



## Judicial Review of Presidential Threshold Decisions: The Dynamics of Constitutional Injury

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### Abstract

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This study examines the Dynamics of Constitutional Injury Interpretation by the Constitutional Court in the Judicial Review of the Presidential Threshold Law, focusing on how the Court's interpretation of constitutional harm has shifted in relation to granting legal standing to individual applicants. Historically, individual citizens have held the right to challenge laws they believe infringe on their constitutional rights. However, recent rulings show a shift where the Court restricts legal standing, allowing only political parties to challenge the Presidential Threshold Law. This restriction is based on two main reasons: changes in the electoral system, which now directly involves political parties, and the notion that voters' increased knowledge diminishes the need for individual challenges. The study aims to critically assess whether these reasons hold sufficient weight to limit individual participation. Through a normative legal approach utilizing case and statutory analysis, findings reveal that limiting individual participation undermines democratic legitimacy, as the cited reasons lack substantive grounds to justify the restriction on individual legal standing in the constitutional review process.

**Keywords:** constitutional injury, judicial review, presidential threshold

## I. Introduction

The Constitutional Court of Indonesia, established based on the 1945 Constitution of the Republic of Indonesia (henceforth referred to as the 1945 NRI), has become a crucial institution in the enforcement of human rights. The role of the Constitutional Court in reviewing the constitutionality of laws is often faced with the conflict between the principles of Majority Rule versus Minority Rights, highlighting the importance of balance in the enforcement of legal and constitutional rights.<sup>1</sup> Over the past two decades, the Court's jurisprudence has undergone a significant evolution, especially in relation to the legal standing of applicants in the review of Law Number 7 of 2017 as amended by Law Number 7 of 2023 on Government Stipulation in Lieu

<sup>1</sup> Steven S. Smith and Hong Min Park, "Americans' Attitudes About the Senate Filibuster," *American Politics Research* 41, no. 5 (September 2013): 736, accessed July 13, 2024, <http://journals.sagepub.com/doi/10.1177/1532673X13475472>.

of Law on General Elections (*hereinafter referred to as the Election Law*). Theoretically, an applicant is defined as a legal subject who fulfils the statutory requirements to file a constitutional case. The concept of importance, in this case, is used to determine whether the applicant has a significant enough impact to warrant filing a petition before the court.<sup>2</sup> Article 51 paragraph (1) of Law No. 7 of 2020 on the Amendment to Law No. 24 of 2003 on the Constitutional Court establishes clear criteria for the legal standing of the applicant, but in its implementation it is still often a matter of public debate, essentially the legal standing of the applicant is obtained from the assessment of constitutional injury.

The discourse on determining the legal standing of the applicant in judicial review is not a new issue. Previous research has shown various dynamics in determining the legal standing of applicants. Dian Agung Wicaksono and Nurbaningsih in their research highlighting the determination of taxpayers as a legal position in judicial review, showed that the *ratio legis* of this determination can be traced through legal considerations in the Constitutional Court's decisions from 2003 to 2019.<sup>3</sup> Another study by Fitra Arsil and Qurrata Ayuni highlighted that in general the Constitutional Court has the view that political parties that have seats in the DPR and/or members of the DPR who have legislated do not have legal standing to review laws. There are exceptions in a number of cases where political parties and members of the House of Representatives are considered to have special legal standing even though they co-deliberated on the laws that were passed.<sup>4</sup>

This study has novelty in several important aspects, namely first, this study provides a comprehensive analysis of the Court's changing attitude regarding the legal position of individual applicants in the review of election laws with a special focus on the doctrine of Constitutional injury, second, this study fills the gap by assessing the consistency of the Court's decisions and their impact on legal certainty and the protection of the applicant's constitutional rights, and third, although several studies have elaborated on the doctrine of Constitutional injury, further research is still needed to understand its application in the context of the review of election laws.

Based on the table below, it is evident that the most frequently tested law is the General Election Law with 147 tests from 2017 to 2024. This confirms Participatory Engagement<sup>5</sup> being the highest scoring attribute in the democracy index.<sup>6</sup> Specifically, Article 222 of the Election Law, which triggered public controversy related to the Presidential Nomination Threshold, has been tested 39 (thirty-nine) times by individuals and political parties. This frequency of testing shows the high level of public and political party involvement in the democratic process and reflects the dynamics of active and participatory politics.

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<sup>2</sup> Eshed Cohen, "The Jurisdiction of the Constitutional Court," *Constitutional Court Review* 11, no. 1 (January 2021): 2, accessed July 13, 2024, <https://journals.co.za/doi/full/10.2989/CCR.2021.0016>.

<sup>3</sup> Dian Agung Wicaksono and Enny Nurbaningsih, "Ratio Legis Penetapan Pembayar Pajak (Taxpayer) sebagai Kedudukan Hukum dalam Pengujian Undang-Undang oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 17, no. 3 (November 10, 2020): 461, accessed July 13, 2024, <http://localhost/index.php/jk/article/view/1731>.

<sup>4</sup> Fitra Arsil and Qurrata Ayuni, "Kedudukan Hukum Khusus Dalam Pengujian Undang-Undang Di Mahkamah Konstitusi," *Jurnal Konstitusi* 19, no. 3 (November 30, 2022): 957.

<sup>5</sup> Participatory Engagement in the report "The Global State of Democracy 2020" by the International Institute for Democracy and Electoral Assistance (IDEA) refers to citizen involvement in democratic processes that goes beyond simply voting in elections. It includes various forms of civic participation such as engagement in policy discussions, civic activism, and participation in civil society organizations. The concept emphasizes the importance of an active and informed citizenry in strengthening democratic governance, ensuring that democratic processes are inclusive and representative of diverse community interests.

<sup>6</sup> International Institute for Democracy and Electoral Assistance, *The Global State of Democracy 2019: Addressing the Ills, Reviving the Promise* (Sweden: International Institute for Democracy and Electoral Assistance, 2019), 63, accessed July 13, 2024, <https://www.idea.int/publications/catalogue/global-state-of-democracy-2019>.

