



## Open Legal Policy in Constitutional Court Decisions: Constitutional Limits and Its Issues in the Indonesian State Administration System

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**Abstract.** The doctrine of open legal policy is a jurisprudential construction of the Constitutional Court that provides space for lawmakers to formulate norms as long as they do not contradict the 1945 Constitution of the Republic of Indonesia. Nevertheless, the application of this doctrine in the practice of law testing has raised various constitutional problems, particularly concerning the limits of authority between legislators and the Constitutional Court, as well as the protection of citizens' constitutional rights. This research aims to analyze the concept and construction of open legal policy within the Indonesian constitutional system and to formulate the constitutional limits of its application in Constitutional Court decisions. This research is a normative legal study with an approach based on legislation, a conceptual approach, and a case approach. The legal materials used include the 1945 Constitution, relevant legislation, and pertinent Constitutional Court decisions. The research results indicate that open legal policy cannot be interpreted as absolute freedom for lawmakers, but must be limited by the principle of constitutional supremacy, protection of constitutional rights, and the principle of proportionality as reflected in Article 28J paragraph (2) of the 1945 Constitution. The ambiguity of the parameters for applying this doctrine has the potential to cause inconsistencies in rulings and disrupt legal certainty. Therefore, a more precise and consistent formulation of constitutional limits is necessary to maintain the balance between representative democracy and constitutional oversight.

**Keywords:** Constitutional Court; Constitutional Rights; Judicial Review; Open Legal Policy; Supremacy of the Constitution.

### 1. INTRODUCTION

The establishment of the Constitutional Court (Mahkamah Konstitusi/MK) as a result of the amendments to the 1945 Constitution marked a fundamental transformation in the Indonesian constitutional system. The Constitutional Court was designed as the guardian of the constitution and the final interpreter of constitutional norms, particularly through its authority of judicial review of statutes against the Constitution (Asshiddiqie, 2006; Butt, 2009). This authority affirms the supremacy of the Constitution as the highest law binding all state institutions and reflects Indonesia's commitment to constitutionalism and the rule of law (Wheare, 1966; Lindsey, 2018).

In exercising judicial review, the Constitutional Court plays a strategic role in ensuring that legislative products remain consistent with constitutional principles, including the protection of fundamental rights and the maintenance of democratic governance (Asshiddiqie, 2010; Tushnet, 2008). However, in practice, not all statutory norms are fully subjected to substantive constitutional examination. In several decisions, the Court has invoked the doctrine of open legal policy to justify judicial restraint, arguing that certain regulatory matters fall within the discretionary authority of the legislature.

The doctrine of open legal policy is closely related to the principle of separation of powers and the mechanism of checks and balances. In a democratic constitutional state, lawmakers are granted policy space to design regulations according to social needs and political considerations (Butt & Lindsey, 2012; Mahfud MD, 2009). This discretion acknowledges that legislative products are often the result of political compromise and democratic deliberation. From this perspective, judicial interference in policy matters must be limited to prevent the judiciary from encroaching upon the political domain. Such an approach aligns with the theory of judicial restraint, which emphasizes institutional self-limitation by courts (Schauer, 2007).

Nevertheless, the application of the open legal policy doctrine in Indonesia raises significant constitutional questions. While the doctrine serves as a form of respect for legislative discretion, it also risks narrowing the scope of constitutional review. If interpreted too broadly, open legal policy may function as a shield protecting legislative decisions from meaningful constitutional scrutiny. This concern is particularly relevant in the context of protecting minority rights and preventing discriminatory legal policies (Andiani et al., 2023; Laksito, 2023). As Hirschl (2004) argues, constitutional courts in emerging democracies often operate within complex political environments where judicial empowerment can both strengthen and destabilize democratic governance.

Empirically, the Constitutional Court's practice demonstrates inconsistencies in applying the open legal policy doctrine. In cases concerning the presidential threshold and parliamentary threshold, the Court categorized these matters as open legal policy within the legislature's domain (Mietzner, 2013; Umar et al., 2026). However, in other cases such as the judicial review concerning the age requirement for presidential and vice-presidential candidates the Court adopted a more progressive interpretative approach, effectively reshaping legislative policy. This shift illustrates the Court's oscillation between judicial restraint and judicial activism, generating debate regarding the parameters used to determine when a norm qualifies as open legal policy.

