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Defining the Boundaries of Morality, Rationality, and Justice in Constitutional Court Review of Open Legal Policy

Menentukan Batasan Moralitas, Rasionalitas, dan Keadilan dalam Tinjauan Mahkamah Konstitusional terhadap Kebijakan Hukum Terbuka

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Abstract
The Constitutional Court serves as the final interpreter of the 1945 Constitution of the Republic of Indonesia through its authority in judicial review. This authority has evolved to encompass the legislative domain, specifically regarding "open legal policy." In reviewing such policies, fundamental limits exist: morality, rationality, and intolerable injustice—standards that continue to undergo development. This study employs a normative-juridical research method with a case approach to analyze these limits within Constitutional Court decisions, and a conceptual approach to examine their underlying concepts. The findings reveal that morality, rationality, and intolerable injustice are not always applied collectively; they also function independently as limits, principles, and values. Furthermore, these standards are not only applied to open legal policy review but also serve as a mechanism of checks and balances and an instrument to control the distribution of power among state branches.

Keywords: Constitutional Court; Intolerable Limits; Open Legal Policy.

Abstrak
Mahkamah Konstitusi merupakan lembaga terakhir penafsir UUD NRI 1945 dalam kewenangannya menguji undang-undang. Dalam perkembangannya, pengujian ini tidak terbatas pada ranah yudikatif melainkan hingga legislatif, khususnya dalam bentuk open legal policy. Mengkaji tentang open legal policy, terdapat batasan fundamental yaitu moralitas, rasionalitas, dan ketidakadilan yang intolerable yang terus berkembang. Untuk menganalisis perkembangan tersebut, peneliti menggunakan metode penelitian yuridis-normatif dengan pendekatan kasus guna menganalisis batasan moralitas, rasionalitas, dan ketidakadilan yang intolerable pada putusan Mahkamah Konstitusi, serta pendekatan konseptual guna menganalisis konsep batasan tersebut. Peneliti menemukan bahwa moralitas, rasionalitas, dan ketidakadilan yang intolerable tidak selalu digunakan secara senafas, tetapi dapat pula digunakan secara terpisah, tidak hanya sebagai batasan tetapi juga sebagai prinsip dan nilai. Kegunaan moralitas, rasionalitas, dan ketidakadilan yang intolerable tidak hanya digunakan dalam praktik pengujian terhadap kebijakan hukum terbuka, melainkan juga dapat digunakan sebagai mekanisme check and balances antar cabang kekuasaan negara sebagai instrument yang mengontrol antar cabang kekuasaan.

Kata Kunci: Batasan yang Intolerable; Mahkamah Konstitusi; Open Legal Policy.

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Introduction

The Constitutional Court as the final institution that interprets the Constitution of the Republic of Indonesia (hereinafter referred to as UUD NRI 1945) is the place where problematic laws are resolved.[1] In exercising its authority, the MK adheres to general principles of judicial process. This means that, in general, the MK also adheres to the principle of ius curia novit, which requires it to examine, adjudicate, and decide on any case brought before it. The principle of ius curia novit is a principle stipulated in Article 16 of the Judicial Authority Law, which means that courts are prohibited from refusing to examine, adjudicate, and decide on a case that has been submitted on the grounds that the law does not exist or is unclear.[2] This creates a polemic because sometimes the Constitutional Court, in adjudicating cases, must exercise judicial restraint for fear of acting as if it were a positive legislature and entering the domain of the legislative body. This controversy arises from petitions whose object is an article or law that contains an open legal policy.[3] As a result, the Constitutional Court generally rejects petitions because they are considered to be open legal policy on the grounds that the article or law is within the authority of the lawmaker to amend.[4]

Open Legal Policy constitutes a formulation of statutory norms for which the 1945 Constitution of the Republic of Indonesia does not provide clear limitations regarding "what" and "how" the substance of regulation must be stipulated in a statute. This means that the substance of such a norm is not regulated within the 1945 Constitution of the Republic of Indonesia, or that the Constitution merely grants a mandate to the legislature to further regulate a certain subject matter without providing limitations on the substance of the regulation to be enacted.[5] Through this definition, there is a consequence that the constitutionality of such statutory provisions represents the embodiment of the legislature's response to societal needs as expressed in legislation and may be amended at any time by the legislature. The concept of open legal policy first emerged in Constitutional Court Decision Number 10/PUU-III/2005, which examined the constitutionality of Article 59 paragraph (2) of

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1 Ousu Mendy & Ebrima Sarr, "The Judiciary in Governance: Understanding the Juridical Nature and Function of the Constitutional Court of Indonesia" (2025) 2:1 J Indones Const Law 1–22 at 2.

2 Muchammad Ali Safa'at, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Kepaniteraan dan Sekretariat Jenderal Mahkamah Konstitusi, 2019).

3 Iwan Satriawan & Tanto Lailam, "Open Legal Policy dalam Putusan Mahkamah Konstitusi dan Pembentukan Undang-Undang" (2019) 16:3 J Konstitusi 559 at 561.

4 Syafa'at Anugrah Pradana et al, "Komodifikasi Kewenangan Mahkamah Konstitusi Republik Indonesia melalui Ikhtiar Aktivisme Yudisial" (2024) 5:2 Amsir Law J 106–116 at 103.

5 Gardha Galang Mantara Sukma, "Open Legal Policy Peraturan Perundang-undangan Bidang Politik Dalam Putusan Mahkamah Konstitusi (Studi terhadap Putusan MK Bidang Politik Tahun 2015-2017)" (2020) 5:1 J Lex Renaiss, online: <https://journal.uii.ac.id/Lex-Renaissance/article/view/16804/pdf> at 6.

