

# Constitutional Values And Judges Morals In The Decision of The Constitutional Court Number 90/PUU-XXI/2023: Review of The Flow of Natural Law

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**Abstract :** *The decision of the Honorary Council of the Constitutional Court stated that the Constitutional Court judges who examined case Number 90/PUU-XXI/2023 were proven to have violated the right to refuse. The right to refuse is part of the independent and impartial principle of the Constitutional Court. There has been a conflict of interest between the norms being tested and the Constitutional Court judges. Conflicts of interest are constitutional and moral violations. What are the juridical consequences of Constitutional Court Decision Number 90/PUU-XXI/2023 which violates the constitution and morals from the perspective of natural law philosophy? This research uses a normative juridical research method with a conceptual approach, a statutory approach and a case approach. The results of the discussion have found that in the MKMK decision that the judge consciously and deliberately ignored constitutional principles regarding the right to refuse in Law Number 48 of 2009 concerning Judicial Power. Overruling the right to refuse is tantamount to overruling constitutional principles. Judges place constitutional values in practice as semantic values. Apart from that, there was a moral violation which was assessed by the lack of awareness not to review case Number 90/PUU-XXI/2023 due to a conflict of interest. Awareness comes from conscience and is closely related to integrity, independence and impartiality. The integrity of judges as enforcers and guardians of the constitution is at stake. Moral and legal principles in the constitution are two things that go hand in hand in natural law philosophy.*

**Keywords :** *Constitution, Morals, and Natural Law.*

**Abstrak :** Putusan Dewan Kehormatan Mahkamah Konstitusi menyatakan hakim Mahkamah Konstitusi yang memeriksa perkara Nomor 90/PUU-XXI/2023 terbukti melanggar hak menolak. Hak untuk menolak merupakan bagian dari prinsip independen dan imparial Mahkamah Konstitusi. Terjadi konflik kepentingan antara norma yang diuji dengan hakim Mahkamah Konstitusi. Benturan kepentingan merupakan pelanggaran konstitusi dan moral. Apa akibat yuridis Putusan Mahkamah Konstitusi Nomor 90/PUU-XXI/2023 yang melanggar konstitusi dan moral dalam perspektif filsafat hukum alam? Penelitian ini menggunakan metode penelitian yuridis normatif dengan pendekatan konseptual, pendekatan perundang-undangan, dan pendekatan kasus. Hasil pembahasan menemukan bahwa dalam putusan MKMK hakim secara sadar dan sengaja mengabaikan prinsip konstitusional tentang hak menolak dalam Undang-



Undang Nomor 48 Tahun 2009 tentang Kekuasaan Kehakiman. Mengabaikan hak menolak sama saja dengan mengesampingkan prinsip-prinsip konstitusi. Hakim menempatkan nilai-nilai konstitusional dalam praktik sebagai nilai semantik. Selain itu, terdapat pelanggaran moral yang dinilai dari kurangnya kesadaran untuk tidak meninjau perkara Nomor 90/PUU-XXI/2023 karena adanya benturan kepentingan. Kesadaran bersumber dari hati nurani dan erat kaitannya dengan integritas, independensi dan imparialitas. Integritas hakim sebagai penegak dan penjaga konstitusi dipertaruhkan. Asas moral dan hukum dalam konstitusi merupakan dua hal yang berjalan beriringan dalam filsafat hukum kodrat.

**Kata kunci :** Konstitusi, Moral, dan Hukum Alam.

## I. INTRODUCTION

The institution of judicial power has the principle of independent power to organize the judiciary in order to enforce law and justice. This principle is stated in the article based on Article 24 paragraph 1 of the 1945 Constitution of the Republic of Indonesia (UUD NRI Tahun 1945). The norm in question creates the position of the Constitutional Court as an independent and impartial institution.

Independence is closely related to the impartiality of judges in both examination and decision-making.<sup>1</sup> The principle of independence was born from the doctrine of separation of powers, which must be implemented strictly for each branch of power.<sup>2</sup> The doctrine of separation of powers is actually a manifestation of the rule of law. The rule of law comes with various existing instruments. Julius Stahl argues that there are 4 (four) elements of a formal state of law, as:<sup>3</sup> protection of human rights, separation of powers, every government action must be based on statutory regulations, and there is an independent administrative court. Basically, the protection of human rights will be realized with the separation of powers. This is done to avoid the accumulation of power in one branch of power. Because the accumulation of power will tend to lead to abuse of power.

