CONSTITUTIONAL COURT
OF THE REPUBLIC OF INDONESIA

SUMMARY OF DECISION
FOR CASE NUMBER 145/PUU-XXI/2023

Concerning

Formal Review of the Norms of Article 169 letter q of the General Elections Law After Decision 90/PUU-XXI/2023

Petitioners	:	**Denny Indrayana and Zainal Arifin Mochtar**
Type of Case	:	Formal Review of Article 169 letter q of Law 7 of 2017 concerning General Elections (Law 7/2017) against the 1945 Constitution of the Republic of Indonesia (1945 Constitution)
Subject Matter	:	Formal Review of Article 169 letter q of Law 7/2017 after Decision 90/PUU-XXI/2023 against the 1945 Constitution.
Verdict	:	**On the Preliminary Injunction:** To dismiss the Petitioners' petition for preliminary injunction **On the Merits:** To dismiss the Petitioners' petition entirely.
Date of Decision	:	Tuesday, January 16, 2024
Overview of Decision	:	

Whereas the Petitioners are individual Indonesian citizens who work as lecturers of constitutional law, advocates, and academics who have been prejudiced due to the enactment of the norms of Article 169 letter q of Law 7/2017 after Constitutional Court Decision Number 90/PUU-XXI/2023 against the 1945 Constitution.

Regarding the Court's authority, because the Petitioners' petition is a Formal Review of the norms of Article 169 letter q of Law 7/2017 against the 1945 Constitution, the Court has the authority to hear the *a quo* petition.

Regarding the Petitioners' legal standing, the Petitioners are Indonesian citizens, academics, lecturers of constitutional law, and voters in the 2024 presidential election who believe that their constitutional rights have been injured due to the enactment of the establishment of Article 169 letter q of Law 7/2017 after Decision 90/PUU-XXI/2023, especially because one of the constitutional judges was proven to have committed an ethical violation.

In the Petitioners' opinion, the establishment of the norms of the *a quo* article is formally flawed as has been backed up by the MKMK decision. Regardless of whether the arguments related

to unconstitutionality issues about the establishment of Article 169 letter q of Law 7/2017 under Constitutional Court Decision Number 90/PUU-XXI/2023 are proven or not, as argued by the Petitioners using a formal review method that cannot be separated from the intersection with the material review as described above, together with the Petitioners' explanation that they are voters, the Court in its legal considerations regarding legal standing is of the opinion that the Petitioners have been able to describe their position and activities relating to Article 169 letter q of Law 7/2017 under Constitutional Court Decision Number 90/PUU-XXI/2023 and have also outlined the specific and potential causal relationship (*causal verband*) between their assumptions regarding the injury of constitutional rights and establishment process of Article 169 letter q of Law 7/2017 under Constitutional Court Decision Number 90/PUU-XXI/2023 which, according to the Petitioners, is not in accordance with the 1945 Constitution and Law 48/2009. Therefore, if the petition is granted, such injury of constitutional rights will not occur. Thus, the Petitioners have the legal standing to act as Petitioners in the *a quo* petition.

Furthermore, regarding the petition for preliminary injunction and the merits of the petition, the Court in its consideration states as follows:

On the Preliminary Injunction:

Whereas regarding the petition for preliminary injunction, the Court emphasizes that a judicial review of a law is not adversarial nor an *interpartes* case nor a dispute over the interests of the parties, but rather a review of the enactment of a generally applied law *erga omnes* for all citizens. Therefore, after the Court carefully examines the reasons for the petition for preliminary injunction submitted by the Petitioners, it is evident that it is more closely related to the material of the merits of the petition, which concerns whether there is unconstitutionality on the substance questioned by the Petitioners, which can only be known after legally considering the merits of the petition. Therefore, it will be premature to delay the enactment of a legal norm while the existence of the unconstitutionality issue is not yet known. Moreover, the Court does not find that the impact will be wider if the provisions of the norms of such Article remain in effect than if the enactment is postponed. In addition, the Court has also adjudicated the *a quo* case under Article 54 of the Constitutional Court Law, namely without going through a trial examination agenda to hear statements from the DPR, the President, and Relevant Parties. Meanwhile, regarding the right of refusal for Constitutional Justice Anwar Usman, the Court has considered adjudicating the *a quo* petition without Constitutional Justice Anwar Usman.

Pursuant to the legal considerations above, the Petitioners' petition for preliminary injunction is legally unjustifiable.