Law Number 32 of 2004 on Regional Government concerning the nomination threshold for regional heads.[6]

Furthermore, this concept was reiterated in Constitutional Court Decision Number 51-52-59/PUU-VI/2008 by establishing a principle that the provision under review, in this case the presidential threshold in the Election Law, constitutes an open legal policy and represents a policy choice adopted by the legislature that must be deemed constitutional. [7] The principle emphasized in the decision can be found in the ratio decidendi point [3.17], which affirms that the content of a statute, even if considered poor, such as the presidential threshold[8] at that time, constitutes an open legal policy, and the Constitutional Court does not have the authority to declare such a statute unconstitutional, unless the legal policy clearly violates morality, rationality, and intolerable injustice.[9]

Based on the principles enshrined in the ratio decidendi of Constitutional Court Decision Number 51-52-59/PUU-VI/2008, in adjudicating cases involving provisions or statutes that contain open legal policy, the Constitutional Court must first consider whether such provisions clearly violate morality, rationality, and intolerable injustice. This can be observed in Constitutional Court decisions subsequent to the a quo decision, such as Case Number 3/PUU-VII/2009 concerning the judicial review of the Legislative Election Law, Case Number 4/PUU-VII/2009 concerning the judicial review of the Legislative Election Law and the Regional Government Law, Case Number 104/PUU-VII/2009 concerning the judicial review of the Presidential Election Law, Case Number 114/PUU-VII/2009 concerning the judicial review of the Constitutional Court Law and the Legislative Election Law, and Case Number 130/PUU-VII/2009 concerning Legislative Elections. The Constitutional Court's reasoning for rejecting these petitions was grounded in the position that policy choices made by the legislature are inherently constitutional and in the necessity of judicial restraint, as excessive intervention could result in overlapping authority encroaching upon the legislative domain as a positive legislator.[10] Furthermore, statutes or provisions containing open legal policy constitute detailed manifestations of constitutional mandates or societal

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6 *Putusan Mahkamah Konstitusi Nomor 10/PUU-III/2005*, Mahkamah Konstitusi.

7 *Putusan Mahkamah Konstitusi No 51-52-59/PUU-VI/2008*, Mahkamah Konstitusi.

8 *Presidential threshold, according to Lutfil Ansori, in his journal article entitled "A Review of the Presidential Threshold in the 2019 Simultaneous Elections" (2017) 4:1 Jurnal Yuridis 15 at p. 18, is a rule that determines the minimum percentage of votes that must be obtained by political parties in legislative elections in order to nominate candidates for President and Vice President in presidential elections to be held at a time different from the legislative elections.*

9 Mahkamah Konstitusi, *Putusan Mahkamah Konstitusi No. 51-52-59/PUU-VI/2008.*, *supra* note 8 at 187.

10 Bisariyadi Bisariyadi, "Yudisialisasi Politik dan Sikap Menahan Diri: Peran Mahkamah Konstitusi dalam Menguji Undang-Undang" (2016) 12:3 J Konstitusi 473 at 476.

needs, and if annulled by the Constitutional Court, could result in a legal vacuum in strategically important areas. [11]

In general, the limitations applied by the Constitutional Court in reviewing open legal policy are those articulated in ratio decidendi point [3.17] of Constitutional Court Decision Number 51-52-59/PUU-VI/2008. The most commonly applied limitation in the Court's review of statutes and or norms containing open legal policy is whether they violate morality, rationality, and intolerable injustice. However, in its subsequent development, the limitations of violating morality, rationality, and intolerable injustice have not always been applied verbatim. Frequently, the Constitutional Court employs different phrases to assess whether a provision violates morality, rationality, and intolerable injustice. In addition, in the development of its decisions, the Court has not consistently applied these limitations cumulatively in its legal reasoning.

The use of limitations that are not applied cumulatively reveals a discrepancy with the original formulation of open legal policy in Constitutional Court Decision Number 51-52-59/PUU-VI/2008. In Decision Number 51-52-59/PUU-VI/2008, the Court considered that *"...in the a quo case, the Court nevertheless cannot annul it, because what is considered poor does not necessarily mean unconstitutional, unless the legal policy clearly violates morality, rationality, and intolerable injustice."* However, in other decisions reviewing statutes containing or reflecting open legal policy, the Constitutional Court often does not apply these limitations in their entirety. This can be seen in several decisions, such as Decision Number 112/PUU-XX/2022, which reviewed the age limit for the Chairperson of the Corruption Eradication Commission, where the Court only applied the limitations of rationality and intolerable injustice, along with another limitation, namely exceeding the authority of the legislature, as the benchmark of review, without applying the limitation of morality.[12] The implications of such inconsistency create legal uncertainty regarding the benchmarks or limitations used in statutory review by the Constitutional Court. This legal uncertainty constitutes a paradox that may give rise to the absolutization of judicial power over the concept of freedom within the rule of law in the framework of representative democracy.[13]

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[11] Sholahuddin Al-Fatih, "Interpretation of Open Legal Policy By The Constitutional Judges In Judicial Review Of Parliamentary Thresholds" (2021) 6:2 Diponegoro Law Rev 231–246 at 240–241.

[12] Romi Galih Prabowo & Wahyu Donri Tinambunan, "Constitutional Implications of KPK Leadership Term Changes: Analysis of MK Decision No. 112/PUU-XX/2022 and Ruling Inconsistencies" (2023) 8:1 J Huk Volkgeist 108–116 at 110.

[13] Muhammad Addi Fauzani & Fandi Nur Rohman, "Urgensi Rekonstruksi Mahkamah Konstitusi Dalam Memberikan Pertimbangan Kebijakan Hukum Terbuka (Open Legal Policy)" (2020) 35:2 Justitia Pax, online: <https://ojs.uajy.ac.id/index.php/justitiaetpax/article/view/2501> at 148.