Montesquieu firmly separates the powers in question into three important parts, as:<sup>4</sup> the legislative power has the task of forming laws, the executive is given the task of administering the law, and the judicial power is tasked with prosecuting violations of the law. The three branches in question are indeed separate and insulated from the influence of each other's interests. For example, judicial power should exercise its authority free from the influence of executive power and legislative power. The separation of each power is still in the context of mutual supervision.

The concreteness of this principle is contained in Article 24 paragraph 1 of the 1945 Constitution. Its realization must be realized in every examination of case applications

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<sup>1</sup> Maruarar Siahaan., *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Jakarta: Sinar Grafika, 2015, hlm. 45-46.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Ibid.*, hlm. 32.

<sup>4</sup> Suparto., Pemisahan Kekuasaan, Konstitusi Dan Kekuasaan Kehakiman Yang Independen Menurut Islam, *Jurnal Selat*, Volume. 4 Nomor. 1, hlm. 116.

submitted to the Constitutional Court. Conversely, if this principle is set aside then there has been a violation of the constitution regarding the principle of independent judicial power.

In exercising independent judicial power, the Constitutional Court must uphold independence and impartiality. This principle requires open accountability to the public. The process of examining each case request, judges are always guided by their juridical conscience in carrying out judicial duties that can be accessed by the entire community.<sup>5</sup> Independence is present from the beginning of the community filing a case application, examination at the Court, until the decision is given.

In fact, Constitutional Court Decision Number 90/PUU-XXI/2023 has denied the principle in question. This decision has been a decision that has received public attention since the beginning. The case began with the submission of a judicial review of Article 169 letter q of Law Number 7 Year 2017 concerning General Elections. It has been stipulated that the requirement to be a candidate for President and Vice President is at least 40 (forty) years old. The Applicant believes that the norm in question is considered contrary to the constitution related to the right of every person to recognition, guarantees, protection, and certainty of a fair law and equal treatment before the law.

In the substance of the Constitutional Court's decision, the Applicant expressed admiration for the leadership of Surakarta Mayor Gibran Rakabuming Raka who he considered to have brought progress to the area he led. Gibran Rakabuming Raka's age, which has not even entered 40 years, is considered to hamper the opportunity to compete in the presidential and vice presidential elections that take place in 2024. This is further stated as follows: "...the applicant is an admirer of the Mayor of Surakarta in the period 2020-2025, namely Gibran Rakabuming Raka, where during the administration of Gibran Rakabuming Raka the economic growth in Surakarta increased by 6.25 percent from the beginning when he was Mayor. Gibran Rakabuming Raka, who is still 35 years old, has been able to build and advance the city of Surakarta with honesty, moral integrity and obedient and obedient to serve the interests of the people and the country".<sup>6</sup>

The problem lies in the substance of the norm tested by the applicant which is closely related to the person of Gibran Rakabuming Raka. Gibran Rakabuming Raka has a family relationship with the Chief Justice of the Constitutional Court Anwar Usman who was in office when the case was being tested. Anwar Usman is Gibran Rakabuming Raka's uncle. There has been a denial of the formal procedural law as stipulated in Law No. 48/2009 on Judicial Power. Article 17 paragraph 3 of Law No. 48/2009 on Judicial Power states that "a judge or clerk must withdraw from the trial if he has a direct or indirect interest in the case being examined, either of his own free will or at the request of a litigant".

There is an obligation for judges to resign if they have a direct or indirect relationship to the substance being litigated at the Constitutional Court. If there is a violation of Article 17 paragraph 3 of Law Number 48 of 2009 concerning Judicial Power,

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<sup>5</sup> Maruarar Siahaan., *Op. Cit.*, hlm. 47.

