The Criticism on the Meaning of "Open Legal Policy" in Verdicts of Judicial Review at the Constitutional Court

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Abstract

In several verdicts of judicial review, the Constitutional Court formulates a concept of Open Legal Policy. The concept begins from a condition when a norm of law submitted to judicial review by the 1945 Constitution does not have reference in the 1945 Constitution. In other words, the open legal policy is a condition when the Constitutional Court cannot find any reference for the norm submitted to the judicial review. By using a construction method, this present research tries to find the meaning of a concept of open legal policy arranged by the Constitutional Court, then assessing whether the concept is in line with the spirit of judicial review. If the formulation of the concept done by the Constitutional Court has not been ideal, the deconstruction will be conducted toward the meaning that already exists until the open legal policy ideal with the perspective of the constitution is found. In this research, the finding shows different meaning of open legal policy between various verdicts of the Constitutional Court. Moreover, a new meaning is proposed including improvement of criteria of the open legal policy based on the difference between the object of regulation (*what*) and the content of the regulation (*how*).

Keywords: Open Legal Policy, Construction, Deconstruction

I. INTRODUCTION

The Constitutional Court is a court which is established based on mandate of Article 24 paragraph (2) and the Transitional Provisions Article III of the 1945 Constitution of the State of the Republic of Indonesia (further it is called as

the 1945 Constitution). The authority of the Constitutional Court is regulated in Article 24C paragraph (1) and paragraph (2) of the 1945 Constitution.

Judicial review is the main authority of the Constitutional Court since the aim of the Constitutional Court is as an institution who is authorized to do a judicial review (examining constitutionality of law). Judicial review is basically an assessment about suitability between substance of the norm of law with norm of the 1945 Constitution.

Judicial review becomes relative and difficult when the 1945 Constitution does not explicitly regulates the material of law which is in the process of judicial review. If the material is not clearly mentioned in the 1945 Constitution, the Constitutional Court needs to use a general norm written in the 1945 Constitution as reference. The Constitutional Court even needs to use implied meaning of the 1945 Constitution.

Whether the norm of the 1945 Constitution used as reference has already been available in a judicial review, the Constitutional Court still needs to assess whether that norm is in line with the constitution. The absence of the 1945 Constitution, which clearly regulates the material of law in a judicial review, results a new concept in assessing constitutionality of the law. That is the concept of open legal policy (*Kebijakan Hukum Terbuka/KHT)*.

In various verdicts, the Constitutional Court declares that law is valued as constitutional since the provision of the material of the law is open legal policy, that is the policy in the field of law (legal policy) whose the characteritic is open. Several verdicts of the Constitutional Court[1] shows that the concept of open legal policy is valued and categorized as "constitutional". It means, the entire open

[1] Judicial Review Number 12 of 2003 on General Election of the Members of the People Representatives' Council, Regional Representatives' Council, and Regional People Representatives' Council against the 1945 Constitution, No. 16/PUU-V/2007 (The Constitutional Court of the Republic of Indonesia 2007); Judicial Review Number 42 of 2008 on General Election of President and Vice President against the 1945 Constitution of the Republic of Indonesia, No. 51–52–59/PUU–VI/2008 (the Constitutional Court of the Republic of Indonesia 2008); Judicial Review Number 10 of 2008 on General Election of the Members of the People Representatives' Council , Regional Representatives' Council, and Regional People Representatives' Council, No. 3/PUU-VII/2009 (the Constitutional Court of the Republic of Indonesia 2009); Judicial Review Number 23 of 2011 on the Management of Zakat against the 1945 Constitution, No. 86/PUU-X/2012 (The Constitutional Court of the Republic of Indonesia 2012); Judicial Review Number 8 of 2012 on General Election of the Members of the People Representatives' Council , Regional Representatives' Council, and Regional People Representatives' Council against the 1945 Constitution of the Republic of Indonesia, No. 2/PUU-XI/2013 (The Constitutional Court of the Republic of Indonesia 2013); Judicial Review Number 44 of 2009 on Hospital against the 1945 Constitution of the Republic of Indonesia, No. 38/PUU-XI/2013 (2013).

legal policy are valued and in line with the constitution[2]. The Constitutional Court has never used the concept of open legal policy when stating that a law is unconsitutional.[3]

If the open legal policy is interpreted as freedom for legislator to freely creates the content of law, this matter potentially will result arbitrariness if there is not any guidance from the 1945 Constitution. The meaning of open legal policy then will be used by the legislator to "justify" law when it is under judicial review by the Constitutional Court.[4]

However, a contradictive indication arised when the Verdict No. 4/PUU-VII/2009 exists, the Constitutional Court states that "...from the perspective of legal morality, that is justice, although the formulation of such norm has fulfilled the procedural requirements, it cannot automatically be categorized as a legal policy which does not need to be assessed/reviewed through a judicial review since the legal norm of the *a quo* is clearly not in line with justice."[5]

II. RESEARCH QUESTIONS

From the background of the problem above, it can be formulated the following research questions:

1. What is the meaning of Open Legal Policy in verdicts of judicial review at the Constitutional Court?

[2] Moh. Mahfud MD states that when the 1945 Constitution submitted the regulation of a particular material to the law (attribution), then the law is going through a judicial review by the Constitutional Court, then the Court cannot decide whether that law is cancelled or not. If the Court conducts a judicial review to decide whether the Law is cancelled or not, it means, according to Mahfud MD, the Court has exceed its limit by entering the legislative area (establishing a law). See M. D Mahfud, *Perdebatan Hukum Tata Negara* (Jakarta: LP3ES, 2009), 99; M. D Mahfud, *Konstitusi dan Hukum dalam Kontroversi Isu* (Jakarta: Rajawali Press, 2009), 28–283.