On the other hand, Mardian Wibowo explains that interpreting open legal policy as absolute freedom of the legislature constitutes a paradox that may eliminate the freedom of legal subjects governed by law.[14] Therefore, in order to establish checks and balances among state institutions, the researcher argues that these limitations must remain in place to safeguard the constitutional rights of citizens while still respecting the boundaries of authority so as to prevent overlapping powers among state institutions. Accordingly, tracing the development of the application of these limitations is crucial, not only for the development of judicial review of open legal policy, particularly for petitioners seeking judicial review of statutes containing or reflecting open legal policy, but also for the constitutional structure in maintaining continuity and checks and balances among state institutions. For this reason, this study examines the development of Constitutional Court decisions concerning the limitations of violating morality, rationality, and intolerable injustice used by the Court in adjudicating cases involving open legal policy.

In this study, the author employs a normative juridical research method, focusing on the development of limitations in Constitutional Court decisions in reviewing open legal policy, particularly the limitations of violating morality, rationality, and intolerable injustice.[15] This study also applies a case approach by examining Constitutional Court decisions that utilize the limitations of violating morality, rationality, and intolerable injustice, both explicitly and through alternative formulations, as well as a conceptual approach to examine the concept of the a quo limitations. Furthermore, the author analyzes legal materials using the method of systematic interpretation of primary legal materials in the form of Constitutional Court decisions that employ the limitations of violating morality, rationality, and intolerable injustice as benchmarks for open legal policy, supported by secondary and tertiary legal materials as conceptual reinforcement in determining these limitations. The collection of legal materials is conducted through library research by gathering Constitutional Court decisions reviewing open legal policy and applying the limitations of violating morality, rationality, and intolerable injustice, as well as books, journals, and literature that assist the author in identifying the significance of developments in the concept of these limitations. These findings are then elaborated using a descriptive evaluative method to assess the development of these limitations.

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[14] Mardian Wibowo, I Nyoman Nurjaya & Muchammad Ali Safaat, "The Criticism on the Meaning of "Open Legal Policy" in Verdicts of Judicial Review at the Constitutional Court Mardian Wibowo" (2018) 3:2 Const Rev 262 at 275.

[15] I Gusti Ketut Ariawan, "Metode Penelitian Hukum Normatif" (2013) 1:1, Online: <https://ejournal.unipas.ac.id/index.php/KW/article/view/419/344>.

The Development of Open Legal Policy Decisions with Morality, Rationality, and Intolerable Injustice as Limiting Factors

1. Open Legal Policy Decisions with Morality, Rationality, and Intolerable Injustice as Limitations

In this study, the author examines ten decisions of the Constitutional Court that apply the limitations of morality, rationality, and intolerable injustice as parameters for assessing the constitutionality of legal norms within the realm of open legal policy. These ten decisions demonstrate the consistency of the Court in developing a doctrine that, although the legislature possesses policy making power, such discretion is not absolute and may be restricted when it violates the principles of morality, rationality, or gives rise to intolerable injustice.[16]

As a starting point, the author refers to Constitutional Court Decision Number 51-52-59/PUU-VI/2008 as the initial reference in examining the limitations of violating morality, rationality, and intolerable injustice. This reference leads the author to the understanding that the a quo limitations are intended to be applied in a unified manner, as reflected in ratio decidendi point [3.17], where the Court reasoned that "...the Court nevertheless cannot annul it, because what is considered bad does not necessarily mean unconstitutional, unless the legal policy clearly violates morality, rationality, and intolerable injustice." This legal reasoning is consistent with Constitutional Court Decision Number 010/PUU-III/2005. [17] In that decision, the Court emphasized that judicial review of norms must always consider constitutional dimensions related to substantive justice. Through grammatical interpretation, the a quo limitations constitute an inseparable unity and must be applied coherently.

In the second decision, the author examines Constitutional Court Decision Number 15/PUU-XV/2017, which reviewed the electoral threshold and parliamentary threshold under Law Number 8 of 2012. In the a quo case, the Court found that the electoral threshold[18] constituted a rule or norm that failed to satisfy the principle of justice. In consideration point [3.20], the Court examined the threshold requirement in Article 8 paragraph (2) by comparing it with the same provision in the previous Legislative Election Law. Through

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[16] Rahmat Muhajir Nugroho, Sobirin Sobirin & Reyhan Gymnastiar, "Judicial Activism vs. Electoral Justice: The Overlooked Purcell Principle in Indonesia" (2025) 32:2 J Huk IUS QUIA IUSTUM 361–386 at 367–377.

[17] Mahkamah Konstitusi, *Putusan Mahkamah Konstitusi No. 51-52-59/PUU-VI/2008.*, *supra* note 8.

[18] Electoral threshold, according to Sholahuddin Al-Fatih, in his journal article entitled "Legal Consequences of Threshold Regulation in Legislative Elections and Presidential Elections" (2019) 12:1 Jurnal Yudisial 17 at p. 18, is a legal provision defined as the minimum threshold for political parties to be eligible to participate in elections in the subsequent period.

this comparison, the Court found a legal fact that the requirements to participate in the 2014 election were more burdensome than those of the previous election period due to the imposition of a threshold, resulting in political parties that failed to meet the threshold being required to undergo a more stringent verification process. This constituted a form of injustice toward political parties that were required to undergo re verification after failing to qualify as participants in the previous election. Furthermore, in consideration point [3.21], the Court highlighted that the legislative objective of simplifying the number of political parties was implemented in a partial manner. The requirements should have been applied equally to all political parties. Finally, in consideration points [3.22] and [3.23], the Court affirmed that the phrase contained in the a quo article violated rationality, equality before the law, and constituted injustice. Accordingly, the Court provided a solution by reformulating Article 8 paragraph (2) to ensure compliance with rationality, equality, and justice. Subsequently, in addressing the constitutional argument concerning Article 208 of the Legislative Election Law, the Court examined the issue in consideration points [3.24] to [3.26]. In these considerations, the Court opined that the application of the parliamentary threshold[19] to regional legislative councils eliminated diversity, resulting in a closed regional political system that was inconsistent with the Constitution. Therefore, the Court partially granted the petition and declared the a quo provision conditionally unconstitutional. In the a quo decision, it can be observed that the Court annulled Article 8 paragraphs (1) and (2) on the grounds that the provisions violated rationality.[20]

