution as a result of informal changes to the 1945 Constitution is a special problem in the context of the constitutional system in Indonesia, because the changes that occur do not have the same legal status as the formal constitution. Quasi constitution or "pseudo" constitution in this study refers to the term to define a number of Constitutional Court decisions that are materially comparable to the constitution.

Based on this, this study aims to answer: 1) has there been an informal change to the 1945 Constitution? and 2) how can interpretation by the Constitutional Court lead to informal changes to the 1945 Constitution?

2. Research Method

This research is a *legal research*¹⁵ that uses several approaches to be able to answer the problems studied, namely: *conceptual* approach, *statute* approach, *case approach*, and *comparative* approach. The types of data used in this research are primary and secondary data. The use of such data is because this research uses a normative approach, which begins with an examination of the normative aspects of the constitution in Indonesia (pre-amendment 1945 Constitution, 1949 RIS Constitution, 1950 US Constitution, 1945 Constitution

¹² *Ibid*, p. 150.

¹³ *Ibid*, pp. 106.

¹⁴ Some constitutional and constitutional law scholars have identified this, but it is difficult to conclusively say that there have been informal changes to the 1945 Constitution. For example, in Jimly Asshidiqie, *Constitution and Constitutionalism*, (Jakarta: The Constitutional Court of the Republic of Indonesia and the Center for Constitutional Law Studies, Faculty of Law, University of Indonesia, 2004), Bagir Manan and Susi Dwi Harijanti, *Understanding the Constitution, Meaning and Actualization*, (Depok: RajaGrafindo Persada, 2014), and Mohammad Fajrul Falaakh, *The Growth and Model of the Constitution and Changes to the 1945 Constitution by the President, Parliament, and the Constitutional Court*, (Yogyakarta: Gadjah Mada University Press, 2010).

¹⁵ F. Sugeng Istanto, *Legal Research*, (Yogyakarta: Ganda, 2007), p. 29.

(New Order), post-amendment 1945 Constitution), laws and Constitutional Court decisions. The approach and theoretical framework serve to provide the scope of research in the form of data categorization stages, data systematization, legal analysis data whose object is the decisions of the Constitutional Court. The limitation of the time period is carried out to facilitate the categorization of legal materials in this study, correlation and revision with the problem, as well as the originality of this dissertation research compared to other studies. Secondary data is intended to obtain an understanding of the legal procedures for the formation of laws, namely in the form of an inventory of laws and regulations along with legal concepts and legal doctrines. Thus, this secondary data source comes from various legal materials, consisting of primary legal materials, secondary legal materials, and tertiary legal materials.¹⁶

Legal materials in this research use primary legal materials, namely legal materials consisting of the 1945 Constitution, laws¹⁷ and Constitutional Court Decisions, namely:

- a. 1945 Constitution of the Republic of Indonesia;
- b. MPR/S Decree;
- c. Law on the Formation of Legislation; and
- d. Constitutional Court Decision.

Then secondary legal materials are legal materials consisting of *textbooks* written by influential experts (*deherseende leer*), legal journals, opinions of scholars, and the results of recent symposia related to the research topic.¹⁸ Tertiary legal materials are legal materials that provide guidance or explanation of primary legal materials and secondary legal materials such as legal dictionaries, *encyclopedias*, other sources on the internet, and others.¹⁹

The legal materials that have been collected are then classified into categories of problems studied in this study. The classification of these legal materials can be divided into the following categories:

- a. Legal materials relevant to the constitution, legislation, adjudication of Constitutional Court decisions, and the legal system as a whole; and
- b. Legal materials relevant to the issue of constitutionality and validity of the 1945 Constitution norms.

Based on this classification, a descriptive-analytical juridical analysis is then carried out through legal interpretation techniques on the available legal

¹⁶ Soerjono Soekanto. *Op.Cit.* p. 52.

¹⁷ Kenneth D. Bailey, *Methods of Social Research*, 2nd ed., (New York: The Free Press, 1982). p. 301. 301.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

materials.

3. Results and Discussion

History of Informal Change in Indonesia

a. **Presidential Powers Under the Transitional Rules and Supplementary Rules of the 1945 Constitution (Pre-Amendment)**

Under Article IV of the Transitional Rules of the 1945 Constitution, the President exercises all powers of the MPR, DPR, and DPA with the assistance of the KNIP. Based on this provision, the President's power becomes very large,²⁰ because the position of the KNIP is only to provide consideration.²¹ The 1945 Constitution actually limits the President's power until the formation of the MPR, DPR and DPA.²² In this regard, Article 1 of the Supplementary Rules of the 1945 Constitution stipulates that "*Within six months after the end of the Great East Asian War, the President of Indonesia shall organize and administer all matters stipulated in this Constitution.*" So in this context, the 1945 Constitution only limits the President's extraordinary powers for six months.

In addition, Article II of the Supplementary Rules of the 1945 Constitution states that "Within six months after the People's Consultative Assembly is formed, the Assembly shall convene to enact the Constitution." This provision shows that the 1945 Constitution has from the outset been regarded as a temporary Constitution with the hope of amending it in the future.²³

With the extraordinary position of the President, the President, assisted by his Ministers, controlled centralized power. However, after the formation of the KNIP on August 29, 1945, problems began to arise between the President and the KNIP. The tug of war between the President and the KNIP began to emerge with the formation of the Indonesian National Party, as a result of changes to the People's Power Center (Putera) which was established during the Japanese occupation.²⁴

Article IV of the Transitional Rules of the 1945 Constitution (pre-amendment) states that "Until the People's Consultative Assembly, the House of Representatives and the Supreme Advisory Council are established in accordance with this Constitution, all

²⁰ In some references it is even said that the President can act legally as a dictator, because the existence of the KNIP as an assistant to the President cannot be interpreted as a restraint. See A.K Pringgodigdo, *The Position of the President According to the Three Constitutions in Theory and Practice*, (Jakarta: Pembangunan, 1956), pp. 11.

²¹ J.C.T Simorangkir and B. Mang Reng Say, *About and Around the 1945 Constitution*, (Jakarta: Djambatan, 1979), pp. 105.

²² See further in Ismail Suny, *The Shifting of Executive Power*, *op.cit*, pp. 20-21.

²³ *Ibid*, p. 21.

²⁴ G.J. Wolhoff, *Introduction to the Constitutional Law of the Republic of Indonesia*, (Jakarta: Timun Mas, 1955), pp. 71.

powers shall be exercised by the President with the assistance of a national committee." Meanwhile, paragraph (1) of the Supplementary Rules of the 1945 Constitution (pre-amendment) stipulates that the President of Indonesia shall organize and administer all matters stipulated in this Constitution within 6 (six) months after the end of the Great East Asian War.²⁵ These provisions meant that power was centered on the President, even though the pre-amendment 1945 Constitution constitutionally limited it.²⁶

Interestingly, the existence of these two provisions opened up interpretations of the (pre-amended) 1945 Constitution. Early interpretations of the pre-amendment 1945 Constitution emerged as a result of the above provisions. This was marked by President Soekarno's statement during the inauguration speech of the Central Indonesian National Commission on August 29, 1945.²⁷

"In the transitional period, it is stated that before there is a People's Consultative Assembly, the power is in the hands of the President, so it is clear that the sovereignty of the people at that time was in the hands of the President alone and the National Committee was only his servant and errand boy. This situation, if seen at first glance, is actually contrary to article 1 paragraph (2) of the Constitution which states that the People's Sovereignty is in the hands of the people and is carried out entirely by the People's Consultative Assembly, but if we remember the Supplementary Rules paragraph (1) which reads, "Within six months after the end of the Great East Asian War, the President of Indonesia organizes and organizes all matters stipulated in the Constitution", then we understand that at the time mentioned above sovereignty was in the hands of the President."

If further study is carried out on the interpretation made by President Soekarno, in terms of the theory of constitutional interpretation, it is included in the internal interpretation. Why is this so, because the interpretation carried out by President Soekarno was carried out using the President's point of view as a formal actor in the Indonesian constitutional system. In this case, President Soekarno placed himself as part of the constitutional system that was constructed through a series of norms and rules built through the 1945 Constitution as a unitary and *self-perpetuating rule order*.²⁸ Because even though it is contradictory, it immediately finds its systemic

²⁵ Republic of Indonesia, Paragraph (1) of the Supplementary Rules of the 1945 Constitution of the Republic of Indonesia.

²⁶ See further in Ismail Suny, *The Shift in Executive Power*,

²⁷ See in Moh. Tolchah Mansoer, *Discussion of Some Aspects of the Executive and Legislative Powers of the Indonesian State*, (Jakarta: Pradnya Paramita, 1983), pp. 127.

²⁸ Implicitly as stated by Hans Kelsen, *Pure Theory of Law*, fifth printed, (New Jersey: Lawbook Exchange, 2008), pp. 221-232. Hans Kelsen's construction of legal theory, especially in relation to the concept of "self-referential rule order", is an important part of his thinking about law. Hans Kelsen's construction of the

interdependence with other rules in the 1945 Constitution so that it becomes a coherent, logical and consistent rule.²⁹

Although substantially President Soekarno's statement was an interpretation of the constitution, formally it was not legally binding, because it was not set out in the form of a legal decree. However, the President's action marked the birth of interpretive authority by the body holding legal sovereignty in Indonesia. In this case, it was the President who acted as the holder of the MPR's power to establish the Constitution, including amending the Constitution. Based on this authority, the MPR, which at that time was still held by the President, was authorized to interpret the Constitution. This authority was formally seen in Vice Presidential Decree Number X dated October 16, 1945 which regulated changes in the position of the KNIP.

The position of the KNIP, which was more administrative in nature, changed after the Vice Presidential Edict, which contained that before the MPR and DPR were formed, the KNIP was entrusted with legislative powers and participated in setting the GBHN.³⁰ The Vice President's edict clearly resulted in fundamental changes to the position of the KNIP, which was still regulated under Article IV of the Transitional Rules of the 1945 Constitution.

The interpretation made by the KNIP, especially regarding the phrase "participate in determining the GBHN" is an interpretation of the position of the KNIP in its position as an assistant to the President who exercises the powers of the MPR. This interpretation is an internal interpretation because it refers to the meaning of the text available in the 1945 Constitution. In other words, the KNIP is not a body that has its own powers, but is part of the President's powers.

b. Interpretation of the 1945 Constitution Through the Explanation of the 1945 Constitution and Stipulation in the Presidential Decree of July 5, 1959

Another interpretation was carried out by President Soekarno through the Presidential Decree on July 5, 1959. Through Presidential Decree of the Republic of Indonesia Number 150 of 1959, President Soekarno announced the Decree of the President of the Republic of Indonesia / Commander-in-Chief of the Armed Forces on Returning to the 1945 Constitution.³¹

In the preamble, it was stated that the Presidential Decree was issued because the

self-referential rule order provides a strong theoretical foundation for understanding law as an independent and structured normative system. It explains how legal norms interact with each other and form a coherent legal order.

²⁹ *Ibid*, pp. 267-270.

³⁰ See Republic of Indonesia, Vice Presidential Decree Number X, dated October 16, 1945, Berita Republik Indonesia, Year I, Number 2, pp. 10.

³¹ Republic of Indonesia, Presidential Decree of the Republic of Indonesia Number 150 of 1959, State Gazette of the Republic of Indonesia Number 75, 1959.

