
The Constitutionality Of Open Legal Policy On The Guarantee Of Citizens Rights In Judicial Review

Rudatyo¹, Sunny Ummul Firdaus², Ri'dhollah Purwa Jati³

¹Faculty of Law University of Islam Batik Surakarta

²Faculty of Law University of Sebelas Maret Surakarta

³Faculty of Law, University of Sebelas Maret Surakarta

e-mail: Rudatyo.uniba@gmail.com¹, firdaussunny@yahoo.com²,
ridhollah13.08@gmail.com³

Abstract

This study aims to analyze the constitutionality of the open legal policy on the guarantee of citizens' rights in a judicial review. The results showed that an open legal policy can be interpreted as a freedom for legislators to form legal policies (laws). There were at least 15 Constitutional Court Decisions that did not grant the petition on the basis of open legal policy considerations from 2005 to 2015. However, until the time the conception related to open legal policy in the Constitutional Court Decision did not have clear boundaries.

1. INTRODUCTION

Indonesia is a democracy, this is an ideological and factual statement that cannot be denied. The necessity of being a democracy can be seen from the participation of the people in every state administration. Democracy does not only talk about the participation of the people in determining their representatives in the political competition as the concept of democracy developed by Joseph Schumpeter and Samuel P. Huntington is called procedural or minimal democracy. Democracy was also discussed more deeply by Robert Dahl who stated that democracy is not only a form of participation in the democratic contestation, but democracy is also a view that believes that the principle of self-government must underlie decision-making regarding laws and other public policies that must flow from the views of citizens. This kind of democracy is said to be an aggregative democracy which considers the majority of elections to be a preference.

Furthermore, democracy implemented through deliberative democracy considers various institutions, political parties, civil society, people's representative institutions, court departments and government services, village deliberations and public spaces with rational and open considerations. Amy Gutman and Dennis Thompson put forward a lot of deliberative democracy. Furthermore, the principles of democracy stated by Benjamin Barber, which is called participatory democracy, have the view that minimalist democracy as a thin-level democracy, aggregation democracy does not adequately reflect the principle of

self-government, while deliberative democracy has not involved all citizens. Through participatory democracy, citizens participate directly in the discussion of laws or policies to solve common problems.

The Indonesian constitutional landscape emphasizes the existence of constitutional supremacy after the amendments to the 1945 Constitution. With the fusion of parliamentary supremacy, a new judicial institution has been born that has received many nicknames, such as the guardian of constitution, the guardian of democracy, the guardian of state ideology, the protector of human rights, the protector of citizen's constitutional rights, dan the final interpreter of constitution. The Constitutional Court has a very crucial role in guarding the journey of constitutional democracy, the sovereignty of the people carried out according to the constitution and a democratic rule of law (*demokratische rechtstaat*).

As an interpreter and protector of the constitution through one of its powers in judicial review, the Constitutional Court has contributed greatly to democratization. Since its formation in 2003 until now the Constitutional Court has reviewed at least 1392 laws. Of the many laws that the Constitutional Court tested, there were 269 verdicts that were granted. With so many decisions granted, the Constitutional Court has provided a constitutional interpretation to save the nation from inappropriate or unconstitutional norms.

The existence of the Constitutional Court is at the same time to maintain the implementation of a stable state government, and is also a correction to the past experiences of constitutional life which have resulted in multiple interpretations of the constitution. The Constitutional Court, in implementing its authority to carry out judicial review of the constitutional court, may reject or grant the petition of petitioner. Thus, in one of the decisions of the Constitutional Court that was rejected, the argument of open legal policy is often used by some of them. Decisions that use the open legal policy considerations give legislators the freedom to regulate the material in the law. However, then what should be questioned is whether the consideration of this open legal policy can become a loophole that causes harm to the community. In fact, if it is returned to its spirit, the birth of the Constitutional Court is expected to be able to protect the constitution which is the embodiment of the collective agreement of the people. Indirectly, the limited authority of the Constitutional Court in interpreting the 1945 Constitution of the Republic of Indonesia as outlined in its decision, can cause constitutional losses to the community.