<sup>6</sup> Constitutional Court Decision Number 90/PUU-XXI/2023, p. 15-16.

it will reduce the independence of judges in exercising their authority. Therefore, a violation of independence is the same as a violation of the constitution itself. Whereas in the context of the rule of law, there is an obligation for judges to obey and comply with the constitution. The Decision of the Honorary Council of the Constitutional Court (MKMK) Number 5/MKMK/L/10/2023 explicitly states that judges must resign if they have a relationship with the object of the norm being tested. Furthermore, it is also said that judges should have a sense of ethics that arises from their conscience and heart.<sup>7</sup> Legal violations committed by judges are also followed by moral violations.<sup>8</sup> Constitutional judges as enforcers of law and morals need to be studied in the philosophy of law, especially the flow of natural law. Meanwhile, the Decision of the Honorary Council of the Constitutional Court (MKMK) Number 2/MKMK/L/11/2023 states that Anwar Usman did not serve and did not behave independently and impartially in terms of handling case Number 90/PUU-XXI/2023.<sup>9</sup>

There are several studies that discuss the same thing: *First*, a study entitled "Independent and Responsible Judicial Power in the Constitutional Court: Efforts to Find Balance", written by Aidul Fitriadi Azhari.<sup>10</sup> The important thing in this research is that the Constitutional Court as an independent judicial institution, institutionally and in making decisions, is free from all kinds of influence from other powers and other political or economic forces. In addition, the independence of judges is fixated on responsibilities that have the aim of an honest and impartial judiciary. *Second*, a study entitled "Urgency of Independence and Restructuring of Judicial Power in Indonesia", written by Sri Hastuti Puspitasari.<sup>11</sup> It is said that judicial institutions in Indonesia are basically based on the 1945 Constitution. The derivative norms provide strict rules on the principle of independence, structure, authority, and institutional guarantees to realize independence.

The exercise of judicial power without the principle of independence supported by morals is a violation of the constitution. The violation of the principle of judge independence in Constitutional Court Decision Number 90/PUU-XXI/2023 needs to be studied from the perspective of legal philosophy. One of the flows that is often recognized in law is the flow of natural law. The problem raised is what are the juridical consequences of Constitutional Court Decision Number 90/PUU-XXI/2023 which violates the constitution and morals in the perspective of natural law philosophy? The principle of the flow of natural law is that law must be practiced without violating morals. Moral values are closely related to every power exercised by the state.

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<sup>7</sup> Decision of the Honorary Council of the Constitutional Court (MKMK) Number 5/MKMK/L/10/2023, p. 106.

<sup>8</sup> Indra Lorenly Nainggolan dan Rahmat Saputra., *Perlunya Syarat Surat Keterangan Catatan Kepolisian Calon Anggota Legislatif Berdasarkan Prinsip Checks And Balances*, *Jurnal USM Law Review*, Volume 6, Nomor 1, hlm. 425.

<sup>9</sup> Decision of the Honorary Council of the Constitutional Court (MKMK) Number 2/MKMK/L/11/2023, p. 370-371.

<sup>10</sup> Aidul Fitriadi Azhari., *Kekuasaan Kehakiman Yang Merdeka Dan Bertanggung Jawab Di Mahkamah Konstitusi: Upaya Menemukan Keseimbangan*, *Jurnal Jurisprudence*, Volume 2, Nomor 1, hlm. 89-118.

<sup>11</sup> Sri Hastuti Puspitasari., *Urgensi Independensi Dan Restrukturisasi Kekuasaan Kehakiman Di Indonesia*, *Jurnal Hukum*, Nomor 1, Volume 14, hlm. 41-47.

## II. RESEARCH METHOD

This research uses normative research methods or doctrinal research. Research that focuses on legal rules or positive legal norms as legal products of state power.<sup>12</sup> In normative research, legal norms are analyzed using deductive reasoning, namely general analysis to be more specific. The approach taken is a conceptual approach, legislative approach and case approach. The legislative approach used starts from the 1945 Constitution of the Republic of Indonesia, Law Number 48 of 2009 concerning Judicial Power, Law Number 7 of 2017 concerning General Elections. While the intended case approach is related to the study of Constitutional Court Decision Number 90/PUU-XXI/2023, Decision of the Honorary Council of the Constitutional Court (MKMK) Number 2/MKMK/L/11/2023 and Decision of the Honorary Council of the Constitutional Court (MKMK) Number 5/MKMK/L/10/2023 which are analyzed based on concepts or theories in the legal philosophy of natural law.

## III. RESULT AND DISCUSSION

### Constitutional Values of Norm Review in Constitutional Court Decision Number 90/PUU-XXI/2023

Discussing Constitutional Court Decision Number 90/PUU-XXI/2023 is naive without an understanding of the constitution. The French term constitution is *constituer*, the English term constitution, and the Indonesian equivalent is *konstitusi*.<sup>13</sup> C.F. Strong, defines the constitution, as follows: "constitution is a collection of principles according to which the power of the government, the rights of the governed, and the relations between the two are adjusted".