**Table 1.** Laws That Are Often Judicially Reviewed

Laws That Are Often Judicially Reviewed	Number of Frequency
Law Number 7 of 2017 on General Elections	155
Law Number 8 of 1981 concerning the Criminal Procedure Code	85
Law Number 10 of 2016 on the Amendment to Law No. 1 of 2015 on the Stipulation of Government Regulation in Lieu of Law No. 1 of 2014 on the Election of Governors, Regents, and Mayors into Law	80
Law Number 8 of 2015 on the Amendment to Law No. 1 of 2015 on the Stipulation of Government Regulation in Lieu of Law No. 1 of 2014 on the Election of Governors, Regents, and Mayors into Law	43
Law Number 32 of 2004 on Regional Government	39

*Source: Website of the Constitutional Court of Indonesia*

The urgency of this research lies in the inconsistency in the Court's determination of the legal standing of individual petitioners, which has become an urgent problem that threatens legal certainty and the protection of constitutional rights. This study aims to fill the gap by providing a comprehensive analysis of the consistency of the Constitutional Court's attitude towards legal standing in the review of election laws, examining fundamental doctrinal shifts, and the possible influence of political configurations on judicial decisions. Specifically, the recent decisions of the Constitutional Court—Decision Number 62/PUU-XXII/2024, Decision Number 87/PUU-XXII/2024, and Decision Number 101/PUU-XXII/2024 demonstrate significant changes in how the Court determines the legal standing of applicants. The standing of the applicants in these decisions was influenced not only by the interpretation of constitutional injury as an individual matter, as in previous rulings, but also by other factors, including violations of morality, rationality, and intolerable injustice.

This research focuses on 2 (two) main legal issues relating to the legal position of the applicant in the review of Article 222 of the Election Law at the Constitutional Court. First, this research will explore the development of the Court's interpretation of the applicant's legal standing from 2017 to 2024. During this period, there were significant changes in the way the Court determined the legal standing of applicants in the constitutionality test of the article. Secondly, this study will analyze the reasons behind the Court's changing interpretation. This includes the doctrinal, political and social factors that influence the Court's decisions, as well as how these changes reflect the internal and external dynamics affecting the institution.

**II. Research Problems**

The focus of this article is to analyze the shift in the Constitutional Court’s interpretation of constitutional injury, specifically regarding the legal standing of individual applicants in the judicial review of the Presidential Threshold Law. Recent Court decisions have limited legal standing to political parties, with justifications grounded in changes to the electoral system and an increase in voter knowledge. This shift raises concerns about whether the rationale provided is sufficient to restrict individual participation in the constitutional review process, potentially undermining democratic legitimacy. Considering these developments, this article seeks to address two central questions: 1) To what extent does the Constitutional Court’s restriction of legal standing to political parties in the judicial review of the Presidential Threshold Law align with principles of democratic legitimacy? 2) Are the Constitutional Court’s justifications for limiting individual legal standing based on changes in the electoral system and increased voter knowledge adequate to justify the exclusion of individual applicants from the constitutional review process? These questions aim to critically assess the Court's rationale and its implications for democratic values and constitutional rights.

### III. Research Methods

Normative legal research methodology is used in this research with 2 (two) approaches including case approach and statutory approach.<sup>7</sup> Through a case study approach, the decision on the Election Law testing in particular, while the legislative approach serves to help examine the real intention of the legislators. The sources of legal material used include the decision on the testing of Article 222 of the Election Law which was tested 39 (thirty-nine) times and secondary legal sources in the form of literature relating to Constitutional injury as an applicant in testing the Law, while the legal material analysis technique used is content analysis (content analysis technique) analysis is any systematic procedure that is encouraged to examine the content of the information obtained.

### IV. Result And Discussion

#### 1. Development of the Applicant's Legal Standing

The applicant's 'legal standing' (*Kedudukan Hukum Pemohon*) is often interpreted as the same as the meaning of legal standing, as quoted in the Black Law Dictionary as follows:<sup>8</sup> "To have standing in federal court, a plaintiff must show (1) that the challenged conduct has conduct has caused the plaintiff actual injury, and (2) that the interest sought to be protected is within the zone of interests meant to be regulated by the statutory or constitutional guarantee in question".

A similar opinion was also expressed by Harjono<sup>9</sup> and Jimly Asshiddiqie<sup>10</sup> which states that legal standing is the right or status to file a case in court that is only given to parties who have suffered direct harm as a result of the action or regulation in question. Without direct harm, the petition will not be accepted by the court (*niet ontvankelijk verklaard*). Another similar opinion by Laica Marzuki states that legal standing cannot be directly translated into 'legal standing', because legal standing is a basis for a person or group of people to submit a petition for judicial review, which means that according to him legal standing is part of the basic framework of the broad concept of the applicant's legal standing, because its legitimacy is obtained cumulatively if it is proven that there is a Constitutional injury.<sup>11</sup> Based on the description of the various expert opinions, this article uses the word *Kedudukan Hukum* with the writing legal standing as interpreted according to the original meaning written in the Black Law Dictionary and used as official terminology in litigation at the Constitutional Court.

Regarding the regulation of the applicant's qualifications as a formal requirement in Article 51 paragraph (1) of the Constitutional Court Law, it is confirmed by the results of Dian Agung Wicaksono's research that the qualifications of the applicant are the development of Perma Number 2 of 2002 concerning Procedures for the Implementation of the Authority of the Constitutional Court by the Supreme Court.<sup>12</sup> Another case with Constitutional injury as a material requirement that must be described before entering the subject matter of the case which has been formulated in such a way as to follow the developing doctrine of Constitutional injury, this doctrine ensures that only individuals or entities that have a direct and real interest in a case can access the justice system.<sup>13</sup> This principle is not only a filter for cases examined that have the

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<sup>7</sup> Irwansyah Irwansyah, *Penelitian Hukum: Pilihan Metode Dan Praktik Penulisan Artikel (Edisi Revisi)*, 5th ed., vol. 3, 123 (Yogyakarta: Mirra Buana Media, 2022), 123.

<sup>8</sup> Black Black et al., *Black's Law Dictionary*, 9th ed. (New York: West, 2009), 8.

<sup>9</sup> Marurar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, 2nd ed. (Jakarta: Sinar Grafika, 2015), 94.

<sup>10</sup> Jimly Asshiddiqie, *Hukum Tata Negara Darurat* (Jakarta: PT. Raja Grafindo Persada, 2007), 68.

<sup>11</sup> I Gede Yusa et al., "Gagasan Pemberian Legal Standing Bagi Warga Negara Asing dalam Constitutional Review," *Jurnal Konstitusi* 15, no. 4 (January 15, 2019): 759, accessed July 14, 2024, <http://ejournal.mahkamahkonstitusi.go.id/index.php/jk/article/view/1544>.

<sup>12</sup> Wicaksono and Nurbaningsih, "Ratio Legis Penetapan Pembayar Pajak (Taxpayer) sebagai Kedudukan Hukum dalam Pengujian Undang-Undang oleh Mahkamah Konstitusi," 487.

