

From Judicial Restraint to Judicial Activism: A Comparison of Decisions Number 30-74/PUU-XII/2014 and 22/PUU-XV/2017

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Abstract: In the case review of decision Number 30-74/PUU-XII/2014 and 22/PUU-XV/2017, the Constitutional Court experienced a shift from judicial restraint to judicial activism. The object of the case being tested was Article 7, paragraph (1) of the Marriage Law relating to the age limit for marriage. Article 7, paragraph 7 (1) of the Marriage Law is an open legal policy. In practice, the Constitutional Court applies the principle of judicial restraint as stated in the decision 30-74/PUU-XII/2014. This is different from decision 22/PUU-XV/2017. This essay formulates the shift in the Constitutional Court's stance from judicial restraint to judicial activism. The change in the Constitutional Court's stance opens up important questions regarding the consistency and limits of its authority in a state of law and living constitution in the Constitutional Court's decisions. This research uses a regulatory approach (statute approach) and a conceptual approach (conceptual approach). The results of this study are the differences in legal considerations in decisions 30-74/PUU-XII/2014 and 22/PUU-XV/2017. These differences arise in legal considerations and verdicts. Second, the shift of the Constitutional Court from judicial restraint to judicial activism is marked by differences in viewing the testing of open legal policies, the form of progressiveness of the Constitutional Court, and judicial activism in enforcing justice in a limited manner. Third, the living constitution theory requires the Constitutional Court to re-interpret the Constitutional Court's powers within the Constitution. This interpretation must be in line with the legal needs of society, particularly in the context of the age limit for marriage.

Keywords: Constitutional court; shift; judicial restraint; judicial activism.

Introduction

The authority to review laws against the 1945 Constitution (UUD 1945) rests with the Constitutional Court. This is mandated by Article 24C paragraph (1) of the 1945 Constitution.¹ Nonetheless, not all articles submitted for constitutional review can be examined by the Constitutional Court. This issue is reflected in the review of regulations in laws regarding the authority of open legal policy. Article 20 paragraph (1) and Article 20A paragraph (1) of the 1945 Constitution mandate the House of Representatives (DPR) as the law-making body, together with the President, in accordance with Article 5 paragraph (1) and Article 20 paragraph (2) of the 1945 Constitution.² In the formation of legislation, there are two models of legal products. First, organic laws whose subject matter has been determined by the 1945 Constitution. Organic laws are laws enacted to directly implement the mandate of the provisions of the Constitution. Second, non-organic laws whose subject matter has not been regulated in the 1945 Constitution. The 1945 Constitution formulates organic laws with '...regulated by law,' and '...regulated in law.'

¹M. Asro, "Kewenangan Mahkamah Konstitusi Dalam Undang-Undang Dasar Negara Republik Indonesia Tahun 1945," *ADLIYA: Jurnal Hukum Dan Kemanusiaan* 11, no. 2 (2019): 151-64, <https://doi.org/10.15575/adliya.v11i2.4857>.

²Ahmad Yani, "Analisis Konstruksi Struktural Dan Kewenangan DPR Dalam Fungsi Legislasi Berdasarkan Undang-Undang Dasar 1945," *Jurnal Konstitusi* 15, no. 2 (2018): 348, <https://doi.org/10.31078/jk1526>.

Next, non-organic laws are laws whose authority is delegated to the House of Representatives (DPR). The authority referred to here is the authority to regulate the content of laws. The content of the law is regulated in Article 10 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Legislation (Law on the Establishment of Legislation). In the context of legislation, the policy of forming laws is said to be open when the 1945 Constitution, as a higher legal norm, does not regulate or provide clear limitations regarding what and how certain materials should be regulated by law. The conditions for the formation and/or content of laws are considered an open legal policy is, first, granting a mandate to lawmakers without accompanying limitations on the regulation of the content. Second, the 1945 Constitution does not provide a mandate to lawmakers to further regulate certain matters.³

From the definition above, open legal policy refers to non-organic laws or the substantive content in laws that have not been determined by the 1945 Constitution. Therefore, lawmakers have full authority in determining the material content within open legal policy. This also serves as an affirmation of Article 20 paragraph (1) and Article 20A paragraph (1) of the 1945 Constitution, where the House of Representatives holds the legislative function.⁴

In terms of testing open legal policies, the Constitutional Court often exercises restraint. In addition to avoiding the Constitutional Court's involvement in the regulation of a norm, the Constitutional Court also firmly adheres to the principle of separation of powers. This is to prevent the interests of the Constitutional Court from entering into the testing of a norm. This principle is called judicial restraint. Judicial restraint is the self-restraint exercised by the judiciary in carrying out its functions without interfering with other branches of power within the framework of the principle of separation of powers.⁵

The Constitutional Court, in reviewing open legal policy, always avoids conducting such a review. The Constitutional Court consistently maintains that this is the authority of the legislative body. This aligns with the principle of judicial restraint. Even in the review of the presidential threshold, the Constitutional Court did not change its stance. The presidential threshold is always stated as an open legal policy, even though it has been reviewed during the 2009, 2014, and 2019 presidential elections in six different decisions.