Theoretically, this tension reflects the broader debate between judicial restraint and judicial activism in constitutional adjudication (Tushnet, 2008). Judicial restraint emphasizes deference to democratically elected institutions, whereas judicial activism permits courts to interpret constitutional values more expansively in order to safeguard rights and constitutional principles. The Indonesian Constitutional Court appears to operate between these two paradigms, without consistently articulating clear normative standards for distinguishing policy discretion from constitutional violation.

From the standpoint of constitutional supremacy, every legal policy must remain subject to constitutional limits. The supremacy of the Constitution requires that legislative discretion be exercised within the framework of justice, legal certainty, and human rights protection (Asshiddiqie, 2006; Lindsey, 2018). Therefore, open legal policy cannot be understood as absolute freedom. Instead, it must be interpreted as conditional discretion, bounded by constitutional principles. Without clearly formulated criteria, the doctrine risks undermining legal certainty, which is a fundamental element of the rule of law (Marzuki, 2014).

Furthermore, the absence of explicit and systematic parameters in Constitutional Court jurisprudence contributes to normative ambiguity. To date, the Court has not comprehensively developed doctrinal guidelines specifying when a matter constitutes open legal policy and when it crosses into unconstitutional territory. The case-by-case application of the doctrine may provide flexibility, but it also generates unpredictability and public skepticism. In a constitutional democracy, judicial legitimacy depends heavily on consistency, transparency, and principled reasoning (Butt, 2009; Hirschl, 2004).

The issue of open legal policy also reflects the dynamic relationship between law and politics. Legislative norms are products of political processes, yet constitutional review demands that political legitimacy be distinguished from constitutional legitimacy (Mahfud MD, 2009). When the Constitutional Court labels a norm as open legal policy, it implicitly acknowledges the political character of the decision. However, political legitimacy does not automatically equate to constitutional compliance. Therefore, the Court must carefully maintain institutional distance from political considerations while upholding constitutional supremacy.

In the broader context of modern constitutionalism, constitutions are no longer perceived as static documents but as living instruments responsive to societal change (Ginsburg, 2003). This perspective justifies progressive constitutional interpretation. However, progressive interpretation must remain grounded in doctrinal clarity to preserve institutional balance and prevent accusations of excessive judicial activism. Consequently, the discourse on the constitutional limits of open legal policy becomes increasingly relevant within Indonesia's evolving constitutional framework.

The urgency of examining this doctrine is further reinforced by public controversies surrounding several Constitutional Court decisions that rely on open legal policy arguments. Public trust in constitutional adjudication depends on the Court's ability to articulate coherent and principled reasoning. If the boundaries of open legal policy remain ambiguous, the

legitimacy of the Constitutional Court as the guardian of the constitution may be weakened, thereby affecting the stability of Indonesia's constitutional system.

Academically, existing studies have discussed aspects of judicial review and specific Constitutional Court decisions (Isra, 2010; Rosjidi, 2017), yet a comprehensive theoretical reconstruction of the open legal policy doctrine within Indonesia's constitutional system remains limited. A systematic normative analysis is therefore necessary to clarify its conceptual foundation and practical implications.

Based on this background, this research focuses on a conceptual and normative analysis of the open legal policy doctrine in the decisions of the Indonesian Constitutional Court. The study aims to (1) identify the constitutional limits of open legal policy, (2) analyze inconsistencies in its application, and (3) formulate normative parameters to guide future constitutional adjudication. By clarifying the boundary between legislative discretion and constitutional oversight, this research seeks to contribute both to the development of constitutional law theory and to the strengthening of consistent and principled judicial review practice in Indonesia.

## **2. RESEARCH METHODS**

This research is a normative legal study that focuses on the analysis of constitutional norms, legislation, and Constitutional Court decisions related to the doctrine of open legal policy. The approaches used include the statute approach and the conceptual approach. The legislative approach is carried out by examining the provisions in the 1945 Constitution of the Republic of Indonesia, specifically Article 1 paragraphs (2) and (3) concerning the principles of people's sovereignty and the rule of law, Article 20 paragraph (1) regarding the authority to enact laws by the DPR, and Article 24C paragraph (1) concerning the authority of the Constitutional Court in conducting law reviews against the 1945 Constitution. In addition, this research also examines Law Number 24 of 2003 concerning the Constitutional Court as last amended by Law Number 7 of 2020, as well as Law Number 12 of 2011 concerning the Formation of Legislation as amended by Law Number 13 of 2022.