K.C. Wheare defines the constitution as the entire constitutional system of a country in the form of a collection of rules that form, regulate, or govern in a country.<sup>14</sup> Furthermore, the constitution can be interpreted narrowly, namely all state regulations that are written, while the definition of the constitution broadly, is all state regulations, both written and unwritten, which are often referred to as constitutional conventions as basic laws that have significance for certain countries.

Djokosoetono provides an understanding of the constitution, into 3 (three) important parts, which is:<sup>15</sup>

- a) Constitution in the material meaning (Constitutite in Materiele Zin);
- b) Constitution in the formal meaning (Constitutite in Formele Zin); and

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<sup>12</sup> Ronny Hanitjo Soemitro., *Metode Penelitian Hukum dan Jurimetri*, Jakarta: Ghalia Indonesia, 1991, hlm. 46.

<sup>13</sup> Widodo Ekatjahjana, *Negara Hukum, Konstitusi, dan Demokrasi: Dinamika Dalam Penyelenggaraan Sistem Ketatanegaraan Republik Indonesia*, Jember: Jember University Press, 2015, hlm. 4.

<sup>14</sup> Beni Ahmad Saebani dan Ai Wati., *Perbandingan Hukum Tata Negara*, Bandung: Pustaka Setia, 2016, hlm. 39.

<sup>15</sup> Jimly Asshiddiqie., *Pengantar Ilmu Hukum Tata Negara*, Jakarta: PT Raja Grafindo Persada, 2017, hlm. 98.

- c) Constitution in the meaning of documented for evidentiary purposes and unity of reference (Constitutite in gedocumenteerd voor bewijsbaar en stabiliteit).

The definition of a constitution can be expressed as the framework of a state organized by and through law. The parts of the law that exist, i.e.<sup>16</sup> Arrangements regarding the establishment of permanent institutions, the functions of the organs, and certain rights that have been determined. Sri Soemantri argued that the content material contained in the constitution, including:<sup>17</sup>

- a) There are regulations regarding the protection of human rights and citizens;
- b) The regulation of the basic constitutional structure of the state;
- c) The regulation of the division and limitation of constitutional duties is also fundamental.

C.F. Strong suggests the elements contained in the constitution, i.e.:<sup>18</sup> Principles about the powers of government, principles about the rights of citizens; and principles about the relationship between citizens and government. Based on the description above, it can be concluded that the content material contained in the constitution are:<sup>19</sup> *First*, there are regulations on the protection of human rights and citizens. *Second*, there are regulations on the constitutional structure of a country that is fundamental, and *Third*, there are limitations and division of constitutional duties that are also fundamental.

The constitutional court in the constitution clearly has its authority. In addition, in exercising its authority there are constitutional values that must be carried out by the Constitutional Court as a basic principle of constitutionalism. The principle of constitutionalism is the limitation of power. Richard S. Kay states that, "constitutionalism implements the rule of law; It brings about predictability and security in the relations of individuals and the government by defining in advance the powers and limits of that government".<sup>20</sup> The principle of modern constitutionalism is closely related to the limitation of state power (*limited government*).<sup>21</sup> The Constitution was created to limit the powers of each state institution, in order to avoid abuses of human rights.

Limitation of power is also carried out on judicial power, with the purpose that the power exercised does not violate human rights. Article 24 paragraph 1 of the 1945 Constitution explicitly states that the Constitutional Court is an independent judicial power to enforce law and justice. The authority to review the norms of laws against the 1945 Constitution of the Republic of Indonesia will be fair when there is independence

<sup>16</sup> Widodo Ekatjahjana., *Op. Cit.*, hlm. 6.

<sup>17</sup> Sri Soemantri., *Hukum Tata Negara Indonesia (Pemikiran dan Pandangan)*, Bandung: PT Remaja Rosdakarya, 2015, hlm 10.

<sup>18</sup> M. Agus Santoso., Perkembangan Konstitusi Di Indonesia, *Jurnal Yustisia*, Volume 2, Nomor 3, hlm. 121.

<sup>19</sup> Sri Soemantri., *Op.Cit.*, hlm. 37.