Nonetheless, the Constitutional Court can deviate from its founder in terms of reviewing open legal policy. The Constitutional Court will depart from its stance as long as the provisions in the open legal policy clearly violate morality, rationality, and result in intolerable injustice, contradict political rights, the sovereignty of the people, and as long as the policy does not exceed the authority of the legislator and is not an abuse of power, and is not clearly in conflict with the 1945 Constitution.⁶

Deviations from the principle of judicial restraint were made by the Constitutional Court in reviewing the age of marriage. In Decision Number 30-74/PUU-XII/2014, the Constitutional Court considered that the minimum age limit for marriage is regarded as a national consensus that constitutes an open legal policy.⁷ The lawmakers, who considered various aspects wisely while

³ Mardian Wibowo, "Menakar Konstitusionalitas Sebuah Kebijakan Hukum Terbuka Dalam Pengujian Undang-Undang," *Jurnal Konstitusi* 12, no. 2 (2016): 196, <https://doi.org/10.31078/jk1221>.

⁴ Sugiman, "Fungsi Legislasi DPR Pasca Amandemen UUD NKRI 1945," *Jurnal Ilmiah Hukum Dirgantara* 10, no. 2 (2020): 173-82, <https://doi.org/10.35968/jh.v10i2.468>.

⁵ W. Dramanda, "Menggagas Penerapan Judicial Restraint Di Mahkamah Konstitusi," *Jurnal Konstitusi* 11, no. 4 (2014): 617-31.

⁶ Konstitusi Mahkamah, Putusan Mahkamah Konstitusi 22/PUUU-XV/2017 (2017).

⁷ 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)," *Jurnal Lex Renaissance* 5, no. 1 (2020), <https://doi.org/10.20885/jlr.vol5.iss1.art1>.

taking into account the values existing at that time, in 1974. In its ruling, the Constitutional Court also rejected the review. However, in Decision Number 22/PUU-XV/2017, the Constitutional Court provided different considerations and a different ruling.

Decision Number 22/PUU-XV/2017 indicates a shift of the Constitutional Court from judicial restraint to judicial activism. In its considerations and ruling, the Constitutional Court stated that the marriage age limit stipulated in Article 7 paragraph (1) of Law Number 1 of 1974 concerning Marriage (Marriage Law) is contrary to the 1945 Constitution and has no binding legal force.⁸

From the description above, the author sees the urgency of this research summarized in the following points: first, the emergence of dynamics from the shift in the stance of the Constitutional Court from a position of silence, or restraint in the law-making process by the court (judicial restraint). In Decision 30-74/PUU-XII/2014, it was considered that the matter of determining age limits falls within the domain of the legislature. However, this stance shifted from judicial restraint to judicial activism. The Constitutional Court eventually granted the petition through Decision 22/PUU-XV/2017. This is what the researcher intends to study – why the shift in the stance of the Constitutional Court occurred.

Secondly, in the practice of constitutional governance and the principles of a state based on law, is it possible for the establishment of courts to shift? Does the Constitutional Court have a recent perspective on open legal policy in relation to age limits? This becomes interesting when linked to and reviewed from the standpoint of a state based on law. Moreover, within the age limits, there are issues of children's rights, equality, and protection against discriminatory practices. Third, the researcher intends to delve deeper into the shift in the Constitutional Court's role in safeguarding citizens' constitutional rights within the limits of the marriage age. This section seeks to further examine why there has been a shift in efforts to protect citizens' constitutional rights within the constraints of the marriage age. This section will be analyzed using the living constitution theory.

Method

The research focuses on library research. The legal materials used are secondary legal materials in the form of Constitutional Court Decision Number 22/PUU-XV/2017 and Constitutional Court Decision Number 30-74/PUU-XII/2014. A conceptual approach and a statutory approach are applied. The conceptual approach is used to examine how the formulation of judges' legal considerations is shaped, the arguments presented, and the rulings delivered in the judicial review. The statutory approach is used to trace various regulatory formulations related to open legal policy, judicial restraint, and judicial activism. The legal materials are referred to in order to provide an overview of the legal foundations used in testing the norms of open legal policy, as well as how the Constitutional Court decided Constitutional Court Decision Number 22/PUU-XV/2017 and Constitutional Court Decision Number 30-74/PUU-XII/2014.