The legal materials used consist of primary legal materials in the form of the 1945 Constitution, related regulations, and relevant Constitutional Court decisions concerning the application of open legal policy, as well as secondary legal materials in the form of literature and scientific articles in the field of constitutional law. The technique for collecting legal materials was carried out thru library research, then qualitatively analyzed using systematic and argumentative interpretation methods to assess the conformity of legal norms with the

principles of constitutional supremacy and the protection of constitutional rights as regulated in Article 28D, Article 28I, and Article 28J paragraph (2) of the 1945 Constitution. The analysis is conducted to formulate the constitutional limits of open legal policy in judicial review practices and to assess its consistency within the Indonesian constitutional system. With this method, this research aims to produce a clear normative construction regarding the parameters of applying the open legal policy doctrine in the decisions of the Constitutional Court.

### **3. RESULT AND DISCUSSION**

#### **The Concept and Construction of the Open Legal Policy Doctrine in the Indonesian Constitutional System**

The doctrine of open legal policy in the practice of the Indonesian constitution is a jurisprudential construct that has developed through the decisions of the Constitutional Court (MK) in exercising its authority to review laws against the 1945 Constitution of the Republic of Indonesia. Normatively, this authority is affirmed in Article 24C paragraph (1) of the 1945 Constitution, which states that the Constitutional Court has the authority to adjudicate at the first and final level with a final decision to test laws against the Constitution. This provision is further regulated in Article 10 paragraph (1) letter a of Law Number 24 of 2003 concerning the Constitutional Court, as last amended by Law Number 7 of 2020. Constitutionally, the Constitutional Court has the authority to assess whether a legal norm is in conflict with the 1945 Constitution. However, in practice, not every norm that is tested is deemed to violate the constitution, especially if the norm is viewed as an open legal policy of the legislator.

The concept of open legal policy is fundamentally rooted in the recognition of the legislator's authority to formulate legal policies. That authority is derived from Article 20 paragraph (1) of the 1945 Constitution, which states that the People's Consultative Assembly (DPR) holds the power to enact laws, and Article 5 paragraph (1) of the 1945 Constitution, which grants the President the right to propose draft laws. The combination of these two articles emphasizes that the formation of laws is the constitutional domain of the legislative branch together with the President. Therefore, as long as the constitution does not regulate a norm in detail or limitatively, lawmakers have the policy space to determine regulatory choices. This space is what is referred to in constitutional judicial practice as open legal policy.

In the framework of a state of law as emphasized in Article 1 paragraph (3) of the 1945 Constitution, every legal policy must still adhere to the supremacy of the constitution. The supremacy of the constitution means that all actions and legal products of state institutions must not contradict the 1945 Constitution as the highest law. Open legal policy is not a form

of absolute freedom, but rather freedom that is limited by constitutional norms. If a legal policy clearly violates the constitutional rights of citizens guaranteed in Chapter XA of the 1945 Constitution, such as Article 28D paragraph (1) regarding the guarantee of fair legal certainty or Article 28I paragraph (2) regarding protection from discrimination, then the policy cannot hide behind the argument of open legal policy. This is where the role of the Constitutional Court as the guardian of the constitution becomes central.

Systematically, the construction of open legal policy is also related to the principle of the separation of powers upheld by the 1945 Constitution. Article 24 paragraph (1) of the 1945 Constitution emphasizes that the judicial power is an independent power to administer justice in order to uphold the law and justice. However, the independence of the judiciary does not mean taking over the legislative functions held by the DPR and the President. Therefore, in the context of judicial review, the Constitutional Court must maintain a balance between the function of constitutional oversight and respect for the authority of lawmakers. The doctrine of open legal policy serves as a conceptual instrument to maintain that boundary so that there is no disproportionate shift in power.

In practice, the Constitutional Court often uses this doctrine when the constitution does not provide detailed regulations regarding a legislative matter. For example, the 1945 Constitution does not explicitly determine the threshold for presidential nominations, the electoral system used, or the parliamentary threshold. The provisions of Article 6A of the 1945 Constitution only stipulate that pairs of presidential and vice-presidential candidates are proposed by political parties or coalitions of political parties participating in the election, without specifying a certain percentage. This condition opens up policy space for lawmakers to determine its technical design through legislation. In such a context, the Constitutional Court often states that the determination of numbers or models is an open legal policy as long as it does not contradict the principles of democracy and constitutional rights.

The construction of open legal policy must also be understood within the framework of Law Number 12 of 2011 concerning the Formation of Legislation, as last amended by Law Number 13 of 2022. This law emphasizes that the content of the legislation includes further regulations of the provisions of the 1945 Constitution or other matters mandated by law. This means that lawmakers have discretion in formulating norms as long as they do not deviate from the hierarchy of legislation as regulated in Article 7 of Law 12/2011. Thus, open legal policy must still adhere to the principle of conformity between the type, hierarchy, and substance of the legislation.