[3] Judicial Review Number 32 of 2004 on Regional Government against the 1945 Constitution, No. 006/PUU-III/2005 (The Constitutional Court 2005). Here, the term open legal policy was used for the first time, but the Constitutional Court uses it in verdicts thereater. In that verdict, the Constitutional Court argues that legislators can freely decides whether the election of regional head is part of the General Election ruled by the 1945 Constitution in Artikel 22E or whether the election is not part Article 22E of the 1945 Constitution . So, the Constitutional Court is authorized to resolve that conflict.

[4] Judicial Review Number 15 of 2011 on General Election against the 1945 Constitution, No. 31/PUU-XI/2013 (the Constitutional Court of the Republic of Indonesia 2013); Judicial Review Number 3 of 2009 on the Second Amendment of Indonesian Law Number 14 of 1985 on the Constitutional Court against the 1945 Constitution of the Republic of Indonesia, No. 25/PUU-XI/2013 (the Constitutional Court of the Republic of Indonesia 2013); Judicial Review Number 8 of 2015 on the Amendment of Indonesian Law Number 1 of 2015 on the Enactment of Government Regulation in Lieu of Laws Number 1 of 2014 on the Election of Governor, Regent, and Mayor into Law against the 1945 Constitution of the Republic of Indonesia, No. 80/PUU-XIII/2015 (The Constitutional Court of the Republic of Indonesia 2015).

[5] Judicial Review Number 10 of 2008 on General Election of the Members of the People Representatives' Council, Regional Representatives' Council, and Regional People Representatives' Council; Judicial Review Number 32 of 2004 on Regional Government against the 1945 Constitution.

2. How is the ideal criteria of the open legal policy in verdicts of judicial review at the Constitutional Court?

III. RESEARCH METHOD

3.1 Research Paradigm

Rational acts of a human are basically meaningful. There is always an implied meaning behind the act of human that is used as the shield to justify that act. That matter is like a structure of a building which is used to form, navigate, stimulate, and control the act of a human being.

In a perspective of knowledge, by using the term by Thomas Kuhn, that structure is also can be called as a paradigm.[6] George Ritzer explains that the paradigm initiated by Kuhn is, "...a fundamental picture of particular primary problem".[7] Further, Ritzer explains that a paradigm helps someone to decide something that should be studied, questions that should be proposed, the way to propose questions, and tools to interpret the data to answer the questions. Ritzer clearly states that a paradigm is a "consensus unit" in a knowledge that helps people to distinguish between one community to another one. A paradigm can be used to categorize, decide, and connect various theories, methods, and the instruments involved.[8]

In brief, the law's paradigm consists of: i) paradigm of natural law, ii) paradigm of historical law, iii) utilitarianism, iv) the paradigm of positive law, v) the paradigm of sociological law, vi) the paradigm of pragmatic realist law.[9] vii) paradigm of deliberative democracy,[10] and viii) the paradigm of postmodernism law.[11]

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[6] Thomas Kuhn, *Peran Paradigma dalam Revolusi Sains*, 6th Printing (Bandung: PT. Remaja Rosdakarya., 2008), 10–11.

[7] George Ritzer and Douglas Goodman, *Teori Sosiologi Modern* (Jakarta: Kencana, 2004), A-13.

[8] *Ibid*.

[9] Lili Rasjidi and Ida Bagus Wyasa Putra, *Hukum Sebagai Suatu Sistem* (Bandung: Mandar Maju, 2003), 109–28.

[10] Deliberative democracy is a democracy whose law is to gain legitimacy from a discourse of the people/citizen/parties who have the same interest. Those parties are on the same level. See Reza Wattimena, *Melampaui Negara Hukum Klasik*: Locke-Rousseau-Habermas (Yogyakarta: Kanisius, 2007). Compare to Budi Hardiman, *Melampaui Positivisme dan Modernitas* (Yogyakarta: Kanisius, 2003), 128–30.

[11] Postmodernism tends to deny and leave ideas involving in modernism era. See Akhyar Yusuf Lubis, Postmodernisme Teori dan Metode (Jakarta: Raja Grafindo Persada, 2014), 15.

This present research is based on the paradigm of post-modernism.[12] The reason behind it is this research tries to find interpretation of open legal policy used by the Constitutional Court in verdicts of judicial review. Therefore, this research is limited to discuss provisions (verdicts of the Constitutional Court), principal matters, doctrines, arguments, opinions, theories, and legal philosohy.

3.2 Research Method

In relation to the idea of open legal policy conveyed by the Constitutional Court which has been categorized earlier, it is categorized before being constructed to find the meaning and reference of the open legal policy. After the constructivism found a concept of open legal policy, then the earlier one is completed and rechecked by using other sources and interviews.

In the present research, the method of construction is defined as a method which tries to complete the meaning of open legal policy. The meaning had not been complete since the phrase "open legal policy" is not fully formulated in particular laws and regulations. The Constitutional Court only formulated it in chunk through verdicts of judicial reviews.

Keith E. Whittington argues that the construction (in a phrase of the construction of constitution) is not a matter of finding meaning who has not arised (pre-existing), whose the meaning is hidden in documents of the establishment of constitution. The construction tries to find the meaning and also to learn political reasons behind the establishment of a constitution. In this method, the political characters are even bolder than the legal characters.[13]

The next step is to do analysis towards the concept of open legal policy. The aim is to assess whether the concept has been in line with other concepts in legal science, and whether the concept has been able to answer or given solution to the legal problems related to the establishment and judicial review of law. If the existing concept cannot become the legal solution, therefore an effort by using hermeneutics is done, especially through deconstructibve hermeneutics.

[12] The limitation of the modernism and post-modernism cannot be defined clearly. Criticisms on modernism does not always end as post-modernisms (it is like postmodernism ideas of Derrida, Bourdieau, dan Giddens). Some criticism stay on modernism (such as Habermas).

[13] Whittington Keith, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (Kansas: University Press of Kansas, 1999), 5.