On the Merits:

- Whereas regarding the *a quo* Petitioners' argument, as the Court has emphasized in Constitutional Court Decision Number 141/PUU-XXI/2023 and Constitutional Court Decision Number 131/PUU-XXI/2023, parts of which have been described in Paragraph **[3.15]** above, Constitutional Court decisions do not recognize any invalid decisions even though in the decision-making process carried out by constitutional judges it is proven that one of the judges who participates in deciding the case has conducted ethical violation. This does not necessarily result in the decision being invalid or void. The Court has also emphasized that regarding a Constitutional Court decision that allegedly contains the issue of alleged violations as referred to in the provisions of the norms of Article 17 paragraph (1), paragraph (2), paragraph (3), paragraph (4), and paragraph (5) of Law 48/2009, the object of the petition may be re-submitted for review in terms of the constitutionality issue to the extent that it is not hindered by the provisions of the norms of Article 60 of the Constitutional Court Law and Article 78 of PMK 2/2021 or carried out through the legislators' legislative review. In addition, the legal considerations of the Constitutional Court Decisions have emphasized that the provisions of the norms of Article 17 paragraph (6), and paragraph (7) of Law 48/2009 cannot be applied in the judicial procedural law of the Constitutional Court, as has been the stance of the Ethics Council of the Constitutional Court (MKMK) [*vide* MKMK Decision Number 2/MKMK/L/11/2023, p. 380]. Pursuant to the legal considerations above, the Petitioners' argument, stating that the establishment of the norms of Article 169 letter q of Law 7/2017 as made through Constitutional Court Decision Number 90/PUU-XXI/2023 does not meet

the formal requirements, given that the Constitutional Court Decision Number 90/PUU-XXI/2023 is formally flawed in terms of the preparation and enactment of a norm, resulting in the *a quo* Decision does not meet the formal requirements and becomes invalid, thereby it is contrary to Article 1 paragraph (1), Article 1 paragraph (2), Article 1 paragraph (3), Article 24 paragraph (1), and Article 28D paragraph (1) of the 1945 Constitution as well as Article 17 paragraph (5) and paragraph (6) of Law 48/2009, is legally unjustifiable.

- Whereas the Petitioners further argue that the Court can carry out judicial activism and use progressive law as the main approach in examining, adjudicating, and deciding the *a quo* case as an approach that is also known and adopted in the 1945 Constitution, namely in Article 24 paragraph (1) and Article 28D paragraph (1) of the 1945 Constitution, where these two articles have shown that judicial power shall not only uphold the law but also justice. The Court in its legal considerations states that the petition for formal review as argued by the Petitioners, namely the formal review of Article 169 letter q of Law 7/2017 which has been interpreted by the Court through Constitutional Court Decision Number 90/PUU-XXI/2023, is not yet known in the legal system in Indonesia. Moreover, it is impossible for the Court to equate the process of the formation of law with the decision-making process in the Deliberation Sessions of Judges (RPH) when deciding to assess the constitutionality of a norm that is actually a material part of a law. However, despite the Petitioners' argument stating that the Constitutional Court in its course of action often takes progressive legal steps such as declaring that a legal norm conditionally is conditionally constitutional or conditionally unconstitutional, in the Court's opinion, this cannot be used as a reference in deciding a case, including the *a quo* petition. In this regard, the Court should be more careful and prudent in assessing a legal norm because each norm has a different character. Furthermore, in the Court's opinion, the pattern of a formal review of a norm resulting from a Constitutional Court decision is unusual and has the potential to give rise to new legal uncertainty so that fair legal certainty as guaranteed in the 1945 Constitution that the Court, as the guardian of the constitution, should guard becomes neglected. In such circumstances, in the *a quo* particular case, the Court must be able to refrain from actively taking progressive legal steps or taking judicial activism as desired by the Petitioners. Therefore, through the *a quo* decision, it is important for the Court to emphasize that the steps of judicial activism cannot necessarily be used as an assessment to fulfill the "urges" of justice seekers. Moreover, Constitutional Court Decision Number 141/PUU-XXI/2023 has emphasized that in case of Constitutional Court Decisions still containing the issue of the unconstitutionality of norms, including Constitutional Court Decision Number 90/PUU-XXI/2023 which has been declared as a Decision that is final and has binding legal force, a petition for review to the Constitutional Court or a legislative review may be re-submitted regarding the matters.