<sup>13</sup> Greg Goelzhauser, "Avoiding Constitutional Cases," *American Politics Research* 39, no. 3 (May 1, 2011): 471, accessed July 14, 2024, <https://doi.org/10.1177/1532673X10388144>.

potential and significant constitutional impact on the life of the nation, but also prevents the Constitutional Court from exceeding its authority.<sup>14</sup>

Referring to the opinion of William A. Fletcher that the practice of granting legal standing is quite complicated to distinguish, because it involves the subjective nature of constitutional injury, the complexity of legal standing elements and variations in legal doctrine.<sup>15</sup> Apparently, at the stage of formalizing the legal position of the applicant also experienced the same thing, this is related to the issue of assessing the Constitutional injury itself because the legal subject and Constitutional injury are intertwined into one unit. Article 51 paragraph (1) of Law No. 8 of 2011 Concerning the Amendment to Law No. 24 of 2003 Concerning the Constitutional Court of the Republic of Indonesia, explains the legal subject who is entitled to file an application followed by Article 51 paragraph (2) with the obligation of the applicant to describe the Constitutional injury.

The breakthrough of Constitutional Court Decisions No. 006/PUU-III/2005 and 011/PUU-V/2007 seemed to end the problematic issue of providing legal standing for the applicant so far by providing a measure of constitutional injury, as follows:

- a. The existence of the applicant's constitutional rights granted by the 1945 NRI;
- b. That the applicant's constitutional rights are considered by the applicant to have been impaired by a law being tested;
- c. That the loss in question is specific (special) and actual or at least potential in nature which according to reasonable reasoning can be ascertained to occur;
- d. The existence of a causal relationship (*causal verband*) between the loss and the enactment of the law petitioned for review;
- e. There is a possibility that by granting the petition, the constitutional injury argued will not or no longer occur.

This benchmark is taken from the development of case law in the United States Supreme Court,<sup>16</sup> with 3 (three) main tools to detect legal standing, namely injury in fact, causation and redressability.<sup>17</sup> Bisariyadi's opinion that the adoption of the doctrine of constitutional injury by enriching it into 5 (elements) actually causes the emergence of inconsistencies in granting legal standing, this is based on the first group, namely "The existence of constitutional rights and/or losses" and "the existence of losses suffered by the applicant" because both are considered to overlap with the other three elements.<sup>18</sup> In addition, the Constitutional Court often requires applicants to begin their petition on the basis of "the existence of constitutional rights and/or authorities" in the legal position section, which is premature.

A total of 137 petitions were filed to test the Election Law, with the Presidential and Vice-Presidential nomination thresholds being tested 33 (thirty-three) times. Presidential threshold is the minimum requirement of support that must be met by a political party or a coalition of political parties to be able to nominate a presidential and vice-presidential pair. In Indonesia, this threshold was first applied in the 2004 General Election with a requirement of 10% of the DPR seats. This percentage was then increased to 20 per cent in the 2009 elections and has been maintained to date. The aim is to ensure strong initial support from parliament for elected candidates so that political stability can be maintained. This concept has sparked much debate.<sup>19</sup>

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<sup>14</sup> Thomas P. Schmidt, "Standing Between Private Parties," SSRN Scholarly Paper (Rochester, NY, December 22, 2023), 27, accessed July 14, 2024, <https://papers.ssrn.com/abstract=4673895>.

<sup>15</sup> William A. Fletcher, "The Structure of Standing," *The Yale Law Journal* 98, no. 2 (1988): 222, accessed July 14, 2024, <https://www.jstor.org/stable/796702>.

<sup>16</sup> Bisariyadi Bisariyadi, "Membedah Doktrin Kerugian Konstitusional," *Jurnal Konstitusi* 14, no. 1 (2017): 30, accessed July 14, 2024, <https://www.neliti.com/id/publications/114619/>.

<sup>17</sup> James E. Pfander, "Uncontested Adjudication and Standing to Sue," in *Cases Without Controversies: Uncontested Adjudication in Article III Courts*, ed. James E. Pfander (Oxford University Press, 2021), 78, accessed July 14, 2024, <https://doi.org/10.1093/oso/9780197571408.003.0011>.

<sup>18</sup> Bisariyadi, "Membedah Doktrin Kerugian Konstitusional," 30.

<sup>19</sup> Denny Indra Sukmawan and Syaugi Pratama, "Critical Review of the Constitutional Court's Decision on the Presidential Threshold: Tinjauan Kritis Mengenai Putusan Mahkamah Konstitusi tentang Ambang Batas Pencalonan

Some see it as necessary to strengthen the presidential system, while others see it as limiting the people's constitutional right to choose from a wider selection of candidates.<sup>20</sup> Article 222 of the Election Law explains that candidate pairs are proposed by a political party or a coalition of political parties with a number of seat acquisition requirements of at least 20% (twenty per cent) of the total number of DPR seats or obtaining 25% (twenty-five per cent) of the national valid votes. Since the enactment of the Election Law in 2017, it has triggered various controversies, one of which is raising the threshold for Presidential candidacy to 20%, explicit in Article 222. It is recorded that the Presidential Threshold has been tested 33 (thirty-three) times, including 18 (eighteen) times by individuals/associations.

In both Decision No. 59/PUU-XV/2017 and Decision No. 72/PUU-XV/2017, the Constitutional Court recognized a clear *causal verband* between the constitutional injury suffered by the applicants and the enactment of Article 222 of the Election Law. The two applicants, Effendi Gazali and Mas Soeroso, managed to convince the Constitutional Court that the presidential threshold requirement in Article 222 of the Election Law limited their constitutional right to choose the best candidate for leadership. The Constitutional Court found that this norm reduced the number of viable candidates and led to transactional politics, which had a negative impact on the quality of democracy and voter choice due to the reduction in the number of viable candidates.<sup>21</sup>

Although there are differences in the focus of the *causal verband* argument, both decisions have similarities in recognizing the constitutional injury caused by Article 222 of the Election Law. The Constitutional Court concluded that with the granting of the petition, the constitutional injury experienced by the applicant would not occur, thus providing legal standing to the applicants to file a petition for judicial review of the law.

Constitutional Court Decisions Number 50/PUU-XVI/2018 and Number 58/PUU-XVI/2018 affirmed the principle that the submission of Presidential and Vice-Presidential candidate pairs can only be done by a political party or a coalition of political parties in accordance with Article 6A paragraph (2) of the 1945 Constitution, not by individuals. In both decisions, although the applicants were initially deemed to have *prima facie* legal standing, the Constitutional Court ultimately rejected the applications because it did not find a sufficiently strong causal link between the constitutional injury argued and the enactment of Article 222 of the Election Law. Both decisions are in line with the Constitutional Court's 2017 decisions such as decision number 59/PUU-XV/2017 and Decision Number 72/PUU-XV/2017, in which the Constitutional Court also affirmed the constitutionality of Article 222 of the Election Law as an effort to strengthen the presidential system and encourage simplification of the number of political parties. The 2017 decision shows the Court's consistency in assessing that the presidential threshold provision is legitimate and necessary for political stability and effective governance, so requests that cannot prove a real or potential constitutional injury are rejected.

