

Open Legal Policy in the Constitutional Court Decisions and National Legislation Making

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Abstract- The Constitutional Court's Decision No. 46/PUU/XIV/2016 which rejected the petition of petitioners to broaden the meaning of zina (fornication) in the Criminal Code of Indonesia has been becoming an interesting issue to be discussed. Some researchers have argued that the Constitutional Court must use its authority to conduct a break-through in responding the crucial legal issue. On the other hand, the Court asserted that widening the meaning of zina in the Criminal Code of Indonesia is not its authority. The current paper aims at discussing further the ratio decidendi of the Decision of the Constitutional Court which contains the element of open legal policy and its implication to national legislation system. The research is a normative legal research which uses statute approach and case law approach. The result of research shows that firstly, the concept of open legal policy in the Constitutional Court's decisions does not have a clear limitation which implies uncertainty of its implementation in the Court's decisions and the national legislation system. Secondly, the Decision of the Constitutional Court with open legal policy also shows that on one hand, there is a trend of using judicial activism among the constitutional judges and on the other hand, some constitutional judges also use judicial restraint approach as their reasons which results uncertainty of law in Court's decision. This paper recommends that there should be a further study on design model of open legal policy in the Constitutional Court decisions and its implication to national legislation system.

Keywords: open legal policy, the Constitutional Court decisions, national legislation system

INTRODUCTION

Political uproar in the community surfaced again with various provocations which incriminated and judged "MK pro zina - LGBT/ Lesbian, Gay, Bisexual, and Transgender," MK Legalized LGBT ", and others. The uproar and provocation are motivated by the decision of the Constitutional Court Number 46/PUU-XIV/2016 regarding the review of Article 284 of the Criminal Code which rejects the expansion of the meaning of zina which has only ensnared the adulterers of married men and women, even though adultery outside of it (for example

among teenagers) has damaged the system of social order and family. In the Decision, the Constitutional Court has argued that the authority to expand the criminal is the authority of the legislator body, which essentially submits criminal arrangements to the legislators.

In addition, several previous decisions also experienced controversy. The Constitutional Court decisions relating to controversial open legal policy is the decision of the Constitutional Court No. 14/PUU-XI/2013 regarding the material constitutional review of Law No.42 of 2008 about the Presiden and Vice-President election, especially relating to Presidential Threshold provisions. According to the Constitutional Court states that Presidential Threshold contained in Article 9 of the President and Vice President Election Law "Candidates pairs are proposed by Political Parties or Political Parties coalition who meet the requirements for obtaining seats at least 20% of the total seats in the House of Representatives or obtain 25% from the national result vote in the election of House of Representatives members, before the election of the President and Vice President" constitutes the authority of the legislators while still basing on the provisions of the 1945 Constitution. This means that the Court submits the provisions of the presidential threshold to the open legal policy. Even though the presidential threshold is the most obvious political compromise.

In the decision containing the open legal policy above, the Constitutional Court is often trapped in the meaning of negative legislature and positive legislature, even in the body of the Constitutional Court itself it seems unclear in laying the foundation of partiality on judicial activism or judicial restraints. Open legal policy or in the Constitutional Court decisions known as the opened legal policy, open legal policy, or legal policy which all of them are translated into Indonesian as an open legal policy (kebijakan hukum terbuka).

In the legal studies, the concept of the open legal policy is new and relatively unknown before. So far the term policy is more widely known in the field of public policy studies, among others in terms of communitarian (public policy), public policy, and social policy. In the field of public policy, the term policy has the meaning of free or open, because basically the meaning of policy always refers to the freedom of officials/ authorities to do certain things that are not implemented or not clearly

regulated by legislation. This is different from the open understanding in the field of legislation making.¹

In the national legislation system, legal policy can be interpreted as an act of forming laws in determining subjects, objects, actions, events, and/ or consequences to be regulated in legislation. Thus the word "open" in the term "open legal policy" is defined as a freedom for legislators to take legal policies. There are fundamental problems related to the open legal policy from some of the Constitutional Court decisions which has broad implications for the national legislation system, especially in the legislation making. The issue of the open legal policy conception in the Constitutional Court decision does not yet have clear limits according to the 1945 constitution, so that positive legislature and negative legislature understandings are often confused in the practice of legislation making and constitutional review. Several studies on open legal policy were conducted by Mardian Wibowo about "appraising the constitutionality of open legal policy in the judicial review activity" and Radita Ajie focused on "limit to open legal policy in legislation making based on constitutional court decisions. Differences from these publications, this study uses the perspective of constitutional court decisions with different cases and constitutional interpretations in the legislation making.

Likewise, in the legislation making, open legal policies lack limitations because sometimes open legal policies are carried out based on mere political interests. In addition, basically the open legal policy decision gives the legislators the right to make policies, but in some cases the legal policies that are formed are contrary to the principles of democracy and cause the failure of the realization of the "living constitution" in the national legislation system. The problem that will be answered in this study, namely: (1) what is the legal argument (*ratio decidendi*) that was built by the Constitutional Court regarding the open legal policy in its decision?, (2) what legal arguments have been established by the legislators regarding the open legal policy in the legislation making?