This study is a literature-based research focusing on Constitutional Court Decision Number 22/PUU-XV/2017 and Constitutional Court Decision Number 30-74/PUU-XII/2014. This research only uses secondary data from Constitutional Court Decision Number 22/PUU-XV/2017 and Constitutional Court Decision Number 30-74/PUU-XII/2014. This study aims to build a theoretical foundation, understand legal concepts, and examine juridical arguments without conducting field data collection. Data

⁸ Syaifullahil Maslul, "Judicial Restraint Dalam Pengujian Kewenangan Judicial Review Di Mahkamah Agung," *Jurnal Yudisial* 15, no. 3 (2023), <https://doi.org/10.29123/jy.v15i3.496>.

collection is carried out through the inventory of Constitutional Court decisions. Constitutional Court Decision Number 22/PUU-XV/2017 and Constitutional Court Decision Number 30-74/PUU-XII/2014 are used as the main data for review purposes. Furthermore, conceptual and statutory approaches are applied to answer the existing problem statements.

Result and Discussion

Comparison of the Constitutional Court's Legal Considerations in Reviewing the Age Limit for Marriage in Decision Number 30-74/PUU-XII/2014 and 22/PUU-XV/2017

In a verdict, judges or panels of judges are required to articulate legal considerations. Legal considerations are the result born from the trial process, which is an inseparable part of the judge's knowledge. Legal considerations form the foundation upon which the ruling is built. The relevance of the ruling is always connected to the legal considerations.⁹ The ruling's verdict can't deviate from the legal reasoning, or vice versa.

Legally, legal considerations are regulated in Article 14 paragraph (3) of Law Number 48 of 2009 concerning Judicial Power (Law on Judicial Power). This article explains that judges are obliged to convey legal considerations or legal opinions regarding the cases being tried or examined. Furthermore, legal considerations are an inseparable part of the decision. As an obligation, legal considerations represent a judge's accountability in deciding a case.¹⁰ Judges must consider carefully and thoroughly in order to minimize errors in delivering their decisions.¹¹

The matter of legal considerations is further emphasized in Article 53 of the Law on Judicial Power. Article 53, paragraph (2) explains that a decision must include legal considerations. These legal considerations are based on correct and strong reasons and contain legal grounds related to the case being tried. In adjudicating case number 30-74/PUU-XII/2014, the Constitutional Court considered various aspects. In reviewing laws against the 1945 Constitution at the Constitutional Court, it is required to present the norms being tested, whether in the form of articles, paragraphs, or even laws. Furthermore, it is also required to present the benchmarks in the review, which are none other than the articles of the 1945 Constitution.¹²

In the ruling of case number 30-74/PUU-XII/2014, the article being tested was Article 7 paragraph (1) of the Marriage Law. The petitioners argued that there was discrimination regarding the regulation of the marriage age limit. In the regulation, men were given an age limit of 19 (nineteen) years, while women were 16 (sixteen) years. This was considered to conflict with Article 28A, Article 28B paragraphs (1) and (2), Article 28C paragraph (1), Article 28D paragraph (1), Article 28G paragraph (1), Article 28H paragraphs (1) and (2), and Article 28I paragraphs (1) and (2) of the 1945 Constitution. From the outset, this regulation was evidently showing differences. These

⁹ Lilik Mulyadi, *Kompilasi Hukum Pidana Dalam Perspektif Teoritis Dan Praktek Pradilan* (Bandung: Mandar Maju, 2007).

¹⁰ Dwi Hananta, "Pertimbangan Keadaan-Keadaan Meringankan Dan Memberatkan Dalam Penjatuhan Pidana / Aggravating and Mitigating Circumstances Consideration on Sentencing," *Jurnal Hukum Dan Peradilan* 7, no. 1 (2018): 87, <https://doi.org/10.25216/jhp.7.1.2018.87-108>.

¹¹ Muhammad Danil, Chabibatul Maulidah, and Melia Rosa, "Constitutional Court Decision in Indonesia Reformasi Undang-Undang Perkawinan Melalui Putusan Mahkamah Konstitusi Di Indonesia," *Jurnal Konstitusi* 21, no. 4 (2024), <https://doi.org/https://doi.org/10.31078/jk2147>.