Constituent Assembly was considered to have failed in carrying out its duties to make a new Constitution, resulting in a constitutional situation that endangered the unity and safety of the State, Nusa, and the Nation and hindered universal development to achieve a just and prosperous society.³² On that basis, the Presidential Decree was issued as the only way that had to be taken to save the State of Proclamation. It was also stated that this step was taken after the President and the Government's suggestion to return to the 1945 Constitution delivered on April 22, 1959 did not receive a decision from the Constituent Assembly.³³ In addition, the Presidential Decree also believes that "The Jakarta Charter dated June 22, 1945, animates the 1945 Constitution and is a link with the Constitution."³⁴

Various considerations accompanied the Decree, including the ideological conflict that existed within the Constituent Assembly, namely between groups that wanted Islam as the basis of the state and groups that wanted the Pancasila state basis.³⁵ The differences of opinion that had occurred during the discussion of the Jakarta Charter and the Preamble of the 1945 Constitution occurred again in the discussion of the basis of the state.³⁶

The enactment of the 1945 Constitution was initially the wish of Nasution, who did not go through constitutional channels, but through a Presidential Decree. Further

³² Adnan Buyung Nasution argued that the Constituent Assembly had actually been successful. Because it had formulated and drafted 12 decisions regarding the basic material of the constitution and drafted 157 articles. In addition, the Constitution Preparation Committee formed by the Constituent Assembly had produced seven basic resolutions on the basic material of the constitution consisting of 304 formulations and draft articles, including articles that reflected two different opinions to be submitted to the final plenary. Some of the material that needed to be decided at the plenary level included the Preamble of the Constitution, the form of the state, the basic principles of the state. See further in Adnan Buyung Nasution, *Aspirations of Constitutional Government in Indonesia, A Socio-Legal Study of the Constituent Assembly 1956-1959*, second printing, (Jakarta: Grafiti, 2001), p. 349. 349.

³³ As early as February 21, 1957 President Soekarno had actually presented his "Presidential Conception," as a proposal to change Indonesia's political structure and order in order to save the republic. This concept condemned liberal democracy and proposed the formation of a Gotong Royong Cabinet consisting of ministers from parties and functional groups, and the establishment of a National Council, *Ibid*, pp. 318-319.

³⁴ Many Muslim members of the Constituent Assembly doubted President Soekarno's sincerity in "accepting" the Jakarta Charter. Many even assumed that this was Soekarno's way of negotiating to get the Muslims to accept the concept of guided democracy, see further in *ibid*, pp. 361-364.

³⁵ Initially there were three proposals for the basis of the state to be included in the new Constitution made by the Constituent Assembly. The three proposals were Islam, Pancasila and Socio-Economic. However, in its development only Islam and Pancasila became the main discourse on the basis of the state in the Constituent Assembly. For more details see *Ibid*, pp. 49-130.

³⁶ According to K.H. Solahuddin Wahid, the appearance of the Jakarta Charter of June 22, 1945 in the consideration of the Presidential Decree of July 5, 1959 was the result of the NU's request to President Soekarno through General Nasution. At that time, General Nasution was sent by President Soekarno to meet with K.H. Idham Chalid (Chairman of PB NU) and K.H. Saifuddin Zuhri (Secretary General of PBNU) to ask for NU's support for the Presidential Decree plan. See Salahuddin Wahid, *Amien Rais' Political Ideas and Steps*, in Firdaus Syam, *Amien Rais is a People's Politician and a Pious Intellectual*, (Jakarta: Pustaka Al Kautsar, 2003), pp. xvi-xvii. xvi-xvii.

implementation of the re-enactment of the 1945 Constitution was also determined by political events that were taking place in the country. Based on the law of decrees, what follows must be in accordance with the 1945 Constitution itself. The Decree was completed when it established the enactment of the 1945 Constitution as a replacement for the UUDS and other provisions mentioned therein.³⁷

After the announcement of the Presidential Decree on July 5, 1959, President Soekarno delivered a landmark speech on August 17, 1959 entitled "The Rediscovery of Our Revolution". The speech was considered the "ideological counterpart of the constitutional changes of July 5, 1959."³⁸ The speech was then confirmed by the DPA as the *Political Manifesto of the Republic of Indonesia* (Manipol). The DPA's decision was later strengthened by MPRS Decree No. I/MPRS/1960 which stipulated Manipol as GBHN. With the determination in the MPRS Decree, Manipol became the main interpretation of the 1945 Constitution during Guided Democracy.

With the return to the 1945 Constitution and the addition of the Explanation of the 1945 Constitution into a single unit, the 1945 Constitution of the Proclamation stipulated on August 18, 1945 is different from the 1945 Constitution resulting from the Presidential Decree of July 5, 1959.³⁹ This enactment, according to Bagir Manan, creates inconsistencies between the articles and explanations of the 1945 Constitution.⁴⁰ For the author, this is the biggest interpretation in the history of the constitution in Indonesia because there has actually been a change in the structure of the 1945 Constitution from the structure of the 1945 Constitution on August 18, 1945 with the structure of the 1945 Constitution of the Presidential Decree of July 5, 1959.

In addition to the issue of democratic legitimacy, the 1945 Constitution of August 18, 1945 was only meant to be a temporary constitution. As recognized by Sukarno who was also involved in the drafting process of the 1945 Constitution, that the 1945 Constitution was a "*revolutionary grondwet*", meaning that it was a temporary constitution intended to operate only during the revolutionary period and could be replaced with a new one once exigent circumstances no longer prevailed.⁴¹

Based on this context, the drafters of the 1945 Constitution accepted Soepomo's proposal to use an integralistic concept, which gave enormous powers to the government as they needed to work efficiently in conflict situations. The fact that the 1945 Constitution contains only thirty-six articles-including two transitional articles-

³⁷ Danang Risdiarto, *The Legality of the Presidential Decree of July 5, 1959 and its Influence on the Development of Democracy in Indonesia*, Journal of Indonesian Legislation, Vol. 15 No. 01 - March 2018: 59 - 68, p. 63.

³⁸ Herbert Feith and Lance Castles (Ed), *Indonesian Political Thought 1945-1965*, (Jakarta: LP3S, 1995), pp. 85.

³⁹ Bagir Manan, *Constitutional Theory and Politics*, (Yogyakarta: Presidential Institute, 1999), pp. 12-19.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

reflects the time constraints and the temporary consensus on a different vision of the state among the drafters.⁴²

With the reintroduction of the 1945 Constitution, the weaknesses in the 1945 Constitution also accompanied its implementation. Moreover, the Presidential Decree of July 5, 1959 emphasized that the 1945 Constitution consisted of a Preamble, a Body, and an Explanation. The Explanation referred to in the Presidential Decree was an interpretation of the 1945 Constitution drafted by Soepomo.

c. Interpretation by the MPR through MPR/MPRS Decrees

In the practice of carrying out the duties of the MPR/MPRS, there are many constitutional interpretations that according to the author can be categorized as quasi-constitutional to the 1945 Constitution. *First*, the appointment of Soekarno as President of the Republic of Indonesia for life, as in MPRS Decree Number III/MPRS/1963 concerning the Appointment of the Great Leader of the Revolution Bung Karno as President of the Republic of Indonesia for Life, is a textual interpretation of the MPRS. Because textually, the 1945 Constitution does not contain provisions regarding the term of office of the President for life.

Normatively, MPRS Decree Number III/MPRS/1963 mentions its legal basis in Article 1 paragraph (2) of the 1945 Constitution which determines the power of the MPR in fully exercising the sovereignty of the people and Article 7 of the 1945 Constitution which limits the term of office of the President and Vice President to five years and thereafter may be re-elected. MPRS Decree No. III/MPRS/1963 clearly shows the centralization of power stemming from the interpretation of the original democratic system in the 1945 Constitution which was formulated as Guided Democracy. Textually, Soekarno's appointment as President for Life contradicted Article 7 of the 1945 Constitution which stipulated that the term of office of the President and Vice President was only five years and could be re-elected.

However, the MPRS had provided an interpretation of Article 1 paragraph (2) of the 1945 Constitution by giving meaning to the MPR's authority to exercise the sovereignty of the people in an unlimited manner. In MPRS Decree Number III/MPRS/1963, it is stated that "the MPRS is the highest institution of the Republic of Indonesia to channel and implement the strong desire of the Indonesian people", so that when a "strong desire arises from various groups of people and regions", so that Bung Karno becomes President for life, the MPRS sets this desire into an MPRS Decree in accordance with its position as the highest state institution that exercises popular

⁴² Abdurrachman Satrio, *Restoring Indonesia's (Un)Constitutional Constitution: Soepomo's Authoritarian Constitution*, German Law Journal (2023), 24, pp. 402-416, pp. 411.

sovereignty.⁴³

In this context, it appears that the interpretation of the unlimited power of the MPRS trumps the provisions that limit government power. This means that even though it is in line with the principle of limiting power contained in constitutionalism, the will of the people to appoint Soekarno as President for life must be determined by the MPRS as a manifestation of the principle of popular sovereignty which is fully exercised by the MPR.

Second, another practice during the MPRS period was the existence of MPRS Decree Number XXXVII/MPRS/1968 concerning Guidelines for the Implementation of Democracy Led by Wisdom in Consultation / Representation or also known as Guidelines for the Implementation of Pancasila Democracy,⁴⁴ an effort to refine the implementation of the 1945 Constitution, by revoking MPRS Decree Number VIII/MPRS/1965 concerning Principles for Deliberation and Consensus in Guided Democracy.⁴⁵ This decree made principle corrections and interpreted the principle of popular sovereignty in the 1945 Constitution. MPRS Decree No. XXXVII/MPRS/1968 provides an interpretation that the principles of deliberation for consensus must be returned to the purity of Pancasila and the 1945 Constitution. The principle of deliberation for consensus in its pure meaning is a typical procedure in the implementation of the fourth principle of Pancasila based on the unanimity of the will of the people and not the will of the Chairman alone in a blanket manner.⁴⁶ In this regard, the meaning of wisdom is a healthy mind or ratio, so that the principle of populism must be led by common sense, not by political power.⁴⁷

Third, another MPRS Decree that is important to mention in this research is Decree No. XX/MPRS/1966 concerning the DPR-GR Memorandum on the Source of Legal Order of the Republic of Indonesia and the Order of Laws and Regulations of the Republic of Indonesia. The Decree states that Pancasila as the State Foundation of Indonesia is the embodiment of "the view of life, consciousness and legal ideals as well as lofty moral ideals that encompass the psychological atmosphere and character of the Indonesian Nation".

Through this interpretation, the MPRS seeks to provide principles regarding Pancasila so that there are no other interpretations as in the Guided Democracy Period, including

⁴³ "Weighing" considerations number 5 and number 6 of MPRS Number III/MPRS/1963.

⁴⁴ Republic of Indonesia, Decree of the Provisional People's Consultative Assembly of the Republic of Indonesia in 1968, Number XXXVII/MPRS/1968 on Guidelines for the Implementation of Democracy Led by Wisdom in Consultation/Representation. Can also be seen in Secretariat General of the MPR RI, *Set of Decrees of the MPRS and MPR 1960 to 2002*, (Jakarta: Secretariat General of the MPR RI, 2002), pp. 303-311.

⁴⁵ The preamble to MPRS Decree No. XXXVII/MPRS/1968, *Ibid.* "First: Revoke and declare invalid Decree of the MPRS No. VIII/MPRS/1965 on the principles of deliberation for consensus in Guided Democracy."

⁴⁶ *Ibid*, Preamble "Considering" letter b.