The Constitutional Court's Attitude towards the Legal Standing of Individual Applicants Between 2020-2021, In Decision Number 74/PUU-XVIII/2020, the Constitutional Court rejected a petition filed by an individual Indonesian citizen regarding the constitutionality of Article 222 of the Election Law regarding the Presidential Threshold. The applicant argued that this provision reduced his constitutional right to elect and be elected in the Presidential and Vice-Presidential Elections. The Court affirmed that based on Article 6A paragraph (2) of the 1945 Constitution of the Republic of Indonesia, the right to propose a presidential and vice-presidential candidate pair is only owned by a political party or a coalition of political parties. In addition, the

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Presiden," *Jurnal Konstitusi* 20, no. 4 (December 1, 2023): 563, accessed July 14, 2024, <https://jurnalkonstitusi.mkri.id/index.php/jk/article/view/2108>.

<sup>20</sup> Abdul Ghoffar, "Problematisasi Presidential Threshold: Putusan Mahkamah Konstitusi dan Pengalaman di Negara Lain," *Jurnal Konstitusi* 15, no. 3 (2018): 480, accessed July 14, 2024, <https://www.neliti.com/id/publications/267422/>.

<sup>21</sup> Eduardo Mello and Matias Spektor, "Brazil: The Costs of Multiparty Presidentialism," *Journal of Democracy* 29, no. 2 (2018): 115, accessed July 14, 2024, <https://muse.jhu.edu/pub/1/article/690080>.

Constitutional Court considered that individuals did not suffer constitutional injury due to the norms of Article 222 of the Election Law because voters already knew that the results of the legislative elections were used to determine the threshold for proposing presidential and vice-presidential candidate pairs. The dissenting opinion judge argued that the Presidential Threshold reduces the constitutional right to elect and be elected and limits inclusive and representative political participation.

In Decision Number 66/PUU-XIX/2021, the Constitutional Court again rejected the judicial review petition of Article 222 of the Election Law filed by an individual Indonesian citizen who also serves as Deputy Chairman of the Gerindra Party. The applicant argued that the Presidential Threshold provision reduces his constitutional right to elect and be elected and has the potential to cause limited presidential and vice-presidential candidates to be elected. The Court affirmed that the constitutional right to propose a pair of presidential and vice-presidential candidates remains with a political party or a coalition of political parties in accordance with Article 6A paragraph (2) of the 1945 NRI.

In the first case, the applicant argued that this provision reduced his constitutional right to elect and be elected, but the Constitutional Court confirmed that the right to propose a presidential and vice-presidential candidate pair based on Article 6A paragraph (2) of the 1945 Constitution is only owned by a political party or a coalition of political parties. The Constitutional Court also noted that the applicant could not prove support from political parties and did not suffer constitutional injury due to the norms of Article 222 of the Election Law. In the second case, the applicant, who also served as Deputy Chairperson of the Gerindra Party, submitted a similar argument, but the Constitutional Court reiterated that the right remains with a political party or a coalition of political parties, and the applicant could not prove any support or constitutional injury.

In 2017, the Constitutional Court in decisions related to the testing of Article 222 of the Election Law such as Decision Number 53/PUU-XV/2017 and Decision Number 59/PUU-XV/2017, provided legal standing to individual Indonesian citizen applicants who argued constitutional injury due to the enactment of the Presidential Threshold provision. The Constitutional Court at that time considered that the constitutional right to vote and the right to be elected could be impaired by these provisions, thus providing legal standing to the applicant. However, in Decision 74/PUU-XVIII/2020 and Decision 66/PUU-XIX/2021, the Constitutional Court consistently affirmed that the right to propose a presidential and vice-presidential candidate pair rest with a political party or a coalition of political parties in accordance with Article 6A paragraph (2) of the 1945 NRI. The Constitutional Court also demanded more concrete evidence from the applicant regarding political party support and constitutional injury, which the applicant did not fulfil in that case. This shows a shift in the Court's approach in assessing the legal position of the applicant regarding the constitutionality of Article 222 of the Election Law.

Changes in The Attitude of The Constitutional Court (Non-Originalist to Originalist): In Decision No. 59/PUU-XV/2017 and Decision No. 72/PUU-XV/2017, the Constitutional Court granted legal standing to an individual Indonesian citizen applicant on the grounds that the applicant could demonstrate a constitutional injury suffered due to the enactment of Article 222 of the Election Law. The Constitutional Court considered that the applicant as an Indonesian citizen who has the right to vote in the General Election, has the right to have more presidential and vice-presidential candidates to choose from. The restrictions caused by the presidential threshold were considered to have the potential to reduce these rights.

The Constitutional Court's approach at that time was based on constitutional theory that recognizes the basic rights of citizens, including the *right to vote* and the *right to be a candidate* as part of the constitutional rights that must be protected. The Constitutional Court also used a substantive approach that considered the real impact of the provisions of the law on the constitutional rights of citizens. However, a change in the Constitutional Court's approach in subsequent decisions (74/PUU-XVIII/2020 and 66/PUU-XIX/2021) emphasized the textual

and literal approach of Article 6A paragraph (2) of the 1945 NRI, which grants the right to propose pairs of presidential and vice-presidential candidates to political parties or coalitions of political parties. The Constitutional Court also demanded concrete evidence of political party support and more specific constitutional injury, which resulted in individual applicants who could not fulfil these requirements not being granted legal standing.

That the change in the attitude of the Constitutional Court changed from Inclusive to Restrictive or in other words changed the interpretation approach from *Non-Originalist* to *Originalist*.<sup>22</sup> The *originalist* approach focuses on the original meaning and intention of the drafters of the constitution. If the 2017 decision is placed in this framework, the Court would emphasize interpreting the text of Article 6A (2) of the 1945 Constitution as the drafters understood it, looking at the historical background and political context at the time the constitution was made, and taking a more conservative decision to maintain the *status quo* and legal certainty. In contrast, the non-originalist approach sees the constitution as a living document that must be interpreted in the modern context.<sup>23</sup> Within this framework, the 2017 judgements will focus more on protecting citizens' constitutional rights in the current context, considering the impact of provisions on the right to vote and be elected, and taking into account contemporary social and political developments to make progressive and adaptive decisions.