¹² Moh. Ali Hofi, "Judicial Review Satu Atap Di Mahkamah Konstitusi Sebagai Refleksi Terhadap Problematika Dan Tantangan Kekuasaan Kehakiman Di Indonesia," *HUKMY: Jurnal Hukum* 1, no. 2 (2021): 133-48.

differences stem from gender differences. Ultimately, the different regulations have now led women into a condition of discrimination.¹³ Thus, it causes many negative effects. The Constitutional Court, in the consideration of Decision Number 30-74/PUU-XII/2014, began by quoting religious arguments present in Indonesia. Islam, for example, states that marriage is an encouragement aimed at those who are mature, capable, and intended to continue the lineage.¹⁴ In addition, in Hindu teachings, a woman can only be married at the age of 21.¹⁵

In the legal considerations of Constitutional Court Decision Number 30-74/PUU-XII/2014, the court cited three main reasons. First, the regulation in Article 7 paragraph (1) of the Marriage Law, which constitutes an Open Legal Policy.¹⁶ Open legal policy is the legal option chosen by lawmakers in formulating norms. The legal option chosen by lawmakers or the House of Representatives is the original jurisdiction. This authority came into existence with the enactment of Article 20, Article 20A paragraph (1), and Article 21 of the 1945 Constitution.¹⁷

Further arrangements related to open legal policy can be traced from the provisions on the content of laws. This is as regulated in the Law on the Formation of Legislation. In Article 10, paragraph (1), letter e of the Law on the Formation of Legislation¹⁸:

“The subject matter that must be regulated by law contains:....

e. fulfillment of legal needs in society.”

The subject matter in letter e differs from the subject matter in letters a, b, c, and d in Article 10 paragraph (1) of the Law on the Formation of Legislation. The difference is seen in the limitations of content stipulated in the law. For example, letter a is limited to matters already outlined in the 1945 Constitution, and letter b is limited to the presence or absence of directives from other laws. This, of course, serves as a distinction that in principle points to an open legal policy.

The unlimited differences in terms of regulation are the reason given by the Constitutional Court for not intervening. The Constitutional Court does not enter this area of authority solely to maintain the judicial realm's non-interference in the legislative process. This principle is commonly referred to as the separation of powers. This principle emphasizes the effort to avoid encroaching on the authority of other branches.¹⁹

Based on a review of several Constitutional Court decisions, the Constitutional Court consistently refrains from granting tests on open legal policy. This is based, first, on the fact that open legal policy is the authority of the legislators. Second, the judicial branch does not interfere in legislative affairs. Finally, it is to maintain institutional relations within the principle of separation of powers and the principle of checks and balances. The testing of open legal policy is presented in the following table:

Table 1. Testing of Open Legal Policy at the Constitutional Court

¹³ Jordy Herry Christian and Kirana Edenela, “Terampasnya Hak-Hak Perempuan Akibat Diskriminasi Batas Usia Perkawinan,” *Lex Scientia Law Review* 3, no. 1 (2019): 1-14.

¹⁴ Mahkamah Konstitusi, 30-74/PUU-XII/2014 (2014).

¹⁵ Mahkamah Konstitusi.

¹⁶ Mahkamah Konstitusi.

¹⁷ Muh. Yusuf, “Fungsi Legislasi Dewan Perwakilan Rakyat Dalam Sistem Ketatanegaraan Indonesia,” *Clavia: Jurnal Of Law* 17, no. 1 (2019): 49-62.

¹⁸ Daniel Samosir, “Faktor-Faktor Yang Menyebabkan Materi Muatan Undang-Undang Bertentangan Dengan UUD 1945,” *Jurnal Konstitusi* 12, no. 4 (2015).

¹⁹ E. Zaenal Muttaqin, “Konsep Pemisahan Kekuasaan (Separation Of Power) Pasca Amandemen UUD 1945 Antara Lembaga Eksekutif Dan Legislatif,” *Al Qisthâs; Jurnal Hukum Dan Politik* 6, no. 1 (1945): 14-31.

Nu.	Decision Number	Legal Considerations
1	a. Number 51-52-59/PUU-VI/2008, b. 56/PUU-VI/2008 c. 14/PUU-XI/2013 d. 46/PUU-XI/2013 e. 108/PUU-XI/2013 f. 53/PUU-XV/2017	The Constitutional Court stated that the regulation of the Presidential Threshold is an open legal policy, which falls under the authority of the legislators.
About Testing the Presidential <i>Threshold</i>		
2	46/PUU-XIV/2016 About the Testing of Adultery Articles	The Constitutional Court believes that this is entirely within the authority of the legislators through criminal policy, which is part of criminal law politics.
3	74/PUU-VIII/2010 Concerning the Judicial Review of the Shipping Law	The court does not have the authority to add the word "facility" to the phrase "provision and/or service of cargo loading and unloading" to become the phrase "provision and/or service of cargo loading and unloading facilities." This is because it constitutes an open legal policy.
4	16/PUU-V/2007 and 3/PUU-VII/2009 Concerning the Review of the Electoral Threshold and Parliamentary Threshold	The Constitutional Court thinks that the Electoral Threshold and Parliamentary Threshold are within the authority of the lawmakers. The Constitutional Court does not have the right to intervene as long as it does not conflict with political rights and sovereignty. rakyat, dan rasionalitas
5	30-74/PUU-XII/2014 Concerning the Review of Marriageable Age	The Constitutional Court thinks that the issue of the minimum age for marriage is considered a matter of national consensus, which is an open legal policy of lawmakers who prudently take into account various considerations while considering the values prevailing at that time, which was 1974.