⁴⁷ *Ibid*, Consideration "Considering" letter c and Article 4 paragraph (4).

providing an interpretation that Pancasila is the formulation of PPKI which was ratified on August 18, 1945.⁴⁸ Decree No. XX/MPRS/1966 requires the unity of interpretation of the absolute Pancasila.⁴⁹ The absolutism of the meaning of Pancasila became clearer after the growing preference for Integralistic views and familyism in MPR Decree Number II/1993 on the Outlines of State Policy. This interpretation also obscures Soekarno's thoughts on Pancasila and the meaning of Pancasila only refers to the views formulated by Soepomo about the integralistic state.⁵⁰

Fourth, in the development of state administration, the MPR / S also interpreted the 1945 Constitution which led to different state administration practices from those intended in the 1945 Constitution. The state practice referred to in this case concerns the interpretation of the New Order Government's intention to purify the 1945 Constitution.⁵¹ This step was taken by the MPRS through MPRS Decree Number X/MPRS/1966 concerning the Position of All Central and Regional State Institutions in the Positions and Functions Set out in the 1945 Constitution. In the preamble "Considering" this Decree, it emphasizes three things:

- 1) that the chaos in all areas of the lives of the people and the State which culminated in the counter-revolutionary movement of G-30-S/PKI was caused, among other things, by the violation of the 1945 Constitution;
- 2) that the MPRS, as the highest body in the Republic of Indonesia and the embodiment of the Sovereignty of the Indonesian People, is obliged to stop the perversion of the 1945 Constitution in accordance with the demands of the people's conscience;
- 3) that in order to ensure that no further abuses occur, the State Institutions must be re-established in their positions and functions in accordance with the 1945 Constitution.

Based on this decree, the MPRS was disorganized and functioned like the MPR according to the 1945 Constitution, namely stipulating the Constitution, making Guidelines, electing the President and Vice President. In addition, it was also stated that the MPRS was the highest body and the embodiment of the sovereignty of the

⁴⁸ President Joko Widodo, through Presidential Decree No. 24/2016 on the Birth Day of Pancasila, re-established that the birth day of Pancasila is June 1, 1945. This decree ends the polemic surrounding the birth of Pancasila. Republic of Indonesia, Presidential Decree Number 24 of 2016, on the Birth of Pancasila.

⁴⁹ Compare with MPR Decree Number II/MPR/1978 on the Guidelines for the Appreciation and Experience of Pancasila (*Ekaprasetya Pancakarsa*) or P-4. Article 1 states that this Decree is not intended as an interpretation of Pancasila as the State Foundation, but the Decree is clearly mentioned to maintain "unity of language, unity of view, and unity of movement in terms of living and practicing Pancasila." See Republic of Indonesia, Decree of the Consultative Assembly of the Representatives of the Republic of Indonesia Number II/MPR/1978 on the Guidelines for the Creation and Practice of Pancasila, "Considering", letter b.

⁵⁰ Aidul Fitriciada Azhari, *Constitutional Interpretation, The Struggle to Realize Democracy in Indonesia*, *op.cit*, pp. 266-267.

⁵¹ See Denny Indrayana, *1945 Constitutional Amendment, Between Myth and Demolition*, *op.cit*, pp. 141-150.

Indonesian people.⁵²

However, in another decree, restrictions were also made on the authority of the MPRS, namely MPRS decree No. XV/MPRS/1966 which stipulated that the MPRS would not elect a Vice President. In addition, the MPRS also determined that in the absence of the president, the holder of the March 11, 1966 warrant would hold the office of president. The restrictions on the authority of the MPRS, which were based on political-psychological considerations, were clearly related to the position of President Soekarno and General Soeharto.⁵³ Based on its legal basis, the limitation on the authority of the MPRS is an interpretation of Article 4 paragraph (2), Article 6 paragraph (2), Article 7 and Article 8 of the 1945 Constitution, especially intended to regulate the replacement of the President in case of absence.

A more complete arrangement of the constitutional structure was outlined in MPRS Decree No. XX/MPRS/1966 in the form of a scheme of the power structure of the Indonesian state. Based on the position of the MPR as the highest state institution under the Constitution which oversees other State institutions. In the scheme, the MPR occupies a position as the highest State institution under the 1945 Constitution.

When connected with MPRS Decree No. IX/MPRS/1966, the decision not to elect a Vice President and to hand over the office of President to the bearer of the March 11, 1966 Order, will be related to efforts to safeguard the policy of returning to the pure implementation of the 1945 Constitution and the improvement of state institutions/apparatus in accordance with the 1945 Constitution.⁵⁴ Thus, although it contradicts the 1945 Constitution, it aims to purify the implementation of the 1945 Constitution and perfect the institutions of the state apparatus in accordance with the 1945 Constitution.

Such contradictions must be understood in relation to the political transition situation that allowed the MPRS to make decisions outside the provisions of the 1945 Constitution. In this case, the MPRS had established transitional rules outside the text of the 1945 Constitution that were aimed at the text itself. The MPRS had interpreted the provisions regarding the authority to elect the Vice President and the mechanism for the transfer of power in the event of the President's absence based on temporary situational considerations with an internal purpose.

Therefore, the Decree No. XV/MPRS/1966 basically works from an internal interpretation perspective with an originalism pattern because it is based on the political-psychological considerations of the officials involved in the constitutional system who want to purify the 1945 Constitution. Although it regulates the procedure

⁵² Consideration of MPRS Decree No. X/MPRS/1966, letter b.

⁵³ Preamble to MPRS Decree No. XV/MPRS/1966

⁵⁴ The preamble to MPR Decree No. IX/MPRS/1966, letters c and d

for the transfer of power, the interpretation cannot be classified as proceduralism because it does not aim to expand representation. In fact, the interpretation shows absolutism by determining directly and individually the subject who will hold the office of President if President Soekarno is absent.

Fifth, a similar pattern of originalist interpretation to Decree No. XV/MPRS/1966 is found in MPR Decree No. IV/MPR/1983 on Referendum. The decree decided that if the MPR wanted to amend the 1945 Constitution, it must first ask for the people's opinion through a Referendum conducted by the President as the MPR's mandate.⁵⁵ This decree on the Referendum was based on concerns that there would be a reduction in the 1/3 of MPR members appointed so as to make it easier for the MPR to use Article 37 of the 1945 Constitution to amend the 1945 Constitution.⁵⁶ On that basis, the Referendum was considered a "Constitutional way" that could prevent amendments to the 1945 Constitution based on Article 37 which gave the MPR full authority to amend the Constitution.

The MPR Decree is clearly an interpretation of the provisions regarding the amendment of laws in the 1945 Constitution. The aim is to interpret the 1945 Constitution itself inwardly, to defend and secure the 1945 Constitution. Thus, the perspective used is an internal perspective that refers to the consideration of the apparatus within the 1945 Constitution system and for the sake of the 1945 Constitution itself.

Apart from the MPR decree on the Referendum, the provisions on the MPR in the MPR decree show a very clear pattern of originalism in the form of reference to the will of the framers of the 1945 Constitution. This can be seen in MPR Decree No. VI/MPR/1973, which was updated by MPR Decree No. III/MPR/1978 on the position and working relationship of the Supreme State Institution with and/or among the High State Institutions.

The decree explains that the MPR, as the embodiment of all the people of Indonesia, is the holder of supreme state power and the exercise of popular sovereignty. The MPR elects and appoints the President and Vice President and mandates the President to implement the GBHN and other MPR decisions.

The position of the MPR has the consequence that the President is subject to and responsible to the MPR and at the end of his term of office provides accountability for the implementation of the State Policy stipulated by the Constitution or MPR before the MPR session. In addition, the President must give an account before a special session of

⁵⁵ Articles 2 and 3 of MPR Decree No. IV/MPR/1983

⁵⁶ Consideration of MPR Decree No. IV/MPR/1983, letter e. the appointment of 1/3 of MPR members is seen as a "New Order National Consensus" intended to maintain and secure Pancasila and the 1945 Constitution.

the MPR specifically convened to hold the President accountable for the implementation of the State Policy established by the Constitution or the MPR.

In this regard, the MPR may dismiss the President before the end of his/her term of office due to: at his/her own request, permanent disability, and/or serious violation of the State Policy. In the event that the Vice President is permanently absent, the President and/or the DPR may request the MPR to convene a Special Session to elect a Vice President.

Meanwhile, the DPR, whose members are all members of the MPR, is obliged to always supervise the actions of the President in the context of implementing the State Policy. If the DPR considers that the President has seriously violated the State Policy, then the DPR can ask the MPR to hold a Special Session to hold the President accountable, which can occur if the President does not heed the DPR's memorandum twice within a period of 4 (four) months, the first memorandum three months, the second memorandum one month.⁵⁷

The provision on the MPR in the decree clearly refers to the elucidation of the 1945 Constitution, which is sourced from the minutes of discussion of the 1945 Constitution.⁵⁸ This means that the position of the MPR in the decree is the result of an interpretation with an originalist pattern that refers to the will of the framers of the 1945 Constitution.

Still in the same pattern of interpretation, it is also worth examining the interpretation of the MPR's authority to provide interpretation of the 1945 Constitution. Since MPR Decree No. I/MPR/1973, All Rules of Procedure of the People's Consultative Assembly stipulate that one of the MPR's authorities is to provide explanations that are interpretative of the decisions of the Assembly.⁵⁹ This authority clearly includes the authority to interpret the 1945 Constitution, because according to Article 3 of the 1945 Constitution, one of the MPR's decisions is the 1945 Constitution.

The determination of the MPR's authority is clearly the result of an interpretation of the MPR's position according to the 1945 Constitution. The 1945 Constitution itself does not mention the MPR's authority to interpret MPR decisions. However, in legal logic, as the body authorized to establish the Constitution, the MPR is also authorized to interpret the Constitution.

Sixth, This interpretation must be seen from the interpretation of constitutional

⁵⁷ Article 3 to Article 7 of MPR Decree No. VI/MPR/1973.

⁵⁸ Elucidation of the 1945 Constitution on the State Government System, section III on Supreme State Power in the hands of the People's Consultative Assembly (*Diegezante Staatgewalt Liegi allein bei der Majelis*).

⁵⁹ Article 4 letter b of MPR Decree No. I/MPR/1973 on the Rules of Procedure of the MPR as amended by MPR Decree No. I/MPR/1978, MPR Decree No. I/MPR/1983, MPR Decree No. I/MPR/1988, MPR Decree No. I/MPR/1993, MPR Decree No. I/MPR/1993, MPR Decree No. I/MPR/1998, and MPR Decree No. VII/MPR/1998.

practice that has been carried out since at least 1960 and is related to MPRS Decree No. XX/MPRS/1966 - although not explicitly mentioned as one of the legal bases - which stipulates that the MPR in the power structure of the Republic of Indonesia is directly under the 1945 Constitution with the consequence that in the order of legislation the MPR Decree is directly under the 1945 Constitution.

MPRS Decree No. XX/MPRS/1966 states that "in accordance with the constitutional system as described in the authentic explanation of the 1945 Constitution. The 1945 Constitution, the highest form of legislation, is the basis and source for all subordinate legislation in the State."⁶⁰ When projected onto the MPR's interpretation of its authority to interpret MPR decisions, including the 1945 Constitution, the reference to the authentic Explanation of the 1945 Constitution in MPRS Decree No. XX/MPRS/1966 shows that the interpretation of the MPR's authority to interpret MPR decisions, including the 1945 Constitution, is an originalist interpretation. The interpretation clearly refers to the will of the framers of the 1945 Constitution contained in the authentic explanation of the 1945 Constitution.