In the third decision, the author examines Decision Number 15/PUU-XV/2017, which reviewed Law Number 28 of 2009 concerning double taxation in the imposition of taxes on heavy equipment. In its legal considerations, the Court cited decisions with final and binding force, namely Decision Number 1/PUU-X/2012 and Decision Number 3/PUU-XIII/2015, as the basis for adjudicating the a quo case. In the a quo case, the Court aligned Decision Number 1/PUU-X/2012 and Decision Number 3/PUU-XIII/2015 concerning the classification of heavy equipment as motor vehicles. Through these two decisions, it was established that heavy equipment does not fall within the category of motor vehicles. Furthermore, in consideration point [3.12], the Court affirmed that taxation of heavy equipment is permissible but must not

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[19] Parliamentary threshold, according to Nur'Ayni Itasari, in her journal article entitled "The Implementation of the Parliamentary Threshold in the 2009 General Election" (2013) 3:2 Al-Daulah Journal of Law and Islamic Legislation 356–374 at p. 361, constitutes a threshold mechanism for political parties participating in general elections to be included in the calculation of votes for the central House of Representatives, based on the total number of valid votes nationally multiplied by a certain percentage threshold, with the objective of simplifying the party system through limiting the participation of political parties based on the number of votes obtained in order to be able to send their representatives to parliament.

[20] *Putusan Mahkamah Konstitusi No 52/PUU-X/2012*, Mahkamah Konstitusi.

be interpreted to mean that heavy equipment constitutes a motor vehicle subject to vehicle tax. In consideration point [3.13], the Court emphasized the need to amend the a quo law in order to revise the conceptual basis for taxing heavy equipment under the motor vehicle tax regime. This was intended to ensure certainty, justice, and utility of taxation. Accordingly, the Court concluded that the a quo petition was legally grounded and declared the challenged article unconstitutional. In the a quo case, the challenged provision constituted a clear instance of injustice.[21]

In the fourth decision, the author examines Decision Number 22/PUU-XV/2017, which reviewed the minimum marriage age under Article 7 paragraph (1) of Law Number 1 of 1974 on Marriage. In the a quo case, the Court granted the petition on the grounds that the age differentiation created legal uncertainty and resulted in discrimination within the challenged provision. Such discrimination served as the basis for the Court to establish that the a quo norm violated morality, rationality, and intolerable injustice. Accordingly, the Court held that harmonization between the challenged provision and the Child Protection Law was necessary by equalizing the minimum marriage age for men and women in order to ensure legal certainty and eliminate gender discrimination. In the a quo case, the Court applied the limitations of morality, rationality, and intolerable injustice by partially granting the petition and ordering the legislature to amend the provision in accordance with the Court's ruling.[22]

In the fifth decision, the author examines Decision Number 53/PUU-XV/2017, which reviewed issues concerning political party verification and the presidential threshold under Article 173 paragraphs (1) and (3) and Article 222 of the Election Law. In its considerations, the Court held that the political party verification provisions violated rationality and constituted intolerable injustice, as well as infringed political rights and hindered regional diversity in a manner that threatened pluralism. According to the Court, the verification requirements for political parties participating in elections must consider fairness for all election contestants, regional expansion and demographic development, the dynamic nature of political parties, and the fulfillment of all requirements for election participation in a comprehensive manner. Where discrepancies exist with respect to these aspects, the provisions regulating political party verification are deemed to violate the aforementioned limitations. In contrast, the presidential threshold was not considered by the Court to constitute a discriminatory norm that reduced the constitutional rights of political parties. The Court reasoned that discrimination cannot be established solely on the basis of differential treatment but must extend to harm affecting all political parties. Accordingly, the Court partially granted the

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21 *Putusan Mahkamah Konstitusi No 15/PUU-XV/2017*, Mahkamah Konstitusi.
22 *Putusan Mahkamah Konstitusi No 22/PUU-XV/2017*, Mahkamah Konstitusi.

petition and declared Article 173 paragraph (3) unconstitutional. In the a quo case, the Court applied the limitations of morality, rationality, and intolerable injustice by partially granting the petition and declaring the phrase contained in Article 173 paragraph (3) unconstitutional.[23]

In the sixth decision, the author examines Decision Number 93/PUU-XVI/2018, which reviewed Article 92 paragraph (2) letter (c) of the Election Law. In its considerations, the Court examined the constitutional issue by comparing the a quo case with Decision Number 31/PUU-XVI/2018. After conducting this comparison, the Court held in consideration point [3.14] that there was no strong legal basis for determining the number of members of the Regency or Municipal Election Supervisory Committee. According to the Court, the a quo provision constituted an open legal policy and did not violate any applicable limitations. Furthermore, in consideration points [3.16] and [3.17], the Court considered factual circumstances indicating that the number of members did not disrupt the technical implementation of election stages, as election administration primarily depends on the professionalism of election organizers. Accordingly, the Court concluded that the petitioner's arguments were unfounded both because the provision did not violate the limits of open legal policy and because it did not create technical issues in practice. In the a quo case, the Court declared the petition inadmissible. Nevertheless, the Court articulated guiding principles to determine the parameters of morality, rationality, and intolerable injustice.[24]

In the seventh decision, the author examines Decision Number 112/PUU-XX/2022, which reviewed the constitutionality of Article 29 letter (e) and Article 34 of Law Number 19 of 2019 concerning the Second Amendment to Law Number 30 of 2002 on the Corruption Eradication Commission. In that case, a constitutional issue arose concerning the term of office of the Chairperson of the Commission, which the petitioner argued was discriminatory and lacked legal certainty. Based on this issue, the Court considered that Article 29 letter (e) of the Law explicitly did not contradict the Constitution. However, implicitly, the provision gave rise to issues of injustice and discrimination. The provision should also have been consistent with Article 34 of the same Law, which affected the exercise of the petitioner's constitutional rights. In Decision Number 5/PUU-IX/2011, the Court had previously reviewed Article 34 of the Law and limited its examination to the interpretation of interim replacement before the end of the term of office. Therefore, the current review was not barred by nebis in idem. Based on these considerations, in consideration point [3.19], the Court concluded that Article 29 letter (e) and Article 34 clearly resulted in legal uncertainty, injustice, and discrimination due to differences in terms of office between the Commission