The second legal consideration is the legislative review process. The second legal consideration is closely related to the first legal consideration. Applicants should not force their will in the effort to amend Article 7, paragraph (1) of the Marriage Law through the judicial review

process. However, it should be done through the legislative review process.²⁰ This authority is an authority that is inseparable from the authority to examine legal products, viewed from whichever institution is reviewing them.²¹

In this authority, the House of Representatives (DPR) as the legislator based on Article 20, Article 20A paragraph (1), and Article 21 of the 1945 Constitution, as well as Article 10 paragraph (1) of the Law on the Formation of Legislation, has the right to amend its own legal products. In amending its legal products, the DPR can add, reduce, replace, or even repeal the laws it has enacted.²² This authority is similar to the concept of the principle of *contrarius actus*. This principle means that the body or institution that issues a policy also has the authority to modify, amend, or revoke it.²³ From this explanation, it is clear that the Constitutional Court intends for efforts to make changes to be directed towards the legislative process in the House of Representatives.

The final consideration in Decision Number 30-74/PUU-XII/2014 is the Constitutional Court's reluctance to limit changes in the future.²⁴ This is inseparable from the Constitutional Court's decision, which is final. This finality is stated in Article 24C paragraph (1) of the 1945 Constitution.²⁵ The final nature means the absence of further legal remedies and the obligation of the maker to comply with it or of the party addressed by the decision. Issues that are concrete in determining the boundaries of marriage age, as decided by the Constitutional Court, will actually lead to limitations in the future.

The Constitutional Court decision is further the Constitutional Court decision 22/PUU-XV/2017. In its legal reasoning, the Constitutional Court explained 3 three legal considerations.²⁶ First, there is discrimination in the formulation of the norm in Article 7, paragraph (1) of the Marriage Law. Article 7, paragraph (1) of the Marriage Law clearly discriminates against women.²⁷ Women are given a lower age limit than men. This difference is not in line with Article 27 of the 1945 Constitution, which states that all people are equal before the law without exception based on religion, ethnicity, race, group, or gender. This regulation is also not denied by the Constitutional Court, as it was an agreement made in 1974. Therefore, it should be open to being changed and improved.²⁸

The second consideration is the open legal policy and its exceptions. The Constitutional Court does not deny that Article 7, paragraph (1) of the Marriage Law is an open legal policy. However, the Constitutional Court sets boundaries on when and under what conditions it can

²⁰ I Ketut Sukawati and Lanang Putra, "Legal Policy in the Decision of the Constitutional Court and the Formation of Law," *Journal of Law and Sustainable Development* 11, no. 12 (2023).

²¹ Muhammad Fadli Efendi, "Mekanisme Legislative Review Peraturan Pemerintah Pengganti Undang-Undang Dalam Perspektif Politik Hukum," *Veritas et Justitia* 7, no. 2 (2021): 406-30, <https://doi.org/10.25123/vej.v7i2.4215>.

²² Wiwit Pratiwi and Sherly Nelsa Fitri, "The Implication of Presidential Threshold as an Open Legal Policy in Indonesia's General Election," *International Journal of Multidisciplinary Research And Analysis* 06, no. 11 (2023), <https://doi.org/10.47191/ijmra/v6-i11-09>.

²³ Imam Sukadi, "Asas *Contrarius Actus* Sebagai Kontrol Pemerintah Terhadap Kebebasan Berserikat Dan Berkumpul Di Indonesia," *Mimbar Keadilan* 12, no. 2 (2019): 181, <https://doi.org/10.30996/mk.v12i2.2457>.

²⁴ Mahkamah Konstitusi, 30-74/PUU-XII/2014.

²⁵ Johansyah Johansyah, "Putusan Mahkamah Konstitusi Bersifat Final Dan Mengikat (Binding)," *Solusi* 19, no. 2 (2021): 165-82, <https://doi.org/10.36546/solusi.v19i2.359>.

²⁶ Mahkamah, Putusan Mahkamah Konstitusi 22/PUUU-XV/2017.

²⁷ Aristoni Aristoni, "Kebijakan Hukum Perubahan Batasan Minimal Umur Pernikahan Perspektif Hukum Islam," *Jurnal USM Law Review* 4, no. 1 (2021): 393-413.