- Whereas pursuant to the entire description of the legal considerations above, the Court is of the opinion that the decision-making process in Constitutional Court Decision Number 90/PUU-XXI/2023 and Law 48/2009 cannot be contradicted. Therefore, regarding the Petitioners' petition, Article 169 letter q of Law 7/2017 as has been interpreted by Constitutional Court Decision Number 90/PUU-XXI/2023 does not contain any formal defects and therefore it is not contrary to the 1945 Constitution. Thus, Article 169 letter q of Law 7/2017 as has been interpreted by Constitutional Court Decision Number 90/PUU-XXI/2023 still has binding legal force and therefore the Petitioners' petition is entirely legally unjustifiable.

Accordingly, the Court subsequently passed down a decision in which the verdict was as follows:

On the Preliminary Injunction:

To dismiss the Petitioners' petition for preliminary injunction

On the Merits:

To dismiss the Petitioners' petition entirely.

CONCURRING OPINION

Regarding the *a quo* Constitutional Court decision, two Constitutional Justices, namely Constitutional Justice Arief Hidayat and Constitutional Justice Enny Nurbaningsih, have concurring opinions, as follows:

Concurring opinion of Constitutional Justice Arief Hidayat

In normal situations, it has become inevitable that the Court decisions are final and binding as stipulated in Article 24C paragraph (1) of the 1945 Constitution. However, considering the dynamics and development of the practice of judicial review at the Constitutional Court, especially after Decision 90/PUU-XXI/2023, I think the Court as the final interpreter of the Constitution needs to reinterpret the meaning of final and binding as stipulated in the provision only if faced with an abnormal situation. The definition and limitations of an abnormal situation is a situation where the Court adjudicates a case in which there is a strong suspicion of intervention from another branch of power which factually or potentially damages the Court's independence in adjudicating and deciding cases, there is judge's right to refusal that is ignored, there is a constitutional judge who has direct or indirect conflicts interests but does not withdraw, there is irregularity in the case handling process, and there is a decision-making quorum that seems forced. In such conditions, people seeking justice may submit a formal review of such problematic Constitutional Court decision by not including the constitutional judge who is suspected or actually has a conflict of interest with the *a quo* petition. This aims to restore the damaged value of justice (restorative justice) because of a process that is alleged to be problematic and unconstitutional.

Such a method is the way and essence of law with a progressive legal approach by seeking the meaning of substantive justice and leaving legal models and styles that tend to be positive legalistic-formal by breaking the deadlock (rule-breaking) resulting from a rigid interpretation towards Article 24C paragraph (1) of the 1945 Constitution. Therefore, the Constitutional Court can basically carry out a formal review of its own decision if there is an abnormal situation as described above, as is common in the practice of law formation by the DPR and the President when there are procedural defects during the stages of planning, drafting, discussion and ratification, as well as promulgation, or if the law is not formed by an authorized institution, or is made not in accordance with the format specified in the law regarding the formation of statutory regulations, then the law in question can be submitted to the Constitutional Court for its formal constitutionality to be formally reviewed. Likewise, within the judiciary scope at the Supreme Court, if, for example, a judge turns out to have applied norms incorrectly, cassation may be submitted, even until a judicial review if new evidence (*novum*) is found.

In the context of the Constitutional Court, the political design of constitutional law as contained in Article 24C paragraph (1) of the 1945 Constitution states that “the Constitutional Court adjudicates at the first and final instance, the judgment of which is final...". This means that there are no other legal remedies submitted against the Constitutional Court decisions. Philosophically, in principle, the Court decisions are designed as final and binding decisions. Why? Because what is being reviewed is a generally applied norm (*erga omnes*) and binding on all citizens. If the Court decisions are not final and binding, it will of course have the potential to give rise to legal uncertainty if the status of the norms in question are unclear in terms of whether they are constitutional or not. Meanwhile, the norms in question are often used in the law-making process, in the law enforcement process as well as in the government administration process. However, if a Constitutional Court decision clearly contains formal defects as described above, then the *a quo* case may be reviewed and adjudicated again by the Constitutional Court without judges suspected of having the potential to have direct or indirect conflicts of interest. Of course, if there is a petition for formal review submitted to the Constitutional Court after a decision, *in casu* Decision Number 90/PUU-XXI/2023, the next question is, what happens if there is a review related to the Constitutional Court itself *in casu* a review of the Constitutional Court Law, of course, all judges have the potential to have conflicts of interest. Moreover, there is the principle of *nemo judex in causa sua* where judges may not adjudicate a case that concerns themselves. On the other hand, the principle of nemo judex in causa sua will also certainly be in contact with the principle of *ius curia novit* where constitutional judges may not reject the case submitted. To answer this question, I will use a progressive legal view which contains 3 (three) main essences of progressive legal methods, namely:

1. **The law is for humans, not humans for the law.** If the view that humans are for the law is used, then humans will always be attempted or perhaps forced to be included in the scheme created by the law. In fact, it is the law that must be formed according to human needs.

