ABSTRACT

Objective: The purpose of this research is to raise the Criminal Law Act as a hotly debated topic. Some people think that the Constitutional Court should have the courage to make a legal breakthrough on this very important issue. However, the Constitutional Court judges are of the opinion that expanding the meaning of adultery is not within their jurisdiction. This research aims to examine further the legal arguments of the Constitutional Court's decision which is an open legal policy and its implications for the formation of laws and regulations in Indonesia.

Method: The research method used is literature research with a legal approach and case studies of several Constitutional Court decisions which contain open legal policy arguments. Conceptually, this research will also discuss the implications of the Constitutional Court's decision containing the open law policy for the national legislative system.

Results: The research results show that first, the concept of open legal policy in Constitutional Court decisions does not yet have clear boundaries so that the meaning of positive legislator and negative legislator is often confused in the practice of forming and reviewing laws. This decision, which is an open legal policy, also shows that there has been a tug-of-war between the judges of the Constitutional Court in using the paradigm of judicial activism and judicial restraints, giving rise to legal uncertainty in society.

Keywords: law policy, constitutional court decisions, national legislation system.

A POLÍTICA JURÍDICA DE KOPEN NA DECISÃO DO TRIBUNAL CONSTITUCIONAL E NA FORMAÇÃO DO DIREITO

Objetivo: O objetivo desta pesquisa é levantar a Lei do Direito Penal como tema bastante debatido. Algumas pessoas pensam que o Tribunal Constitucional deveria ter a coragem de fazer um avanço jurídico nesta questão tão importante. No entanto, os juízes do Tribunal Constitucional são de opinião que expandir o significado do adultério não é da sua competência. Esta investigação visa examinar mais aprofundadamente os argumentos jurídicos da decisão do Tribunal Constitucional, que é uma política jurídica aberta, e as suas implicações para a formação de leis e regulamentos na Indonésia.

Keywords: política jurídica, decisão do tribunal constitucional, formação do direito.
Método: O método de investigação utilizado é a pesquisa bibliográfica com abordagem jurídica e estudos de caso de diversas decisões do Tribunal Constitucional que contêm argumentos de política jurídica abertos. Conceitualmente, esta pesquisa também discutirá as implicações da decisão do Tribunal Constitucional que contém a política de direito aberto para o sistema legislativo nacional.

Resultados: Os resultados da investigação mostram que, em primeiro lugar, o conceito de política jurídica aberta nas decisões do Tribunal Constitucional ainda não tem limites claros, de modo que o significado de legislador positivo e de legislador negativo é frequentemente confundido na prática de formação e revisão de leis. Esta decisão, que é uma política jurídica aberta, mostra também que tem havido um cabo de guerra entre os juízes do Tribunal Constitucional na utilização do paradigma do ativismo judicial e das restrições judiciais, dando origem à instabilidade jurídica na sociedade.

Palavras-chave: política de direito aberto, decisões do tribunal constitucional, sistema legislativo nacional.

1 INTRODUCTION

In legal science, the concept of open legal policy is something new and relatively unknown before. So far, the term Policy is more widely known in the field of public policy studies, including the terms Communitarian (community policy), Public Policy (public policy), and Social Policy (social policy). In the field of public policy science, the term policy already contains the meaning of free or open, because basically the meaning of policy always refers to the freedom of officials/authorized parties to do certain things whose implementation is not or has not been clearly regulated by legislation. This is different from the meaning of open in the field of legal formation (in the national legal system).

In the national legal system, legal policy can be interpreted as the actions of lawmakers in determining subjects, objects, actions, incident, yes /or consequence unforarranged in regulation legislation. Thus, the word "open" in the term "open legal policy" is interpreted as freedom for legislators to make legal policies. From several of the Constitutional Court's decisions, there are fundamental problems related to open law policies which have broad implications for the national legislative system, especially in the formation of laws. The issue of the concept of open legal policy in the Constitutional Court's decision does not yet have clear boundaries according to the constitution (1945 Constitution), so that the meanings of positive legislature and negative legislature are often confused in the practice of forming and reviewing laws. Likewise in the formation of laws, open legal policies there are less restrictions, because sometimes open legal policies are carried out based solely on political interests. Apart from that, basically open
legal policy decisions leave it to legislators to make policies, but in some cases the legal policies that are formed are contrary to democratic principles and cause the failure to realize a "living constitution" in the national legislative system.