²⁸ Daud Rismana et al., "The Controversy on the Minimum Age for Marriage in Indonesia: Factors and Implications," *Journal of Sustainable Development and Regulatory Issues (JSDERI)* 2, no. 1 (2024).

review an open legal policy.²⁹ The Constitutional Court has the authority to review open legal policy on the condition that the regulation, norm, or policy violates morality, rationality, and causes intolerable injustice, contradicts political rights, the sovereignty of the people, and provided that the policy does not exceed the legislative authority and is not an abuse of power, as well as not being clearly in conflict with the 1945 Constitution.³⁰

The final consideration is that the Constitutional Court does not set an age limit for marriage.³¹ The Constitutional Court is considering annulling Article 7, paragraph (1) of the Marriage Law.³² However, it does not intend to enter the realm of lawmakers. The Constitutional Court is willing to annul Article 7 paragraph (1) of the Marriage Law, but still places lawmakers as the authority to change the provisions on the age of marriage. This change is limited to 3 (three) years.

From the description above, by comparing the two decisions 30-74/PUU-XII/2014 and 22/PUU-XV/2017, the comparison obtained is as follows. First, the difference in the legal provisions used in the review. In the review of decision 30-74/PUU-XII/2014, the petitioner referred to Articles 28A, 28B paragraphs (1) and (2), 28C paragraph (1), 28D paragraph (1), 28G paragraph (1), 28H paragraphs (1) and (2), as well as 28I paragraphs (1) and (2) of the 1945 Constitution. Meanwhile, Decision 22/PUU-XV/2017 referred to Article 27 of the 1945 Constitution.³³

The subject matter in the decisions Number 30-74/PUU-XII/2014 and 22/PUU-XV/2017 is the same, namely Article 7 paragraph (1) of the Marriage Law. In the Constitutional Court itself, there is a prohibition called *ne bis in idem*. This is regulated in Article 60 of the Constitutional Court Law. *Ne bis in idem* means that a case must reach a conclusion or finality in its process. Therefore, the court is prohibited from re-examining a case that has already been decided.³⁴

The Constitutional Court in cases 30-74/PUU-XII/2014 and 22/PUU-XV/2017 has clearly adjudicated the same object of the case, namely Article 7 paragraph (1) of the Marriage Law. However, *ne bis in idem* in this matter was excluded. This is due to differences in the points of examination in cases 30-74/PUU-XII/2014 and 22/PUU-XV/2017. The second comparison is the difference in viewing open legal policy. In the decision of 30-74/PUU-XII/2014, the Constitutional Court held that it is not possible to examine open legal policy. This is because it falls under the authority of the lawmaker.³⁵ In addition, changes to regulations within the open legal policy should preferably be carried out through the legislative review process. The Constitutional Court holds the position that the involvement of the Constitutional Court in determining the marriage age conflicts with the principle of separation of powers.

²⁹ Radita Aje, "Batasan Pilihan Kebijakan Pembentuk Undang-Undang (Open Legal Policy) Dalam Pembentukan Peraturan Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi," *Jurnal Legislasi Indonesia (Indonesian Journal of Legislation)* Vol. 13, no. No.2 Juni (2016): 111-20.

³⁰ Mahkamah, Putusan Mahkamah Konstitusi 22/PUUU-XV/2017.

³¹ Mahkamah.

³² Syaifullahil Maslul, "Progresifitas Mahkamah Konstitusi Dalam Pengujian Batasan Usia Perkawinan," *Al-Hukama* 12, no. 1 (2022).

³³ Mahkamah, Putusan Mahkamah Konstitusi 22/PUUU-XV/2017.

³⁴ Ilhamdi Putra and Khairul Fahmi, "Karakteristik Ne Bis In Idem Dan Unsurnya Dalam Hukum Acara Mahkamah Konstitusi," *Jurnal Konstitusi* 18, no. 2 (2021): 345, <https://doi.org/10.31078/jk1824>.

³⁵ Tanto Lailam and Nita Andrianti, "Legal Policy of Constitutional Complaints in Judicial Review: A Comparison of Germany, Austria, Hungary, and Indonesia," *Bestuur Journal* 11, no. 1 (2023).

The Constitutional Court's view in 22/PUU-XV/2017 deviates from the decision 30-74/PUU-XII/2014. The Constitutional Court argued that it has the authority to review open legal policies. The Constitutional Court has the authority to review open legal policies if the provisions in the norm regulate matters, and such regulations, norms, or policies violate morality, rationality, and result in intolerable injustice, contradict political rights, the sovereignty of the people, and as long as the policy does not exceed the authority of the lawmaker and is not an abuse of power, and is not clearly contrary to the 1945 Constitution.