RESEARCH METHOD

Legal research is a study that is applied specifically to the science of law which helps the development of legal science in revealing a legal truth. The research chosen was normative (doctrinal) research. Doctrinal legal research can be conducted with several approaches. *First*, the legislation approach is carried out by examining the laws and regulations relating to the legal issues being studied. *Second*, the analytical approach is done by looking for meaning or legal terms contained in the laws and regulations, so that researchers obtain understanding/ understanding or new meaning of legal terms and test its application practically by analyzing judges' decisions.

¹ Mardian Wibowo, "Menakar Konstitusionalitas sebuah Kebijakan Hukum Terbuka dalam Pengujian Undang-Undang", *Jurnal Konstitusi*, Volume 12, Nomor 2, Juni 2015, p.204

Third, a case approach is to study the norms or legal rules carried out in the legal practice of the constitutional court (decision). Case approach is a number of cases examined to be used as a reference for a legal issue that carried out by analyzing the *ratio decidendi* (legal considerations or legal reasoning).

Data collection techniques used in this study are library research or referred to as document study. Literature studies are carried out on primary legal materials, secondary legal materials, and tertiary legal materials. Searching for legal materials can be done by reading, seeing, hearing the legal material. Data analysis of this study used qualitative descriptive. The qualitative descriptive analysis approach is carried out by treating objects based on certain categories, the categories aim to select data relating to research, then classified juridically and systematically. There are several stages of data analysis in legal research, namely: (1) legal material or facts systematized or organized and adapted to the object under study; (2) Legal material or facts that have been systematized described and explained according to the object under study based on theory; (3) Legal materials that have been described are evaluated and assessed using the applicable legal measures, so that they are found suitable and some are not in accordance with applicable law. These stages of several activities were carried out such as collecting various decisions and other literature, mapping the results of interviews with resource persons. (4) The steps are taken to understand the focus of the study in depth and comprehensively, systematically arranged to provide a comprehensive result.

DISCUSSION

A. Open Legal Policy in Constitutional Court Decisions

The constitutional review is a form of checks and balances system in structuring of the national legal system, which essentially provides oversight of legal products made by the House of representatives and the President (including the Regional Representative Council). It means that the constitutional review is a review of the constitutionality of the legal norms being tested, whose reviewing is carried out using a constitutional measuring instrument.² According to M. Fajrul Falaakh efforts to safeguard and enforce the constitution are referred to as constitutional reviews, meaning that products and legal actions must be in accordance with and not contrary to the 1945 constitution.³ Therefore, the Constitutional Court is often stated as "the guardian of the constitution and the sole interpreter of constitution", or as a guardian of the constitution based on the authority to decide whether a

² Jimly Asshiddiqie, 2005, *Model-Model Pengujian Konstitusional di Berbagai Negara*, Konpress, Jakarta, p.7

³ M.Fajrul Falaakh, dalam "Skema Constitutional Review di Indonesia: Tinjauan Kritis", *Jurnal Mimbar Hukum No.38/1/2001*, p.15

legislative product is in accordance with the constitution or not.⁴

In the decision containing the open legal policy above, the Constitutional Court is often trapped in the meaning of negative legislature and positive legislature, even in the body of the Constitutional Court itself it is not clear in laying the foundation for partiality on judicial activism or judicial restraints. The following are some analyzes of the open legal policy in the Constitutional Court decisions:

1. **Presidential Threshold Provisions**

This decision is a material constitutional review of Law No.42 of 2008 about the Presidential Election against the 1945 Constitution, the issue of norm conflict according to the Constitutional Court is grouped on 2 (two) issues, namely:

- a. The norms that stipulate the holding of the President and Vice President Election are carried out after the holding of General Elections of members of the House of Representatives, Regional Representatives Council and Regional Representatives, namely Article 3 paragraph (5) of the Presidential Election Law; and
- b. Norms relating to the procedures and requirements for submitting candidates for the President and Vice President, namely Article 9, Article 12 paragraph (1) and paragraph (2), Article 14 paragraph (2), and Article 112 of Presidential Election Law.

The Constitutional Court states that Article 9 of the Presidential Election Law "Candidate pairs are proposed by Political Parties or Political Parties coalitions participating in the election that meet the requirements of obtaining seats at least 20% of the House of Representatives seats or obtain 25% of votes national law in the election of House of Representatives members", before the implementation of the President and Vice President Election" is a provision for the requirements for the vote acquisition of political parties as a requirement for nominating pairs of president and vice-president candidates, while still basing on the provisions of the 1945 Constitution. This means that the Constitutional Court submits the provisions of the presidential threshold to legislators, whether the presidential threshold can be applied or is not very dependent on the political will of the legislators.

In fact, in Article 6A paragraph (2) of the 1945 Constitution "The pair of candidates for President and Vice President proposed by political parties or a coalition of political parties participating in general elections before the general election" does not determine the presidential threshold in the Presidential Election. If referring to the Constitutional Court

decision about the simultaneous elections do not necessarily imply the loss of the provisions of the presidential threshold in the submission of Candidates for the President and Vice President for 2019 and onwards. The pros and cons of implications for these provisions are given the strengths and weaknesses of applying the presidential threshold. Simultaneous national elections have implications for drastic changes regarding the presidential threshold and the presidential threshold to become irrelevant or have lost their urgency, because all political parties that qualify as election participants will be able to nominate candidates for President and Vice-President. In fact, it might be possible to enter an independent presidential candidate as well.