Based on Derrinda, deconstruction is..."*a way to read a text interpretatively or a hermeneutics in a radical manner*".[14] So, what is the difference between hermeneutics used to find the original intent from hermeneutics used as a method to do a deconstruction? Hardiman explains as follow,

> *"A deconstruction is different from the 'normal' hermeneutik which tries to reconstruct the real meaning of a text. A deconstruction leaves the rehabilitating effort. Instead of providing the real meaning of a text, a deconstruction assumes the absence of promordial meaning (Ursinn)".*[15]

A radical hermeneutics is chosen since that character helps us to find the appropriate meaning by letting us stop and move everywhere. The result from this deconstruction is not a stable meaning. However, from the instability, which makes the meaning becomes "fragile" to be changed, the connecting line needed by the Constitutional Court is found. Based on Kimmerle, a deconstruction is an interpretation which is marked as "continuous change of perspective".[16]

A Constitutional Court as a court which becomes the final judge to interpret a constitution,[17] when conducting a hearing of a case, it is faced by a need to find a meaning which is in line with the constitution or the 1945 Constitution. However, sometimes the meaning which can answer the need related to justice is not the real one. The contextual meaning when the legal norm is established sometimes can answer it. Sometimes those two meaning cannot even answer the need of justice, so another way to find the meaning is needed, a current contextual meaning for instance.

Without the ability to do a radical deconstruction, the Constitutional Court will lost its "soul" as a constitutional court whose duty is to protect the rights of the people. It means, this will downgrade the Constitutional Court into a general court whose duty is only to implement the law.

Both the constructive or deconstructive method is basically comes from the similarity of the purpose, such as explaining, interpreting, and/or completing the

[14] Budi Hardiman, *Filsafat Fragmentaris* (Yogyakarta: Kanisius, 2007), 163.
[15] Hardiman, 163; Budi Hardiman, *Seni Memahami: Hermeneutik dari Schleiermacher Sampai Derrida* (Yogyakarta: Kanisius, 2015), 283–85.
[16] Hardiman, Seni Memahami: Hermeneutik Dari Schleiermacher Sampai Derrida, 285.
[17] Jimly Asshiddiqie, *Peradilan Etik dan Etika Konstitusi*: Perspektif Baru Tentang 'Rule of Law and Rule of Ethics' & Constitutional Law and Constitutional Ethics', 2nd Edition (Jakarta: Sinar Grafika, 2015), 238.

concept of open legal policy which has been formulated by the Constitutional Court. The two methods are in the area of new law (new finding), therefore it can be categorized as legal hermeneutics.[18]

IV. FINDINGS AND ANALYSIS

4.1 The Criteria of Open Legal Policy (KHT) in Verdicts of Judicial Review Conducted by the Constitutional Court

The research is conducted to 940 verdicts of judicial reviews. The verdicts are from the very first time of verdict done by the Constitutional Court in August 2003 until the verdict done in October 2016. From 940 verdicts, there are 77 verdicts which consist of term Open Legal Policy, and the rest (863 verdicts) does not consist of the term open legal policy.

Further, from 77 verdicts consisting of term Open Legal Policy, 30 verdicts also consist of a brief description and/or explanation/argumentation behind the reason why the Constitutional Court reviewed the provision of law and categorized it into open legal policy. 47 verdicts only mention term Open Legal Policy without providing further explanation/argumenation which can be used as reference to find the meaning of Open Legal Policy.

In a verdict No. 27/PUU-V/2007 about a judicial review No. 3 Year 2005 about the National Sports System, the Constitutional Court conveys "*...that matter is the option (related to the policy) given to the legislator to regulate the law which does not have any relation to the constitutionality of a norm*". The quotation shows that based on the Constitutional Court, there is an option of legal policy which becomes the rights or obligation of the legislator. The constitutionality of the option cannot be reviewed. That concept is repeated by the Constitutional Court, that is in the verdict No. 30/PUU-XIII/2015, verdict No. 46/PUU-XIII/2015, and verdict No. 120/PUU-XIII/2015.

[18] Sudikno Mertokusumo, *Penemuan Hukum Sebuah Pengantar* (Yogyakarta: Liberty, 2004), 56. See also Aharon Barak, *Purposive Interpretation in Law* (New Jersey: Princeton University Press, 2005), 55.

It is different from the four verdicts which review that the constitutionality of the open legal policy cannot be reviewed/examined, the constitutionality of the open legal policy of some verdicts can be reviewed, even have to be reviewed. In a verdict No. 006/PUU-III/2005 about judicial review 32/2004 about the local government, it is stated that "...the legal policy which cannot be reviewed except if it is done arbitrarily (*willekeur*) and exceeds the authority of the legislator (*detournement de pouvoir*)."[19] The bolded phrases show the requirements for an open legal policy to be able to be reviewed to a judicial review. The requirement for following a judicial review is different from the requirement to be categorised as open legal policy.

"Requirements of a judicial review" is a condition which has to be fulfilled (in this case is legal provisions), so it can follow a procedure of the review. Whether the requirements are fulfilled or not, this will not affect the result of the review. Although the requirements have been fulfilled, it does not guarantee for passing the review. The requirement of a review is like an entry gate to follow a judicial review. Meanhwile, to pass the review itself, there is an assessment to be fulfilled.

An object of a review is not always what is being faced by the requirements of the review. A legal provisions in front of "requirements of a judicial review" cannot be considered as an object of a judicial review. "Requirements for a review" have to be fulfilled by the provisions of a particular law so it can be stated as an object of a judicial review. After the legal provisions become an object of a judicial review, so it finally can be examined/reviewed through judicial review.