The problem formulation that will be answered in this research is:
1. What legal arguments (ratio decidendi) were built by the Constitutional Court regarding the open law policy in its decision?
2. What are the legal arguments built by legislators regarding open law policies in the formation of laws?

2 METHOD
This research is normative research. Approach Legislation is carried out by reviewing statutory regulations relating to the legal issue being studied. Second, the analytical approach (analytical approach), this approach is carried out by looking for the meaning or legal terms contained in statutory regulations, in this way the researcher obtains a new understanding or meaning of legal terms and tests their practical application by analyzing the judge's decisions. Third, the case approach, this approach is to study the norms or legal rules applied in the legal practice of the Constitutional Court (decisions). The case approach is that several cases are studied to be used as a reference for a legal issue which is carried out by examining and analyzing ratio decidendi (legal considerations). The data collection technique used in this research is library research or what is known as document study. Literature studies were carried out on primary legal materials, secondary legal materials and tertiary legal materials. Searching for legal materials can be done by reading, seeing, listening to the legal materials.

3 RESULT AND DISCUSSION
3.1 THE LEGAL ARGUMENT (RATIO DECIDENDI) BUILT BY THE CONSTITUTIONAL COURT REGARDING THE OPEN LAW POLICY IN ITS DECISION

Testing this law is a form of checks and balances system in structuring the national legal system, which in essence provides supervision of legal products made by the DPR and the President (including the DPD). This means that judicial review is a test of the constitutionality of the legal norm being tested (judicial review on the constitutionality of law), the test of which is carried out using constitutional measuring instruments. In M.
Fajrul Falaakh's view, efforts to maintain and uphold the constitution are called constitutional review, meaning that legal products and actions must be in accordance with and not conflict with the constitution. For this reason, the Constitutional Court is often stated as "the guardian of the constitution and the sole interpreter of the constitution", or as the guardian of the constitution based on the authority to decide whether a legislative product is in accordance with the constitution or not.

Open legal policy (open legal policy) in the MK's view is a policy regarding provisions in certain articles in the law which are the authority of the law makers. As explained at the beginning, the debate regarding open law policies resurfaced after the Constitutional Court Decision Np. 46/PUU-XIV/2016 regarding the expansion of the meaning of adultery in the Criminal Code which was requested by the Constitutional Court. Several previous MK decisions have also experienced controversy, such as MK decision No.14/PUU-XI/2013 regarding the material review of Law no. 42 of 2008 concerning the General Election of President and Vice President (UU Pilpres), especially relating to the provisions of the Presidential Threshold (threshold for determining candidates for President and Vice President). According to Saldi Isra, the Constitutional Court did not cancel the presidential threshold for submitting presidential and vice presidential candidate pairs, within the limits of reasonable reasoning, by reinstating the meaning of simultaneous elections in Article 22E Paragraphs (1) and (2) of the 1945 Constitution, the minimum threshold it loses relevance. This means that all political parties that are declared qualified as election participants can nominate pairs of candidates for President and Vice President as specified in Article 6A Paragraph (2) of the 1945 Constitution. In this regard, using maximum assumptions, if all political parties participating in the election nominate their own candidates, the number of candidate pairs will be greater. So that the number of candidates is not beyond common sense, the requirements for political parties participating in the election should not be lighter and looser than the current provisions. This means that, using the number of political parties in the 2014 elections, at most only 12 pairs of candidates will appear in the first round of the Presidential election, this number can be said to be more than enough to provide alternative candidates for voters.

MK assessed that the applicant's arguments were legally groundless. In its consideration, the Constitutional Court explained that in principle the applicant's petition asked the Court to expand the scope because it was no longer appropriate to society. This
results in changes in principles or matter principles in criminal law and basic concepts relating to a criminal act.