According to Saldi Isra that the Constitutional Court did not cancel the presidential threshold for the nomination of candidates for President and Vice President, at a reasonable reasoning limit, with the re-meaning of the simultaneous Election in Article 22E Paragraph (1) and (2) of the 1945 Constitution, a minimum threshold it loses relevance. This means that all political parties that have passed the election contestants can submit candidates for the President and Vice President as specified in Article 6A Paragraph (2) of the 1945 Constitution. In connection with that, by using the maximum assumption, if all political parties participating in the Election submit their own candidates, the number of candidate pairs will be even greater. In order for the number of candidates not to be out of common sense, the requirements of Political Parties participating in the Election should not be lighter and looser than the existing provisions. That is, by using the number of Political Parties in the 2014 Election, then there will be at most 12 pairs of candidates in the first round of the Presidential election, such numbers can be said to be more than enough to provide alternative candidates for voters.⁵

The authors agree with Saldi Isra's view that alternative figures will emerge that adorn the contestation of the 2019 Presidential Election, both those proposed by large political parties and small political parties and may be alternative figures that become the people's choice. On the other hand, in the absence of the provisions of the presidential threshold of all political parties having the same constitutional rights before the law and constitution, it does not mean prohibiting political parties from forming coalitions. Political parties can still coalition to nominate the President / Vice President or coalition at the cabinet. This means that the presidential threshold in the presidential election is not intended to create a stable

⁴ Tanto Lailam, dalam "Penafsiran Konstitusi dalam Pengujian Konstitusionalitas Undang-undang terhadap UUD 1945, Jurnal Media Hukum Volume 21 No.1 Tahun 2014, p.90

⁵ Saldi Isra, dalam "Jalan Panjang menuju Pemilu Serentak, http://www.saldiisra.web.id/index.php?option=com_content&view=article&id=563:jalan-panjang-menuju-pemilu-serentak&catid=2:mediaindonesia&Itemid=2, diunduh pada tanggal 15 Juli 2014, pukul.21.00

government or strengthen the presidential system position. The reinforcement can be done by the President / Vice President after being elected in the General Election by designing his government cabinet, where here the President and supporting parties of the government can accept the proposal of other political parties to coalition to support the government.

2. Provisions for Adultery Crime (Zina)

The controversy surfaced again in the community after the Constitutional Court decision No. 46 / PUU-XIV / 2016 related to the testing of Article 284 of the Criminal Code which rejected the expansion of zina meanings which had only ensnared male adulterers with wives and married women, despite adultery (for example teenagers) the fact has damaged the system of social order and family.

In the request, the petitioner requested the Court to clarify the formulation of decency offenses set out in Article 284, Article 285, and Article 292 of the Criminal Code (KUHP). In its verdict, five constitutional justices argued that the substance of the petition involved the formulation of offenses or new crimes that fundamentally changed both the subject that could be convicted, acts that could be convicted, the nature of being against the law, and criminal sanctions. "So that this has actually entered the area of 'criminal policy'.

The Constitutional Court considered that the petitioners' arguments had no legal grounds. In its consideration, the Constitutional Court explained, in principle the petition of the applicant requested the Court to expand the scope because it was not in accordance with the community. This results in a change in principle or principle in criminal law and basic concepts relating to a criminal act. This means that substantially, the applicant requested the Constitutional Court to form a new crime which was the authority of the legislators.

In the Decision, the Constitutional Court has argued that the authority to expand the criminal is the authority to form the law, which essentially submits criminal arrangements to the legislators. That all the considerations above do not mean that the Constitutional Court rejects the idea of "renewal" and does not mean that the criminal law norms contained in the Criminal Code are complete. The Court only states that the norms of the articles in the Criminal Code petitioned for by the applicant do not conflict with the 1945 Constitution. Regarding whether or not it is needed, this is entirely the authority of the legislator through its criminal policy which is part of criminal law politics. Therefore, the ideas of reform offered by the applicants should be submitted to the legislators and this should be an important input for legislators in the process of completing the new Criminal Code formulation.

In the decision, there were dissenting opinions from Constitutional Justice Arief Hidayat,

Constitutional Justice Anwar Usman, Constitutional Justice Wahidudin Adams, Constitutional Justice Aswanto. In his argument, it was stated that if this matter is allowed to continue or be decided as an open legal policy from the legislator who fully depends on the political power and configuration which is always dynamic, the Court actually provides an opportunity or at least sincerely allows the existence of a legal norm in law. laws and court decisions that are not illuminated and even conflict with the values of religion and the Divine Light and the living law of the Indonesian people. Even though the Supreme Court as fellow judicial authorities and some Indonesian Criminal Law experts along with the government in the drafting and discussion team on the Bill on the Criminal Code have long struggled and showed real steps in partisanship by stating the attitude that the intercourse of sexual intercourse outside marriage. The act is intrinsically true and not only because it destroys the sanctity or integrity of the marriage institution so that the scope of abuse in the context of orderly Indonesian criminal law must be restored as before before its scope was narrowed by the Dutch East Indies colonial government based on *Wetboek van Strafrecht* and the principle of concordance by the Dutch East Indies government. Therefore, the concept of adultery should include adultery and fornication. This means that not only ensnares perpetrators who are bound by marriage, but also ensnares offenders.