The 2020 and 2021 decisions show a more conservative tendency by affirming the exclusive rights of political parties, showing less flexibility in adjusting constitutional interpretation to ensure inclusive and representative political participation. In this context, the 2020 and 2021 rulings are more suitable to be placed in the originalist group as the Constitutional Court emphasizes the original text and intention of the drafters of the constitution, maintaining stability and legal certainty, and avoiding more flexible or progressive interpretations that could extend the constitutional right to vote and be elected to individuals beyond the explicit provisions of the constitution. These decisions show a tendency to keep constitutional interpretation in line with the original intent of the drafters and avoid significant departures from previous interpretations.<sup>24</sup>

In interpreting the legal standing of individual petitioners in the Election Law, a *non-originalist* approach tends to be more suitable as it offers flexibility and adaptability to the evolving social and political context. This approach allows for a more inclusive interpretation, ensuring that citizens' constitutional rights to vote and be elected are optimally protected. The non-originalist approach recognizes that society and political dynamics are constantly evolving, so constitutional interpretation must adapt to these changes to remain relevant and effective.<sup>25</sup> In the electoral context, this means taking into account developments in democracy, political participation and people's expectations of a more inclusive and representative electoral system.

In addition, this approach allows the Constitutional Court to interpret the constitution in a way that more effectively protects the constitutional rights of individuals, including the right to vote and be elected, by considering the direct and indirect impact of legal rules on individual rights. The non-originalist approach also allows for legal interpretations that take into account the current political and social context and realities, which is important in electoral systems where political realities can change rapidly. In contrast, the originalist approach tends to be rigid and

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<sup>22</sup> Masthead Masthead, "UC Law Journal | Law Journals | UC Law SF," *UC Law SF Scholarship Repository*, last modified March 2024, accessed July 14, 2024, [https://repository.uclawsf.edu/hastings\\_law\\_journal/?utm\\_source=repository.uchastings.edu%2Fhastings\\_law\\_journal%2Fvol62%2Fiss3%2F3&utm\\_medium=PDF&utm\\_campaign=PDFCoverPages](https://repository.uclawsf.edu/hastings_law_journal/?utm_source=repository.uchastings.edu%2Fhastings_law_journal%2Fvol62%2Fiss3%2F3&utm_medium=PDF&utm_campaign=PDFCoverPages).

<sup>23</sup> Herdiansyah Hamzah, "The Constitutional Interpretation on the Natural Resource: Originalist Vs Non-Originalist Interpretation," *Hasanuddin Law Review* 5, no. 3 (March 4, 2020): 307.

<sup>24</sup> Jonathan Gienapp, "Written Constitutionalism, Past and Present," *Law and History Review* 39, no. 2 (May 2021): 350, accessed July 14, 2024, <https://www.cambridge.org/core/journals/law-and-history-review/article/abs/written-constitutionalism-past-and-present/53E0428BC8926DAEACC991AE153A4BF7>.

<sup>25</sup> Erwin Chemerinsky, *Worse Than Nothing: The Dangerous Fallacy of Originalism* (New Haven: Yale University Press, 2022), 64–65.



may not always be able to adjust to social and political changes, thereby hindering the legal adaptation necessary to ensure the protection of constitutional rights.

## 2. Reasons for The Constitutional Court to Change its Interpretation of The Applicant's Legal Standing

The fundamental reason has been explicitly expressed by the Constitutional Court in Decision Number 74/PUU-XVIII/2020, following its consideration:<sup>26</sup> "The mechanism and system for determining the threshold requirements for proposing presidential and vice-presidential candidates in the 2014 General Elections are different from the 2019 General Elections, where in the 2014 General Elections voters did not know that the results of the legislative elections would be used as a threshold requirement for proposing presidential and vice-presidential candidates so that in this regard the Court had provided legal standing for individual voters, while the results of the 2019 General Elections voters already knew that the results of the legislative elections would be used to determine the threshold in determining the nomination of presidential and vice-presidential candidates in the 2024 General Elections."

The fundamental reason falls into the category of changes in the political system and the development of democracy because the DPR and the Government are synchronizing the implementation of the Presidential and Legislative Elections simultaneously,<sup>27</sup> Another reason was found to be a change in the composition of judges, both of which will be comprehensively reviewed. The change in judges' attitudes towards Article 222 of the Election Law is a clear reflection of how political and democratic change can affect legal interpretation.

Changes in the composition of Constitutional Court judges have a significant impact on the direction and nature of legal interpretations conducted by the institution. Indonesia's Constitutional Court, which acts as the guardian of the constitution and protector of citizens' constitutional rights, often faces internal dynamics that influence important decisions. Over time, a change of judges within the Constitutional Court can bring about changes in the interpretative approach and legal philosophy applied. Newly appointed judges bring diverse perspectives, backgrounds and experiences, all of which can influence how they view constitutional issues and apply legal principles in the cases they hear. Therefore, understanding how changes in the composition of Constitutional Court judges may affect legal interpretation is an important aspect of analyzing the evolution of constitutional jurisprudence in Indonesia.

Changes in the composition of Constitutional Court judges can affect legal interpretation through several important mechanisms. Firstly, each judge brings a unique educational background, professional experience and legal outlook, which may influence the way they interpret laws and constitutions. For example, judges with a strong academic background may be more likely to adopt a theoretical approach to legal interpretation, while judges with more practical experience may focus more on the application of the law in real contexts.<sup>28</sup> Second, changes in the composition of judges can alter the internal dynamics within the Constitutional Court. New judges can influence the way collective decisions are made, either through internal debate or through the formation of coalitions among judges. Third, changes in the composition of judges can also reflect changes in the broader political and social context. For example, the appointment of new judges by the government in power may reflect certain political priorities and legal reform agendas. New judges may be more likely to support government policies or be more responsive to changes in public opinion.

The change in the composition of Constitutional Court judges in decisions number 74/PUU-XVIII/2020 and number 66/PUU-XIX/2021 shows a shift from the *non-originalist* approach in 2017 (59/PUU-XV/2017, 72/PUU-XV/2017)) which was more inclusive of

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<sup>26</sup> Verdic No. 74/PUU-XVIII/2020," 2020, 44.

<sup>27</sup> Abdul Fuadi, "Politik Hukum Pengaturan Keserentakan Pemilu," *Jurnal Konstitusi* 18, no. 3 (February 15, 2022): 712.

<sup>28</sup> Thom Snijders, "Virtuous Judges, Politicisation, and Decision-Making in the Judicialized Legal Landscape," *Legal Ethics* 26, no. 1 (January 2, 2023): 50, accessed July 14, 2024, <https://doi.org/10.1080/1460728x.2023.2235183>.

individual rights, towards a more strict and literal approach in interpreting the constitution. that was more inclusive of individual rights, towards a more strict and literal *originalist* approach in interpreting the constitution. A change of judges bringing a more conservative perspective may explain this shift, where the Constitutional Court emphasizes legal certainty and interpretative stability, in accordance with the original text and intentions of the drafters of the constitution, data as follows:

**Table 2.** Composition of Constitutional Court Judges in Decisions Related to Originalist and Non-Originalist Approaches.