[19] The principle for not being arbitrary and the principlce for not exceeding the authority of a legislator are part of good governmental principles in Netherland which come from a jurisprudence of general courts. It is then developed to be Wet AROB especially for the ban of detornement de pouvoir and the ban for being arbitrary. The principle is conducted in Indonesia in a law 5/1986 about State Administrative Judiciary which is changed with the law 9/2004 and and 51/2009. It is possible that the Constitutional Court refers to the principle which is formulated in the explanation of Article 53 (2) b of law 9/2004. See also Philipus Hadjon et al., *Pengantar Hukum Administrasi Indonesia*, 7th Printing (Yogyakarta: Gadjah Mada University Press, 2001), 270–82; Cekli Pratiwi et al., *Penjelasan Hukum Asas-Asas Umum Pemerintahan yang Baik (AUPB) Hukum Administrasi Negara* (Jakarta: LeIP, 2016), 25–30; Muchsan, *Pengantar Hukum Administrasi Negara Indonesia* (Yogyakarta: Liberty, 1982); Soehartono, "Eksistensi Asas-Asas Umum Pemerintahan yang Baik sebagai Dasar Pengujian Keabsahan Keputusan Tata Usaha Negara di Peradilan Tata Usaha Negara," *Jurnal Yustisia* 83 (n.d.); I Gede Eka Putra, *AAUPB sebagai Dasar Pengujian dan Alasan Menggugat Keputusan Tata Usaha Negara* (Pengadilan Tata Usahan Negara 2017).

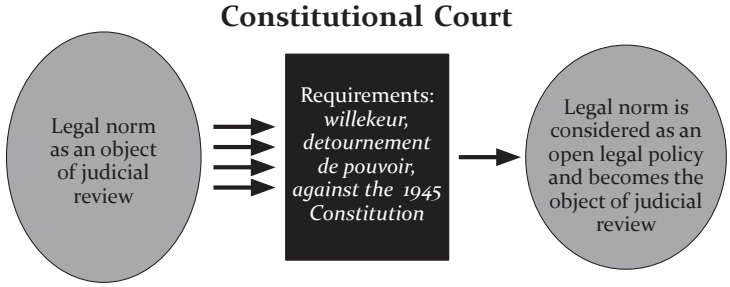
Chart 1
Steps for the Requirements for A Judicial Review of Legal Norm

Sources: Author

The difference between the requirements for a review from "requirements to be assessed/categorised as an open legal policy" is the condition which has to be fulfilled by the object of the review so it can be categorised as legal norm whose characteristic is like the open legal policy. If the requirements cannot be fulfilled, so the object of a review can be categorised as a legal norm whose characteritstic is not like an open legal policy.

In a verdict No. 006/PUU-III/2005, the Constitutional Courts argues that "*...is a legal policy which cannot be reviewed except it is done arbitrarily (willekeur) and exceeds the authority of the legislator (detournement de pouvoir)*". The previous quotation from a verdict explains that there is a possibility that arbitrariness (*willekeur*) and exceeding the authority (*detournement de pouvouir*) are two requirements for a legal norm of open legal policy to be reviewed in a judicial review.

Chart 2
The Steps: Requirements for a Legal Norm to be the Object of a Judicial Review and Being Assessed as an Open Legal Policy by the Constitutional Court



Source: Author

If the meaning is as being stated before, judicial review written in verdict No. 006/PUU-III/2005 is a review of legal norm of open legal policy toward the Constitution 1945. In other words, the verdict of the Constitutional Court quoted above assumes that a norm that will be reviewed needs to be a legal norm of an open legal policy. The concept of the review needs assumption. The assumption is at a pre-judicial review, the Constitutional Court needs to know whether the legal norm is open legal policy.

The understanding is confirmed by verdict No. 10/PUU-III/2005 about the judicial review of Law 32/2004 about a local government. It conveys that:

> "*...as long as the option of the policy does not exceed the authority of the legislator and it does not misuse the authority, and also does not against provisions written in 1945 Constitution, so this kind of policy cannot be reviewed inthrough judicial review by the Court*".

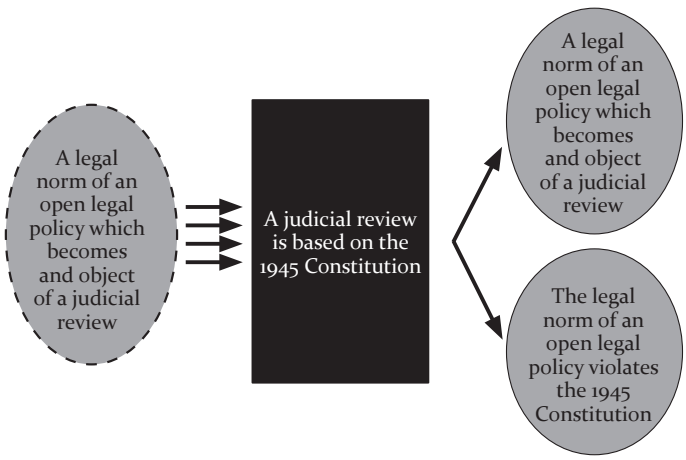
The question arised is how the Constitutional Court knows that the policy does not exceed the authority of the legislator, does not misuse the authority, and does not against the 1945 Constitution, without conducting a judicial review towards the option (policy)?

In the verdict No. 10/PUU-III/2005, this verdict confirms the concept of "requirements of a review" written in verdict No. 006/PUU-III/2005, that the Constitutional Court needs to know whether the legal norm is open legal policy or not, then the Court can decide to do a judicial review or not. From the provision, it is known that in judicial review, the Constitutional Court provides several steps to filter the case, those are i) deciding whether a legal norm is open legal policy ii) whether a norm of open legal policy is considered having constitutional value or not.

This kind of concept needs further assumption, that is an assumption that "valued as open legal policy" is not always "valued its constitutionality". It means, a legal norm which is valued as open legal policy by the Court is in fact not always having constitutionality value. In brief, from the sentence, the mening can be infered from the sentence "*...therefore the option of the policy can not follow judicial review...*" in a verdict 10/PUU-III/2005, in *a contrario* manner shows

options of policy which can follow a judicial review. This meaning is confirmed by a verdict No. 130/PUU-VII/2009 about a review of a law 10/2008 about a general election of the members of People Representative Council, Regional Representatives, and Regional People Representatives Council.