The author's view regarding criminal policy that must contain the articles petitioned for and the Constitutional Court cannot enter the area forming the norm. Even though it is related to the formation of new legal norms, it is often carried out by the Constitutional Court on other decisions and has been confirmed by the Constitutional Court in the decision of Decision No.48 / PUU-IX / 2011. This decision is a test of Law No. 35 of 2009 concerning Narcotics and Amendment of the Constitutional Court Law No.8 / 2011, related to the testing of the Amendment Court Law No.8 / 2011 tested by the Constitutional Court is Article 57 paragraph (2a), Article 57 paragraph (2a) declared to be contrary to the 1945 Constitution and does not have binding legal force. Editorial Article 57 as a whole reads:

- (1) The Constitutional Court decision that the decision states that the content of paragraphs, articles, and / or parts of the law contradicts the 1945 Constitution, the content of paragraphs, articles, and / or parts of the law do not have binding legal force.
 - (2) The decision of the Constitutional Court whose decision ruling states that the establishment of the said law does not fulfill the provisions for the establishment of laws based on the 1945 Constitution, the law has no binding legal force.
- (2a) MK Decision does not include:
- a. orders other than as referred to in paragraph (1) and paragraph (2);

- b. orders to legislators; and
 - c. formulation of norms as a substitute for norms of laws that are declared contrary to the 1945 Constitution
- (3) The Constitutional Court's decision to grant the Application must be published in the Official Gazette of the Republic of Indonesia within a maximum period of 30 (thirty) working days after the verdict is pronounced.

The norm of Article 57 paragraph (2a) basically provides a limitation that the Constitutional Court is a state institution that has a *negative legislatuer* function. *Negative legislatuer* who have authority only cancel the norms in legislation, in the sense that the Constitutional Court is not a positive legislator. This means that in the practice of the Constitutional Court there is a shift in the meaning of the function of the Constitutional Court from the negative legislator to the positive legislator, from only limited to "canceling legal norms" towards "legislation making". The argument that the Court in the cancellation of Article 57 paragraph (2a) of the Amendment Court Law No.8/2011 is that Article 57 paragraph (2a) a quo is contrary to the objective of the Constitutional Court's establishment of law and justice, especially in the context of enforcing the constitutionality of the law with the 1945 Constitution. Article a quo results in the obstruction of the Constitutional Court to (i) examine the constitutionality of norms; (ii) fill in the legal vacuum as a result of the Constitutional Court decision stating that a norm is contrary to the Constitution and does not have binding legal force. Meanwhile, the process of forming a law requires considerable time, so it cannot immediately fill the legal vacuum; (iii) implementing the obligations of constitutional justices to explore, follow, and understand the legal values and sense of justice that live in society.

In both types of norms, the Constitutional Court in its decision stated clearly and clearly that this was an open legal policy choice. The open legal policy in the Constitutional Court decision often shows a split personality in the body, between camps that are more inclined to use the judicial activism approach and on the other side the tendencies are the judicial restraints approach. The doctrine of judicial activism was first introduced by Arthur Schlesinger in Fortune magazine in January 1947⁶. Schlesinger added that in practice sometimes the parliament does not have a plan to improve or change a problem that occurs in legislation, at least until it is detrimental to society, then at that time the court must act quickly. Judicial activism is the response and adaptation of the court to social change by developing principles taken from the text of the constitution and existing decisions in order to implement the basic values of the constitution progressively. In other words, the use of judicial activism is a step to avoid a legal vacuum that is

too long because it awaits the process of forming a law in the legislature.

In contrast to judicial restraint, this principle restrains the court from acting as a "miniparliament"⁷. The developing doctrine in America is an implementation of the application of the principle of separation of powers⁸. One form of court action that can be categorized as a parliamentary act is forming a new legal norm when deciding a judicial review case⁹. The development of judicial activism has gone from negative and limited to positive. However, this critique of the doctrine of judicial activism is inseparable from the interference of judicial institutions which are seen as degrading and damaging the democratic system and the principle of separation of powers. The threat to the function of democracy that came from the doctrine of judicial activism was described by William P. Marshall as the "Seven Sins of Judicial Activism", namely:

1. *Counter-Majoritarian Activism*: The reluctance of the court to submit to the decisions of other democratically elected branches of power;
2. *Non-Originalist Activism*: The failure of a court to submit to original ideas when deciding a case;
3. *Precedential Activism*: The failure of the courts to comply with earlier court decision (judicial precedent);
4. *Jurisdictional Activism*: The failure of the court to comply with the limits of its own jurisdiction of power;
5. *Judicial Creativity*: Creation of theories and new rights in constitutional doctrine;
6. *Remedial Activism*: The use of court power to force ongoing affirmative obligations against the government or to take over duties from government institutions under the supervision of the court; and
7. *Partisan Activism*: The use of court power to achieve partisan goals.¹⁰