Furthermore, it is related to the interpretation of the position of the President. The interpretation of the position of the President began with the existence of MPRS Decree Number XVI/MPRS/1966 concerning the definition of MPRS Mandate. With the intention of "preventing confusing interpretations about the meaning of the MPRS Mandataris", the MPRS gave a decree related to this matter, namely that the definition of the Mandataris refers to the explanation of the 1945 Constitution which states that the President is a "mandataris" of the MPR who "is subject to and responsible to the Assembly [and] is obliged to carry out the decisions of the Assembly."⁶¹ This means that in the definition of mandataris, there is an originalist interpretation that refers to the Explanation of the 1945 Constitution, which is none other than the will of the framers of the 1945 Constitution.

In its development, this originalist pattern continues to be used in the interpretation of the position of the President in the 1945 Constitution, as seen in MPR Decree No. VI/MPR/1973 which was renewed by MPR Decree No. III/MPR/1978 concerning the Position and Working Relationship of the Supreme State Institution with and/or between the Highest State Institutions.

In this decree, the position of the President refers to the Explanation of the 1945 Constitution, namely to the will of the framers of the 1945 Constitution. This also means that there is an originalist interpretation. This originalist interpretation is made clearer by the specific reference to the integralistic and familial views in interpreting

⁶⁰ MPRS Decree No. XX/MPRS/1966 Part II on the Order of Laws and Regulations of the Republic of Indonesia According to the 1945 Constitution, Letter A, number 2.

⁶¹ Explanation of the 1945 Constitution on the State Government System, Part III

the constitutional structure in Pancasila Democracy. The reference is revealed in the description of MPR Decree Number II/MPR/1993.

In the Decree, kinship understanding is mentioned simultaneously with the integralistic view of the Indonesian nation, which is seen as the basis of agreement in the drafting of the 1945 Constitution.⁶² Thus, the meaning of the constitutional structure during the New Order returned to the basic position of the formulators of the 1945 Constitution who were anti-liberalism.

A shift in meaning was also made by the MPR through MPR Decree Number IV/MPR/1983 on the Referendum. Article 37 of the 1945 Constitution authorizes the MPR to establish and amend the Constitution. In its development, Article 2 of MPR Decree Number IV/MPR/1983 on the Referendum has made a shift to the provisions of Article 37 of the 1945 Constitution. Article 2 of MPR Decree No. IV/MPR/1983 on Referendum states that "If the MPR wishes to amend the 1945 Constitution, it must first seek the opinion of the people through a Referendum". Thus, changes to the Constitution at the will of the MPR must be approved by the people through a referendum.

Seventh, the MPR's Authority to Examine Laws Against the 1945 Constitution and MPR Decrees. According to MPR Decree No. III/MPR/2000 on Sources of Law and the Order of Legislation and MPR Decree No. V/MPR/2001 on the Third Amendment to the Decree of the People's Consultative Assembly of the Republic of Indonesia No. II/MPR/1999 on the MPR Code of Conduct, the MPR has the authority to provide explanations that are interpretative of MPR decisions and the authority to examine laws against the 1945 Constitution and MPR Decrees.⁶³

Based on this authority, the MPR prior to the fourth amendment of the 1945 Constitution had produced several interpretations of the 1945 Constitution that are relevant to this research. The above interpretations are of course based on the text of the 1945 Constitution as a result of the first to third amendments. Even so, there is still a connection with the intentions of the framers of the authentic 1945 Constitution, causing the construction of the post-amendment 1945 Constitution to be inconsistent with the intent of the amendment. The following are some of the interpretative practices carried out by the MPR before the fourth amendment was made.

⁶² MPR Decree No. II/MPR/1993 on GBHN, Chapter II, letter G, number 5

⁶³ Article 5 paragraph (1) of MPR Decree No. III/MPR/2000 on the Source of Law and the Order of Legislation states "The People's Consultative Assembly has the authority to examine laws against the 1945 Constitution, and the Decrees of the People's Consultative Assembly." Meanwhile, Article 4 letter k of MPR Decree Number V/MPR/2001 on the Third Amendment to the Decree of the People's Consultative Assembly of the Republic of Indonesia Number II/MPR/1999 on the Rules of Procedure of the MPR states that "the People's Consultative Assembly has the authority to review laws against the 1945 Constitution and the Decrees of the People's Consultative Assembly."

d. Limiting the Term of Office of the President and Vice President

Indonesia's constitutional reform in 1998 encouraged improvements in all fields.⁶⁴ One of the reform demands accommodated by the MPR was the affirmation of the terms of office of the President and Vice President. The MPR then issued MPR Decree Number XIII/MPR/1998 on Limiting the Term of Office of the President and Vice President of the Republic of Indonesia. In its Decree, the MPR made a substantial interpretation of the position of the 1945 Constitution, the position of the President and Vice President, and the development of the Indonesian state administration.⁶⁵ The MPR gave the following interpretation:

1. The 1945 Constitution, which is the Constitution of the Republic of Indonesia proclaimed on August 17, 1945, is in accordance with the personality of Indonesia and contains the most fundamental rules for the life of the nation and state of Indonesia;
2. based on Article 7 of the 1945 Constitution, the President and Vice President hold their positions for a period of five years, after which they may be re-elected;
3. in the course of the constitution of the Republic of Indonesia, the absence of restrictions on the number of times the President and Vice President can be re-elected to hold office has led to various interpretations that are detrimental to popular sovereignty/democratic life.

This MPR Decree, which is in line with the MPR's desire to implement constitutional reform, was issued at the Special Session of the MPR on November 10-13, 1998. The MPR affirmed in Article 1 of MPR Decree No. XIII/MPR/1998 on Limiting the Term of Office of the President and Vice President of the Republic of Indonesia, that "The President and Vice President of the Republic of Indonesia shall hold office for a period of five years and thereafter may be re-elected in the same office for one term only." It was on the basis of this MPR Tap that Article 7 of the 1945 Constitution was amended, in the first amendment in 1999.

In principle, the MPR at that time conducted an external interpretation of the 1945 Constitution. By looking at constitutional developments, the MPR made a

⁶⁴ The 1998 reforms were preceded by an economic crisis. The economic crisis in Indonesia originated from the monetary crisis in the Asian region. Thailand was the first country to be hit by the crisis, which at a later stage spread the crisis virus to countries such as Malaysia, South Korea, Indonesia and so on, Indonesia was the country that suffered the most. Even other countries have risen from the crisis for about 5 years, Malaysia and South Korea for example, Indonesia has not moved from sharing the decline in economic performance, the crisis in the next stage has created a political crisis until various demonstrations accelerate the resignation of Soeharto's leadership. A. Malik Haramain and MF. Nurhuda Y, *Guarding the Transition, Reflections on Monitoring the 1999 Elections*, Cet.1 (Jakarta: PB PMIIUNDP, 2000), pp.1-3.

⁶⁵ "Considering" points a, b, and c, MPR Decree No. XIII/MPR/1998 on Limiting the Term of Office of the President and Vice President of the Republic of Indonesia.

determination to emphasize the legal certainty of the term of office of the President and Vice President to be re-elected, only in one term. This decree also deconstructed both the text and the meaning of Article 7 of the 1945 Constitution.

Informal Changes as a Result of Constitutional Interpretation

Debate was also present in the Constitutional Court's examination of laws against the 1945 Constitution. In its decision, the Constitutional Court does not only decide whether a law is contrary to the 1945 Constitution, but the Constitutional Court must first reveal the meaning of the Article in the 1945 Constitution. This debate is more interesting considering that giving meaning has very broad implications. However, not all decisions of the Constitutional Court contain the meaning of the 1945 Constitution. Only in certain cases can interpretation occur. Some of the constitutional interpretations carried out by the Constitutional Court that have become public attention so far include:

a. The Meaning of the Authority of the Constitutional Court in Examining Laws and Government Regulations in Lieu of Laws (Perppu)

The interpretation of the Constitution by the Constitutional Court using the hermeneutic method also occurred in Constitutional Court Decision Number 138/PUU-VII/2009 concerning the Examination of Government Regulation in Lieu of Law Number 4 of 2009 concerning Amendments to Law Number 30 of 2002 concerning the Corruption Eradication Commission against the 1945 Constitution of the Republic of Indonesia.

The applicants in this case were 13 (thirteen) lawyers who filed formal⁶⁶ and material tests.⁶⁷ In its decision, the Constitutional Court stated that the petition could not be accepted. The Constitutional Court held that the Plaintiffs did not have legal standing because the Plaintiffs were not harmed by the enactment of the Perppu.⁶⁸

That in its ruling the Constitutional Court declared the petition inadmissible is certainly not something new and is one of the legal consequences that may occur in any examination of the Law against the Constitution by the Constitutional Court. Indonesian constitutional law has regulated the formal requirement that the applicant must have

⁶⁶ The Applicant argues that Perppu No. 4/2009 violates the procedural formation of laws and regulations.

⁶⁷ The applicant argued that Perppu No. 4 of 2009 was detrimental to the applicant's constitutional rights.

⁶⁸ In deciding on the issue of legal standing, the Constitutional Court referred to its previous decisions, namely Decision No. 006/PUU-III/2005 dated May 31, 2005 and Decision No. 11/PUU-V/2007 dated September 20, 2007. For more on constitutional losses, see Radian Salman, *The Nature of Constitutional Losses in Judicial Review at the Constitutional Court*, Constitutional Journal, Volume 5 Number 1, (Jakarta: Constitutional Court, June 2008).

legal standing,⁶⁹ in addition to other material requirements, namely the existence of clear losses. However, the decision became unique when in its conclusion the Constitutional Court stated that it had the authority to examine, hear and decide on the testing of Perppu against the Constitution. It is said to be unique because the authority to examine Perppu against the 1945 Constitution is something that has never happened in the trial of judicial review, especially considering that the authority of the Constitutional Court to examine Perpu is not explicitly stated in the 1945 Constitution, nor the organic laws related to the authority of the Constitutional Court, namely the Constitutional Court Law, or the Judicial Power Law. Article 24 C paragraph (1) of the 1945 Constitution states that the Constitutional Court has the authority to adjudicate at the first and last level whose decision is final to test the law against the Constitution of the Republic of Indonesia Year 1945. Essentially the same thing is emphasized in Article 10 paragraph (1) point a of Law No. 24 of 2003 concerning the Constitutional Court (MK Law) and Article 12 paragraph (1) of Law No. 4 of 2004 concerning Judicial Power.

The Constitutional Court in its legal reasoning stated that the legal basis of Perppu is Article 22 paragraph (1) of the 1945 Constitution which states "In the event of a compelling urgency, the President has the right to enact government regulations in lieu of laws" and that Law 10/2004 has placed Perppu on an equal footing with laws. The Constitutional Court is of the opinion that the existence of Article 22 which regulates the President's authority to make Perppu must be placed in the 1945 Constitution system within the framework of the First, Second, Third and Fourth Amendments. The Constitutional Court found that the article on Perpu was placed in Chapter VII of the 1945 Constitution on the DPR. The material of Chapter VII consists of Article 19, Article 20, Article 20A, Article 21, Article 22, Article 22A, and Article 22B, which regulates the institution of the DPR (Article 19, Article 20A, Article 21, and Article 22B) as well as material regarding lawmaking as a result of the First and Second Amendments (Vide Article 20). In relation to the material regulated in Chapter VII, the provisions of Article 22 are closely related to the authority of the DPR in lawmaking.