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23 *Putusan Mahkamah Konstitusi No 53/PUU-XV/2017*, Mahkamah Konstitusi.
24 *Putusan Mahkamah Konstitusi No 93/PUU-XVI/2018*, Mahkamah Konstitusi.

and other independent institutions of constitutional importance. Accordingly, the Court granted the petition in its entirety. In the a quo case, the Court applied the limitations of violating rationality and intolerable injustice.[25]

In the eighth decision, the author examines Decision Number 90/PUU-XXI/2023, which reviewed Article 169 letter (q) of the Election Law. The constitutional issue concerned the age requirement for candidates for President and Vice President. Based on this issue, the Court first argued that the determination of eligibility requirements for presidential candidates falls within the authority of the legislature, but remains bound by guiding principles in law making, including rationality, non-discrimination, morality, justice, and conformity with Pancasila, the Constitution, and human rights. Second, the Court directly examined the age requirement under Article 169 letter (q) by referring to original intent, related Court decisions, and general principles. It was found that the minimum age requirement has been a subject of ongoing discourse since the amendment of the Constitution, as neither original intent, relevant decisions, nor principles explicitly stipulate such a requirement. Third, the Court interpreted the phrase "previously elected through a general election" as referring to positions such as provincial and regency or municipal heads. Fourth, the Court considered comparative constitutional practice, noting that many countries in Asia, Africa, and the Americas have heads of state or government under the age of forty. Fifth, the Court interpreted the petitioner's request to add the phrase "provided that the candidate has experience as a state official elected through elections" as referring to regional elections as part of the electoral regime. Based on these considerations, the Court identified injustice and insufficient rationality in consideration point [3.14] and partially granted the petition. In the a quo case, the Court applied limitations relating to insufficient rationality and intolerable injustice.[26]

In the ninth decision, the author examines Decision Number 116/PUU-XXI/2023, which reviewed the constitutionality of Article 414 paragraph (1) of the Election Law concerning the parliamentary threshold. In consideration point [3.13], the Court noted that parliamentary threshold provisions had been reviewed at least six times previously, four times under Law Number 8 of 2012 and twice under Law Number 7 of 2017. In consideration point [3.15], the Court cited pre Law Number 7 of 2017 decisions which unanimously held that determining the level of the parliamentary threshold falls within the authority of the legislature and does not violate political rights, popular sovereignty, electoral justice, or rationality. This position was reaffirmed in subsequent decisions reviewing the parliamentary threshold under Law Number 7 of 2017, as stated in consideration point [3.16]. However, in

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25 *Putusan Mahkamah Konstitusi No 112/PUU-XX/2022*, Mahkamah Konstitusi.
26 *Putusan Mahkamah Konstitusi No 90/PUU-XXI/2023*, Mahkamah Konstitusi.

consideration point [3.17], the Court emphasized the petitioner's arguments regarding the lack of theoretical and academic foundations for determining the parliamentary threshold. It was found that the absence of methodological and argumentative bases rendered the existing threshold irrational. Furthermore, this deficiency resulted in wasted votes and disproportionate elections, contradicting popular sovereignty and creating injustice, as considered in points [3.18] and [3.19]. Based on these considerations, the Court declared Article 414 paragraph (1) conditionally unconstitutional and partially granted the petition. In the a quo case, the Court applied the limitation of rationality, while not explicitly articulating limitations relating to morality or intolerable injustice.[27]

In the final decision, the author examines Decision Number 62/PUU-XXII/2024, which reviewed the constitutionality of Article 222 of the Election Law concerning the presidential threshold. The Court noted that at least thirty three previous petitions had challenged the same provision. In prior decisions, the Court consistently held that the presidential threshold constituted an open legal policy and remained constitutional unless it violated morality, rationality, or intolerable injustice. Accordingly, the Court revisited the boundaries of these limitations and examined the original intent underlying the presidential threshold. In consideration point [3.24], the Court found that the amendments to Articles 6 and 6A of the Constitution were intended to strengthen and purify the presidential system.

De facto, the presidential threshold did not strengthen the presidential system but instead blurred it by intersecting it with parliamentary logic. In practice, countries with established presidential systems and multiparty legislatures do not impose a presidential threshold for nominating presidential candidates.[28] Thus, Article 222 of the Election Law lacked alignment with the constitutional spirit of purifying the presidential system. Furthermore, in consideration point [3.25], the Court found that the presidential threshold lacked a clear academic basis and therefore violated rationality. The infringement of voters' constitutional rights due to the loss of rational choice, as well as the unequal treatment of political parties in nominating presidential candidates, constituted intolerable injustice. These issues were compounded by the inapplicability of the presidential threshold in simultaneous elections and the existence of conflicts of interest between the legislature and the legal product, which constituted a violation of morality as a limitation of open legal policy. Based on these considerations, the Court granted the petition in its entirety. In the a quo case, the Court applied the limitations of rationality and

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[27] *Putusan Mahkamah Konstitusi Nomor 116/PUU-XXI/2023*, Mahkamah Konstitusi.

[28] Riyadi Eko Prasetyo & Dr Sodikin Dr Sodikin, "Analysis presidential Threshold Perspective of Law Number 7 of 2017" (2025) 7:2 Int J Adv Eng Manag 269–275 at 273–274..

intolerable injustice, while moral considerations were inferred through indicators of conflicting interests rather than explicitly stated.[29]

Through these ten decisions, the author identifies the functional application of the limitations of morality, rationality, and intolerable injustice. Not all decisions applied these limitations cumulatively. At least two decisions applied only rationality, one decision applied only intolerable injustice, two decisions applied rationality and intolerable injustice, and five decisions applied all three limitations. These limitations function as benchmarks for assessing the constitutionality of open legal policy. Inconsistencies in their application create uncertainty regarding constitutional standards, as evidenced in Decision Number 90/PUU-XXI/2023. Therefore, the author considers it necessary to trace the development of the application of these limitations through the ten decisions discussed above in order to identify their significance, clarify their use and placement, and examine their development in Constitutional Court jurisprudence, which will be further analyzed in the subsequent chapter.