<sup>20</sup> Bactiar., Esensi Paham Konsep Konstitualisme Dalam Konteks Penyelenggaraan Sistem Ketatanegaraan, *Jurnal Surya Kencana Dua: Dinamika Masalah Hukum dan Keadilan*, Volume 6, Nomor 1, hlm. 124.

<sup>21</sup> Johannes Suhardjana., Supremasi Konstitusi Adalah Tujuan Negara, *Jurnal Dinamika Hukum*, Volume 10, Nomor 3, hlm. 262.

of judges. FX. Adji Samekto said that the position of judges should be to do creative sharpening of legal texts based on Pancasila values.<sup>22</sup>

John Ferejohn states the purpose of judicial independence into three main points, which are: First, judicial power is aimed at maintaining the rule of law: *First*, judicial power is intended to protect the rule of law. *Second*, there is the ability of the court to perform its duties and authority in enforcing the law. If there is a norm of law that violates constitutional values, the Constitutional Court has the authority to cancel it. *Third*, the judiciary has strong autonomy to reject temptations from economic or political power holders.<sup>23</sup> In the modern era, the temptation of judges in enforcing the law will be influenced by various kinds. This is because the Constitutional Court is the last bastion in enforcing legal norms formed from the political process. The Constitutional Court must avoid political practices in exercising its authority. So that things that are directly related to their authority must be prevented from the beginning.

If the legislative and executive institutions are full of political interests. Then the Constitutional Court enforces justice with the principle of independence as regulated in the constitution. According to John Ferejohn, it is important for the Constitutional Court to maintain the rule of law. Meanwhile, the quality of a country's rule of law is determined by its compliance with the law, even though on the other hand it is suspected of containing a hidden agenda that can be far from the common interest.<sup>24</sup>

Hamdan Zoelva said that independent judicial power is included in the idea of the rule of law, which includes independence and impartiality.<sup>25</sup> According to Simon Shetreet and Peter H. Russel, judicial independence falls into three categories, i.e: *First*, the independence of judicial power in deciding cases (substantive independence); *Second*, independence collectively as a branch of power in the state (collective independence). *Third*, the independence of the judicial power internally (internal independence).<sup>26</sup>

The independence of independent judges in deciding cases appears to be set aside in Constitutional Court Decision Number 90/PUU-XXI/2023, and even seems to lead to political actions. There was a dissenting opinion from 4 (four) MK judges, who stated that they rejected the petition. Meanwhile, the 5 (five) Constitutional Court judges who granted the petition also differed in their views. In the first group, 3 (three) Constitutional Court judges agreed that the age limit for presidential and vice presidential candidates should be at least 40 (forty) years old or have / are currently carrying out or occupying regional head positions such as Governor, Regent and / or Mayor. The second group, consisting of 2 (two) Constitutional Court judges, agrees that the age limit for presidential and vice presidential candidates is at least 40 (forty) years old or has / is currently carrying out or occupying the position of regional head only as Governor.

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<sup>22</sup> FX. Adji Samekto., Tantangan Hakim Di Indonesia: Dari Penjaga Kepastian Hukum Menuju Pencipta Keadilan Berdasarkan Pancasila, *Jurnal Ketatanegaraan*, Volume 4, September 2017, hlm. 72.

<sup>23</sup> Aidul Fitriadi Azhari., *Op.Cit.*, hlm. 98.

<sup>24</sup> FX. Adji Samekto., *Op.Cit.*, 89.

<sup>25</sup> Hamdan Zoelva, Implementasi Independensi kekuasaan Kehakiman Menurut UUD NRI Tahun 1945, *Jurnal Ketatanegaraan*, Volume 4, September 2017, hlm. 173.

<sup>26</sup> *Ibid.*, hlm. 175.

The Decision of the Honorary Council of the Constitutional Court (MKMK) Number 2/MKMK/L/11/2023 states that Anwar Usman has served and not behaved independently and impartially in terms of handling case Number 90/PUU-XXI/2023.<sup>27</sup> The constitutional violation has resulted in Case Number 90/PUU-XXI/2023 not being tested based on independent and impartial principles. The constitutional value, especially the independence and impartiality of Decision No. 90/PUU-XXI/2023, was weakened.