But behind that, human rights activists and pro-democracy tend to give a positive view of the existence of judicial activism. This is due to the need for legal adaptation to the social changes that occur in the community by developing the principles contained in the constitution and the previous judge's decision to progressively implement the constitutional basic values. Bradley C. Canon, for example, presents 6 general concepts and structures that are often referred to as judicial activism, namely:

⁷ Philip A. Talmadge, "Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems", *Seattle University Law Review, Volume 22, Nomor 695, 1999*, p.711

⁸ *Ibid.*

⁹ Wicaksana Dramanda, "Menggagas Penerapan Judicial Restraint di Mahkamah Konstitusi *Jurnal Konstitusi, Volume 11, Nomor 4, Desember 2014*, p.618

¹⁰ William P. Marshall, "Conservatives and the Seven Sins of Judicial Activism", *University of Colorado Law Review, Volume 73, Issue 4, September 2002*, p.1220

⁶ Keenan D. Kmiec, "The Origin and Current Meanings of 'Judicial Activism'", *California Law Review, Volume 92, Nomor 5, Oktober 2004*, p.1446

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: Consider the extent to which doctrinal decisions and previous interpretations of a court are changed again;
3. Interpretative Fidelity: Describes the extent to which the articles in the constitution are interpreted differently from what is clearly intended by the constitution maker or what is clearly legible from the language used;
4. Substance/Democratic Process Distinction: Seeing the extent to which court decisions have made substantive policy compared to maintaining the results decided from a democratic political process;
5. Specificity of Policy: Analyze the extent to which a court ruling forms its own policies that conflict with the principle of discretion held by other institutions or individuals;
6. Availability of an Alternate Policymaker: Consider the extent to which court decisions replace important considerations made by other government institutions.¹¹

However, the facts on the ground that occurred in various decisions, the open legal policy argument actually favored judicial restraints, but in other decisions it was prioritizing judicial activism. That is, there is a lack of clarity on the benchmarks of the Constitutional Court in applying whether they use the judicial activism and judicial restraints approaches related to open legal policy arguments, so that decisions containing an open legal policy are often misguided and groundless on a strong constitutional basis.

B. Open Legal Policy in the Legislation Making

As explained above, open legal policy is a new term in law in Indonesia. This term is widely used in the Constitutional Court decisions. The Constitutional Court in several decisions stated that there were provisions (norms) which were open legal policies, when a norm of law was included in the category of open legal policy. According to the Constitutional Court that norm was in a constitutionally valued area or in accordance with the 1945 Constitution. The term open legal policy can be interpreted as a freedom for legislators to form legal policies. As an open legal policy or norm in the constitutional area / in accordance with the Constitution, which frees the legislators to interpret and pour in a certain law. The freedom given by the 1945 Constitution to legislators has two opposing sides. On the one hand it provides broad or flexible opportunities to regulate the state, but on the opposite side it can be dangerous if the legislators act arbitrarily in determining what and how a material will be arranged.

In progressive legal theory, legal interpreters are asked not to maintain the status quo of the law and give

¹¹ Bradley C. Canon, "Defining the Dimensions of Judicial Activism", *Judicature*, Volume 66, Issue 6, December 1983, p.239

greater attention to changes that occur in society and state. A legal interpreter has a special position compared to legal texts since the meaning of the text was formed¹². The core focus of the interpretation of legal texts, according to Michael J. Clark, lies not in the text, but in the interpreter whose thoughts dominate the legal text¹³.

In connection with the Constitutional Court as an interpreter, Maria Farida argues that the basis of the Constitutional Court makes judicial activism an urgent element, a substantial element of justice and an element of expediency. Muhammad Alim added that the legal basis of the need for a Constitutional Judge to make a new (norm) provision was Article 45 paragraph 1 of the Constitutional Court Law which essentially constituted the Constitutional Court to decide cases based on evidence and beliefs (material truth), justice and benefit, and situations urgent so it must be resolved.¹⁴

The open legal policy by the legislators (House of Representatives, President + Regional Representative Council) can be done if the mandate is to establish organic and inorganic laws. For open legal policy organic law can be done if the provisions in the Constitution contain the choice of law or policy or the authority to interpret the phrase in each paragraph and article in the 1945 Constitution, so that the phrase will be constitutional if interpreted according to the constitution by the legislators invite. For the formation of inorganic laws, the legislators have the freedom to determine norms that are in line with the times and even the interests of legislators.