2. RESULTS aND DISCUSSION

1. *Open Legal Policy in the Constitutional Court Decision.*

The Constitutional Court was born from the development of a modern idea of a democratic government system based on legal ideas (rule of law), the principle of separation of powers, and protection and advancement of human rights (the protection of fundamental rights). At this point, as Mauro Cappelletti has underlined in *The Judicial Process in Comparative Perspective*, the Constitutional Court is idealized to act as a tool to correct the running of the government so that it is not trapped in authoritarianism anymore. In the Indonesian context, based on the provisions of Article 24C paragraph (1) of the 1945 NRI Constitution, the Constitutional Court has the authority to judge at the first and last levels, whose decisions are

final to examine laws against the 1945 NRI Constitution, decide disputes over the authority of state institutions whose authority is granted by The 1945 Constitution of the Republic of Indonesia, decides the dissolution of political parties, and resolves disputes over the results of general elections. The Constitutional Court is also given other powers apart from those stated in Article 24 C paragraph (1), namely the Constitutional Court is obliged and authorized to give decisions on the opinion of the House of Representatives regarding alleged violations by the President and/ or Vice President according to the 1945 Constitution.

Given the authority to carry out judicial reviews of political products, it can be stated that this is a form of judicialization of politics or a phenomenon where there is a transfer of authority in deciding the making of political public policies from political institutions such as the legislature and the executive to the judiciary. Through its decision, the Constitutional Court can annul a provision of a law. Even in some of its decisions in the early days of its formation, the Constitutional Court has been active and progressive, one of which is by changing the policies that have been stipulated in the Act or *ultra petita*. However, not a few of the Constitutional Court rejected the petition. Of the many petitions rejected by the Constitutional Court, the Constitutional Court has several times stated in the considerations of its ruling that a norm that has been tested is an open legal policy. The following are some of the Constitutional Court decisions based on open legal policy considerations from 2005 to 2012 as follows.

No.	Decision of the Constitutional Court	Statement
1.	The Constitutional Court Decision No. 10 / PUU-III / 2005	"...as long as such a policy choice does not constitute a matter that exceeds the authority of the legislators and does not constitute an abuse of authority, and does not clearly contradict the provisions of the 1945 Constitution, then such policy choice cannot be examined by the Court. Moreover, restrictions in the form of mechanisms and procedures in the exercise of these rights can be carried out as stipulated in Article 28J paragraph (2) ..."
2.	The Constitutional Court Decision No. 16 / PUU-V / 2007	"...The provisions on ET have been known since the 1999 General Election as stated in Law Number 3 of 1999 concerning General Elections which was later adopted again in Law No. 12 of 2003 concerning General Elections, which raised ET from 2% (two percent) to 3% (three percent), so that the Petitioners should have understood very well from an early age that the provisions on ET

		were indeed a policy choice of the legislators in order to build a simple multiparty system in Indonesia.”
3.	The Constitutional Court Decision No. 15 / PUU-V / 2007	“...With regard to the age criterion, the 1945 Constitution does not specify a certain minimum age limit as a generally accepted criterion for all government positions or activities. This means that the 1945 Constitution leaves the determination of the age limit to the legislators to regulate it. In other words, by the 1945 Constitution, this matter is considered as part of the legal policy of legislators. Therefore, the minimum age requirements for each government position or activity are regulated differently in various laws and regulations...”
4.	The Constitutional Court Decision No. 51-52-59 / PUU-VI / 2008	“...The Constitutional Court may not cancel a law or its contents, if the norm is an open delegation of authority that can be determined as a legal policy by the legislators. Even if the contents of a law are considered bad, ... since what is considered bad does not always mean unconstitutional, unless the legal policy clearly violates morality, rationality and injustice and intolerance ... As long as the choice of policy does not transcend authority, abuse of power, does not clearly contradict the 1945 Constitution of the Republic of Indonesia, this kind of policy choices cannot be overturned by the Court.”
5.	The Constitutional Court Decision No. 3 / PUU-VII / 2009	“...legislative institutions can determine the threshold as a legal policy for the existence of political parties, either ET or PT. ... the amount of the threshold figure is the authority of the legislators to determine it without being interfered with by the Court as long as it does not conflict with political rights, people's sovereignty, and rationality ... Everywhere in the world the constitution always gives authority to legislators to determine the limits in the law for the