Chart 3
The Steps of Judicial Review
of a "Legal Norm Which is Considered as an Open Legal Policy" in Verdicts of the Constitutional Court



Source: Author

A condition where the legal norm is "valued as open legal policy" which is not identically "valued as constitutional" arised new problem since the foundation of the review is constitution. A legal argument is needed when that legal norm is reviewed twice. Those two reviews should use the same basis but the output are different.

Chart 1 until 3 above show something that logically can not be done by the Constitutional Court, that is distinguishing the difference between "the requirements of a review",[20] "requirements to be valued as open legal system",[21]

[20] Requirements of a review is an entry gate for reviewing the constitutionality of a legal norm valued as an open legal policy.
[21] Requirement to be valued as an open legal policy is a requirement to assess/categorize whether a legal norm being reviewds is an open legal policy.

and "requirements of open legal policy to be considered as constitutional".[22] The reason is the basis of three reviews are from the same basis, that is the 1945 Constitution.

In relation to that condition which is considered as complicated, 30 verdicts of the Constitutional Court were chosen for the object of the research. Three categorizations were found. Those three categorizations were considered having different requirements, but in fact several requirements were also used by different categorizations.

Table 1

The Requirements of the Three Categorizations of the Open Legal Policy.

Criteria	Requirements of a Legal Norm to be valued as Open Legal Policy	Requirements for Proving the Constitutionality of a Legal Norm which Have been Valued as Open Legal Policy	Requirements for a Legal Norm (which has been valued as Open Legal Policy) so It Would not Be Reviewed
1	It does not violate the 1945 Constitution		
2	It has to pay attention to the demand/postulate in a fair manner and in line with the moral consideration, religious value, security value, and public order value;	It is not an intolerable injustice;	It has fulfilled the justice;
3	It ensures the rights of citizen;	It does not against the political rights.	
4		It is not conducted arbitrarily (*willekeur*);	
5		It does not exceed and/or violate the authority (*detournement de pouvoir*);	

[22] Requirements of an open legal policy to be valued as constitutional is a requirement to assess/value whether that legal norm (which has been valued as open legal policy) is in line with the constitution or not.

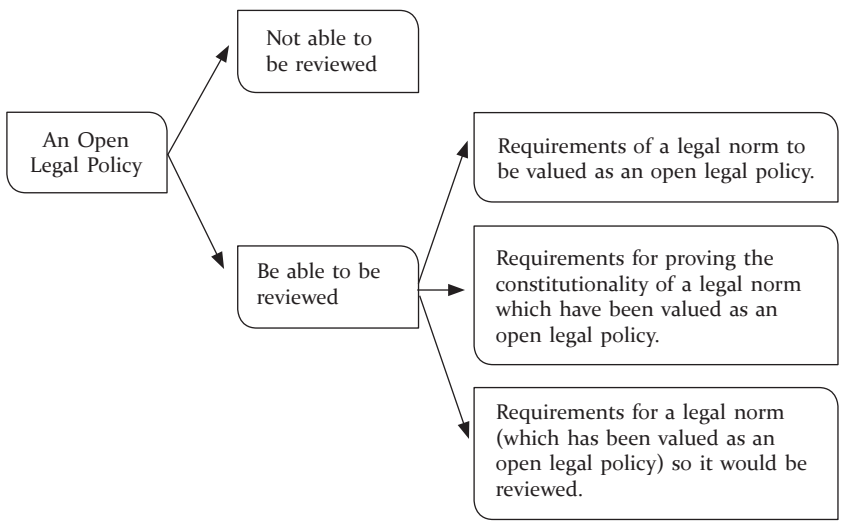
6		It does not violates moral values;	It does not arise dispute/problem in (an) institution(s);
7		It does not violate rational values;	
8		It does not violate the sovereignty of people;	
	It is logically and legally accepted.		
10	It is useful.		

Source: Author

The similarities are logically not accepted. A categorization cannot have any similarities in requirements/criteria with other categorization. If those categorizations have similarities in the requirements, it means the requirements have to be merged into one categorization.

Chart 4

The Position of Judicial Review of Open Legal Policy in Verdicts of the Constitutional Court



Sources: Author

The formulation done by the Constitutional Court taken from various verdicts, and the meaning of the open legal policy proposed by the President or the People Representatives Council in several judicial reviews, show tendency in interpreting the open legal policy as an absolute freedom for the legislator to formulate the norm of a law. That absolute freedom is potentially misused so a disadvantageous law will arise.

A freedom is actually paradoxical. The absolute freedom or limitless freedom of a legislator will limit and even erase the freedom of people who are regulated by the law. The absolute freedom also negates the constitutional understanding which have ben formed to appreciate and ensure the freedom of the people of a state.

4.2 Criticism on Open Legal Policy

From the perspective of the term, open legal policy still has inconsistency between the meaning of the combination of each word with the meaning desired by the Constitutional Court. Clearly, there is difference between the meaning of open legal policy from the semantic point of view with the meaning desired by the Constitutional Court.

The term open legal policy is formed from three words, i) policy, ii) legal, iii) open. The meaning from the three words are:[23]

a) Policy, is an option taken by an authorized party to do or not to do something as a response toward a particular condition;
b) Legal, is a provision made by a particular institution in order to create a peaceful life (and well-organized matters) by regulating the behaviour of the society; and
c) Open, is a freedom to choose without being affected by anyone or anything, whether it is in form of coercion or limitation.