The difference in perspective has resulted in differences in decision-making. The Constitutional Court rejected the judicial review of Article 7 paragraph (1) of the Marriage Law in decision 30-74/PUU-XII/2014 and approved the review of the a quo Article in decision 22/PUU-XV/2017. The third comparison is the attempt to annul Article 7 paragraph (1) of the Marriage Law to a limited extent. This is only found in decision 22/PUU-XV/2017. The Constitutional Court, to a limited extent, granted the applicant's request by annulling Article 7 paragraph (1) of the Marriage Law. Article 7, paragraph (1) of the Marriage Law was declared to conflict with the 1945 Constitution and has no legally binding force until amended. In addition, the legislator is required to make changes to the marriage age limit no later than 3 (three) years after the ruling is pronounced.

Legal Review on the Shift of the Constitutional Court from Judicial Restraint to Judicial Activism in Decisions 30-74/PUU-XII/2014 and 22/PUU-XV/2017

The shift in the Constitutional Court's stance in decision 30-74/PUU-XII/2014 and decision 22/PUU-XV/2017 marks a shift from Judicial Restraint to Judicial Activism. In its main principle, the Constitutional Court has always been reluctant to examine open legal policies. The principle of reluctance, or in other words, refraining from entering the realm of legislative authority/law-making, is the principle of judicial restraint.³⁶ The Constitutional Court itself also explains that not everything considered bad can be used as a reason to deem a regulation, norm, or law unconstitutional.³⁷

The ability to exercise restraint in the governance process is very important. This is to prevent interference from certain parties in the governance process. This process aligns with the principle applied in power in Indonesia, which is the separation of powers.³⁸ Thus, all authority in its implementation operates within the framework established by laws and regulations at all levels.

In the review of Article 7 paragraph (1) of the Marriage Law in case 22/PUU-XV/2017, the Constitutional Court changed its view. The Constitutional Court explained several reasons related to the shift in its principle in the review of open legal policy. The Constitutional Court highlighted the existence of evident discrimination in the form of different marriage age limits based on gender. Secondly, the Constitutional Court detailed the factors that could lead it to change its stance in reviewing open legal policy or the application of judicial restraint in such reviews. Finally, although the Constitutional Court granted the petition, it still allowed the lawmakers who formulated the norms or rules regarding the age limit for marriage to remain responsible.

This shift stems from matters that have been established by the Constitutional Court in examining open legal policy. The Constitutional Court considers that the principle of judicial

³⁶ Dramanda, "Menggagas Penerapan Judicial Restraint Di Mahkamah Konstitusi."

³⁷ Mahkamah Konstitusi, 30-74/PUU-XII/2014.

³⁸ Sarip and Nur Rahman, "Separation Of Power: Berpisah Untuk Bertemu," *Jurnal De Jure* 4, no. 2 (2020): 53-65.

restraint can be set aside in certain circumstances. Such reasons include violations of morality or the existence of injustice that cannot be tolerated.³⁹ There is a deviation from political rights, the supremacy of the people. In addition, there is also the reasoning that the Constitutional Court does not intervene in the authority of the legislator, the legislator does not abuse its power, and it is not in conflict with the 1945 Constitution.

The shift of the Constitutional Court from judicial restraint to judicial activism in reviewing Article 7 paragraph (1) of the Marriage Law is a form of the Constitutional Court's progressiveness. The Constitutional Court places humanitarian issues and considerations in safeguarding rights and dignity. At the very least, the Constitutional Court positions that the law serves humanity, not the other way around.⁴⁰

The judicial activism carried out by the Constitutional Court is limited. Although it recognizes and considers that it is an injustice, the Constitutional Court still does not enter the realm of lawmaking. In its legal considerations and ruling, the Constitutional Court stated that Article 7 paragraph (1) of the Marriage Law is contrary to the 1945 Constitution and has no legal force conditional upon certain terms. The condition is that the article remains in effect until amended by the House of Representatives within a period of 3 (three) years. This has also been followed up by an amendment to the Marriage Law, which regulates that the minimum age of marriage is 19 (nineteen) years for both men and women.

Constitutional Court Shift: Protecting Citizens' Constitutional Rights Within Marriage Age Limits

This section will focus on the shift of the Constitutional Court in the process of testing open legal policy related to Article 7 paragraph (1) of the Marriage Law. In formal legal terms, the Constitutional Court indeed only has the authority to review laws against the 1945 Constitution. This is as stipulated in Article 24C paragraph (1) of the 1945 Constitution. This position, as previously explained, in the context of the separation of powers, means there is a separate institution whose function is to enact laws. This is reflected in Articles 20 and 20A of the 1945 Constitution, which regulate the powers of the House of Representatives in law-making. Furthermore, the president, based on Articles 5 and 20 of the 1945 Constitution, is also involved in the law-making process.