In this decision, the Constitutional Court argued that the authority to expand criminal law is the authority of the legislators, which essentially leaves criminal regulation to the legislators (open legal policy). That with all the considerations above does not mean that the Constitutional Court rejects the idea of "renewal" and does not mean that the criminal law norms in the Criminal Code are complete. The Court only stated that the norms of the articles in the Criminal Code which the applicant requested did not conflict with the 1945 Constitution. Regarding whether or not they need to be supplemented, that is completely make it authority form Constitution through its criminal policy which is part of criminal law politics. Therefore, the reform ideas offered by the applicants should be submitted to the legislators and this should be an important input for the legislators in the process of finalizing the formulation of the new Criminal Code.

In this decision there are dissenting opinions from Constitutional Justice Arief Hidayat, Constitutional Justice Anwar Usman, Constitutional Justice Wahiduduin Adams, Constitutional Justice Aswanto. In its argument, it is stated that if this is allowed to continue or is decided as an open legal policy from the legislators which is completely dependent on the power and political configuration which is always dynamic, then the Constitutional Court will actually provide an opportunity or at least be willing to allow the existence of a legal norm in the law, laws and court decisions that are not enlightened and even conflict with religious values and the Light of God as well as the living law of Indonesian society. In fact, the Supreme Court, as a fellow member of the judiciary and some experts in Indonesian criminal law, together with the government in the team drafting and discussing the draft law on the Criminal Code, have been fighting for a long time and showing real steps of partisanship by stating the attitude that sexual relations outside of marriage are disgraceful. This act is actually intrinsic and not just because the act damages the sanctity or integrity of the institution of marriage so that the scope of blameworthiness (verwijtbaarheid) for adultery in the context of orderly Indonesian criminal law must be returned to the way it was before its scope was narrowed by the Dutch East Indies colonial government based on van Strafrecht's Wetbook, and the principle of concordance by the Dutch East Indies colonial government. Therefore, the concept of adultery should include both adultery and fornication. This means not only...
ensnaring perpetrators who are bound by marriage, but also ensnaring perpetrators who are outside of marriage.

The norm of Article 57 paragraph (2a) basically provides a limitation that the Constitutional Court is a state institution which has the function of being a negative legislator whose only authority is to cancel norms in statutory regulations, in the sense that the Constitutional Court is not a positive legislator or maker of legal norms/legislation. This means that in the practice of the Constitutional Court there is a shift in the meaning of the Constitutional Court's function from negative legislator to positive legislator, from merely "canceling legal norms" to "forming norms."law". The argument built by the Constitutional Court in canceling Article 57 paragraph (2a) of the Constitutional Court Amendment Law No. 8/2011 is that Article 57 paragraph (2a) a quo is contrary to the aim of establishing the Constitutional Court to uphold law and justice, especially in order to uphold the constitutionality of statutory norms in accordance with with the 1945 Constitution. The a quo article prevents the Constitutional Court from (i) testing the constitutionality of norms; (ii) filling the legal vacuum resulting from the Constitutional Court's decision stating that a norm is contrary to the Constitution and has no binding legal force. Meanwhile, the process of formulating laws takes quite a long time, so it cannot immediately fill the legal gaps; (iii) carrying out the obligations of constitutional judges to explore, follow and understand the legal values and sense of justice that exist in society.

In both types of norms, the Constitutional Court in its decision stated clearly and clearly that this was a policy choice for law makers (open legal policy). The open law policy in the Constitutional Court's decisions often shows that there is a split personality within the Constitutional Court, between the side that is more inclined to use a judicial activism approach and on the other hand the side that tends to use a judicial restraints approach.

The doctrine of judicial activism was first introduced by Arthur Schlesinger in just do it Fortune January 1947. Schlesinger added that in practice sometimes parliament does not have a plan to fix or change a problem that occurs in legislation, at least until it harms society, so at that point the court must act quickly. Judicial activism is the court's response and adaptation to social change by developing principles taken from constitutional texts 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 takes too long due to waiting for the law formation process in the legislative body.