[23] The three terms (Policy, Legal, Open) refer to several dictioraries. See Tim Penyusun Kamus Pusat Bahasa, "Kamus Besar Bahasa Indonesia, (3rd Ed., 1st Printing)," *Kamus Besar Bahasa Indonesia*, (3rd Ed., 1st Printing) (Jakarta: Balai Pustaka, 2001); Dheeraj and Sinha, "Legal Dictionary," *Legal Dictionary* (Kuala Lumpur: International Law Book Services, 1996); S. L Salwsan and U Narang, "Academic's Legal Dictionary," Academic's Legal Dictionary (New Delhi: Academic India Publisher, 2004); Bryan Garner, Black's Law Dictionary, 9th Edition (Minnesota: West, 2009); Susan Wild and Jonathan Wallace, "Webster's New World," *Law Dictionary* (Canada: Webster's New World, 2006); Elizabeth Martin, "A Dictionary of Law," *A Dictionary of Law* (Oxford: Oxford University Press, 2003).

It is quite odd to understand the open legal policy from its terms. The confusion is the difference between grammatical meaning and real meaning desired by the Constitutional Court. There is also a contradiction between each terms used in the phrase "Open Legal Policy". The term open legal policy as a legal term has failed to give an appropriate meaning since it raises confusion. The reason behind the unclear meaning of open legal policy is that the three words does not belong to the same level and categorization.

In line with Gilbert Ryle, this case is like a category mistake,[24] that is when the two terms from different categorizations are combined without any explanation. When the word "policy", "legal", and "open" are considered at the same level, the meaning of the combination of the three terms is "an act, a verdict, a draft of regulation, in the field of law which can be done freely by legislators". Is it the correct meaning desired by the Constitutional Court?

To know the desired meaning of an Open Legal Policy, a reposition of each word building the term is needed. The circle/environment where the terms are used is obligatory to be known. Different circle will define different meaning. Ludwig Wittgenstein II argues,[25] "*Don't ask for the meaning, ask for the use ... Every kind of statement has his own kind of logic*".[26] This is in line with Kaelan "*... the meaning of a word is its use in the sentence, the meaning of a sentence is its use in the language, and the meaning if a language is its use in different contexts in life*".[27]

Therefore, the term "legal" needs to be understood together with its context (in relation to the establishment of law). The term "legal" cannot be understood by using broad meaning (in general way). After that, the term "policy" can be combined with the term "legal", and the meaning of "policy" can be understood as an activity to create laws.

[24] Based on Gilbert Ryle, a category mistake is "... a mistake that happens when someone tries to describe a fact about a particular group/categorization by using characteristics of other group(s)". See Rizal Mustansyir, *Filsafat Analitik: Sejarah, Perkembangan, dan Peranan Para Tokohnya* (Yogyakarta: Pustaka Pelajar, 2007), 118. Compare Adelbert Snijders, *Manusia dan Kebenaran: Sebuah Filsafat Pengetahuan* (Yogyakarta: Kanisius, 2006), 139–40.

[25] Snijders, Manusia Dan Kebenaran: Sebuah Filsafat Pengetahuan, 112–13. See K Bertens, *Filsafat Barat Kontemporer: Inggris-Jerman* (Jakarta: Gramedia, 2002), 52–53.

[26] Snijders, Manusia Dan Kebenaran: Sebuah Filsafat Pengetahuan, 138.

[27] Kaelan, "Filsafat Analitis Menurut Ludwig Wittgenstein: Relevansinya Bagi Pengembangan Pragmatik," Jurnal Humaniora 16, no. 2 (2004). Compare to Mustansyir, Filsafat Analitik: Sejarah, Perkembangan, Dan Peranan Para Tokohnya.

The term "open" is not at the same level as the two previous terms. It is lower than them and the meaning of "open" has to be understood by using its context, that is the context of a judicial review. The term "open" will have an appropriate meaning and will not against the term "legal" when the position of "open" is lower than the term "legal policy".

When the level of the term "open" is lower than the phrase "legal policy" of legislators in a context of judicial review, the meaning of the term "open" is a freedom for legislators to interpret the 1945 Constitution, but the freedom still get to follow a judicial review by other institution outside the legislators – *in casu* the Constitutional Court.

The effort to know the real meaning of an open legal policy found its supporting argument. This argument is in form of the aim of a judicial review. The aim of a concept of a judicial review will raise ideas of new open legal policy which can be developed. It is also aimed to limit its authority. The concept of open legal policy needs to be reviewed through a judical review. If the concept of the open legal policy is not appropriate/does not pass the judicial review, the formulation is not correct/appropriate.

John Agresto formulates 10 main points of judicial review by a judicial institution, that is:[28]

1. To protect the constitution as the supreme law;
2. To ensure the implementation of the aim of the constitution;
3. To give protection to the fundamental values of the country written in the constitution;
4. To control the legislative;
5. To ensure the implementation of a country and make the people of the country respect and obey the constitution;
6. To ensure the implementation of checks and balances principle;
7. To avoid a tyrannical majority or to control the principle of majority law;
8. To implement the values and principles of constitutional democracy;

[28] Benny Harman, *Mempertimbangkan Mahkamah Konstitusi*: Sejarah Pemikiran Pengujian UU terhadap UUD (Jakarta: KPG, 2013), 95–96.

9. To implement the ideology of rule of law state.
10. To keep the consistency of the hierarchy of the legal norms.

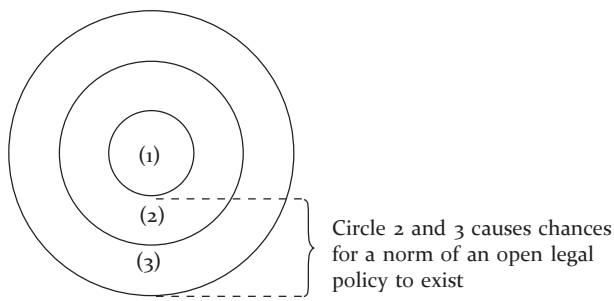
The new understanding about the open legal policy is from the logic of *stufenbau* which is established by Kelsen dan Nawiasky, that is all the laws and regulations have to be assessed and reviewed by the higher norms. If there is a law which cannot be reviewed (where that law is not the supreme/highest law), this condition is against the concept of *stefenbau* which causes a violation towards the existence of legal norms above the law.