2. **To refuse to defend the status quo in legal activities.** Status quo in legal activities means that the laws applied to solve all kinds of social problems are laws that are positive, normative, and legalistic-formal, resulting in rigid and inflexible laws. In fact, in resolving the issue faced, responsive, adaptive, and flexible laws in accordance with the values of justice that grow and develop in society are needed.

3. **To overcome obstacles in using written laws.** Whether realized or not, legal texts may be left behind by developments over time and the dynamics of society. Therefore, breakthroughs are needed through legal interpretation and discovery, especially by the courts. In this context, the mechanisms of legislative review, executive review, and judicial review are the solutions to address the deadlock in law activities.

In answering the question above, we must not be rigid in understanding the application of the principles of *nemo judex in causa sua* and *ius curia novit*. Therefore, finding a balance point between the two is very important. The balance point needs to be positioned proportionally. This means that we need to look at this matter on a case-by-case basis. When, in the amendment to the MK Law, there are elements of politicking that are not good and have the potential to weaken the Constitutional Court institutionally or damage the independence and impartiality of constitutional judges, then in such a point, the Court needs to do judicial activism for any efforts that potentially weaken the Court. However, if there are no indications of such a thing, then the Court needs to apply judicial restraint. Herein lies the essence of one of the legal teachings of progressive law, namely **"to refuse the status quo in legal activities**." Therefore, I deliberately raise the discourse of the possibility of the formal review of the Constitutional Court decisions as part of an academic discourse that needs to be studied and researched continuously by legal experts, academics, practitioners, and stakeholders. At the same time, it becomes a trigger so that our legal activities in administering the state can prioritize substantive justice rather than procedural justice, which of course is carried out in a proportional and balanced manner, in order to realize laws that are just, certain and beneficial to the public, because in reality the law is for humans, not humans for the law.

Whereas for the time being I agree with the majority of judges who dismiss the *a quo* petition in accordance with this verdict. As a constitutional justice and academic, I feel moved to bring up a discourse on the formal review of the Court Decisions which of course is carried out by the Constitutional Court itself whenever an abnormal situation arises. I deliberately do this as part of an effort to develop an understanding of constitutionalism through scientific thinking and the expansion of knowledge, especially in the field of law.

Concurring opinion of Constitutional Justice Enny Nurbaningsih

After carefully examining the *a quo* petition, regardless of whether the petitioners agree or disagree with Court Decision Number 141/PUU-XXI/2023, the legal considerations of the *a quo* Decision in fact have confirmed the review of Article 169 letter q of Law 7/2017 which has been interpreted by the Court through Decision Number 90/PUU-XXI/2023. If we refer back to the statement of the legislators (the DPR and the President) in Case Number 90/PUU-XXI/2023 who leave it to the discretion of the Court to decide the constitutionality issue of the norms of Article 169 letter q of Law 7/2017, even though the legislators realized that this is an open legal policy, so in Decision Number 141/PUU-XXI/2023, the Court confirms that Decision Number 90/PUU-XXI/2023 is final and binding and leaves it to the legislators to further determine the norms regarding the minimum age requirements of candidates for the president and vice president which are alternated with candidates for president and/or vice president who are public officials and elected officials. In principle, everything is left to the legislators.

Because the substance questioned by the Petitioners has essentially been answered by the Court in Constitutional Court Decision Number 141/PUU-XXI/2023, although with a different form of review, the essence of what is being petitioned in the *a quo* case is the same as the previous case, namely questioning the constitutionality of Article 169 letter q of Law 7/2017 as interpreted by Constitutional Court Decision

Number 90/PUU-XXI/2023, then the legal considerations in case 141/PUU-XXI/2023 also applies *mutatis mutandis* to the *a quo* petition.

Whereas pursuant to all of the legal considerations above, the Court has the authority to examine and hear the *a quo* case. However, the substance questioned by the Petitioners basically has been considered by the Court in Constitutional Court Decision Number 141/PUU-XXI/2023. Thus, even though the Court has the authority to hear the *a quo* case, the Petitioners' arguments are legally unjustifiable, and it is declared that the Petitioners' Petition is dismissed.