The Constitutional Court considered that the provisions of Article 22 contain three things, namely the granting of authority to the President to make Perppu, an authority that can only be used in a state of compelling urgency. The Perppu must be approved by the DPR in the next session. Perppu, according to the Constitutional Court, is different from Government Regulation (PP), which according to Article 5 paragraph (2) aims to implement the law properly. The placement of the regulation on Perppu in the Chapter

⁶⁹ In Article 51 paragraph (1) of Law No.24 of 2003 as elaborated in the Regulation of the Constitutional Court Number 06/PMK/2005, it is determined that "the applicant is a party who considers his/her constitutional rights and/authorities to be impaired by the enactment of the law, namely (a) individual Indonesian citizens; (b) customary law communities as long as they are still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as regulated by law; (c) public or private legal entities; or (d) state institutions."

on the DPR where the DPR holds the power to form laws shows that the actual material of Perppu is material that according to the Constitution is regulated by law and not material that implements the law as referred to in Article 5 paragraph (2) of the 1945 Constitution and the material of Perppu is not the material of the Constitution. Furthermore, according to the Constitutional Court, it is the urgent and emergency conditions that make the material of a law that has not yet become a law in accordance with the procedures applicable in law making, namely with the joint approval of the DPR and the President, used to fill the legal vacuum. The normal procedure of joint discussion between the DPR and the President is believed by the Constitutional Court to take a long time while the need to fill the legal vacuum is urgent.

The Constitutional Court is of the opinion that Perppu is needed in a condition that is considered a compelling urgency as referred to in Article 22 paragraph (1) of the 1945 Constitution. The condition of compelling urgency according to the Constitutional Court consists of three things, namely *first*, there is an urgent need to resolve legal problems quickly based on the law. *Second*, the necessary law does not yet exist, which creates a legal vacuum, or there is a law but it is inadequate. *Third*, the legal vacuum cannot be resolved by making a law in the usual procedure because it will take a long time, while the existing legal vacuum is urgently certain to be resolved. In relation to the three conditions of compelling urgency, the Constitutional Court is of the opinion that compelling urgency is not limited to the existence of a state of danger as mentioned in Article 12 of the 1945 Constitution. The Constitutional Court recognizes that a state of danger can lead to a compelling urgency, but a state of danger is not the only situation that creates a compelling urgency as referred to in Article 22 paragraph (1) of the 1945 Constitution.

Furthermore, the Constitutional Court considers that Article 22 paragraph (1) of the 1945 Constitution can be concluded that the material of Perppu should be regulated in law, but because of the existence of a compelling urgency, the Constitution gives the President the right to establish Perppu. This right is not given to the DPR because the DPR will take a long time to discuss it considering that the DPR is a representative institution with decisions resting with members so that it must go through DPR meetings, a situation that if followed will take a long time to be approved.

The Constitutional Court stated that Perppu creates a legal norm and as a new legal norm Perppu will create: (a) new legal status, (b) new legal relations, (c) new legal consequences. A new legal norm is born once a Perppu is passed and the fate of the legal norm depends on whether the DPR rejects or accepts the Perppu. However, even though the DPR will determine whether the Perppu is accepted or not, before being discussed by the DPR, the norms contained in the Perppu are valid and applicable as laws. Because the binding force is the same as a law, the Constitutional Court is of the

opinion that the Constitutional Court is authorized to test the constitutionality of Perppu before the Perppu is rejected or approved by the DPR as a law. The Constitutional Court is also authorized to test the constitutionality of a Perppu after the DPR's approval of the Perppu because the Perppu has become a law.

Against the decision, there are judges who have different reasons (*concurring opinion*) namely Constitutional Judge Moh. Mahfud M.D and judges who have different opinions (*dissenting opinion*) namely Constitutional Judge Muhammad Alim. Constitutional Judge Mahfud MD, who also served as Chairman of the Constitutional Court, said that if traced from the original intent, historical interpretation, grammatical interpretation, and legal logic, the Constitutional Court should not be able to test the constitutionality of Perpu against the 1945 Constitution. Article 24C paragraph (1) of the 1945 Constitution according to Mahfud does not mention Perpu as one of the legal products that can be tested by the Constitutional Court.

In contrast to Constitutional Judge Mahfud M.D. and eight other constitutional judges, Constitutional Judge Muhammad Alim as a judge who has a different opinion in essence argues that the authority to test Perpu by the Constitutional Court has never been expressly stated in the 1945 Constitution or other sources of constitutional law. Therefore, Muhammad Alim believes that the Constitutional Court does not have the authority to review Perpu at all. He emphasized that both the 1945 Constitution, the Constitutional Court Law, and the Judicial Power Law only mention "testing the Law against the Constitution." Furthermore, Alim linked the different opinions with Article 20 of the 1945 Constitution, namely the authority to form laws and Article 22A on the authority to make Perpu which already existed before Article 24C paragraph (1), but Article 24C paragraph (1) only mentions "testing the law against the Constitution."

Alim argues that the non-mention of Perpu as a legal product that is the authority of the Constitutional Court to test in Article 24C paragraph (1) of 1945 is an indication that the author of the 1945 Constitution left the testing of laws to the DPR. If a Perpu has been discussed by the DPR in the next session and approved as a law as stated in Article 22 paragraph (2) of the 1945 Constitution, then only then is the Constitutional Court authorized to test the law.

The opinion of the Constitutional Court judges as stated in Decision No. 138/PUU-VII/2009 (except for the opinion of Constitutional Judge Muhammad Alim) contradicts the view that emphasizes Perpu as a Presidential Regulation rather than a Perpu that has the quality of a law. In line with Muhammad Alim, Jimly Asshiddiqie emphasized that in terms of its form, a Perpu is not the same as a law.⁷⁰ Jimly believes that in terms

⁷⁰ See Jimly Asshiddiqie, *Law Testing Procedure*, (Jakarta: Konstitusi Press, 2006), p. 50. 50. However, in his other book, *Perihal Undang-Undang*, Jimly also emphasizes Perpu as a law in the material sense or "*wet in*

of its form, Perpu is a regulation under the law and therefore the institution authorized to conduct testing is the Supreme Court. In addition, from the name he believes that it is clear that a Perpu is a government regulation, although Jimly also recognizes that from its content a Perpu is actually a law, so that like Constitutional Judge Muhammad Alim, Jimly argues that Perpu is the domain of the DPR's authority to exercise control.⁷¹

Indeed, the Constitutional Court has made changes to the 1945 Constitution. The Constitutional Court does not change the formulation of the Article in the 1945 Constitution which regulates the authority of the Constitutional Court (and indeed the Constitutional Court is not an institution authorized to amend the Constitution as specified in Article 3 paragraph (1) of the 1945 Constitution), but as the *sole interpreter of the constitution*,

b. The meaning of the Authority of the House of Regional Representatives (DPD) in the Legislation function as stipulated in Article 22D paragraph (1) and paragraph (2) of the 1945 Constitution

The existence of parliament in Indonesia under the 1945 Constitution has raised debates since the beginning. There is the MPR, there is the DPR, all of which are members of the MPR.⁷² Amendments to the 1945 Constitution still retain the MPR and DPR, but by forming DPD although MPR members are all members of DPR and DPD members. The 1945 Constitution does not describe the wholeness of parliament (MPR, DPR, and DPD), which obscures the understanding of parliament in Indonesia today. This formalizes tricameralism in Indonesia or other forms as proposed by Arend Lijphart as *asymmetric bicameralism*.⁷³

This context is tested by DPD in relation to the implementation of the legislative function of DPD and the position of DPD in the Indonesian constitutional system. This test is based on the practice of parliamentary and legislative practices that heed the role of DPD in it. This test also provides a perspective on the interpretation of Article 22D of the 1945 Constitution.

Parliament-MPR is independent, stand alone, and permanent. However, the implementation of the functions of the MPR suspends the routine functions of the legislature due to the equality of MPR membership with DPR-DPD. Meanwhile, the Indonesian Parliament also consists of the DPR and DPD. Members of this "bicameral" legislative parliament relate in groups and are institutionalized. Parliament stands alone, independent, permanent, and "everyday" carry out its functions. However, the

materiele zijn," which therefore can be tested by the Constitutional Court. See Jimly Asshiddiqie, *Perihal Undang-Undang*, (Jakarta: Konstitusi Press, 2006), pp. 80.

⁷¹ *Ibid.*

⁷² Added with delegates from the regions and group delegates.

⁷³ See further Arend Lijphart *Democracies: Patern of Majotarian and Concensus Government in Twenty One Democacies*, (New Haven: Yale University Press, 1984).

posture, authority, domain of power of each and the pattern of their relationship is very unequal (*asymmetric*).

Members of DPR are elected through the General Election whose participants are parties (open proportional system). While DPD members are elected in each province through the General Election followed by individual participants (multi-member district system). The 1945 Constitution emphasizes the number of DPD members is less than one-third the number of DPR members.⁷⁴

DPD only discusses with DPR, the bill relating to regional autonomy; formation, expansion, and merger of regions; management of natural resources and other economic resources, as well as the financial balance between the center and the regions. DPD only gives consideration to DPR on the Draft State Budget and the bill relating to taxes, education, and religion. DPD's role in the budgeting function seems very limited.

The imbalance is more striking in the field of legislation, because the President is involved as a discussant and decision maker with DPR,⁷⁵ while DPD is only involved in the proposal and discussion.⁷⁶ This pattern of relationship can be called a hybrid type, which is a *three-chamber legislative process* with decision-making in the hands of DPR and the President (*president-executive in parliament*). This pattern of legislation feels odd, because it is done like the pattern of legislation in the parliamentary system,⁷⁷ because the 1945 Constitution does not emphasize that "legislative power" is exercised jointly by DPR and DPD.

In Act No. 27 Year 2009 on the MPR, DPR, DPD, and DPRD (MD3 Act 2009) and in Act No. 12 Year 2011 on the Establishment of Legislation (P3 Act 2011) positioned the DPD as a subordinate of DPR by placing DPD on par with DPR organs.⁷⁸ The bill initiated by DPD must be harmonized, rounded, and stabilized by DPR organs, namely the Legislation Body of DPR, then the bill from DPD "change clothes" into a bill from DPR.⁷⁹

DPD fought for its constitutional authority by filing a *judicial review* to the Constitutional Court.⁸⁰ In the application of case number 92/PUU-X/2012, there are two constitutional authorities that are tested, namely the authority to be able to propose the Bill (Bill) and the authority to participate in discussing the bill in a particular field. Both constitutional authority of DPD is mandated in Article 20 paragraph (2) and Article 22D paragraph (1) and paragraph (2) of the 1945 Constitution.

⁷⁴ Article 22C paragraph (2) of the 1945 Constitution.

⁷⁵ Article 20 paragraph (2) of the 1945 Constitution.

⁷⁶ Article 22D paragraphs (1) and (2) of the 1945 Constitution.

⁷⁷ Saldi Isra, *op.cit.*

⁷⁸ Article 102 of the 2009 MD3 Law.

⁷⁹ Article 147 paragraph (3) and paragraph (4) of MD3 Act 2009.

⁸⁰ DPD's application was submitted on September 14, 2012, the application was then recorded in the Constitutional Case Registration Book with number 92/PUU-X/2012 on September 17, 2012 which has been corrected and received at the Registrar of the Constitutional Court on October 8, 2012.