Some provisions are included in the definition of open legal policy for the legislators, namely:

1. Democratic Meanings in Article 18 of the 1945 Constitution

Article 18 paragraph (4) of the 1945 Constitution which states that "Governors, Regents and Mayors respectively as heads of provincial, regency and city governments are democratically elected", do not regulate limit whether the regional heads are elected directly by the people or elected by the Regional Representatives (DPRD). At least there are two main principles contained in the formula "democratically elected regional heads", namely: first; regional heads must be "selected" through the selection process and it is not possible to be directly appointed, second; elections are carried out "democratically". The democratic meaning here can be directly elected by the

¹² Mahrus Ali, dalam "Mahkamah Konstitusi dan Penafsiran Hukum yang Progresif", *Jurnal Konstitusi*, Volume 7, Nomor 1, Februari 2010, p.75

¹³ Michael J. Clark, dalam "Foucault, Gadamer and the Law: Hermeneutics in Postmodern Legal Thought", *University of Toledo Law Review*, Volume 26, 1994, p.115-116

¹⁴ Martitah, "Progresifitas Hakim Konstitusi dalam Membuat Putusan: Analisis Terhadap Keberadaan Putusan Mahkamah Konstitusi yang bersifat Positive Legislature", *Jurnal Masalah-Masalah Hukum*, Volume 41, Nomor 2, April 2012, p.322

people and can also be chosen by the Regional Representatives whose members are also the result of democratic elections.¹⁵

The final result of the constitutional interpretation by the legislators of Article 18 paragraph (4) which contains provisions "democratically elected" is direct election by the people. Pilkada is one of the significant political breakthroughs in realizing democratization at the local level. This means that the implementation of democratic governance is reflected in the 'recruitment' of the head of government. No matter how good a country is organized democratically, it will not be considered truly democratic when its leaders are not freely elected by their own people. In fact, not a few democratic theorists say that basically all politics are local, and democracy at the national level will grow and develop well if supported by the solid values of local democracy. Local elections are part of the process of strengthening and deepening democracy and efforts to realize effective governance at the local level. In addition, the implementation of regional elections is basically also a follow-up to the realization of democratic principles which include guarantees of the principles of individual freedom and in particular equality in political rights.¹⁶

Some important considerations in the implementation of direct regional elections are as follows: *First*, elections are the answer to the demands of the people's aspirations because the President and Vice President, House of Representative, Regional Representative Council, and even the Head of the Village have been carried out directly. *Second*, local election is the embodiment of the mandate of Article 18 paragraph (4) of the 1945 Constitution. *Third*, local election is seen as a means of learning (political) for the people (*civics education*). *Fourth*, local election is seen as a means to strengthen regional autonomy. One of the successes of regional autonomy is determined by local leaders. The better local leaders are generated through local election, then the commitment of local leaders to improve the community that is the goal of regional autonomy can be realized. *Fifth*, local election is an important means for the regeneration process of national leadership.¹⁷

The choice of direct elections is an open legal policy that forms a law that interprets the phrase as "democratically elected", but that choice is an open and

changeable policy in accordance with the dynamics of political governance. The legislators have also made an open legal policy by changing the meaning of "democratically elected" from direct elections by the people to the electoral system by the DPRD through the establishment of Law No. 22 of 2014 concerning the Election of Governors, Regents and Mayors.

This law is based on philosophical - sociological meanings that the direct implementation of the election of governors, regents and mayors is still covered by various problems that are not in accordance with the principles of democracy. Because based on the evaluation of the direct election of governors / vice governors, regents / vice regents, and mayors / vice mayors and one package, so far it illustrates empirical facts that the costs must be incurred by the State and by the candidates pairs are also very large also potentially to increase corruption, decrease the effectiveness of governance, increase escalation of conflict and decrease voter participation.

Affirmation of the open legal policy stipulated in Article 3 of the Law, namely:

- (1) Governors are elected by members of the Provincial DPRD democratically based on a free, open, honest and fair principle.
- (2) Regents and mayors are elected by members of Regency / City DPRD democratically based on free, open, honest and fair principles.

But then the implementation of the open legal policy contained problems in the dynamics of political politics, so that the Government Regulation No. 1 of 2015 was issued which was later passed into Law No.1 of 2015, then amended by the establishment of Law No.8 In 2015 and changed for the second time by establishing Law No.10 of 2016. Law No. 1 of 2015 stipulates that the open legal policy of legal interpretation of the phrase "democratically elected" is through general elections by the people.

2. Meanings of "Other Authorities" of the Supreme Court

The issue of the dualism of elections that can be categorized as an election regime or regional government has implications for the dispute resolution system. This is certainly related to institutions that have constitutional authority in resolving regional election disputes. One of the institutions that has been given authority up to 2 times by the legislators is the Supreme Court. In the context of the open legal policy, the legislators legally and constitutionally interpret Article 24A paragraph (1) that the Supreme Court has the authority to adjudicate at the level of cassation, test legislation under the law against the law, and have other authority that given by law.