		exercise of the political rights of the people.”
6.	The Constitutional Court Decision No. 26 / PUU-VII / 2009	“...The Court in its function as guardian of the constitution is not possible to annul a law or part of its contents, if the norm is an open delegation of powers that can be determined as a legal policy by the legislators. Even if the contents of a law are considered bad, the Court cannot annul it, since what is considered bad does not always mean unconstitutional, unless the legal policy product clearly violates morality, rationality and intolerable injustice. As long as the policy choice does not constitute something that exceeds the authority of the legislators, does not constitute something that exceeds the authority of the legislators, does not constitute an abuse of authority, and does not clearly contradict the 1945 Constitution...”
7.	The Constitutional Court Decision No. 37-39 / PUU-VIII / 2010	“...With regard to the age criterion, the 1945 Constitution does not specify a certain minimum or maximum age limit as a generally accepted criterion for all government positions or activities. This means that the 1945 Constitution leaves the determination of the age limit to the legislators to regulate it. In other words, by the 1945 Constitution, this matter is considered as part of the legal policy of legislators. Therefore, the minimum age requirement for each government position or activity is regulated differently in various laws and regulations in accordance with the characteristics of the needs of each position...”
8	The Constitutional Court Decision No. 52 / PUU-X / 2012	“...the policy of ET is not discriminatory since it applies to all political parties, is a legal policy mandated by Article 22E paragraph (6) of the 1945 Constitution which is very open, namely "Further provisions regarding general elections are regulated by law", thus, according to the Constitutional Court, both ET and PT policies have the

		same constitutionality (vide Decision Number 16 / PUU-V / 2007 on October 23, 2007)...”
9.	The Constitutional Court Decision No. 56 / PUU-X / 2012	“...According to the Court, the 1945 Constitution does not specify an age limit for all positions of judge. Determining the age limit for judges is an open legal policy, which can be changed at any time by legislators in accordance with the demands of existing development needs and in accordance with the type and specifications as well as the qualifications of the position. Thus, determining the age limit is entirely the authority of the legislators...”
10.	The Constitutional Court Decision No. 86 / PUU-X / 2012	“...according to the Court, such a provision is an option of legal policy (opened legal policy) of the legislators, since the 1945 Constitution has never limited the place/location of the domicile of a particular institution. The 1945 Constitution also does not limit the nature of government-formed institutions, whether they will be structural or non-structural in nature...”

Constitutional Court Decision with Consideration of Open Legal Policy Year 2005-2012

The Constitutional Court used the open legal policy for the first time in the Constitutional Court Decision Number 10 / PUU-III / 2005, dated May 31, 2005, although at that time no specific term was used. According to Muktie Fadjar, the open legal policy itself is an open legal policy that emerged when the 1945 Constitution ordered to regulate certain norms in the form of laws, but only provided broad directions. Meanwhile, regulated laws must be regulated in more detail. Regulating in more detail what is meant here is an open or free area for legislators to determine as long as it is still within the outline set by the 1945 Constitution. Legal norms that are not regulated by the 1945 Constitution, but these norms must exist in order to carry out the orders of the 1945 Constitution, such norms are legal norms that fall into the category of open legal policies. According to the Constitutional Court, such legal norms may be changed by legislators at any time desired.

2. *Implications of Open Legal Policy in the Constitutional Court Decision on The Guarantee of Citizens Rights Guarantee.*

The term open law policy can be interpreted as a freedom for legislators to form legal policies (laws). Open legal policy by legislators (DPR and President and DPD) can be carried out if it carries out the mandate of forming organic and inorganic laws. Thus, although the Constitutional Court gives consideration to the freedom to determine open legal policies to legislators, it will not cause moral hazard that is detrimental to the people. Because, at the implementation level, the Constitutional Court often fails to grant a petition for judicial review, only because when there is a provision that is not unconstitutional, but has a sufficient impact on society or certain parties.