However, the fundamental issue lies in the absence of explicit parameters in the legislation regarding the limits of open legal policy. The 1945 Constitution and the Constitutional Court Law do not provide a normative definition of that concept. This doctrine purely develops thru the jurisprudential practice of the Constitutional Court (MK). Consequently, the boundary between open legal policy and constitutional violation heavily relies on the construction of constitutional judges' arguments in each case. Dependence on this interpretation has the potential to cause inconsistencies if not accompanied by clear and consistent standards.

From the perspective of democratic constitutionalism, open legal policy should be limited by three main parameters. First, the policy must not contradict explicit norms in the 1945 Constitution. Second, the policy must not disproportionately reduce the substance of citizens' constitutional rights as guaranteed in Article 28J paragraph (2) of the 1945 Constitution, which states that the limitation of human rights can only be carried out by law and solely to ensure the recognition and respect for the rights of others and to fulfill the demands of justice. Third, the policy must remain in line with the principles of the rule of law and democracy as reflected in Article 1 paragraph (2) and paragraph (3) of the 1945 Constitution.

Thus, conceptually and normatively, open legal policy is a recognized policy space within the Indonesian constitutional system, but it is not without limits. This doctrine was born out of the need to maintain a balance between the authority of legislators based on Article 20 of the 1945 Constitution and the constitutional oversight function of the Constitutional Court based on Article 24C of the 1945 Constitution. Within the framework of constitutional supremacy, every legal policy must still be subject to testing if it has the potential to violate constitutional norms or citizens' fundamental rights. Therefore, the construction of open legal policy must be understood as a mechanism of respect for representative democracy that remains within the corridors of strict and measured constitutional oversight.

### **The Issues and Constitutional Limits of Open Legal Policy in Constitutional Court Decisions**

The application of the open legal policy doctrine in the Constitutional Court's (MK) decisions has created significant constitutional dynamics within Indonesia's state administration system. Normatively, Article 24C paragraph (1) of the 1945 Constitution grants the Constitutional Court the authority to review laws against the 1945 Constitution. This authority is a manifestation of the principle of constitutional supremacy, which places the Constitution as the highest law. However, in practice, not every legal norm is substantially tested by the Constitutional Court, especially when the norm is categorized as an open legal

policy. Herein lies the issue regarding the boundary between respecting the authority of legislators and the obligation of the Constitutional Court to uphold the constitution.

The authority to form laws itself is derived from Article 20 paragraph (1) of the 1945 Constitution, which states that the DPR holds the power to form laws, and Article 5 paragraph (1) of the 1945 Constitution, which grants the President the right to propose draft laws. These two provisions affirm that the formation of legal norms is the constitutional domain of the legislature together with the President. When the Constitutional Court declares a norm as an open legal policy, the Court essentially respects the discretion of legislators in formulating policies. However, this respect should not diminish the constitutional mandate of the Constitutional Court to ensure that legislative products do not contradict the 1945 Constitution.

The problem arises because neither the 1945 Constitution nor Law Number 24 of 2003 on the Constitutional Court, as last amended by Law Number 7 of 2020, provides an explicit definition or parameters regarding open legal policy. The law only stipulates that the Constitutional Court has the authority to declare whether a norm is in conflict or not in conflict with the 1945 Constitution. As a result, the doctrine of open legal policy fully developed through the construction of jurisprudence. The absence of clear normative standards causes its application to heavily depend on the interpretation of constitutional judges.

This condition has the potential to cause inconsistencies in rulings. In the context of a rule of law state as emphasized in Article 1 paragraph (3) of the 1945 Constitution, legal certainty is a fundamental principle. Article 28D paragraph (1) of the 1945 Constitution explicitly guarantees the right of every person to recognition, assurance, protection, and fair legal certainty. If the implementation of open legal policy is carried out without consistent parameters, uncertainty will arise in the practice of judicial review.

The public does not have clear standards regarding when a policy can be tested and when it cannot. This has the potential to weaken public trust in the Constitutional Court. The problem is also related to the protection of citizens' constitutional rights. Chapter XA of the 1945 Constitution contains various guarantees of human rights, including the right to equality before the law (Article 28D paragraph (1)), the right not to be discriminated against (Article 28I paragraph (2)), and the right to participate in government (Article 28D paragraph (3)). If a legal norm restricts those rights, the Constitutional Court should conduct a strict examination. However, in some cases, the restriction of political rights is considered part of an open legal policy. This approach raises the question of whether the protection of constitutional rights has been adequately tested.