The absence of control towards the legislators causes a tyrannical majority as it is worried by Agresto. This tyranny arises since the law becomes the supreme/highest law and replaces the 1945 Constitution.

4.3 The Circle of Constitutionality

To be more comprehensive in understanding the position of an open legal policy in a verdict of a judicial review conducted by the Constitutional Court, the circle/the environment of the constitutionality is also needed to be known as it is seen on the chart.

Chart 5
The Concept of The Circle of Constitutionality



(1) Circle of explicit order of the constitution;
(2) Circle of implicit order of the constitution;
(3) Circle which is created after the implementation of the two circles mentioned above.

Source: Author

The chart of Circles of Constitutionality above consists of three concentric circles. The first circle is inside the second circle. The second circle is inside the third circle. Each circle represents a categorization of a particular norm of a constitution:

1. The explicit order of the 1945 Constitution, is a circle consisting clear constitutional norms which are mentioned/ordered by the 1945 Constitution. To understand the meaning of these norms, it is needed to read word, phrase, or sentence of the article and/or paragraph consisting the norms. [29]For instance, the norm in Article 4 paragraph (2) and Article 6A paragraph (2) of the 1945 Constitution.
2. The implicit order of the 1945 Constitution, is a circle consisting of constitutional norms which the contents are not mentioned/ordered directly by the 1945 Constitution. To find the implicit norm, a deep interpretation is needed. For instance, the Article 22E paragraph (5) of the 1945 Constitution which states: "General elections are conducted by a commission of general elections having national, permanent, and autonomous character". The Indonesia's Election Supervisory Body (Bawaslu) is not regulated by the 1945 Constitution, but the Constitutional Court interprets the Article 22E paragraph (5) teleologically so the The Indonesia's Election Supervisory Body is included as the part of "General Election Commission".[30]
3. A circle created due to the implementation of the two other circles (explicit and implicit).

   The idea of the the third circle is inspired from the questions delivered by M V. Tushnet about the existence of constitution outside the current constitution in the tradition of state administration in the US.[31] In context in Indonesia,

[29] In the method of constitutional interpretation, this interpretationis known as grammatical interpretation. See Mertokusumo, *Penemuan Hukum Sebuah Pengantar*, 56–78.

[30] See the verdict of the Constitutional Court Number Judicial Review Number. 22 of 2007 on General Election, No. 11/PUU-VIII/2010 (The Constitutional Court of the Republic of Indonesia 2010). See also Mardian Wibowo, "Justices' Freedom of Constitutional Interpretation Method in The Indonesian Constitutional Court," *Mimbar Hukum* 25, no. 2 (n.d.): 290–91.

[31] Tushned states that "a constitution outside the circle of constitution" is a set of norms created from the practice of a state administration where the practice is the order of the constitution or being ordered directly by the constitution. The term"The Constitution Outside the Constitution" can be found in Mark Tushnet, *Why The Constitution Matters* (London: Yale University Publisher, 2010), 7. Hans Kelsen differentiates between a formal constitution from material constitution. The formal one is "a Constitution with a capital 'C'; a single document which purports to define institutions of the state and delineates their relative powers and duties". On the other-hand, material constitution "...consists of those legal rules that regulate the production of other (general) legal

a norm which is created as the result from the implementation of the two other norms consists of people's customs/habit existing before Indonesia exists, then it develops into states admininstration. The most obvious example of the third circle is about the convention of state administration in form of deliberations in a session conducted by the People's Consultative Assembly.[32] This method is not regulated in the 1945 Constitution but it becomes prioritized obligation in the session it self. However, when the People's Consultative Assembly does not conduct a deliberations, they just do voting, this matter is a violation of the law.[33]

Another example is the Law 12/2011 about the establishment of Laws and Regulations (Law 12/2011). The result of the judicial review of this law should be as a reviewed norm. However, the result of the existence Article 51A paragraph (3) from Law of the Constitutional Court is assigning the Law 12/2011 to be the foundation of the Judicial review. Therefore, the role of the Law 12/2011 is as a constitution.

In relation to the open legal policy, the norms exist between the second and the third norm are norms which give a chance/possibility for the new open legal policy.

4.4 The New Meaning of an Open Legal Policy

Open legal policy should be divided into two, those are i) an absolute open legal policy, and ii) a relative open legal policy. It is possible to create another type of open legal policy outside the two mentioned before.

An absolute open legal policy is a policy which cannot be reviewed by the Constitutional Court. This policy is a conception which becomes the basis of

rules; the constitution is the highest level of law within national law". According to Kelsen, not all the states have a formal constitution, but all states must have material constitution. See N. W Barber, The Constitutional State (Oxford: Oxford University Press, 2010), 75–76.

[32] Refering to stufenbau Kelsen and Nawiasky, the deliberation is a norm of presupposition (a norm which is presupposed as a very basis from the hierarchy of a norm). However, the exstence of a deliberation as a convention in a state adminsistration can be considered as other laws outside the law of a state. I Nyoman Nurjaya conveys that, "...empirically a law in a society can be explained in form of state law, it is also in form of relihious law, customary law. However, from the point of view anthropology, the inner order mechanism or self-regulation in the communties is law whose function is as a tool to keep the social life". See I Nyoman Nurjaya, "Perkembangan Pemikiran Konsep Pluralisme Hukum" (Konferensi Internasional tentang Penguasaan Tanah dan Kekayaan Alam di Indonesia, Jakarta, 2004), 10.

[33] Compare to Barber's argument about customs position in constitution. See Barber, *The Constitutional State*, 85–86.

freedom of a particular state. If this absolute open legal policy does not exist, the state will not be able to run the state freely. Explicitly, this absolute policy does not have any legal foundation in the 1945 constitution. However, implicitly, the legal foundation of this open legal policy can be found in the provisions regulating the authority of the president, People's Representatives Councils, and Regional Representatives Council.