Decision Number	Composition of Judges
59/PUU-XV/2017; 72/PUU-XV/2017	Arief Hidayat Anwar Usman Maria Farida Indrati Saldi isra I Dewa Gede Palguna Wahidudin Adams Manahan MP Sitompul Aswanto Suhartoyo
74/PUU-XVIII/2020; 66/PUU-XIX/2021	Anwar Usman Aswanto Arief Hidayat Daniel Yusmic Enny Nurbaningsih (Dissenting opinion) Suhartoyo (Dissenting opinion) Manahan MP Sitompul (Dissenting opinion) Saldi Isra (Dissenting opinion) Wahidudin Adams

Source: Website of the Constitutional Court of Indonesia

The replacement of Constitutional Judge I Dewa Gede Palguna with Daniel Yusmic brings a new perspective that may be more conservative or different compared to I Dewa Gede Palguna. This perspective may affect the direction and nature of the Court's collective judgement, particularly in sensitive constitutional review cases. Judges with conservative views tend to favour a strict and literal interpretation of the constitution, which may lead to more restrictive decisions in terms of individual participation in constitutional review. For example, in the case of the constitutional review of Article 222 of the Election Law, conservative judges favored limiting individual participation on the grounds of maintaining legal stability and legal certainty.

The replacement of Constitutional Justice Maria Farida Indrati with Enny Nurbaningsih, who had a dissenting opinion, shows that she has a different view that is more progressive or critical of the majority decision. Judges with progressive views tend to adopt interpretations that are more inclusive and adaptive to social change. In the context of constitutional review, progressive judges may be more supportive of individual participation in the legal process as part of an inclusive democracy. This approach reflects the view that individuals have a constitutional right to challenge laws that they consider detrimental to their rights, thereby maintaining democratic legitimacy and equal access to justice.

The influence of Judicial Heroes in the context of changes in the composition of judges is also worth noting. In the literature on the judiciary and judicial review, the concept of "Judicial Heroes"<sup>29</sup> refers to judges who are courageous and passionate in protecting the rights of individuals from the power of the state. These judges are often portrayed as activists who use the constitution to overturn acts of parliament.<sup>30</sup> The replacement of judges with a more conservative perspective may explain the Constitutional Court's change in stance in limiting individual participation in constitutional review, which shows that judicial behavior is not only influenced by the legal text, but also by political social dynamics and the personal composition of the court.<sup>31</sup>

Several studies have shown that changes in court composition have a significant impact on legal interpretation and judicial decisions.<sup>32</sup> The personal composition of the court can influence the direction and nature of judgements, with judges having different backgrounds and political views often resulting in different interpretations of the law. Changes in the composition of judges often lead to shifts in interpretative approaches, reflecting the broader political dynamics within society.<sup>33</sup>

In addition, judges' ideologies have a significant influence on court decisions. Judges with conservative views tend to favour strict and literal interpretations of the constitution, while more progressive judges tend to adopt more inclusive and adaptive interpretations. In the context of the changing composition of judges in Indonesia's Constitutional Court, a change in judges may bring about ideological shifts that affect how the constitution is interpreted and applied.<sup>34</sup>

Courts that successfully maintain a balance between strict legal interpretation and adaptation to social change tend to be more effective in protecting citizens' constitutional rights.<sup>35</sup> In the case of the Indonesian Constitutional Court, changes in the composition of judges bringing a more conservative perspective in 2020 and 2021 may have resulted in a shift from a more inclusive non-originalist approach in 2017, towards a more strict and literal originalist approach. The decision to limit individual participation in constitutional review may have been influenced by the change in ideology and personal views of the newly appointed judges.

Changes in the composition of judges not only impact the outcome of court decisions, but also on the internal deliberative process. New judges bring different backgrounds, experiences, and legal views, which can affect the dynamics of discussion and decision-making among judges. For example, more conservative judges may be more likely to emphasize the importance of stability and legal certainty, while more progressive judges may focus more on the protection of human rights and adaptation to social change.

Related literature shows that the composition of the court can significantly influence legal interpretation. It is found that judges with different backgrounds and political views often result in different legal interpretations.<sup>36</sup> This is relevant in the context of changes in the composition of

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<sup>29</sup> Stefanus Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (London: Routledge, 2018).

<sup>30</sup> Cass Sunstein, *Constitutional Personae* (New York: Oxford University Press, 2015).

<sup>31</sup> Fortunato Musella and Luigi Rullo, "Constitutional Courts in Turbulent Times," *European Politics and Society* 25, no. 3 (May 26, 2024): 462, accessed July 14, 2024, <https://doi.org/10.1080/23745118.2023.2244394>.

<sup>32</sup> Theunis Roux, "Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years," *Journal of Southern African Studies* 42, no. 1 (January 2, 2016): 13, accessed July 14, 2024, <https://doi.org/10.1080/03057070.2016.1084770>.

<sup>33</sup> Lee Epstein, "Some Thoughts on the Study of Judicial Behavior," *William & Mary Law Review* 57, no. 6 (2016): 2043.

<sup>34</sup> Simon Zschirnt, "Gay Rights, the New Judicial Federalism, and State Supreme Courts: Disentangling the Effects of Ideology and Judicial Independence," *Justice System Journal* 37, no. 4 (October 1, 2016): 355, accessed July 14, 2024, <https://doi.org/10.1080/0098261X.2016.1153988>.

<sup>35</sup> B. C. Smith, *Judges and Democratization: Judicial Independence in New Democracies*, vol. 2 (London: Routledge, 2022).

<sup>36</sup> Scott Hofer and Susan Achury, "The Consequences of Diversifying the US District Courts: Race, Gender, and Ideological Alignment through Judicial Appointments," *The Justice System Journal* 42, no. 3/4 (2021): 310, accessed July 14, 2024, <https://www.jstor.org/stable/27224784>.

judges in Indonesia's Constitutional Court, where ideological shifts that occur due to a change in judges can alter the court's interpretative approach to constitutional cases.

Are the reasons related to electoral system changes and voter knowledge not strong enough to justify limiting individual participation in constitutional review? in-depth analyses need to be conducted on whether electoral system changes and increased voter knowledge provide sufficient grounds for limiting individual rights in the context of constitutional review.