Be in contrast to judicial restraint, this principle restrains the court from acting like a "miniparliament". This doctrine that developed in America is an implementation of the principle of separation of powers. One form of court action that can be categorized as parliamentary action is establishing new legal norms when deciding on a judicial review case. Development of judicial activism has moved from a negative and limited meaning to a positive one. However, the criticism of the doctrine of judicial activism cannot be separated from the intervention of judicial institutions which is considered to be degrading and damaging the democratic system and the principle of separation of powers. The threat to the function of democracy that comes from the doctrine of judicial activism is described by William P. Marshall as the "Seven Sins of judicial activism", namely:

1. Counter-Majoritarian Activism: The reluctance of the judiciary to defer to the decisions of other democratically elected branches of power;
2. Non-Originalist Activism: The failure of a court to adhere to original ideas when deciding a case;
3. Precedential Activism: Failure of the court to comply with previous court decisions (judicial precedence);
4. Jurisdictional Activism: The failure of a court to comply with the limitations of its own jurisdictional power;
5. Judicial Creativity: Creation of new theories and rights in constitutional doctrine;
6. Remedial Activism: The use of court power to enforce ongoing affirmative obligations of the government or to take over the duties of government institutions under court supervision; And
7. Partisan Activism: The use of court power to achieve partisan goals. However, behind that, human rights and pro-democracy activists tend to give a positive view of judicial activism. This is due to the need for legal adaptation to social changes occurring in society by developing the principles contained in the constitution as well as previous judge decisions to apply the basic values of the constitution progressively.
Bradley C. Canon, for example, put forward 6 general concepts and structures which are often used as references for judicial activism, namely:

1. Majoritarianism: Seeing the extent to which policies that have been taken and adopted based on the democratic process are negated by the judicial process;
2. Interpretative Stability: Considering the extent to which previous doctrinal decisions and interpretations of a court have been changed;
3. Interpretative Fidelity: Describes the extent of the articles in the constitution interpreted different with What in a way clearly intended by the creator of the constitution or what is clearly read from the language used;
4. Substance/Democratic Process Distinction: Seeing the extent to which court decisions have made substantive policies compared to maintaining the results decided by a democratic political process;
5. Specificity of Policy: Analyzing the extent to which a court decision forms its own policy which conflicts with the discretionary principles of other institutions or individuals;
6. Availability of an Alternate Policymaker: Consider the extent to which court decisions supersede important considerations made by other government agencies
7. However, the facts on the ground are that in various decisions, the argument for open law policies actually favors judicial restraints, but in other decisions it prioritizes judicial activism. This means that there is unclear benchmarks for the Constitutional Court in applying whether they use the judicial activism and judicial restraints approach regarding open law policy arguments, so that decisions containing open law policies are often misguided and not based on a strong constitutional basis.

3.2 LEGAL ARGUMENTS BUILT BY LEGISLATORS REGARDING OPEN LAW POLICIES NATURE OF LAW FORMATION

SAs explained above, open law policy is a new term in statutory law in Indonesia. The Constitutional Court in several Decisions stated that there are provisions (norms) which are open legal policies, when a legal norm falls into the category of open legal policy then according to the Constitutional Court the norm is in an area of constitutional value or in accordance with the 1945 Constitution. can be interpreted as freedom for legislators to form legal policies (laws). As an open legal policy/open legal policy or norm
that is in the constitutional area/in accordance with Constitution, which frees legislators to interpret and express a particular 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 hand, it can be dangerous if legislators act arbitrarily in determining what and how certain material will be regulated.

In progressive legal theory, legal interpreters are asked not to maintain the status quo of the law and pay more attention to changes that occur in society and the state. A legal interpreter has a special position compared to legal texts since the meaning of the text is formed. The core focus of legal text interpretation, according to Michael J. Clark, lies not on the text, but on the interpreter whose thinking dominates the legal text.