This absolute open legal policy is about *what* material that will be regulated in a law, for instance about the bio diversity, *koperasi* (cooperatives), and business competition, etc. The constitutionality of those materials cannot be reviewed since the *what* do not contain any moral values, usage values, or other values. Its characteristic is free from any value.

A characteristic of *what* which cannot be reviewed does not automatically make a law consisting of *what* becomes not able to be reviewed. The review towards the *what* and a review towards the law consisting the *what* are two different matters. Every law can be filed to the Constitutional Court. In a judicial review, the Constitutional Court is not allowed to deny a petition. However, if the material of the petition is about the *what*, the Constitutional Court still conduct a hearing and the verdict of the hearing will be "denied". In brief, things that are included in *what* are noun.[34] So, it can be said that any noun can be chosen as the object of a law by legislators.

From analytics and linguistics perspectives,[35] as a material, the *what* is in form of a noun which does not have any reference except from the *what* itself. A noun should be neutral. The act of a human being that will result a difference in a noun. A rope –as a noun-, it is a neutral matter for the first time, but it will have negative meaning when someone uses it as a hanging sentence. On the other hand, it will give positif meaning when someone uses it as a tool to pull a bucket of water.

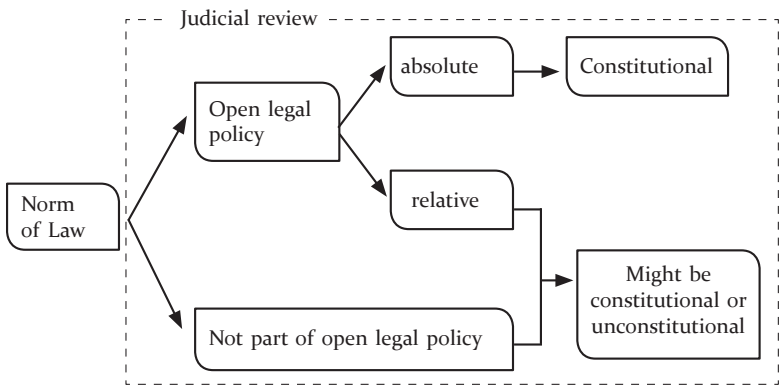
[34] In linguistics (Indonesian language) a word is devided into two, i) lexical and ii) order. A lexical word has lexical meaning. A lexical word is devided into a) noun, b) verb, c) adjective, and d) adverb. While the order word does not refer to those things, but the aims is to show the grammatical relation in a construction. See S Effendi, Kentjono Djoko, and Suhardi Basuki, *Tata Bahasa Dasar Bahasa Indonesia* (Bandung: Remaja Rosdakarya, 2015), 31–34.

[35] Compare to J.J. H. Bruggink Rechts-Reflecties, Grondbegrippen uit de rechtstheorie translated by B. Arief Sidharta about "Hukum dan Ilmu Bahasa". See J. J. H Bruggink, *Refleksi tentang Hukum* (Bandung: Citra Aditya Bakti, 1999), 18, 31–35.

A material of a law that can be reviewed is *how* material. The *how* indeed has purposes. The implementation of the *how* is related to the interest of other people. A regulation related to doctors have not had benefit or disadvantage for anyone. This statement will be different if there is a norm stating that doctors can be prosecuted for their medical treatment which is considered as harmful/ malpractice, although the doctors have been reviewed by the Honorary Council of Indonesian Medical Discipline.[36] The provision which regulates the *how* of the doctors becomes a provision whose constitutionality can be reviewed. Meanwhile, the doctors, as the *what* who were chosen to be regulated, their constitutionality cannot be reviewed since doctors are in the area of free values.

How, a regulated material of a law is in the area (part of) the relative open legal policy. It means that the legislators are authorized to formulate any law they want since the 1945 Constitution does not regulate the provision of that material. However, the principles behind *how* should or even has to be reviewed (by the Constitutional Court) towards the 1945 Constitution. The reason is because the basis principle of the *how* is principles which are not free from any values.

Chart 6
The Ideal Position of Open Legal Policy in a Judicial Review of Norms of Law



Source: Author

[36] See Judicial Review Number 29 of 2004 on Medical Practice against the 1945 Constitution of the Republic of Indonesia, No. 14/PUU-XII/2014 (The Constitutional Court of the Republic of Indonesia 2014).

This research proposes that the concept of a relative open legal policy is defined as an authority of a legislator to choose and formulate a norm of law which does not have an explicit reference in 1945 Constitution, where the formulation of that norm can not against the i) implicit norm of the 1945 Constitution; and ii) norms from the implementation of explicit norm or implicit norm of the 1945 Constitution.

V. CONCLUSIONS AND SUGGESTIONS

In various verdicts, the Constitutional Court has not explicitly defined the open legal policy. However, the term open legal policy has been implicitly defined as legal policy which can be made by legislator when the 1945 Constitution does not regulate the content material of the law that will be established.

The analysis of several verdicts of the Constitutional Court found three requirements for the categorization of the open legal policy. This research found ideal criteria of a norm of law which are included in the categorization of the open legal policy, those are:

a. Criteria for the categorization of the absolute open legal policy:
   - The norm is not clearly regulated in the 1945 Constitution;
   - The norm which consists the *what* (about the chosen object that will be regulated).

b. Criteria for the categorization of the relative open legal policy:
   - The norm is not clearly regulated in the 1945 Constitution;
   - The norm which consists the *how* of an object of law that will be regulated;
   - It does not violate the 1945 Constitution.

Based on the findings about the meaning of open legal policy, the author suggests that the Constitutiona Court can do the following matters related to the judicial review:

1. Clearly differentiate between an absolute open legal policy from the relative open legal policy;

2. A judicial review of the norm of relative open legal policy is reviewed by using implicit norm of the 1945 Constitution and the norm from the implementation of 1945 Constitution.

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