2. Analysis of the Use of the Limitations of Morality, Rationality, and Intolerable Injustice in the Significance of the Emergence of the Development of Limitations

In its development, the use of the limitations of "morality, rationality, and intolerable injustice" is not only applied in a single breath (cumulatively) as limitations, but may also be applied separately, as discussed in the previous chapter. In addition to such application, there are also developments in the use and placement of these limitations. Therefore, the researcher employs [Table 1] to elaborate the use and placement of the limitations in the ten Constitutional Court decisions mentioned above.

Table 1. The Limits of Morality, Rationality, and Justice in Constitutional Court Decisions

No.	Decision	Phrase of Limitation Used	Findings in the Court's Legal Considerations	Other Combined Limitations
1.	Decision Number 51-52-59/PUU-VI/2008	"...the Court nevertheless cannot annul it, because something considered to be poor does not necessarily mean unconstitutional, unless the legal policy product clearly violates morality,	In legal consideration [3.17] as a limitation.	1. The policy does not exceed the authority to enact statutes. 2. It does not constitute an abuse

[29] *Putusan Mahkamah Konstitusi No 62/PUU-XXII/2024*, Mahkamah Konstitusi.

		rationality, and intolerable injustice".		of power. It is not manifestly contrary to the 1945 Constitution.
2.	Decision Number 52/PUU-X/2012	• "…according to the Court, it does not fulfill the principle of justice because it imposes different requirements on the parties…" • "…fulfills the rationality of equality and justice …" • "…, in fact, is contrary to popular sovereignty, political rights, and rationality, therefore…"	In legal considerations [3.18], [3.23], and [3.25.1]. ● [3.18]: as a principle. ● [3.23] and [3.25.1]: as limitations in general.	1. Equality 2. Popular Sovereignty 3. Political Rights
3.	Decision Number 15/PUU-XV/2017	• "Based on the considerations set out in points 1) to 4), the Court is of the opinion that the petitioner has legal standing." • Point 3 letter e, "… the reason for the existence of injustice due to the imposition of PKB and BBNKB resulting in double taxation …"	In the consideration of legal standing [3.5] as a limitation.	-
4.	Decision Number 22/PUU-XV/2017	"… discriminatory policies make it difficult for the Court not to declare such policies as violating morality, rationality, not conflicting with political rights, and constituting	In legal consideration [3.10.5] as a limitation.	Political Right

		intolerable injustice …"		
5.	Decision Number 53/PUU-XV/2017	• "….. differential treatment is the cause of electoral injustice. Referring to one of the indicators of electoral justice is equal treatment …" • "… is something that can be justified insofar as it does not violate morality, rationality, and intolerable injustice. Interpreting morality in the formulation ……"	In legal consideration [3.13.7] as a limitation. And in the dissenting opinion as a limitation.	Differential treatment
6.	Decision Number 93/PUU-XVI/2018	"… is its conformity with morality, rationality, and the absence of intolerable injustice. Therefore, insofar as the intended open legal policy does not conflict with morality, rationality, and does not contain intolerable injustice, such legal policy cannot be declared contrary to the 1945 Constitution …"	In consideration [3.14] and its derivative points as values contained within the norm a quo.	Manifestly contrary to the 1945 Constitution.
7.	Decision Number 112/PUU-XX/2022	• "…….. may be set aside if it is contrary to morality, rationality, and results in intolerable injustice [vide Constitutional Court Decision Number 93/PUU-XVI/2018], constitutes an abuse of authority	In legal consideration point [3.17.2] and in the concurring opinion point [6.2] of Constitutional Justice Saldi Isra as a limitation.	1. Abuse of authority. 2. Arbitrary action. 3. Exceeding the authority of the lawmaker.

		(detournement de pouvoir), or is carried out arbitrarily (willekeur) and exceeds the authority of the lawmaker [vide Constitutional Court Decision Number 51/PUU-XIII/2015 and previous Constitutional Court decisions] and or is contrary to the 1945 Constitution." • "except where such policy choices clearly violate morality, rationality, and intolerable injustice"		
8.	Decision Number 90/PUU-XXI/2023	"… in several decisions related to legal policy, the Court has often taken the position that legal policy may be set aside if it violates the principles of morality, rationality, and intolerable injustice …"	In legal consideration point [3.13.2] as a principle.	-
9.	Decision Number 116/PUU-XXI/2023	"… Likewise, the determination of the threshold percentage falls within the authority of the lawmaker insofar as it does not conflict with political rights, popular sovereignty, and rationality."	In legal consideration points [3.15.2] and [3.18] as limitations.	1. Political rights. 2. Popular sovereignty.
10.	Decision Number	"… as stipulated in Article 222 of Law Number 7 of 2017, it not only conflicts with	In legal consideration	1. Political rights.

	62/PUU-XXII/2024	political rights and popular sovereignty but also violates morality, rationality, and intolerable injustice, and is manifestly contrary to the 1945 Constitution of the Republic of Indonesia, thus providing strong and fundamental reasons for the Court to depart from its position in previous decisions …"	point [3.26] as a limitation.	2. Popular sovereignty . 3. Manifestly contrary to the 1945 Constitution of the Republic of Indonesia.