The application for judicial review is done to obtain a more precise and definite interpretation for the common interests in the legislative system between DPR, DPD, and the President, which further argues the constitutional losses faced by DPD as follows:

- 1) Article 102 paragraph (1) letter d and letter e of Act 27/2009, Article 48 paragraph (2) and paragraph (4) of Act 12/2011 has reduced the legislative authority of DPD to be equivalent to the legislative authority of members, commissions, and joint commissions of DPR;
- 2) Article 143 paragraph (5) and Article 144 of Act 27/2009 systematically reduce the authority of DPD since the beginning of the Bill submission process;
- 3) Article 147 paragraph (1), paragraph (3), and paragraph (4) of Act 27/2009 has distorted the bill proposed by DPD into a bill proposed by DPR;
- 4) Article 18 letter g, Article 20 paragraph (1), Article 21 paragraph (1) and paragraph (3), Article 22 paragraph (1) and Article 23 paragraph (2) of Act 12/2011 has negated the authority of DPD to be able to submit a bill, both inside and outside the National Legislation Program (Prolegnas);
- 5) Article 43 paragraph (1), paragraph (2) and Article 46 paragraph (1) of Act 12/2011 has degraded the position of DPD into a sub-ordinate institution under DPR because it negates the constitutional authority of the Applicant to be able to submit the bill;
- 6) Article 65 paragraph (3) and paragraph (4) of Act 12/2011 does not include DPD in the entire process of discussion of the bill which is the constitutional authority of DPD;
- 7) Article 71 letter a, letter d, letter e, letter f, and letter g and Article 107 paragraph (1) letter c of Act 27/2009, as well as Article 70 paragraph (1) and paragraph (2) of Act 12/2011 have reduced the constitutional authority of DPD to participate in giving approval as a product of the mechanism to discuss a bill related to its authority;
- 8) Article 150 paragraph (3) of Act 27/2009 and Article 68 paragraph (3) of Act 12/2011 has negated the authority of DPD in the submission and discussion of the Problem Inventory List (DIM) which is the "core" of the discussion of the bill;
- 9) Article 147 paragraph (7), Article 150 paragraph (5) of Act 27/2009, and Article 68 paragraph (5) of Act 12/2011 have reduced the authority of DPD by stipulating that the discussion of the bill is still carried out even without the involvement of DPD;
- 10) Article 150 paragraph (4) letter a, Article 151 paragraph (1) letter a and letter b of

Law 27/2009, as well as Article 68 paragraph (2) letter c and letter d, paragraph (4) letter a, Article 69 paragraph (1) letter a and letter b, and paragraph (3) of Law 12/2011 harm the authority of DPD because every bill as long as it relates to the bill relating to the authority of DPD should be discussed by DPR represented by DPR organs, *in this case* not the faction, the President represented by the appointed minister, and the Applicant represented by DPD organs.

Based on Article 5 paragraph (1), Article 21, and Article 22D paragraph (1) of the 1945 Constitution, DPD holds the following views:

- a. The meaning of the word "may" in Article 22D paragraph (1) of the 1945 Constitution should be treated comparable to the meaning of the word "entitled" in the provisions of Article 5 paragraph (1) of the 1945 Constitution.
- b. The constitutional authority granted by the 1945 Constitution to the DPD and the President is the constitutional authority as "state institutions" not as individuals or "members of state institutions" as given to "Members of DPR".
- c. DPD and the President have the constitutional authority to propose a "bill", while "DPR members" have the constitutional right to propose a "bill proposal".

Thus, the provisions of Article 22D paragraph (1) of the 1945 Constitution which confirms the DPD can propose a particular field bill should not be interpreted parallel to the meaning contained in the provisions of Article 21 of the 1945 Constitution which states the right of Members of DPR to propose a "Proposed Bill". Therefore, DPD concluded that the treatment of the bill originating from the DPD and the President should be the same, because the same muzzle to DPR.

Then, the provisions of Article 22D paragraph (2) of the 1945 Constitution gives constitutional authority to the DPD to participate in discussing the bill relating to regional autonomy, central and local relations, the establishment, expansion, and merger of regions; management of natural resources and other economic resources, as well as the financial balance between the center and the regions. Meanwhile, Article 20 paragraph (2) of the 1945 Constitution stipulates that every bill is discussed by the DPR and the President for joint approval. The definition in Article 20 paragraph (2) of the 1945 Constitution includes all types of bills, either proposed by the President or DPR alone, or specifically associated with the authority of DPD as referred to in Article 22D Paragraph (1) of the 1945 Constitution.

Against these provisions, DPD believes that the phrase "Participate in Discussing" in Article 22D paragraph (2) of the 1945 Constitution should be interpreted as a breath of DPD's full involvement in all processes of discussion of a particular bill with a degree of authority comparable to DPR and the President. This understanding is supported by historical interpretation by reviewing the minutes of amendments to the 1945

Constitution. The phrase "Participate in Discussing" is deliberately formulated stand alone because the 1945 Constitution should be read as a whole, as a unit in one text.

DPD asserted, the provisions in Article 20 paragraph (2) and Article 22D paragraph (2) of the 1945 Constitution should be read together and not be an independent part. Semantically, the Big Indonesian Dictionary provides an understanding that the word "participate" means doing something as done by others, so that "participate in discussing" can be interpreted as "participate in discussing". Therefore, the phrase "participate in discussing" in Article 22D paragraph (2) of the 1945 Constitution should be interpreted that as far as the bill related to the authority of DPD, either the bill proposed by the President, DPR, or DPD, the authority of DPD in discussing the bill is equivalent to the President and DPR. Thus, the DPD is authorized to follow the entire process of discussion of a particular bill, starting from the submission process until the approval process of a bill into law, as long as it concerns the field in accordance with the authority of DPD.

Based on these arguments, DPD concluded that based on Article 20 paragraph (2) and Article 22D paragraph (2) of the 1945 Constitution, the phrase "participate in discussing" in Article 22D paragraph (2) of the 1945 Constitution should be associated with Article 20 paragraph (2) of the 1945 Constitution. The understanding is, as far as the bill related to the authority of DPD, whether the bill comes from the President, DPR, or DPD, then as well as the President and DPR, DPD also has the authority to follow the entire process of discussion of the bill related to the authority of DPD.

Based on the consideration of the Constitutional Court in Decision No. 92/PUU/X/2012, it appears that the Constitutional Court uses a positivistic approach to the interpretation of the position and role of DPD in legislation. Orientation to legal certainty and emphasis on the coherence of the rules indicate the operation of the interpretation of the constitutional authority of DPD based on an internal perspective. Based on the reference, the Constitutional Court confirms the conception of representation of regional representatives in the Indonesian constitutional system, by linking the Articles relating to DPD.⁸¹

The Constitutional Court uses an originalist interpretation approach although it does not directly refer to the will of the framers of the 1945 Constitution, but refers to the certainty, coherence, and textual integration provided by the semantic meaning of the constitutional text itself.⁸² The opinion of the Constitutional Court is in contrast with the

⁸¹ Opinion of the Court in Decision No. 92/PUU-X/2012, Opinion of the Court [3.17], Republic of Indonesia, Decision of the Constitutional Court of the Republic of Indonesia Case No. 92/PUU-X/2012 Testing Law No. 27 of 2009 on the People's Consultative Assembly, the House of Representatives, the Regional Representatives Council, and the Regional Representatives Council and Law No. 12 of 2011 on the Formation of Legislation against the 1945 Constitution of the Republic of Indonesia.

⁸² Compare with the opinion of Owen M. Fiss, *op.cit.*, p. 743.

opinion at the time of deciding the Dispute over the Authority of Presidential Decree No. 185 / M / Year 2004 on the Dismissal of Members of the Supreme Audit Agency for the Period 1999-2004 and the Appointment of Members of the Supreme Audit Agency for the Period 2004-2009, which is considered by DPD to be in conflict with Article 23F of the 1945 Constitution, because it is not through the consideration of DPD.

In its legal considerations, the Constitutional Court emphasized the principle of people's representation. This consideration actually reduces the meaning of representation by eliminating, or delaying the role of DPD as a regional representative formed through changes in the 1945 Constitution. Although both use originalism interpretation, but the interpretation made by the Constitutional Court is different in interpreting the position of DPD.

The Constitutional Court also uses a systematic interpretation related to the role of DPD in the lawmaking system. The Constitutional Court in its opinion explained four things, namely:

First, regarding the authority of DPD in submitting the bill, the Constitutional Court interpreted that the word "may", is a subjective choice for DPD.⁸³ Because the word "may" is a subjective choice of DPD, then "may" is a right or authority of DPD that is given constitutionally.⁸⁴

The Constitutional Court also considered DPD has the same position as DPR and the President. Placing the bill of DPD as a DPD proposal bill, then discussed by the Legislation Body of DPR, and become a bill of DPR is a provision that reduces the authority of DPD to propose a bill that has been specified in Article 22D paragraph (1) of the 1945 Constitution.

Second, regarding the authority of DPD to Discuss the Bill. According to the Constitutional Court, the authority of DPD to discuss the bill has been firmly set in Pasa 22D paragraph (2) of the 1945 Constitution. Argumentation of the Constitutional Court states that the use of the phrase "participate in discussing" in Article 22D paragraph (2) of the 1945 Constitution is because Article 20 paragraph (2) of the 1945 Constitution has determined explicitly that each bill discussed by the DPR and the President to obtain mutual consent. The use of the phrase "participate in discussing" is reasonable because Article 20 paragraph (2) of the 1945 Constitution was passed in the First Amendment of the 1945 Constitution in 1999, while Article 22D of the 1945 Constitution was passed in the Third Amendment of the 1945 Constitution in 2001.⁸⁵

Third, regarding the authority of DPD to Approve the Bill. The Constitutional Court

⁸³ Decision Number 92/PUU-X/2012, pp. 244-245.

⁸⁴ *Ibid.*

⁸⁵ *Ibid*, pp. 245.

considered based on Article 22D paragraph (2) of the 1945 Constitution has clearly determined that the DPD is only authorized to participate in discussing the bill and not participate in giving final approval.⁸⁶

Fourth, regarding the involvement of DPD in the preparation of the National Legislation Program (Prolegnas). According to the Constitutional Court, the participation and involvement of DPD in the preparation of Prolegnas should be a consequence of the norm of Article 22D paragraph (1) of the 1945 Constitution.

c. The meaning of the Terms of Candidacy for President and Vice President

In the realm of constitutional interpretation, the Constitutional Court Decision Number 90/PUU-XXI/2023 became one of the controversial decisions of the Constitutional Court, because it received various criticisms from the public. This decision marks that interpreting the constitution with critical hermeneutics does play a role in law formation that seeks to uncover hidden intentions or tactics. This concept can also strengthen the efforts of lawmakers in understanding the moments of lawmaking.⁸⁷

Based on the provisions in Article 24C paragraph (1) of the 1945 Constitution, the Constitutional Court examines the provisions of laws that are contrary to the 1945 Constitution. However, Article 51 paragraph (1) of Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court, states that the applicant is a party who considers his constitutional rights and or rights to be impaired by the enactment of the Law. However, Decision No. 90/PUU-XXI/2023 states that the applicant, Almas Tsaqibbirru, is not a party whose rights and or constitutional rights have been personally impaired because in his application he mentions the name of another person, not his personal interests.

Decision Number 90/PUU-XXI/2023 is a test of Law Number 7/2017 on General Elections, Article 169 letter (q). As a result of the lawsuit, the chairman of the Constitutional Court Anwar Usman in an open session for the public stated that case number 90/PUU-XXI/2023 of the Constitutional Court's ruling stated that Article 169 letter (q) of the Election Law, presidential and vice-presidential candidates are at least 40 (forty) years old or have / are currently holding positions elected through general elections including regional head elections, which means that the age limit for presidential and vice-presidential candidates is at least 40 (forty) years old.

The Applicant argues that the provisions of Article 169 letter q of Law Number 7 Year

⁸⁶ *Ibid*, pp. 248.