With regard to the Constitutional Court as an interpreter, Maria Farida expressed the opinion that the basis for the Constitutional Court to make judicial activism is an element of urgency, an element of substantial justice and an element of benefit. Muhammad Alim added that the legal basis of the necessity for Constitutional Justices to make new provisions (norms) is Article 45 paragraph (1) of the Law on the Constitutional Court, which in essence is the Constitutional Court decides cases based on evidence and belief (material truth), justice and benefit, as well as an urgent situation that must be resolved. Iwan Satriawan and Tanto Lailam argue that the problem of the conception of open legal policy in the Constitutional Court Decision does not yet have clear boundaries according to the constitution (UUD 1945), so the definitions of positive legislature and negative legislature are often confused in the practice of forming and examining laws.

Bradley C. Canon suggests 6 general concepts and structures that are often referred to as judicial activism, as follow:

1. *Majoritarianism*: Seeing the extent to which policies that have been taken and adopted based on the democratic process are negated by the judicial process;
2. *Interpretative Stability*: Considering the extent to which doctrinal decisions and previous interpretations of a court are amended;
3. *Intepretative Fidelity*: Describing the extent to which articles in the constitution are interpreted differently from what is clearly meant by the constitution maker or what is clearly legible from the language used;
4. *Substance/Democratic Process Distinction*: Seeing the extent to which the decision of the court has made a substantive policy compared to safeguarding the decided outcome of a democratic political process;
5. *Specificity of Policy*: Analyzing the extent to which a court decision forms its own policy which is contrary to the principle of discretion held by other institutions or individuals;
6. *Availability of an Alternate Policymaker*: Considering the extent to which court decisions replace sufficiently important considerations made by other government agencies.

If reflected on progressive legal theory, legal interpreters are asked not to maintain the status quo of the law and pay more attention to the changes that occur in society and the state. A legal interpreter has a special position compared to the legal text since the meaning was formed. Thus, even though a norm does not contradict the norm explicitly regulated in the constitution, justice and public safety should be considered by judges. This is because,

although the authority of the judge is normatively limited, if it is returned to the spirit of the Constitutional Court as the protector of constitutional rights of citizens, this is important to implement when the role of the parliament cannot fulfill the constitutional rights of the people.

The consideration of the existence of this open legal policy can indeed be said to be constitutional as it is the inherent authority of the legislators regulated in Article 20 of the 1945 NRI Constitution. Radita Ajie stated that actually legislators are given the freedom to determine a rule, prohibition, obligation or limitation. - the limits contained in a statutory norm that is being drafted which constitute the decision of the legislator's policy to the extent:

1. Does not contradict significantly (clearly) with the 1945 Constitution, for example: it is not allowed to formulate norms to stipulate an education budget of less than twenty (20) percent of the APBN and APBD, because it is clearly contrary to Article 31 paragraph (4) of the 1945 Constitution.
2. Does not exceed the powers of the legislators (*detournement de pouvoir*), for example legislators compile constitutions/ amendments to the 1945 Constitution which is the authority of the MPR.
3. Not an abuse of authority (*willekeur*).

Thus, the Constitutional Court can only annul a statutory provision that is clearly against or violates morality, even though that provision is an open legal policy. However, the authority of the Constitutional Court to carry out further interpretation of a statutory provision must be regulated more clearly so that there is legal certainty and to avoid arbitrariness in its implementation. Thus, the Constitutional Court can only annul a statutory provision that is clearly against or violates morality, even though that provision is an open legal policy. However, the authority of the Constitutional Court to carry out further interpretation of a statutory provision must be regulated more clearly so that there is legal certainty and to avoid arbitrariness in its implementation.

3. CONCLUSION

An open legal policy can be interpreted as a freedom for legislators to form legal policies (laws). There were at least 15 Constitutional Court Decisions that did not grant the petition on the basis of open legal policy considerations from 2005 to 2015. However, until the time the conception related to open legal policy in the Constitutional Court Decision did not have clear boundaries. Considerations related to open legal policy in the revoked Constitutional Court decision are constitutional as long as they do not conflict with moral and justice in the society, so that when a provision that is open legal policy conflicts with moral values and justice, the Constitutional Court acts as The Guardian of the Constitution at the same time as the protector of the constitutional rights of citizens, it should be able to give the fairest decisions to the people.