The discussion of the Constitutional Court in formulating or examining beyond its authority certainly divides experts, whether the Constitutional Court has the authority to do as it does. In the understanding of constitutionalism or constitutional theories, it is explained that the existence of a constitution is nothing but the will of the constitution-makers to provide limits to power. The constitution not only outlines the powers of state institutions but also seeks to establish limits on that power. Therefore, it is reasonable to raise questions about the authority of the Constitutional Court in testing open legal policies, which are considered the prerogative of the lawmakers.

In the practice of constitutional governance in Indonesia, the Constitutional Court not only conducts the process of testing laws against the 1945 Constitution. This practice is referred to as an effort to protect the constitution, also known as the guardian of the constitution. Efforts to protect

³⁹ Agus Purnomo et al., "Dimensions Maqāṣid Al-Sharī'Ah and Human Rights in The Constitutional Court's Decision on Marriage Age Difference in Indonesia," *Samarah: Jurnal Hukum Keluarga Dan Hukum Islam* 7, no. 3 (2023).

⁴⁰ Alda Rifada Rizqi, "Menakar Progresifitas Lembaga Peradilan Dalam Mewujudkan Demokrasi Berintegritas," *Jurnal Hukum Progresif* 12, no. 2 (2018).

the constitution are common and are indeed carried out as the main duty of the Constitutional Court. However, is that all, making the role of the Constitutional Court seem very limited? It could be explained as part of the limitation of power. The constitution does not desire a state institution to become a superpower entity that then has no limits on its authority.

In general understanding, the existence of a constitution and the concept of constitutionalism indeed require efforts to limit power. However, there has been the development of the living constitution theory. The living constitution theory holds that the constitution should not be viewed rigidly or solely based on the text written in the constitution. The living constitution theory sees that the constitution must be interpreted and given meaning according to social and societal developments. The constitution referred to in this context is a living constitution. A living constitution grows along with what it regulates. The constitution is not a set of dead texts that will inevitably fall behind societal conditions. Therefore, it is said that the values that emerge within society constitute another form of constitution that complements the written constitution as a living constitution.

The shift of the Constitutional Court from judicial restraint to judicial activism, which changed its stance, can be analyzed from the perspective of the living constitution theory. The Constitutional Court views that the provisions in Article 7 paragraph (1) of the Marriage Law, as reflected in the decision 30-74/PUU-XII/2014, represent an adherence to the principles of limitation of power or constitutionalism. However, the researcher sees that this condition is no longer in line with the principles of the living constitution theory. Regulations that differentiate between men and women based on gender in age limits have made women very vulnerable to injustice and limited access to justice. Internationally, regulations on marriage under the age of 18 are considered discriminatory, especially when these rules are applied differently based on gender.

Along with the development of the times, the structure of society also evolves. The living constitution theory considers that the text of the Constitution is merely a formal framework that governs life in society. However, this constitutional text must be brought to life through contextual interpretation. In the Constitutional Court's decision 22/PUU-XV/2017, a new context was provided in the interpretation of Article 7 paragraph (1) of the Marriage Law. The Constitutional Court believes that the existence of distinctions in the age limit for marriage is actually not in line with the principles of the living constitution theory. This means that the Constitutional Court must shift its stance from judicial restraint to judicial activism. The Constitutional Court sees an injustice and discriminatory treatment if Article 7 paragraph (1) of the Marriage Law is maintained.

Conclusion

The comparison of the rulings 30-74/PUU-XII/2014 and 22/PUU-XV/2017 shows three differences. First, the difference in the test articles used by the petitioners. Second, the difference in perspective regarding the subject matter, which is an open legal policy, and third, the effort to annul Article 7 paragraph (1) of the Marriage Law in ruling 22/PUU-XV/2017, which was not present in ruling 30-74/PUU-XII/2014. The shift of the Constitutional Court from judicial restraint to judicial activism is marked by three things. First, matters that can change the principle of judicial restraint to judicial activism, as reflected in the legal considerations of the rulings. This is evident from the legal reasoning of the Constitutional Court. Second, the shift of the Constitutional Court from judicial restraint to judicial activism represents the progressive nature of the Constitutional Court in serving the community through law. This

progressive form is not merely theoretical. The Constitutional Court sees the need for further regulation, although not to exceed the authority of the legislators. Third, the shift made by the Constitutional Court aligns with the living constitution theory, in which, according to the principles of the living constitution theory, the constitution is not merely interpreted as a written text without context. Conversely, the constitution must be brought to life through a contextual interpretation process. This is reflected in the Constitutional Court's decision 22/PUU-XV/2017. The Constitutional Court considers that there is an injustice in the regulation of Article 7, paragraph (1) of the Marriage Law.

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