Be in relation to the Constitutional Court as interpreter, Maria Farida expressed the opinion that the basis for the Constitutional Court making regulatory decisions (judicial activism) is an element of urgency, an element of substantial justice and an element of expediency. Muhammad Alim added that the legal basis for Constitutional Justices to make new provisions (norms) is Article 45 paragraph 1 of the Constitutional Court Law, which in essence is that the Constitutional Court decides cases based on evidence and belief (material truth), justice and expediency, as well as the existing situation. urgent and must be resolved.

This open legal policy by the legislators (DPR and President + DPD) can be implemented if they carry out the mandate of the formation organic and inorganic laws. For organic laws, open legal policies can be implemented if the provisions in the Constitution contain the meaning of a choice of law or policy or there is authority to interpret phrases in each paragraph and article in the 1945 Constitution, so that the phrase will be constitutional if it is interpreted in accordance with the meaning of the constitution by the legislators. invite. For the formation of inorganic laws, the legislators have much freedom in determining norms that are in accordance with current developments and even the interests of the legislators.

The final result of constitutional interpretation by legislators regarding Article 18 paragraph (4) which contains the provision "democratically elected" is direct election by the people (Pilkada). Pilkada is a significant political breakthrough in realizing democratization at the local level. This means that the implementation of democratic government is reflected in the 'recruitment' of the head of government. No matter how well a country is governed democratically, it will not be considered truly democratic if its
leaders are not freely elected by the people themselves. In fact, quite a few democratic theorists say that basically all politics is local, and democracy at the national level will grow and develop well if it is supported by strong local democratic values. Regional elections are part of the process of strengthening and deepening democracy as well as efforts to realize effective governance at the local level. Apart from that, the implementation of regional elections is basically a follow-up to the realization of democratic principles which include guarantees for the principles of individual freedom and equality, especially in political rights.

The choice of direct regional elections is an open legal policy for legislators who interpret the phrase "democratically elected", but this choice is an open policy and can change according to the dynamics of constitutional politics. The legislators have also implemented an open legal policy by changing the meaning of "democratically elected" from direct election by the people to an election system by the DPRD through the establishment of Law Number 22 of 2014 concerning the Election of Governors, Regents and Mayors.

Constitution This based makana philosophical-sociological that the implementation of direct elections for governors, regents and mayors has so far been riddled with various problems that are not in accordance with democratic principles. Because based on the evaluation of the implementation of the election for governor/deputy governor, regent/deputy regent, and mayor/deputy mayor directly and in one package, so far it illustrates the empirical fact that the costs must be borne by the State and by candidate pairs to hold and participate in the gubernatorial/deputy election gubernur, regents/deputy regents and mayors/deputy mayors directly also have a very large potential for increasing corruption, decreasing the effectiveness of government administration, increasing conflict escalation and decreasing voter participation. However, the implementation of the provisions of the open law policy contains problems in the dynamics of constitutional politics, so that Government Regulation in Lieu of Law no. 1 of 2015 which was later passed into Law no. 1 of 2015, then amended with the establishment of Law no. 8 of 2015 and amended for the second time by establishing Law no. 10 of 2016. Law no. 1 of 2015 determines that the legal policy of open legal interpretation of the phrase "democratically elected" is through general elections by the people.
The issue of regional election dualism which can be categorized as either an electoral regime or regional government has implications for the dispute resolution system. This is of course related to institutions that have constitutional authority in resolving regional election disputes. One of the institutions that has been given authority twice by legislators is the Supreme Court. In the context of open law policy, the legislators legally and constitutionally interpret Article 24A paragraph (1) that the Supreme Court has the authority to hear at the cassation level, examine statutory regulations under the law against the law, and has other relevant authorities, granted by law.

The open legal policy regarding other authorities in Article 24A has been implemented several times, for example in the establishment of Law Number 1 of 2015 concerning the Election of Governors, Regents and Mayors into Law, m court Agung given trust. Again to resolve disputes over regional election results whose decisions are final and binding and no other legal remedies can be taken. Several provisions regarding the resolution of disputes over regional election results by the Supreme Court are contained in Article 157 of Law no. 1 of 2015, namely: Paragraph (6) Parties who do not accept the High Court Decision as intended in paragraph (5) can submit an objection request to the Supreme Court no later than 3 (three) days after the High Court decision is read; Paragraph (7): The Supreme Court decides on the objection request as intended in paragraph (6) no later than 14 (fourteen) days after receiving the application; and Paragraph (8) The Supreme Court decision as referred to in paragraph (7) is final and binding.