⁸⁷ See Rachmani Puspitadewi, *The Application of Hermenutics in the Law*, *op.cit*, p. 231. 231.

2017 on Elections⁸⁸ are contrary to the Applicant's constitutional rights which are regulated and protected by the 1945 Constitution, namely: ⁸⁹

1) Article 27 paragraph 1 of the 1945 Constitution which reads:

"All citizens shall be equal before the law and government and shall uphold the law and government with no exceptions."

2) Article 28D paragraph (1) of the 1945 Constitution which reads:

"Every person shall have the right to recognition, guarantees, protection, and certainty of a just law and equal treatment before the law."

3) Article 28D paragraph (3) of the 1945 Constitution which reads:

"Every citizen has the right to equal opportunity in government."

The Applicant also argues that Article 169 letter q of the Election Law is contrary to and has also caused real discrimination against the Applicant, which has clearly harmed and violated the Applicant's constitutional rights, which rights are protected by the Constitution in Article 28I paragraph (2) of the 1945 Constitution which states: ⁹⁰

"Every person shall have the right to be free from discriminatory treatment on any grounds whatsoever and shall have the right to protection against such discriminatory treatment."

In the context of discrimination, the applicant provides key points to support his argument, in two approaches. *First*, through an interpretative approach that Article 129 letter q of the Election Law is discriminatory. The applicant postulates the reasons for the discrimination, as follows:⁹¹

- 1) That *age* discrimination or "*ageism*" is a form of "*stereotyping*" and discrimination against individuals or groups because of their age.
- 2) That however, with the Applicant submitting a conditional application or with experience as a regional head, whoever is elected (participates in the presidential election contest) or chooses whether potential or not, there is no constitutional loss.
- 3) The 1945 Constitution of the Republic of Indonesia (UUD 1945) is a constitution

⁸⁸ Article 169 letter q of Law Number 7 Year 2017 reads: ""The requirements to be a candidate for President and vice president are:

.....

q. at least 40 (forty) years old;"

⁸⁹ Republic of Indonesia, Decision of the Constitutional Court Number 90/PUU-XXI/2023 on the Examination of Law Number 7 of 2017 on General Elections against the 1945 Constitution of the Republic of Indonesia, *op.cit*, pp. 10.

⁹⁰ *Ibid*, p. 11.

⁹¹ *Ibid*, pp. 11-13.

that is the foundation of the life of the nation and state of Indonesia, therefore the 1945 Constitution must be understood comprehensively, not only from a formal perspective. In other words, it is not only bound by the law itself, but also by a sense of justice and morality.

- 4) That one of the principles of justice and/or legal certainty that is clearly regulated is the term of public office, that the term of public office must be based on the principles of justice and legal certainty.
- 5) That the term of office and age determination of public office according to state administrative law is the realization or concretization of the rights a person has to occupy the position in a form or format of state administration intended for everyone in a real and definite manner, which does not contain other interpretations, let alone contradict other provisions.
- 6) That by having been elected and occupied in the period of executive office, the elected has been tested and has experience in leading a region, both provincial and regency / city.
- 7) What is meant by regional head in this petition is the head of local government in both the province and regency/city, which is the executive in the region.

Secondly, the applicant argues that the petition is not an *open legal policy*, but has touched the realm of discrimination that encroaches on human rights.⁹² Therefore, according to the applicant, this is reason enough for the Constitutional Court to decide the case. This context becomes interesting, if you look at the previous decision of the Constitutional Court against Article 169 letter (q) of the Election Law, a Material Test was filed which was still running until Application Number 90/PUU-XXI/2023 was made. And previously several lawsuits entered the Constitutional Court for testing the age limit of Presidential and Vice Presidential candidates in Article 169 letter (q) of Law Number 7 Year 2017 concerning General Elections, such as a judicial review application with Decision No. 29/PUU-XXI/2023 by the Indonesian Solidarity Party, Decision No. 51/PUU-XXI/2023 by the Indonesian Solidarity Party. 51/PUU-XXI/2023 submitted by the Gelora Party, then a judicial review application with case No. 55/PUU-XXI/2023 submitted by the Mayor of Bukittinggi, Deputy Regent of South Lampung, all of these applications were rejected by the Constitutional Court because age restrictions for presidential and vice presidential candidates are the domain of the legislators (*open legal policy*).⁹³

In its legal considerations, the Constitutional Court provides an interpretation of Article

⁹² *Ibid*, pp. 11-18.

⁹³ Arya Apriansyah, Lauddin Marsuni, and Salmawati, *Juridical Analysis of the Constitutional Court Decision Number 90/PUU-XXI/ 2023 Regarding the Age Limit of Candidates for President and Vice President of the Republic of Indonesia*, Journal of Lex Philosophy (JLP), Vol. 5, No. 2, December 2024, p. 829. 829.

6A of the 1945 Constitution, as follows:⁹⁴

"The President and Vice President are political positions that are directly elected by the people (*elected officials*) as stipulated in Article 6A of the 1945 Constitution. As a political office, the *constitutional requirements* to be nominated as President and Vice President are stipulated in Article 6 paragraph (1) of the 1945 Constitution that a candidate for President and Vice President must be an Indonesian citizen since his/her birth and has never received another citizenship by his/her own will, has never betrayed the country, and is able spiritually and physically to carry out the duties and obligations as President and Vice President. Meanwhile, other requirements are further regulated by law, *in this case* the law regarding general elections."

The Constitutional Court also provides an interpretation by looking at the historical approach to regulating the requirements to become President and Vice President.⁹⁵ Furthermore, the Constitutional Court also provides an interpretation of the context of *open legal policy*. The best interpretation of the Constitution must consider the will of the author (*original intent*) and what is needed by society today (*contextual approach*). The text of the 1945 Constitution is the most valid basis for finding the truth in different views on constitutional matters. Article 6A Paragraph (2) of the 1945 Constitution very explicitly includes provisions regarding the nomination of candidates for President and Vice President. The omission, addition, or subtraction of the provisions of Article 6A Paragraph (2) of the 1945 Constitution is a serious form of constitutional deviation by the legislator.

Textual intent (which is part of *original intent*) is an important benchmark. Interpretation of constitutional texts in the form of new rules by lawmakers can only be done if the provisions of the articles of the 1945 Constitution do not clearly regulate. For example, in Article 24 Paragraph (3) of the 1945 Constitution regarding:

"other bodies whose functions are related to the judicial power shall be regulated by law."

The absence of a clear distinction between the content of constitutional norms and statutory norms has the consequence of creating loose spaces in the formation of legislation. From a connotative perspective, the loose space in question can shift into a "blank check" to be filled/interpreted at will by the legislator.

The case being tested is an *open legal policy* case, but was granted by the Constitutional Court. The provisions of *open legal policy* can be seen in the constitution of the 1945 Constitution of the Republic of Indonesia Article 6A paragraph (5) which reads that all

⁹⁴ Republic of Indonesia, Decision of the Constitutional Court Number 90/PUU-XXI/2023 on the Examination of Law Number 7 of 2017 concerning General Elections against the 1945 Constitution of the Republic of Indonesia, *op.cit*, p. 29. 29.

⁹⁵ *Ibid*, pp. 29-30.

implementation of the election of the President and Vice President is further regulated by law. The sentence "further regulated in the law" is part of the provisions of open legal policy which means that all rules up to the implementation of the terms and procedures for the election of the President and Vice President are the authority of the legislature. Meanwhile, the Constitutional Court in this case is the interpreter of the constitution or *negative legislator*.

At this point, the problem caused by the decision of the Constitutional Court No.90/PUU-XXI/2023 with the article being tested, namely Article 169 letter (q) of the Election Law, is part of the derivative Article of Article 6A of the 1945 Constitution, which is very clear that part of the Article is an Article that has the nature of an *open legal policy*. Whereas in a *distribution or division of power* system that does not idealize the principle of '*checks and balances*', such testing, if needed, is considered to be carried out only by the institution that makes the rules themselves. For example, a law can only be tested by the President and the DPR, which are authorized to make it.

Proposals to repeal a law can come from anywhere, but the process of amending or repealing a law must come from the initiative of the President or DPR as the institution that has the authority to do so. In accordance with the results of the RPH which were then outlined in the decision, there were different reasons (*concurring opinion*) from 2 (two) Constitutional Judges and 4 (four) Constitutional Judges. Historically, *dissenting opinions* and different reasons (*concurring opinion*) in Constitutional Court decisions are common. However, the *dissenting opinions* submitted by Saldi Isra and Arief Hidayat, Wahiduddin, and Soehartoyo and the *concurring opinions* submitted by Enny Nurbaningsih and Danil Yusmic P. Foeckh. In this case, the author summarizes the legal reasons for the *dissenting opinion* and *concurring opinion*.

The fact of *concurring opinions* from 2 constitutional judges and *dissenting opinions* from 3 constitutional judges, can be analyzed that there is indeed uncertainty in a number of constitutional judges when deciding the case of the age limit of this presidential-vice-presidential candidate. This is due to strong public pressure and strong political nuances. This is reinforced by the contradictions and inconsistencies of the Constitutional Court in deciding the Election Law review case. There is the fact that Cases 90/PUU-XXI/2023 and 91/PUU-XXI/2023 were declared revoked by their attorneys in a letter dated September 26, 2023 on Friday, September 29, 2023. However, on Saturday, September 30, 2023 at 20.36 WIB, the applicant revoked the revocation of the case. (Vide *dissenting opinion of* Constitutional Judge Prof. Arief Hidayat).

When deciding on the age limit for marriage in Decision Number 22/PUU/XV/2017, the Constitutional Court explicitly showed its attitude as a *negative legislator*. Meanwhile, in Decision Number 90PUU-XXI/2023 on the age limit for presidential and vice-

presidential candidates, the Constitutional Court tends to act as a *positive legislator* by creating new norms in the article being tested. This decision also has implications for the informal change of Article 6 paragraph (1) of the 1945 Constitution informally through constitutional interpretation by the Constitutional Court.

Ius Constituendum MPR in Constitutional Interpretation

Along with the changes to the 1945 Constitution that replaced the supremacy of the MPR⁹⁶ with the supremacy of the constitution. Therefore, the MPR in the context of Indonesian state administration no longer holds the supreme power. The supremacy of the constitution adopted by Indonesia is the highest power, sovereignty in the hands of the people implemented by and in the manner as stipulated in the constitution. The Constitution is the highest source of reference for the exercise of state power.⁹⁷ while the Constitution is a written basic law and jarus contains the main principles regarding the basis and purpose of the state and the main rules that become the *rule of change* in the nation and state. Therefore, the Constitution must contain the purpose and basis of the state.⁹⁸

Therefore, in the future the approach to constitutional interpretation carried out by the Constitutional Court must rely on three main components, namely semantics, objectives (objective-subjective-Pancasila-end), and judicial discretion which is carried out holistically, integratively, and dynamically.⁹⁹ The semantic (language) component rests on the view that the interpretation of the text of the 1945 Constitution cannot be separated from the limitations of the possible meaning of the language (semantics) of the text of the 1945 Constitution itself, including Pancasila which is constructed as general-fundamental legal principles.¹⁰⁰ Thus, interpreting the Articles of the 1945 Constitution semantically

⁹⁶ This term was first introduced by Padmo Wahjono, referring to the grammatical meaning of Article 1 paragraph (2) of the 1945 Constitution (pre-amendment), namely: "Sovereignty is in the hands of the people and is exercised entirely by the People's Consultative Assembly." According to him, the sovereignty of the people is fully represented / exercised by an institution called the MPR. It is the head of this institution that all state activities must be accounted for. Padmo Wahjono, *Cultivating the 1945 Constitution*, (Jakarta: Ind. Hill, 1991), pp. 5.