The meaning of the Supreme Court authority in the phrase: "having other authority given by the law" has a very broad scope as long as it has relevance to the authority to settle disputes which are the authority of the Supreme Court. As an example of the real form of

¹⁵ Hamdan Zoelva, "Problematika Penyelesaian Sengketa Hasil Pemilukada oleh Mahkamah Konstitusi", *Jurnal Konstitusi*, Volume 10, 3 September 2013, p.380-381

¹⁶ Siti Zuhro, "Memahami Demokrasi Lokal: Pilkada, Tantangan, dan Prospeknya", *Jurnal Pemilu dan Demokrasi* Volume 4 Desember 2012, p.30-31

¹⁷ R.Nazriyah, "Pelaksanaan Pemilukada di Otonomi Khusus Papua (Studi terhadap Putusan Mahkamah Konstitusi No.29/PUU-IX/2011)", p.532-534

open legal policy that forms the law is Article 106 of Law No.32 of 2004 concerning Regional Government, in Article 106 there are a number of verses which provide constitutional authority for election disputes by the Supreme Court, namely: Paragraph (1) Objections to the determination of the results of the election of regional heads and deputy regional heads can only be submitted by a candidate pair to the Supreme Court within no later than 3 (three) days after the determination of the results of the election of regional heads and deputy regional heads. Paragraph (3): Submission of objections to the Supreme Court as referred to in paragraph (1) shall be submitted to the high court for the election of regional heads and deputy heads of provincial regions and to district courts for the election of regional heads and deputy heads of regency / city regions. Paragraph (4): The Supreme Court decides the dispute over the results of the vote count as referred to in paragraph (1) and paragraph (2) no later than 14 (fourteen) days after receipt of the objection request by the District Court / High Court / Supreme Court. Paragraph (5) The decision of the Supreme Court as referred to in paragraph (4) is final and binding; and Paragraph (6) of the Supreme Court in exercising its authority as referred to in paragraph (1) may delegate to the High Court to decide on disputes over the results of the vote count of regional heads and deputy heads of regencies and cities.

The open legal policy related to other authorities in Article 24A has been carried out several times, for example in the establishment of Law Number 1 of 2015 concerning the Election of Governors, Regents and Mayors into Laws, the Supreme Court is given more confidence in resolving disputes over regional election results. are final and binding and other legal remedies cannot be carried out. Some provisions regarding the resolution of the dispute over election results by the Supreme Court are contained in Article 157 of Law No.1 of 2015, namely: Paragraph (6) A party that does not accept the Decision of the High Court as referred to in paragraph (5) may submit an objection to the Supreme Court at the latest 3 (three) days since the decision of the High Court was read; Paragraph (7): The Supreme Court decides the objection application as referred to in paragraph (6) no later than 14 (fourteen) days after receipt of the application; and Paragraph (8) The decision of the Supreme Court as referred to in paragraph (7) is final and binding.

In addition to the electoral dispute authority, the interpretation of the open legal policy is also stated in the previous law, namely Law No. 14 of 1985 concerning the Supreme Court, Article 37 mentions other authorities which are not stipulated in the 1945 Constitution, namely: "The Supreme Court can provide consideration - consideration in the field of law both requested and not to other State High Institutions".

3. Meaning of Election Management Body

Specifically regarding the existence of the Election Management Body (EMB) regulated in Article 22E paragraph (5) of the 1945 Constitution states that, "General elections are held by a national election commission that is national, permanent, and independent". Original intense Article 22E Paragraph (5) of the 1945 Constitution, according to Jimly Ashiddiqie, the provisions of the article are not explicitly related to the institutions of election management body. The provision only mentions the principal authority of the electoral commission, as an Election Management Body. The institutional name in the clause is not explicitly stated. Election commission clauses are not mentioned in capital letters, as are the People's Consultative Assembly (Majelis Permusyawaratan Rakyat), House of Representatives, Supreme Court (Mahkamah Agung), and President . The naming of institutions for election management body is actually mandated to be regulated by law as stated in Article 22E paragraph (6) of the 1945 Constitution. That is, the law can only give another name to the election body, not the election commission. Whatever the name of the institution, but having the main task of organizing the election can be called an election commission.

Referring to the Constitutional Court Decision No. 11/ PUU-VIII/2010 concerning the review of Law Number 22 of 2007 against the 1945 Constitution, the Constitutional Court in its decision has placed the Komisi Pemilihan Umum, Badan Pengawas Pemilu, dan Dewan Kehormatan Penyelenggara Pemilu as independent institutions, as described in the Constitutional Court Decision Number 11 / PUU-VIII / 2010 dated March 18, 2010, stating: "That in order to guarantee the implementation of overflowing and fair elections, Article 22E paragraph (5) of the 1945 Constitution stipulates that," General elections shall be held by electoral commission of a national, permanent and independent. The sentence "an election commission" in the 1945 Constitution does not refer to an institution's name, but refers to the function of holding national, permanent and independent.

According to the Court, the function of holding elections is not only carried out by the General Election Commission (KPU), but also includes the election supervisory institution in this case the General Election Supervisory Body (Bawaslu) as a unit of national, permanent and independent. This understanding is more in line with the provisions of the 1945 Constitution which mandates the holding of independent elections to be able to carry out general elections that meet overflowing and fair principles. The holding of general elections without supervision by an independent institution will threaten overflowing and fair principles in the conduct of elections. Therefore, according to the Court, the General Election Supervisory Board (Bawaslu) as stipulated in Chapter IV Article 70 up to Article 109 of Law No. 22 of 2007,

it must be interpreted as an Election Organizing Agency whose task is to supervise the conduct of general elections, so that the function of the General Election is carried out by the Election Commission (KPU) and Election Supervisory Board (Bawaslu). In fact, the Honorary Council which oversees the conduct of election organizers must also be interpreted as an institution which is a unitary function of the holding of elections. Thus, the guarantee of the independence of the election commission becomes real and clear"