Through the ten decisions presented in [Table 1], the development of Constitutional Court decisions concerning open legal policy demonstrates that morality, rationality, and intolerable injustice do not always function as limitations in the review of open legal policy. There are eight decisions that position "morality, rationality, and intolerable injustice" as limitations in examining open legal policy. Furthermore, two of these decisions also employ the phrase "principles" of "morality, rationality, and intolerable injustice" in reviewing open legal policy, and one decision outlines that "morality, rationality, and intolerable injustice" in the review of open legal policy constitute "values" that must be contained within the norm a quo.

In the development of the decisions above, it can also be observed that "morality, rationality, and intolerable injustice" as limitations, principles, and values do not always form a single unified set. In several decisions, other limitations are also included or used simultaneously, either as characteristics, complements, or independent standards of review. The other limitations included alongside morality, rationality, and intolerable injustice include "discriminatory nature, political rights, the principle of popular sovereignty, the principle of the rule of law, the principle of equal treatment, the principle of guarantees of fair legal certainty, not exceeding the authority to enact laws, not constituting an abuse of power, and not being manifestly contrary to the 1945 Constitution".

These developing limitations may serve as evidence of violations of morality, rationality, and intolerable injustice, such as, for example, discriminatory characteristics and the principle of equal treatment. In addition, some limitations replace one of the elements of morality, rationality, and intolerable injustice, as illustrated in Decision Number 116/PUU-XXI/2023, which employs the limitations of political rights, popular sovereignty, and rationality. Thus, in the development of the use of the limitations of morality, rationality,

and intolerable injustice, the Court does not rely solely on these three limitations but may also substitute them with other limitations.

Such development constitutes a form of expansion of the authority of the Constitutional Court in reviewing open legal policy while still referring to the initial limitations formulated, namely the limitations of morality, rationality, and intolerable injustice. For example, the limitation of morality is not interpreted solely as morality within the 1945 Constitution. Beyond that, such morality also refers to the life of the nation and the state, which may be manifested through other principles such as the principle of popular sovereignty and the principle of political rights.[30] The same applies to other limitations such as rationality and intolerable injustice. This is also in line with the view of Constitutional Justice Saldi Isra, who states that in understanding the constitution, the Court cannot always think textually but must also adopt a progressive contextual approach while still adhering to the lines of demarcation within the constitution and the values contained therein.[31]

In addition, the Court may also employ standards of review and limitations other than morality, rationality, and intolerable injustice, where the use of such alternative standards and limitations may directly demonstrate violations of the limitations, principles, or values of morality, rationality, and intolerable injustice within an open legal policy norm. This is closely related to the doctrine of the living constitution[32] as it develops in Indonesia, in which the Court does not assess cases merely in a textual manner but expands the assessment into a contextual one while still referring to the lines of demarcation of the limitations and values within the constitution, in this case the limitations of morality, rationality, and intolerable injustice.[33]

This development is a logical consequence of constitutional flexibility following the amendments in the reform era, such that it affects not only the formal

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30 Annisa Salsabila, Tria Noviantika, & Ahmad Yani, "Initiating Constitutional Morality: Political Intervention, Ethical Reinforcement, and Constitutional Court Decisions in Indonesia" (2024) 10:2 Const Rev 505–537 at 520.

31 Nurrahman Aji Utomo, "Dinamika Hubungan Antara Pengujian Undang-Undang dengan Pembentukan Undang-Undang" (2016) 12:4 J Konstitusi 825 at 833.

32 Living Constitution, according to Fakhris Lutfianto Hapsoro and Ismail, in "Interpretation of the Constitution in Constitutional Review to Realize the Living Constitution" (2021) 50:4 Jurnal Hukum Pembangunan 992 at 998, is a concept that developed in the United States in which the Constitution is not only understood textually but also needs to be elaborated in light of developments occurring in society, so that the Constitution is not merely understood literally but also contextually.

33 Muhammad Addi Fauzani et al, "Living Constitution in Indonesia: The Study of Constitutional Changes Without A Formal Amendment" (2020) 7:1 Lentera Huk 69 at 71–72.

aspects[34] of the constitution but also the material aspects[35] in its interpretation and implementation, including open legal policy and its limitations. After examining the development of formal usage, the researcher needs to explore the material utility of morality, rationality, and intolerable injustice through Constitutional Court decisions within constitutional practice in Indonesia.

Analysis of the Utility Value of Limitations in Constitutional Practice

Normatively, the limitations, principles, and values of "morality, rationality, and intolerable injustice" have utility as standards of review in the judicial review of statutes in the practice of the Mahkamah Konstitusi. However, beyond this utility, a deeper understanding is required regarding the essential elements contained within these limitations, principles, and values. With respect to morality, its utility may be elaborated more broadly through the dialectic between Friedrich Nietzsche and Immanuel Kant. In his work entitled Groundwork of the Metaphysics of Morals, Kant presents a moral foundation based on values of good and evil that are universal, measurable by all individuals using the same method and yielding the same results.[36] Therefore, through Kant's work, the standard of morality may be tested through uniform assessments by all individuals without distinguishing situations and conditions, such as helping an elderly person without considering status and without expecting any reward as a truly moral act.

In contrast to Kant's view, Friedrich Nietzsche emerges as the antithesis of Kant's moral theory. According to Nietzsche, morality is not a value that can be assessed universally, but rather a value that has different standards in each action, which also refer to who the subject is, what the object is, and how the conditions are. Nietzsche argues that morality is a value that arises from a particular condition derived from experience, customs, and or the condition of an individual or a group.[37] As an example, Nietzsche compares the morality of workers or laborers with that of capital owners. In the same act, namely rebellion carried out by workers or laborers, the workers or laborers will state

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[34] The formal component of the 1945 Constitution of the Republic of Indonesia, according to Manfred Nowak, Djumantoro Purbo, and Sri Sulastini, in the book Pengantar Pada Rezim HAM Internasional (Jakarta: Raoul Wallenberg Institute, 2003) at 15, refers to the part of the constitution that contains matters concerning power as well as the limitations on the powers of state institutions and governing bodies.

[35] The material component of the 1945 Constitution of the Republic of Indonesia, according to ibid., consists of values, objectives, and goals to be achieved by the state, democracy, social justice, good governance, environmental protection, and fundamental human or citizens' rights.