Apart from the authority for regional election disputes, the interpretation of open legal policies is also contained in the previous law, namely Law no. 14 of 1985 concerning the Supreme Court, Article 37 states other authorities which are not regulated in the 1945 Constitution, namely: "The Supreme Court can provide considerations in the field of law whether requested or not by other State High Institutions"

Specifically regarding the existence of election organizing institutions, it is regulated in Article 22E paragraph (5) of the 1945 Constitution which states that, "General elections are held by a general election commission that is permanent and independent". According to Jimly Ashiddiqie, the original intent of Article 22E paragraph (5) of the 1945 Constitution is that the provisions of this article are not explicitly related to the institution of election organizers. This provision only states the main authority of the general election commission, as the election management institution. The name of the
institution in this clause is not explicitly stated. Clause the general election commission is not mentioned in capital letters, like the MPR, DPR, DPD, President. The naming of the election organizer institution is actually mandated to be regulated by law as stated in Article 22E paragraph (6) of the 1945 Constitution. This means that the law can give another name to the election organizer, not the general election commission. Whatever the name of the institution, if it has the main task of organizing elections, it can be called a general election commission.

Refer to 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 KPU, Bawaslu and DKPP as independent institutions, as explained in the Constitutional Court Decision Number 11/PUU-VIII/2010 dated 18 March 2010, which stated: "That in order to guarantee the implementation of general elections that are free and fair, Article 22E paragraph (5) of the 1945 Constitution determines that, "General elections are held by a national, permanent and independent general election commission." The phrase "a general election commission" in the 1945 Constitution does not refer to the name of an institution, but rather refers to the function of holding general elections which are national, permanent and independent.

According to the Court, the function of organizing general elections is not only carried out by the General Election Commission (KPU), but also includes general election supervisory institutions, in this case the General Election Supervisory Body (Bawaslu) as a unified function of organizing general elections which is national, permanent, and independent. This understanding better fulfills the provisions of the 1945 Constitution which mandates the existence of independent general election organizers in order to carry out general elections that fulfill the principles of overflow and fairness. Holding general elections without supervision by an independent institution will threaten the principles of transparency and fairness in the implementation of elections. Therefore, according to the Court, the General Election Supervisory Body (Bawaslu) as regulated in Chapter IV Article 70 to Article 109 of Law no. 22 of 2007, must be interpreted as an election organizing institution which is tasked with supervising the implementation of general elections, so that the function of organizing elections is carried out by the organizing element, in this case the General Election Commission (KPU), and the election supervisory element, in this case the General Election Supervisory Agency (Bawaslu). In fact, the Honorary Council which supervises the behavior of election organizers must
be interpreted as an institution which is a unified function of organizing general elections. In this way, the guarantee of the independence of election organizers becomes real and clear.”

Based on the decision of the Constitutional Court, institutionally the DKPP has an equal position with the KPU and Bawaslu, both as election management institutions, which are national, permanent and independent, as regulated by Article 22E Paragraph (5) of the 1945 Constitution. Furthermore, based on the Law Number 15 of 2011 concerning Election Organizers, DKPP is placed as a permanent institution and is domiciled in the nation's capital. Apart from that, DKPP is an institution that is classified as a state auxiliary organ, or auxiliary institutions, namely state institutions that are supporting.

Among the many institutions, there are also those referred to as self-regulatory agencies, independent supervisory bodies, or institutions that carry out mixed functions between regulative, administrative and punitive functions which are usually separated, but are instead carried out jointly, simultaneously by these new institutions.