Based on the decision of the Constitutional Court, Honorary Board of Election Commission (DKPP) institutionally has an equal position with the KPU and Bawaslu, both as an EMB, which is national, permanent and independent, as stipulated in Article 22E Paragraph (5) of the 1945 Constitution. In Law No.7 of 2017 concerning General Elections it has also been emphasized that Election Management Body are institutions that hold elections consisting of the General Election Commission (KPU), Election Supervisory Body (Bawaslu), and Election Organizing Honorary Council (DKPP) as a unit of election management functions. The General Election Commission, hereinafter abbreviated as KPU, is an Election Commission that is national, permanent and independent in carrying out elections. Election Supervisory Board (Bawaslu) is an Election Organizing institution that oversees the Implementation of Elections in the entire territory of the Unitary State of the Republic of Indonesia. While the Honorary Board of Election Commission (DKPP) is an institution tasked with handling violations of the Election Organizers' code of ethics.

The meaning of the election commission consisting of KPU, Bawaslu, and DKPP also starts from the interpretation of Article 22E paragraph (5): General elections are held by an electoral commission that is national, permanent, and independent. The provisions of the electoral commission that use lowercase letters in the 1945 Constitution can be categorized as open legal policy, the legislators can interpret which institutions can be categorized as election commissions. Based on the interpretation of the electoral commission, the legislators include the KPU, Bawaslu, and DKPP as election commissions that are national, permanent, and independent.

Referring to the establishment of a law on organic law (mandate of the 1945 Constitution) there is a red thread that open legal policy is carried out by the legislators because (1) the 1945 Constitution provides a choice of interpretation of the Article or phrase contained in the 1945 Constitution; (2) the legislators can use the open legal policy provisions in consideration of adjusting to the dynamics of the developing state. The results of the study by Radita Ajie state that in fact the legislators are given freedom in determining a rule, prohibition, obligation or boundaries contained in a norm of law that is being

made which is a choice of law-making policies as long as the norm:¹⁸

- a. It is not clearly contradicting the 1945 Constitution, for example: may not formulate norms stipulating an education budget of less than twenty (20) percent of the APBN and APBD, because it clearly contradicts Article 31 paragraph (4) of the 1945 Constitution.
- b. It does not exceed the authority of legislators (*detournement de pouvoir*), for example the legislators formulate amendments / amendments to the 1945 Constitution which are the authority of the MPR.
- c. It is not an abuse of authority (*willekeur*). Even if the contents of a law are considered bad, the Court cannot cancel it, unless the legal policy product clearly violates morality, rationality and intolerable injustice. If there are parties or community members who do not agree to the policy choices, they can propose it through a legislative review mechanism, namely by proposing changes to the legislators.

CONCLUSION

First, the concept of open legal policy in the Constitutional Court decisions does not yet have clear limits according to the constitution (the 1945 Constitution), so that the positive legislature and negative legislature notions are often confused in the practice of forming and testing laws. In addition, this open legal policy often shows a split personality in the body of the Court, between judicial activism and judicial restraints. Judicial activism is a legal adaptation to social change by developing principles taken from the text of the constitution and existing decisions to implement the basic values of the constitution progressively. While in the doctrine of judicial restraints, courts must be able to exercise restraint from tendencies or incentives to act like a "miniparliament". One form of court action that can be categorized as a parliamentary act is forming a new legal norm when deciding a judicial review case. Even though the implementation of judicial activism and judicial restraints must refer to the constitution and the provision of guardian and guardian functions of the constitution. In various decisions on open legal policy arguments, it is in favor of judicial restraints, but in other decisions it prioritizes judicial activism, meaning that there is a lack of clarity on the Court's benchmarks in implementing judicial activism and judicial restraints related to open legal policy arguments, so that decisions contain an open legal policy often misguided and not based on the constitution.

Second, the open legal policy by the legislators (DPR and the President + DPD) can be done if the mandate is to establish organic and inorganic laws. For

¹⁸ Radita Ajie, "Batasan Pilihan Kebijakan Pembentuk Undang-Undang (*Open Legal Policy*) Dalam Pembentukan Peraturan Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi, *Jurnal Legislasi Indonesia*, Vol. 13 No. 02 - Juni 2016, p.117

open legal policy organic law can be done if the provisions in the Constitution contain the choice of law or policy or the authority to interpret the phrase in each paragraph and article in the 1945 Constitution, so that the phrase will be constitutional if interpreted according to the constitution by the legislators invite. For the formation of inorganic laws, the legislators have far the freedom to determine norms that are in line with the times and even the interests of legislators. Some laws that are formed based on the open legal policy actually cause uncertainty and commotion in the community, besides this open legal policy actually considers the legal dynamics of the community that developed at that time.

Based on the problems discussed earlier, further research is needed that focuses on focusing on (1) the implications of the open legal policy in the legislation making and decisions of the Constitutional Court on the constitutional order, the order of society and the nation; (2) the design of the ideal open legal policy in the Constitutional Court Decision and the national legislation system.

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