True democracy must include broad participation of citizens in all aspects of governance, including constitutional review. Restrictions on individual participation undermine the legitimacy of democracy because they do not allow citizens to be directly involved in the legal process. According to democratic legitimacy theory, laws and public policies produced without the active participation of the public tend to be less legitimate and less accepted by the public.<sup>37</sup> Habermas emphasises the importance of public participation in the decision-making process to achieve democratic legitimacy. In this context, restrictions on individual participation in constitutional testing can be seen as a reduction in democratic legitimacy, as it does not allow citizens to voice their interests and concerns directly through legal mechanisms.

Restrictions on individual participation in constitutional review on the grounds of changes to the electoral system and voter knowledge are not strong enough to justify such restrictions. In a democracy, citizen participation is not only limited to elections but also includes active involvement in the monitoring and testing of policies and regulations. Habermas states that the legitimacy of laws and policies can only be achieved through broad and deliberative public participation.<sup>38</sup> Without active participation, laws tend to lose legitimacy and public acceptance. Limiting the right of individuals to apply for constitutional review means reducing the opportunity for citizens to participate in the legal process, which in turn reduces the democratic legitimacy of the legal system itself.

The argument that voters are now more informed about the use of legislative election results to determine the threshold for presidential candidacy cannot be a sufficient reason to limit individual participation in constitutional testing. Legal clarity and transparency are important, but should not be the basis for curtailing citizens' constitutional rights. A strong democracy should encourage broad participation and fair access for all citizens in all aspects of governance, including in the constitutional review process.

Restrictions on individual participation in constitutional review have significant impacts on access to justice. Firstly, it reduces the opportunity for individuals to challenge laws that they consider unconstitutional. The right to apply for constitutional review is one important way for citizens to ensure that their rights are protected by law. Without this access, individuals may not have an effective channel to fight for justice, especially if they feel that their rights have been violated by existing laws. This restriction can create a gap in access to justice, where only larger entities, such as political parties or large organizations, have the capacity to apply for constitutional review, while private individuals are deprived of the same right.

Second, restrictions on individual participation can reduce the legitimacy of the law itself. The legitimacy of the law depends on the public's perception that the law is fair and accessible to all. If individuals feel that they cannot challenge laws that they perceive to be unjust, their trust in the legal system may decline. This distrust can lead to political apathy and a lack of participation in the democratic process. Habermas emphasizes that broad and deliberative public participation is key to achieving democratic legitimacy. Without the active participation of

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<sup>37</sup> David Martínez Rojas, "The Normative Underpinnings of Democracy and the Balance between Morality and Legitimacy," *International Journal of Philosophical Studies* 28, no. 1 (January 1, 2020): 8, accessed July 14, 2024, <https://doi.org/10.1080/09672559.2019.1616801>.

<sup>38</sup> Marit Hammond, "Deliberative Democracy as a Critical Theory," *Critical Review of International Social and Political Philosophy* 22, no. 7 (November 10, 2019): 799, accessed July 14, 2024, <https://doi.org/10.1080/13698230.2018.1438333>.

individuals in constitutional testing, laws may be perceived as illegitimate or unjust by the public, which may reduce the effectiveness of laws and compliance with them.<sup>39</sup>

Third, this limitation also has an impact on the development of constitutional law itself. Individual participation in constitutional review can help identify and correct unconstitutional laws. By limiting who can apply for review, the opportunity to correct problematic laws is reduced. This can hinder the development of constitutional law that is responsive to social and political change. Broad participation in constitutional review also promotes transparency and accountability in the legislative process, ensuring that laws enacted truly reflect the values and needs of society.

Restrictions on individual participation are not only detrimental to the individuals whose rights are restricted but also hinder the advancement of constitutional law as a whole. These restrictions can be seen as a step backwards in the effort to build a legal system that is inclusive, fair and responsive to social dynamics. Modern legal theories emphasize the importance of inclusivity and fair access in all aspects of governance to ensure that every citizen has the opportunity to participate in the decision-making process. Benhabib emphasizes that democratic legitimacy depends on inclusive participation and deliberation.<sup>40</sup> He argues that true democracy should involve all elements of society in political discussions and decisions, without excluding certain groups or individuals.

Dahl in *Democracy and Its Critics* also highlights that a healthy democracy requires active and broad participation from all elements of society. This participation is not only limited to elections but also includes active involvement in monitoring and scrutinizing policies and regulations. Limiting the right of individuals to apply for constitutional review means reducing the opportunity for citizens to participate in the legal process, which in turn reduces the democratic legitimacy of the legal system itself.<sup>41</sup>

Reasons related to changes in the electoral system and increased voter knowledge are not strong enough to justify limiting individual participation in constitutional review. Whilst voters may be more aware of the electoral mechanisms in place, this does not diminish the importance of giving individuals full access to challenge laws that they consider detrimental to their rights. True democracy must include the active and equal participation of all citizens in all aspects of governance, including in the constitutional review process. These restrictions not only undermine democratic legitimacy but also threaten the fairness and integrity of the legal system.

### 3. Constitutional Injury and the Broadening Factors in Legal Standing Determination

The concept of constitutional injury has long served as a fundamental basis for determining the legal standing of applicants in judicial review cases. Traditionally, the Constitutional Court of Indonesia has assessed constitutional injury through a narrow approach, often focusing solely on the direct and individual impact caused by the application of a legal provision under review. However, recent rulings Decision Number 62/PUU-XXII/2024, Decision Number 87/PUU-XXII/2024, and Decision Number 101/PUU-XXII/2024 indicate a significant shift in this approach. These rulings introduce broader factors beyond individual injury, including violations of morality, rationality, and intolerable injustices, as essential elements in determining legal standing.

In previous rulings, the Constitutional Court tended to view the regulation of the presidential threshold as part of an open legal policy. In this context, the Court regarded that

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<sup>39</sup> Jean-Michel Bonvin and Francesco Laruffa, "Deliberative Democracy in the Real World, the Contribution of the Capability Approach," *International Review of Sociology* 28, no. 2 (May 4, 2018): 220, accessed July 14, 2024, <https://doi.org/10.1080/03906701.2018.1477101>.

<sup>40</sup> Benhabib Seyla, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 2021).

<sup>41</sup> James Melton and Tom Ginsburg, "Does De Jure Judicial Independence Really Matter?: A Reevaluation of Explanations for Judicial Independence," *Journal of Law and Courts* 2, no. 2 (2014): 200.

lawmakers have the authority to establish norms based on political considerations and policy needs, as long as they do not explicitly violate the Constitution. One example is Decision Number 14/PUU-XI/2013, in which the Court affirmed that the presidential threshold could be considered a mechanism to simplify the political system and promote governmental stability by limiting the number of proposed candidate pairs.

However, in its previous rulings, the Constitutional Court often did not thoroughly examine the constitutional injury experienced by individual voters as a result of this limitation. Instead, the Court focused more on justifying the policy considerations of legislators. This perspective has led to the perception that the presidential threshold predominantly favors the interests of major political parties, while smaller parties or individual voters have only limited space in the political process. Consequently, the Court's approach in earlier rulings has placed less emphasis on the constitutional rights of voters as a primary element that must be protected.