Jimly Asshiddiqie argues that there are three values of the constitution: First, normative value, namely the various norms contained in the constitution are binding, recognized, accepted, and obeyed by the whole community. Second, nominal value, meaning that in constitutional practice, the provisions of the constitution are only partially carried out and some others are not carried out. Third, the semantic value is that constitutional norms are only appreciated on paper, but in practice every policy does not really implement constitutional norms at all.<sup>28</sup>

The judicial review of norm 169 letter q of Law Number 7 Year 2017 on General Elections does not practice the value of the constitution. Decision Number 90/PUU-XXI/2023 was practiced with semantic value, because from the beginning the norm testing did not honor the independent and impartial constitutional principles. The constitutional principle that should be contained in every action of constitutional judges was set aside. This principle has also been regulated in Article 17 paragraph 3 of Law Number 48 of 2009 concerning Judicial Power. Constitutional violations are even followed by ethical and moral violations. Logically, the chairman of the Constitutional Court should have understood very well that there was a backward awareness to be involved in testing the norms in case 90/PUU-XXI/2023. In fact, there is a moral violation from within him, ethics are not honored by him. Furthermore, it is said as follows:

*"...the elements that form the basis of measurement related to ethics are very broad and not only limited to the applicable laws and regulations".<sup>29</sup>*

MKMK found evidence that the chief justice knowingly violated the judge's right of recusal in Article 17 paragraph 3 of Law No. 48/2009 on Judicial Power to ethics as well. As a person who has constitutional authority in reviewing norms, he should have a high sense of sensitivity that there will be a conflict of interest. It is further stated as follows:

*"...the legal events in the handling of case Number 90/PUU-XXI/2023, could have been prevented or would not have happened if every constitutional judge had a high sense of sensitivity and was alert to the issue of conflict of interest".<sup>30</sup>*

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<sup>27</sup> Decision of the Honorary Council of the Constitutional Court (MKMK) Number 2/MKMK/L/11/2023, p. 370-371.

<sup>28</sup> Jimly Asshiddiqie., *Pengantar Ilmu Hukum Tata Negara*, Depok: Rajawali Pers, 2017, hlm. 108-109.

<sup>29</sup> Decision of the Honorary Council of the Constitutional Court (MKMK) Number 2/MKMK/L/11/2023, p. 378.

<sup>30</sup> Decision of the Honorary Council of the Constitutional Court (MKMK) Number 5/MKMK/L/10/2023, p. 112.



The analysis in the various decisions above places the value of the constitution carried out is a semantic value. Constitutional principles were consciously not implemented in case 90/PUU-XXI/2023.

### **Moral Enforcement in Adjudicating Case Number 90/PUU-XXI/2023 Based on the Flow of Natural Law**

The independence of judges in the constitution will also be studied based on the perspective of legal philosophy. Philosophy is often referred to by the English term known as philosophy. While Arabic uses the term falsafah.<sup>31</sup> Juanda said that philosophy is a contemplation or deep thinking about something that has been seen with the sense of sight, felt with the sense of taste, smelled with the sense of smell, or heard with the sense of hearing to the basis or essence of a thing.<sup>32</sup> Furthermore, it is also said that philosophy is an activity of endless search and adventure regarding wisdom and truth in the stage of life, both about God the creator, the existence and purpose of human life, and the reality of the natural world.<sup>33</sup>

Legal philosophy is one of the branches of philosophy. In the philosophy of law, the basis of thinking is known, which is divided into legal ontology which is closely related to the need to involve and base thinking with an approach and guided by the principles that apply to ontology.<sup>34</sup> In short, discussing legal ontology is related to the nature of law in accordance with the flow of legal philosophy. Legal epistemology will essentially be concerned with exploring, studying, and discussing and answering questions that include how to form, obtain and obtain legal material that is correct, ideal, responsive and fair.<sup>35</sup> Finally, it is mentioned about legal axiology which is associated with the legal objectives to be achieved.<sup>36</sup> Usually the purpose of law is always associated with several schools of thought in legal philosophy.

Soetandyo Wignyoebroto as often quoted suggests that the schools underlying the nature of law, namely as follows:<sup>37</sup>

- a) The stream of natural law or nature, which can be understood the nature of law, based on the principles of truth and justice. There are also moral values that are natural and universal. Every action that often violates morals is an act that is not good and violates the law;
- b) The flow of legal positivism, interpreting the law as a collection of positive norms or formed by authorized institutions in the system of legislation of a country;

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<sup>31</sup> Juanda dan Ogiandhafiz Juanda., *Filsafat Hukum Indonesia (Konsep Pembangunan Sistem Hukum Nasional)*, Depok: Rajawali Pers, 2022, hlm. 4.