[36] Immanuel Kant, *Dasar-Dasar Metafisika Moral* (Sleman: Insight Reference, 2022) Cetakan Kedua at 10.

[37] Friedrich Nietzsche, *The birth of tragedy and The genealogy of morals* (Garden City, N.Y., Doubleday, 1956) at 22–23.

that the act of rebellion is patriotic and moral. Meanwhile, capital owners will state that such an act is unpatriotic and immoral. Through this example, Nietzsche seeks to demonstrate that moral values are not universal values, but rather sectoral values originating from customs or from the a priori perspectives of each subject.

These two types of morality are analogous to ius cogens and ius dispositivum in international law. This indicates that in their application within proceedings before the Constitutional Court, such limitations, principles, or values must also be distinguished in their use. For instance, in cases reviewing provisions in the Criminal Code or provisions containing the constitutional rights of every person, the morality applied is universal morality as proposed by Kant. Meanwhile, with respect to technical rules, systematics, and matters that differ and are not possessed by every legal subject, such as the system of general elections, procedures for general elections, and the determination of membership numbers in an institution, the morality applied is sectoral morality, as there are distinguishing factors among subjects in assessing such determinations.

With regard to rationality, its use as a standard of review must at least be examined from two perspectives, namely the formal aspect as written in the statute, and the material aspect in terms of its utility, which must be able to exist not only today but also in the future. This is reflected in the dialectic between Georg Wilhelm Friedrich Hegel and Karl Marx. According to Hegel, rationality is not based on empirical reality but on something holistic in nature, referred to as the whole.[38] This whole is a manifestation of ideas expressed in the real world. This creates the conception that ideas constitute the primary whole, serving as the key to shaping the secondary real world into a better condition.[39] Such rationality forms the basis of the material aspect to produce norms capable of addressing future challenges, not merely existing problems of the present. This Hegelian thought becomes the thesis for Karl Marx's critique, which asserts that Hegel's rationality constitutes an inverted method.

According to Marx, rationality should originate from the real world and then be manifested into ideas. Thus, the real world is primary, while ideas are secondary, forming thought to address problems that exist today.[40] Through this dialectic, the use of rationality in statutory review may be applied as a standard of review when a norm contradicts existing conditions and when

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[38] Charles Barbour, "The Logic Question: Marx, Trendelenburg, and the Critique of Hegel" (2023) 32:3 Hist Mater 252–281 at 274.

[39] Andi Muawiyah Ramly, *Peta Pemikiran Karl Marx: (materialisme dialektis dan materialisme historis)*, cetakan iv edn (Yogyakarta: LKiS, 2004) at 68.

[40] Pham Thi Kien, "Marxist philosophy and its influence on today's world" (2025) 22:1 Kalagatos ek25008 at 8.

such a norm in the future has the potential to violate rationality and cause harm to all people.

With respect to intolerable injustice, it may be applied using the perspective of John Rawls. According to Rawls, justice consists of social values distributed equally, except where unequal distribution benefits everyone.[41] When a norm a quo contains values that cause harm to parties directly affected by the norm, it may be said that such a norm constitutes intolerable injustice. Based on the explanation above, it can be seen that morality, rationality, and intolerable injustice, whether as limitations, principles, or values in statutory review, may normatively be applied in accordance with the determinations described above.

Accordingly, these three limitations become the key of judicial legal policy that may be expanded into principles, doctrines, or norms. Such expansion must continue to observe the fundamental values, namely the limitations of morality, rationality, and intolerable injustice as standards of review in the judicial review of statutes containing or embodying open legal policy. This is useful in the practice of statutory review not only for the Constitutional Court, but also for petitioners in formulating petitions for judicial review of statutes containing or embodying open legal policy.

Furthermore, from a practical perspective, the utility of these limitations does not function solely within the practice of statutory review before the Constitutional Court. Beyond that, such limitations, principles, and values also hold significance in state governance practices. Within the concept of separation of powers, there exists a mechanism of checks and balances among branches of state power to prevent the absolutism of power within a single branch by reducing the role of other branches.[42] The limitations, principles, or values as described above function as forms of checks and balances that must be observed by branches of state power outside the judicial institution. In the context of lawmaking, the legislative branch, particularly in enacting statutes containing or embodying open legal policy, must align with and not contradict the limitations, values, or principles of “morality, rationality, and tolerable justice”. Similarly, the executive branch in carrying out governance is also required to comply with morality, rationality, and tolerable justice.

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41 Andra Triyudiana & Putri Neneng, “Penerapan Prinsip Keadilan Sebagai Fairness Menurut John Rawls Di Indonesia Sebagai Perwujudan Dari Pancasila” (2024) 2:01 Soll J Kaji Kontemporer Huk Dan Masy, online: <https://journal.forikami.com/index.php/dassollen/article/view/528> at 7–9.

42 Ria Casmi Arrsa, “Pemilu Serentak dan Masa Depan Konsolidasi Demokrasi” (2016) 11:3 J Konstitusi 515 at 533.

Conclusion

In conclusion, it can be observed that the limitations of "morality, rationality, and intolerable injustice" continue to develop. Such development remains within the lines of constitutional demarcation as well as the values contained in the constitution that serve as the limitations, namely morality, rationality, and intolerable injustice. Initially, these limitations emerged and were applied cumulatively. However, in their development, these limitations are not always applied cumulatively, but may also be applied in an alternative-substitutive manner alongside other limitations introduced by the Mahkamah Konstitusi. In addition, the positioning of "morality, rationality, and intolerable injustice" does not always function as limitations, but may also be applied as values or principles contained within norms embodying open legal policy and which may not be deviated from by either the legislature or the implementers of statutes. Accordingly, in state practice, such limitations, principles, and values constitute obligations that must be observed by all branches of power as a mechanism of checks and balances among state institutions in order to prevent overlapping of powers.

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