In the case of Decision Number 62/PUU-XXII/2024, the Petitioner, a university student registered in the Permanent Voter List (DPT), argued that Article 222 of the Election Law restricts their right to vote for a more diverse pool of presidential candidates and hinders political parties from performing their recruitment functions. The Court agreed that this provision narrows the space for political participation, violates the principles of justice, morality, rationality, and contradicts the fundamental rights guaranteed by Article 28C(2) and Article 28D(1) of the 1945 Constitution. By limiting the selection of presidential candidates through the presidential threshold, this provision creates an injustice that directly harms the Petitioner's rights. The Court also determined that there is a clear causal relationship between the Petitioner's injury and the provision, thereby affirming that the Petitioner has legitimate legal standing to file the petition.

The restriction of granting legal standing exclusively to political parties or coalitions of political parties has been entirely transformed when the Court ruled that Article 222, which has often been referred to as an open legal policy within the authority of the House of Representatives (DPR), was annulled. This ruling signifies that the Constitutional Court has firmly established that open legal policy cannot be used as a justification to disproportionately restrict individuals' constitutional rights if such restrictions contradict the limitations provided, namely:<sup>42</sup>

- a. Not in clear (*explicit*) contradiction with the 1945 Constitution.  
The provision in Article 222 of the Election Law restricts the legal standing of petitioners solely to political parties or coalitions of political parties, which is deemed to conflict with the principle of inclusive democracy as guaranteed by Article 28C (2) and Article 28D (1) of the 1945 Constitution. The individual right to participate in the political process by choosing from a diverse pool of presidential candidate pairs is considered a constitutional right that must not be disproportionately restricted by statutory provisions.
- b. Does not exceed the authority of the legislature (*detournement de pouvoir*).  
The Court found that restricting legal standing exclusively to political parties constitutes an institutionalization of power that exceeds the authority of the legislature. The legislative function must not be used to diminish individual access to constitutional review mechanisms guaranteed by the 1945 Constitution. By granting access to individuals, the Court reaffirmed that every citizen has the right to advocate for the constitutionality of a legal provision.
- c. Does not constitute an abuse of authority (*willekeur*).  
The Court found that the presidential threshold policy in Article 222 of the Election Law not only restricts individual legal standing but also creates intolerable injustice. The provision hampers individual political participation and limits the choice of presidential candidate pairs, resulting in a violation of the principle of substantive justice. The Court

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<sup>42</sup> Radita Ajie, "Batasan Pilihan Kebijakan Pembentuk Undang-Undang (Open Legal Policy) Dalam Pembentukan Peraturan Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi," *Jurnal Legislasi Indonesia* 13, no. 2 (May 4, 2018): 111-120.

argued that provisions causing imbalances in political representation and the polarization of power represent an abuse of legislative authority.

The implications of changes in the assessment of constitutional injury are clearly evident in recent Constitutional Court rulings, such as Decision Number 62/PUU-XXII/2024. Although the formal criteria for constitutional injury still refer to the five main points formulated in Decisions Number 006/PUU-III/2005 and 011/PUU-V/2007, their application has now expanded to include the dimensions of socio-political dynamics and a more critical approach to causal relationships. This development not only strengthens the protection of individual constitutional rights but also reflects the Court's adaptation to the dynamic and complex challenges of democracy.

This phenomenon has evolved alongside global trends that link the responsibility of judges to contemporary democracy, as explained by Leslie Green, who states that judges "resolve disputes by applying pre-existing standards." These pre-existing standards do not necessarily have to be codified, nor do they always have legal authority, although in most cases they do.<sup>43</sup> The phenomenon of judicial oversight of legislation in a democracy can be explained through critiques of the so-called "counter-majoritarian difficulty" or "counter-democratic difficulty." Theoretically, these concerns center on the notion that judicial annulment of legislation runs counter to the will of the majority.<sup>44</sup> In a constitutional democracy, the role of judges is not merely to apply the law but also to act as guardians of constitutional values and protectors of individual rights, which are often overlooked in the legislative process. This is crucial because the legislature does not always represent the true will of the majority, whether due to complex political dynamics, unclear collective intentionality, or the limitations of voters in consistently expressing their ideological preferences.<sup>45</sup>

## V. Conclusion

The dynamics of granting legal standing to petitioners by the Constitutional Court must align with the doctrine of constitutional injury. However, this is not an absolute principle; it must be adapted to empirical realities and socio-political dynamics. This is reflected in the Constitutional Court's approach during the 39 challenges to Article 222, where the Court's restriction of legal standing to political parties or coalitions lacked sufficient justification to limit individual participation. This demonstrates that the Court has begun to acknowledge the imbalance created when legal norms, such as Article 222, disproportionately restrict individual participation.

By initially limiting legal standing to political parties or coalitions, the Court justified this restriction on the grounds that the electoral system and political representation were more appropriately represented by collective actors, such as political parties. However, over time, this reasoning proved inadequate to justify the neglect of individual rights as an integral part of the democratic process. In its recent rulings, including those concerning Article 222, the Court has expanded its interpretation of legal standing, considering the empirical reality that voters are not merely objects in the political process but active subjects with the right to advocate for their freedom to choose from a more diverse range of candidates.

This shift aligns with the principle of substantive justice, which demands that every individual have equal opportunities in the political process without disproportionate restrictions.

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<sup>43</sup> Leslie Green, *Law and the Role of a Judge*. In: Ferzan KK, Morse SJ (Eds) *Legal, Moral, and Metaphysical Truths: The Philosophy of Michael S. Moore* (Oxford: Oxford University Press, 2016), 323.

<sup>44</sup> Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 1986), 11.

<sup>45</sup> Brian Leiter, "The Roles of Judges in Democracies: A Realistic View," in *Judges and Adjudication in Constitutional Democracies: A View from Legal Realism*, ed. Pierluigi Chiassoni and Bojan Spaić, vol. 135, Law and Philosophy Library (Cham: Springer International Publishing, 2021), 35, accessed January 26, 2025, [http://link.springer.com/10.1007/978-3-030-58186-2\\_2](http://link.springer.com/10.1007/978-3-030-58186-2_2).

As such, this development reflects a paradigm shift in the Constitutional Court's evaluation of legal standing, moving from a rigid and narrowly defined perspective limited to collective actors to a more flexible and responsive approach that considers the demands of justice and the needs of modern democracy. This change is not only a progressive step in enhancing legal accessibility but also an acknowledgment that the legal system must adapt to evolving social and political changes.

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