<sup>32</sup> *Ibid.*, p. 6.

<sup>33</sup> *Ibid.*, p. 8.

<sup>34</sup> *Ibid.*, p. 55.

<sup>35</sup> *Ibid.*, p. 57.

<sup>36</sup> *Ibid.*, p. 58.

<sup>37</sup> *Ibid.*, p. 55-56.

- c) The utilitarianism flow, interpreting the law as a set of positive rules that are implemented into laws and regulations;
- d) The flow of sociological jurisprudence, understands the law as inconcreto, and systematized judge decisions or judge made law;
- e) The flow of legal history views the nature of law as institutionalized social behavior, existing as a social-empirical variable, and
- f) The flow of legal realism, which interprets the nature of law as a manifestation of the symbolic meanings of social actors as seen in their interactions.

Legal philosophy thinking in the sense of natural law needs to be studied specifically and compared to its application to Constitutional Court Decision Number 90/PUU-XXI/2023. The flow in question is the flow of natural law or nature. The flow of natural law applies moral principles as an action that is right, just and does not violate the law. In exercising its authority based on the constitution, the Constitutional Court will be reviewed for ethical actions from judges in prioritizing their independence.

The reality that there is a direct relationship between the request for judicial review and Gibran as a vice presidential candidate, who was tested by constitutional judge Anwar Usman, none other than still having a kinship relationship, has been an immoral act. The essence of it is the norm that determines whether our behavior is good or bad from an ethical point of view. Moral norms are the highest norms, which cannot be subjugated to other norms. Moral norms can also be called obligations based on decency and modesty.<sup>38</sup>

Furthermore, the measure of morality of an act, good or bad, is determined by two factors:<sup>39</sup>

- 1) Subjective measure, namely a person's conscience subjectively tells him which is good and which is bad;
- 2) General or objective measure, which tells everyone about good and bad actions.

According to Kant, the most famous measure is morality that responds through conscience to actions taken. Good deeds done by a person will not only get the approval of conscience, but also bring peace of mind to the person concerned.<sup>40</sup>

Based on this, in Constitutional Court Decision Number 90/PUU-XXI/2023, there has been a moral violation by judge Anwar Usman. His actions violated the provisions of Article 17 of Law Number 48 of 2009 concerning Judicial Power. In this article, he should have the right of recusal. The right of recusal must be exercised by Anwar Usman himself or by the requester.

Article 17 paragraph 2 of Law No. 48 of 2009 on Judicial Power states that the right of recusal is the right of a person being tried to file an objection accompanied by reasons

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<sup>38</sup> Salman Luthan., *Dialektika Hukum dan Moral dalam Perspektif Filsafat Hukum*, *Jurnal Hukum IUS QUILA IUSTUM*, Nomor 4, Volume 19, hlm. 509

<sup>39</sup> *Ibid.*, p. 509.

<sup>40</sup> *Ibid.*, p. 523.

against a judge who is judging his case. There is a moral obligation by reason of the indirect relationship between the substance of the challenge and the judge hearing it.

In moral philosophy, it is said again that the measure of morality depends on the consciousness of each person.<sup>41</sup> There must be an awareness on the part of the judge that has an indirect connection to the petition under review. The awareness through conscience is also stated in a different opinion in Constitutional Court Decision Number 90/PUU-XXI/2023, that conscience is closely related to integrity, independence, and impartiality. Furthermore, it is said as follows:<sup>42</sup>

*"...the existence of negative cosmology and oddities in the five cases a quo that I need to convey because this disturbs my conscience as a judge who must show an attitude of full integrity, independence and impartiality, and free from any political intervention and only oriented to the interests of the nation and state of the Republic of Indonesia based on the ideology of Pancasila".*

In line with this opinion, the provisions of Article 24 paragraph 1 of the 1945 Constitution of the Republic of Indonesia regarding the independence of judges contain things that are natural. The conscience of judges must be a guideline in exercising their authority. There are several things that are considered awkward in Constitutional Court Decision Number 90/PUU-XXI/2023, including:<sup>43</sup>