⁹⁷ Janedjri M Gaffar, *Constitutional Democracy: The Practice of Indonesian State Administration After the Amendment of the 1945 Constitution*, (Jakarta: Kontitusi Press, 2012), p. 79. 79.

⁹⁸ Secretariat General of the MPR RI, *Minutes of Amendments to the 1945 Constitution of the Republic of Indonesia, Session Year 2001, Fourth Book*, (Jakarta: Secretariat General of the MPR RI, 2010), p. 651. 651.

⁹⁹ Compare this author's view with Barak's writing on the components of purposive interpretation. See Aharon Barak, *Purposive Interpretation in Law*, Princeton-New Jersey: Princeton University Press, 2005, pp. xii-xiii. 89. See also Ariel L. Bendor and Zeev Segal, "The Judicial Discretion of Justice Aharon Barak", *Tulsa Law Review*, 47, 2011, p. 469. 469.

¹⁰⁰ The author refers to Pancasila as the general and most fundamental legal principles (general-fundamental legal principles) by referring to the views of Scholten and Bruggink. In Scholten's view, the term general legal principles indicates the different levels or degrees of generality of a legal principle. That is, general legal principles apply to all types of legal regulations. Meanwhile, Bruggink uses the term most fundamental legal principles, namely the rules of judgment that embody the foundation (basis) of any

cannot be separated from Pancasila as stated in the Preamble of the 1945 Constitution. This semantic component is the starting point in interpreting the constitution. In addition, it also serves to establish certain boundaries that limit the interpreter to find the legal meaning included in the text of the 1945 Constitution, including Pancasila.¹⁰¹

The objective component includes subjective, objective, Pancasila, and final objectives. Subjective objectives are the interests, specific goals, values, intentions, policies, and functions that the framers of the 1945 Constitution (including amendments) wanted to realize through the text of the 1945 Constitution. Objective objectives include the *intent of the reasonable author*, i.e. the intention of the framers of the 1945 Constitution that can be accepted by the common sense of Indonesian people, and the intention of the Indonesian legal system, i.e. the interests, goals, values, intentions, policies, and functions in which the text of the 1945 Constitution is designed to be actualized in the frame of democratic life in the Indonesian legal system based on Pancasila.¹⁰² The purpose of Pancasila includes the interests, specific goals, values, intentions, policies, and functions that the framers of Pancasila wanted to realize, which are in line with the current rational understanding of Indonesian society, and are also in line with the development of the Indonesian legal system. While the final goal is an effort to synthesize and coordinate between the semantic component, the goal component (subjective goals, objective goals, and Pancasila goals).¹⁰³

In this case, research conducted by Fence M. Wantu, Novendri M. Nggilu, Mellisa Towadi, and Ahmad¹⁰⁴ becomes very relevant to provide the final interpretation space for the MPR. In their research, Fence M. Wantu and friends provide recommendations for the relationship between the MPR and the Constitutional Court, in the following two schemes, namely: 1) The MPR participates in the initial trial at the Constitutional Court to provide views related to the *original intent* of the article in the 1945 Constitution that is used as a test for interpretation; and 2) The MPR has space only in the context of filing constitutional interpretations in the Constitutional Court and being taken into consideration by the Constitutional Court in deciding to review laws against the Constitution, so in this second scheme, the position of the MPR is much stronger than in scheme one, at least comparable to the Constitutional Court.

legal system. When referring to the opinions of the two experts above, the principles of Pancasila law can be categorized as general legal principles as well as the most fundamental in a positive legal system or can be called general-fundamental legal principles. See Johannes Josephus Henricus Bruggink, *Rechtsreflecties: Grondbegrippen Uit de Rechtstheorie*, Deventer: Kluwer, 1993, pp. 120-140.

¹⁰¹ Compare with Barak's explanation on this point. See Aharon Barak, *Purposive Interpretation in Law*, pp. 89.

¹⁰² Compare this notion of subjective and objective purpose with Barak's explanation of it. See *Ibid*, pp. 120-148

¹⁰³ Compare this notion of ultimate goal with Barak's explanation of it. See *Ibid*.

¹⁰⁴ Fence M. Wantu, Novendri M. Nggilu, Mellisa Towadi, and Ahmad, *Indonesian Constitutional Interpretation: The Constitutional Court Versus The People's Consultative Assembly*, Journal of Legal, Ethical, and Regulatory Issues, 2021.

Both schemes have weaknesses in the context of placing the MPR in the realm of the Constitutional Court's duties. The most relevant option in the current Indonesian constitutional context is to provide space for the MPR to interpret *original intent* both in the form of minutes and other documents and codify the development of the constitution in Indonesia to serve as guidelines for other state institutions, such as the Constitutional Court, the President, and the DPR and DPD. As a state institution that is given the authority to amend and establish the Constitution, the MPR should be more active, not just relying on the provisions of Article 37 of the 1945 Constitution.

Constitutional interpretation and informal changes to the 1945 Constitution, according to the author, actually form a continuous cycle in the form of *constitutional dialogue* between the Constitutional Court and the MPR and lawmakers (DPR-President-DPD). Indeed, in the search for theory, a solid and generally agreed definition of this *constitutional dialogue* has not been found. However, there are at least some thoughts related to it.

For example, Geoffrey Sigalet, Gregoire Webber and Rosalind Dixon state that constitutional dialogue is the constitutional interaction between the judiciary, legislature and executive.¹⁰⁵

On an implementation basis, *constitutional dialogue* can be seen from the views of Catherine A. Fraser, who provides an overview of the concept of constitutional dialogue which descriptively refers to the interaction and deliberation between the court in this case the Constitutional Court and the legislature in this case the MPR regarding constitutional commitments that must be applied. While normatively is to maintain legal certainty and public interest.

Thus, in simple terms according to the author, the constitutional dialog that occurs is the process of interaction of authority between the Constitutional Court and the MPR as equal and balanced. This interaction is actually part of the constitutional process, namely in the context of interpreting the constitution, *constitutional dismemberment* by the MPR, and the formation of laws.

3. Conclusion

1. There have been informal changes to the 1945 Constitution through Constitutional Interpretation carried out by the Constitutional Court, namely:
 - a. Constitutional Court Decision No. 001-021-022/PUU-I/2003 on Examination of Law of the Republic of Indonesia No. 20 of 2002 on Electricity against the 1945 Constitution. In its decision, the Constitutional Court gave meaning to the phrase

¹⁰⁵ Geoffrey Sigalet, Grégoire Webber, and Rosalind Dixon, *Introduction: The 'What' and 'Why' of Constitutional Dialogue*, LSE Law, Society and Economy Working Papers 21/2019 London School of Economics and Political Science Law Department, pp. 1.

- "controlled by the state" in Article 33 paragraph (2) of the 1945 Constitution.
- b. Constitutional Court Decision No. 138/PUU-VII/2009 on the Examination of Government Regulation in Lieu of Law No. 4 of 2009 on Amendments to Law of the Republic of Indonesia No. 30 of 2002 on the Corruption Eradication Commission. In its decision, the Constitutional Court did not grant this petition, but in its legal opinion, the Constitutional Court provided an interpretation of the meaning of the authority of the Constitutional Court in Article 24C paragraph (1) of the 1945 Constitution to test Perppu with the 1945 Constitution.
 - c. Constitutional Court Decision No. 92/PUU-X/2012 on the Examination of Law of the Republic of Indonesia No. 27/2009 on the MPR, DPR, DPD, and DPRD and Law of the Republic of Indonesia No. 12/2011 on the Establishment of Legislation against the 1945 Constitution. In its decision, the Constitutional Court gave meaning to the bill of DPD in Article 22D paragraph (1) of the 1945 Constitution.
 - d. Decision of the Constitutional Court Number 90/PUU-XXI/2023 on the Examination of Law Number 7 Year 2017 on General Elections against the Constitution of the Republic of Indonesia Year 1945. In the verdict, to decide Article 169 letter q of the Election Law, the Constitutional Court gave new meaning to Article 6 paragraph (1) of the 1945 Constitution.
2. Informal changes in the 1945 Constitution in this study, tend to occur in the results of political compromise at the time of the formulation of changes in the 1945 Constitution or the formulation of norms that are vague and not *fixed (political adjustment)*, namely on 1) the legislative authority of DPD (Article 22D paragraph (1) of the 1945 Constitution); 2) the requirements to be a candidate for President and Vice President (Article 6 paragraph (1) of the 1945 Constitution), or on the formulation of norms in the 1945 Constitution that became a long debate when the formulation of the 1945 Constitutional amendments, namely 1) on the right to control by the state (Article 33 paragraph (2) of the 1945 Constitution); and the authority of the Constitutional Court (Article 24C paragraph (1) of the 1945 Constitution).

The findings of this research are that informal changes are produced through interpretation, or reinterpretation occurs. In this context, there are several possible theoretical implications of the existence of a quasi-constitution in Indonesia, namely:

First, the quasi *constitution* makes the 1945 Constitution undergo a change in *ius constituendum* because it applies as the current *ius constitutum* is a new interpretation of the norms in the 1945 Constitution which is changed through the Constitutional Court Decision.

Second, the constitution does not always contain *jurist truth*. The Constitution is a *written, agreed political consensus* or a mutually agreed political product that is

exercised by power through legislation and enforced through constitutional adjudication. Thus, there is a *triangle relationship sequence* through the interpretation carried out by the Constitutional Court. The quasi-constitution is an anomaly from the results of the *triangle relationship sequence*, its position which is equivalent to the constitution, theoretically adds to the complexity of adoption in constitutionalism and the constitutional system. However, in the context of praxis, the existence of a quasi-constitution is the most constitutional interpretation to affirm that the 1945 Constitution is a *living constitution*.

Third, with its position, the quasi constitution is also a "piece" to complete the vagueness of the compromise *constitutional law*, for example regarding elements of *constitutional drafting techniques*, or *constitutional stupidities*.

Fourth, change through interpretation allows for experimentation, facilitates change and minimizes the risk of error. Thus, if the result achieved through interpretation proves undesirable, correcting the error is possible and relatively easy. However, if a mistake is made in a change by way of amendment, rectification is much more difficult.

Fifth, the Quasi Constitution is an innovative strategy for updating a rigid constitution where it does not really matter how to make changes because the constitution should reflect the preferences of the people. When the constitution no longer accommodates the needs of the society it governs, it shows itself to be a poorly designed tool of government to perform its functions. The consequence is that the constitution will fail to survive in times where pressure for constitutional change continues to mount over a long period of time without any possibility of constitutional change being made.

3. The most essential substance of the concept of a *living constitution* is that the implementation of constitutional values and norms must be dynamic and adaptive. Therefore, normatively, the quasi-constitution must be placed in the constitutional system in Indonesia.

First, as a state of law, it requires respect for three principles: 1) the supremacy of law over public and private actors, 2) legal regulation of the interaction between public and private actors, and the establishment and maintenance of positive law that reflects an order of normative values.

Second, the substance of the quasi-constitution illustrates the vulnerability of the 1945 Constitution to exploitation through interpretive means that are not possible through the mechanism of Article 37 of the 1945 Constitution. The long-term result is uncertainty about constitutional status, because there is a misalignment between the text and practice of the constitution.

Third, the way to create constitutional legal certainty is to transplant the constitution, adopting a quasi-constitution into positive law.

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