4. BIBLIOGRAPHY

- [1] A. Ahsin Thohari. "Mahkamah Konstitusi Dan Pengokohan Demokrasi Konstitusional Di Indonesia." *Jurnal Legislasi Indonesia* 6, no. 3 (2009).
- [2] Arizona, Y. "Perkembangan Konstitusionalitas Penguasaan Negara Atas Sumber Daya Alam Dalam Putusan Mahkamah Konstitusi." *Jurnal Konstitusi* 8, no. 3 (2011): 257–314.
- [3] Bradley C. Canon. "Defining the Dimension of Judicial Activism." *Judicature* 66, no. 6 (1983).
- [4] Gardha Galang Mantara Sukma. "Open Legal Policy Peraturan Perundang-Undangan Bidang Politik Dalam Putusan Mahkamah Konstitusi (Studi Terhadap Putusan MK Bidang Politik Tahun 2015-2017)." *Lex Renaissance* 5, no. 1 (2020).
- [5] Handayani, I.G.A.K. Rachmi, Lego Karjoko, and Abdul Kadir Jaelani. "Model Pelaksanaan Putusan Mahkamah Konstitusi Yang Eksekutabilitas Dalam Pengujian Peraturan Perundang-Undangan Di Indonesia." *Bestuur* 7, no. 1 (2019): 36–46. <https://jurnal.uns.ac.id/bestuur/article/view/42700>.
- [6] Ichlas, Rudy Iskandar. "Questioning the Independence of Media Coverage in the 2019 Elections." *Jurnal Bestuur* 8, no. 1 (2020). <https://doi.org/10.20961/bestuur.42725>.
- [7] Jaelani, Abdul Kadir, I Gusti Ayu Ketut Rachmi Handayani, and Lego Karjoko. "EXECUTABILITY OF THE CONSTITUTIONAL COURT DECISION REGARDING GRACE PERIOD IN THE FORMULATION OF LEGISLATION." *International Journal of Advanced Science and Technology* 28, no. 15 (2019): 816–23.
- [8] Lutfil Ansori. "Telaah Terhadap Presidential Threshold Dalam Pemilu Serentak 2019." *Jurnal Yuridis* 4, no. 1 (2017): 19.
- [9] Martilah. "Progresifitas Hakim Konstitusi Dalam Membuat Putusan: Analisis Terhadap Keberadaan Putusan Mahkamah Konstitusi Yang Bersifat Positive Legislature." *Jurnal Konstitusi* 41, no. 2 (2012): 322.
- [10] Maruar Siahaan. *Hukum Acara Mahkamah Konstitusi Republik Indonesia*. Jakarta: Sinar Grafika, 2012.
- [11] Mauro Cappelletti. *The Judicial Process in Comparative Perspective*. Oxford: Oxford University Press, 1989.
- [12] Muhammad Addi Fauzani, Fandi Nur Rohman. "Urgensi Rekonstruksi Mahkamah Konstitusi Dalam Memberikan Pertimbangan Kebijakan Hukum Terbuka (Open Legal Policy)." *Justitia Et Pax* 35, no. 2 (2019).
- [13] Radita Ajie. "Batasan Pilihan Kebijakan Pembentuk Undang-Undang (Open Legal Policy) Dalam Pembentukan Peraturan Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi." *Jurnal Legislasi Inconesia* 13, no. 02 (2016).
- [14] Satriawan, Iwan, and Tanto Lailam. "Open Legal Policy Dalam Putusan Mahkamah Konstitusi Dan Pembentukan Undang-Undang." *Jurnal Konstitusi* 16, no. 3 (2019): 559–84.
- [15] T. Taufiqulhadi. "Relasi DPR, Partai Politik Dan Konstituen." *Jurnal Transformative* 1, no. 1 (2015): 3.

- [16] Yusriando. “Konstruksi Sistem Jaminan Sosial Nasional Bidang Kesehatan Yusriando.”
Bestuur 7, no. 2 (2019).