Article 28J paragraph (2) of the 1945 Constitution provides a limit that the restriction of human rights can only be carried out by law and must meet the demands of justice and respect the rights of others. This norm contains the principle of proportionality in the limitation of rights. Therefore, every policy that restricts constitutional rights should be tested thru a proportionality test, rather than simply categorized as an open legal policy. If the Court does not conduct that test, there is a risk that the restriction of rights will be carried out without adequate constitutional oversight.

From the perspective of the hierarchy of legal norms as regulated in Article 7 of Law Number 12 of 2011 concerning the Formation of Legislation, the 1945 Constitution is at the top of the hierarchy of legislation. Every law must be in accordance with constitutional norms. The doctrine of open legal policy should not be used to justify legal norms that substantially contradict the constitution. Therefore, the first limit of open legal policy is that it must not deviate from the explicit norms of the 1945 Constitution. Another issue is related to the principle of popular sovereignty as stated in Article 1, paragraph (2) of the 1945 Constitution. Every legal policy must reflect the principles of democracy and public participation. If a policy actually narrows the space for political participation or hinders fair competition, then the policy needs to be constitutionally tested. Not all political policies can automatically be categorized as open legal policies. The Constitutional Court must ensure that the policy does not reduce the essence of constitutional democracy.

Moreover, the inconsistent application of open legal policy can raise issues of institutional legitimacy. Different rulings on similar issues without changes to constitutional norms can create a perception of inconsistency. In a rule of law state, consistency in argumentation is part of the principle of legal reasoning that is rational and accountable. Without clear standards, this doctrine has the potential to become a flexible justification tool according to the context of the case. This certainly affects the credibility of the Constitutional Court. From the perspective of the checks and balances theory, the Constitutional Court functions as a counterbalance to the legislative and executive powers. Article 24 paragraph (1) of the 1945 Constitution emphasizes the independence of the judiciary in upholding law and justice. If too many norms are categorized as open legal policies, then the control function of the Constitutional Court becomes weak. On the other hand, if the Constitutional Court is too active in annulling legislators' policies, accusations of judicial activism will arise. Therefore, the balance between judicial restraint and constitutional oversight becomes important.

To address these issues, clear constitutional boundaries are needed in the application of open legal policy. First, a policy can only be considered open if the constitution does not

limitively regulate the subject matter. Second, the policy must not touch the core of constitutional rights guarantyd in the 1945 Constitution. Third, any restriction of rights must be tested based on the principle of proportionality as implied in Article 28J paragraph (2). Fourth, the Court needs to build argumentative consistency in every decision. In addition to these normative parameters, it is also important for the Constitutional Court to formulate more operational testing standards in its legal considerations. The standards can include tests of policy rationality, proportionality tests, and tests of conformity with the principles of constitutional democracy. With clear standards in place, the application of open legal policy is no longer merely casuistic. This will strengthen legal certainty and the legitimacy of the Constitutional Court's decisions.

Thus, the doctrine of open legal policy must be understood as a mechanism for respecting the authority of legislators based on Article 20 of the 1945 Constitution, while still being under the supervision of constitutional supremacy based on Article 24C of the 1945 Constitution. The balance between representative democracy and the protection of constitutional rights is key in determining its limits. Without clear and consistent boundaries, this doctrine has the potential to reduce the effectiveness of judicial review as an instrument for upholding the constitution. Therefore, strengthening the normative construction and constitutional parameters of open legal policy is an urgent need in the development of Indonesian constitutional law.

#### **4. CONCLUSION**

The doctrine of open legal policy in the Constitutional Court's decision is essentially a form of respect for the authority of legislators as guarantyd in Article 20 of the 1945 Constitution, but this respect should not obscure the Court's constitutional mandate as the guardian of constitutional supremacy based on Article 24C of the 1945 Constitution. This research emphasizes that open legal policy is not an absolute freedom space, but rather a policy that is still constrained by the explicit norms of the 1945 Constitution, the protection of citizens' constitutional rights in Articles 28D and 28I, as well as the principle of proportionality as implied in Article 28J paragraph (2). The ambiguity and inconsistency of the parameters in applying this doctrine in various rulings have the potential to create legal uncertainty and weaken the function of judicial review as a checks and balances mechanism. Therefore, the Constitutional Court needs to formulate clear, measurable, and consistent testing standards in determining the limits of open legal policy to prevent shifts in authority between branches of power. Thus, the balance between representative democracy and constitutional supremacy can be maintained within the framework of the Indonesian rule of law.

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