- 1) The scheduling of the trial which was delayed;
- 2) Discussion in the Consultative Meeting of Judges which was not attended by the chairman;
- 3) Case No. 90/PUU-XXI/2023 and Case No. 91/PUU-XXI/2023 Withdrawn but Still Continued

The absence of the Chief Justice in the Consultative Meeting of Judges is to prevent conflicts of interest. However, this was not done from the beginning. Every state organizer must implement constitutional values consistently and simultaneously.<sup>44</sup> The potential conflict of interest has indirectly occurred indicating that the chief judge believes in his conscience that he should avoid involvement. Furthermore, it is said as follows:<sup>45</sup>

*"...because to avoid a potential conflict of interest due to the legal issue being decided is closely related to the minimum age requirement to become a Presidential Candidate and Vice Presidential Candidate where the Chairperson's relatives could potentially be proposed in the 2024 Presidential Election contest as a Presidential and Vice Presidential Candidate Pair by one of the political parties".*

The effort should have come from the beginning of the petition being registered to the Constitutional Court. As explained above, there is the principle of the judge's right of denial as stipulated in Article 17 paragraph 2 of Law Number 48 of 2009 concerning Judicial Power. The legal philosophy of the natural law flow prioritizes moral values in a norm. The norms listed regarding the independence of constitutional judges are also

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<sup>41</sup> *Ibid.*

<sup>42</sup> Constitutional Court Decision Number 90/PUU-XXI/2023, p. 111.

<sup>43</sup> Constitutional Court Decision Number 90/PUU-XXI/2023, p. 111-114.

<sup>44</sup> Indra Lorenly Nainggolan., Perizinan Berusaha berbasis Risiko Pemanfaatan Perairan Pesisir Paska UU Cipta Kerja, *Jurnal Keamanan Nasional*, Volume VIII, Nomor 1, Juli 2022, hlm. 159.

<sup>45</sup> Constitutional Court Decision Number 90/PUU-XXI/2023, p. 111-113

attached to moral and ethical values to be upheld by Constitutional Court Judges in avoiding conflicts of interest.

So it is necessary to build a tradition for judges consciously to avoid interests that benefit their personal interests above the interests of the nation with moral principles as part of the normative value of the constitution. This is to avoid conflicts of interest within themselves.<sup>46</sup> Moreover, the Constitutional Court has a very important position in guarding the constitution so that it runs based on the written and unwritten constitution. So that every action of constitutional judges in carrying out their duties and authorities must be qualified not only based on the written constitution,<sup>47</sup> including constitutional values that live in society and state life.

#### IV. CONCLUSION

Constitutional Court Decision Number 90/PUU-XXI/2023 has proven a violation of the right of recusal in the provisions of Article 17 paragraph 2 of Law Number 48 of 2009 concerning Judicial Power. This was stated in the Decision of the Honorary Council of the Constitutional Court (MKMK) Number 2/MKMK/L/11/2023 and the Decision of the Honorary Council of the Constitutional Court (MKMK) Number 5/MKMK/L/10/2023. The right of recusal is part of the constitutional principle of independence and impartiality. Overriding the right of recusal is the same as overriding constitutional principles. This puts the value of the constitution at a semantic value. The point is that in the examination of case 90/PUU-XXI/2023, the constitutional principles were consciously not implemented.

In addition to legal principles in the constitution, there are also moral values that are not obeyed. Morality measured by awareness of conscience is closely related to integrity, independence, and impartiality. The attitude that should be aware that there is a conflict of interest in the examination of case 90/PUU-XXI/2023, shows the integrity of the enforcers and guardians of the constitution. Morals and legal principles in the constitution are two things that go hand in hand in the philosophy of natural law.

#### V. SUGGESTION

It is necessary to strengthen the Honorary Council of the Constitutional Court with efforts to make the institution permanent. MKMK is in charge from the beginning of the case until it is decided. This is to avoid abuse of constitutional and moral values with preventive efforts.

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<sup>46</sup> Decision of the Honorary Council of the Constitutional Court (MKMK) Number 5/MKMK/L/10/2023, p. 112.

<sup>47</sup> Indra lorenly Nainggolan., Politik Hukum Penanggulangan Covid-19: Kajian Hukum Administrasi Kesehatan, *Scripta: Jurnal Kebijakan Publik dan Hukum*, Volume 2, Nomor 1, Januari 2022, hlm. 149.

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