In Law no. 7 of 2017 concerning General Elections has also been emphasized that the Election Organizer is the institution that organizes the Election which consists of the General Election Commission, the Election Supervisory Body, and the Election Organizer Honorary Council as a unified function of organizing the Election to elect members of the People's Representative Council, members of the Regional Representative Council, President and Vice President, and to elect members of the Regional People's Representative Council directly by the people. The General Election Commission, hereinafter abbreviated as KPU, is an Election Organizing institution which is national, permanent and independent in carrying out elections. Election Supervisory Body, hereinafter referred to as Bawaslu is institution organizer election supervise the implementation of elections throughout the territory of the Unitary State of the Republic of Indonesia. Meanwhile, the Election Organizer Honorary Council (DKPP) is the institution tasked with handling violations of the Election Organizer's code of ethics.

General election commission provisions that use lowercase letters in the 1945 Constitution can be categorized as open legal policies, legislators can interpret which institutions can be categorized as general election commissions. Based on the interpretation of the general election commission, the legislators included the KPU, Bawaslu and DKPP as national, permanent and independent election organizers.
mReferring to the formation of laws regarding organic law (the mandate of the 1945 Constitution), there is a common thread that open legal policies are carried out by legislators because (1) the 1945 Constitution provides a choice of interpretations of articles and phrases contained in the 1945 Constitution; (2) legislators can use legal policy provisions open with consideration adapted with developing constitutional dynamics. The results of Radita Ajie's study stated that in fact pform laws given freedom in determining a rule, prohibition, obligation or limitation contained in a legal norm that is being made which is the policy choice of the law maker as long as:

a. does not conflict in real (clear) terms with the 1945 Constitution, for example: it is not permissible to formulate norms setting the education budget at less than twenty (20) percent of the APBN and APBD, because it clearly conflicts with Article 31 paragraph (4) of the 1945 Constitution.
b. No surpass authority shaper legislation (detournement de pouvoir), for example the legislators draft changes/amendments to the 1945 Constitution which is the authority of the MPR.
c. does not constitute an abuse of authority (willekeur).

mEven if the contents of a law are considered bad, the Court cannot cancel it, unless the legal policy product clearly violates morality, rationality and is intolerable injustice. If there are parties or members of the public who do not agree with the policy choice, they can propose it through a legislative review mechanism, namely by submitting a proposal for change to the legislators.

4 CONCLUSION

The concept of open legal policy in the Constitutional Court's decision does not yet have clear boundaries according to the constitution (1945 Constitution), so the meaning of positive legislature And negative legislature messed up natural the practice of forming and testing laws. Apart from that, this open law policy often shows the existence of a split personality within the Constitutional Court, between judicial activism and judicial restraints. Judicial activism is legal adaptation to social change by developing principles taken from constitutional texts and existing decisions in order to implement the basic values of the constitution progressively. Meanwhile, in the doctrine of judicial restraints, the court must be able to exercise self-restraint from tendencies or impulses to act like a "mini parliament". One of form of action court yang can be
categorized as a parliamentary action, namely establishing new legal norms when deciding on a judicial review case. In fact, the implementation of judicial activism and judicial restraints must refer to the constitution and provide the function of guarding and protecting the constitution. In various decisions the argumentation of open law policy actually favors judicial restraints, but in other decisions it prioritizes judicial activism, meaning that there is an unclear benchmark for the Constitutional Court in implementing judicial activism and judicial restraints related to open law policy arguments, so that decisions containing open law policy often misguided and not based on the constitution.

This open legal policy by the legislators (DPR and President + DPD) can be implemented if they carry out the mandate to form organic and inorganic laws. For organic laws, open legal policies can be implemented if the provisions in the Constitution contain the meaning of a choice of law or policy or there is authority to interpret phrases in each paragraph and article in the 1945 Constitution, so that the phrase will be constitutional if it is interpreted in accordance with the meaning of the constitution by the legislators. invite. For the formation of inorganic laws, legislators have far more freedom to determine norms that are in accordance with current developments and even the interests of legislators. Some laws that were formed based on open law policies actually created uncertainty and commotion in society. Apart from this, open law policies actually took more into account the legal dynamics of society that were developing at that time.
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