

INTERPRETATION OF OPEN LEGAL POLICY BY THE CONSTITUTIONAL JUDGES IN JUDICIAL REVIEW OF PARLIAMENTARY THRESHOLDS

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Abstract

This study attempted to discuss the interpretation of open legal policy by constitutional judges in terms of reviewing legislation related to the legal norms of parliamentary thresholds. Through conceptual and statutory approaches, this study tries to examine the ways or models of interpretation conducted by constitutional judges. This research uses Aharon Barak's thinking on the concept of legal interpretation a benchmark and an analytical tool. The results of this study show that the interpretation conducted by the constitutional judge relating to a norm that is considered an open legal policy is appropriate. This research is expected to help academics and legal practitioners, especially with regard to election law to be able to dig deeper into models of legal interpretation, not only based on the idea of Aharon Barak but also by other thinkers or experts.

Keywords: *Interpretation; The Judge; Open Legal Policy; Parliamentary Threshold*

1. Introduction

Parliamentary thresholds are often used as a problematic issue in every election¹. The impact of making the parliamentary threshold an issue is the reviewing of the constitution². The process of reviewing the law is conducted through the Constitutional Court to review the constitutionality of the law, in whole or in part³. The Constitutional Court in its decision warned it could choose to reject or grant based on the constitutionality or unconstitutionality of a norm in the law⁴. These choices, refer to opinions and interpretations made by the Judges of the Constitution.

¹ Erviando Pratama Putra, "Tinjauan Yuridis Tentang Ambang Batas Perolehan Suara Dalam Pemilihan Anggota Parlemen (Parliamentary Threshold) Setelah Putusan Mahkamah Konstitusi Nomor 52/PUU-X/2012" (Universitas Bangka Belitung, 2015); Adlina Adelina, "Relevansi Ambang Batas Parlemen (Parliamentary Threshold) Dengan Sistem Presidensial Di Indonesia" (Universitas Islam Indonesia, 2018); Wasisto Raharjo Jati, "Menuju Sistem Pemilu Dengan Ambang Batas Parlemen Yang Afirmatif," *Jurnal Yudisial* 6, no. 2 (2013): 143–58.

² Sholahuddin Al-Fatih, "Akibat Hukum Regulasi Tentang Threshold Dalam Pemilihan Umum Legislatif Dan Pemilihan Presiden: Kajian Putusan Mahkamah Konstitusi Nomor 52/PUU-X/2012 Dan Nomor 14/PUU-XI/2013," *Jurnal Yudisial* 12, no. 1 (2019): 17–38, doi:10.29123/jy.v12i1.258; Sholahuddin Al-Fatih, "Electoral Regulation in Indonesia: Is It Modern Law?," *Unnes Law Journal* 6, no. 2 (2020): 205–16, doi:https://doi.org/10.15294/ulj.v6i2.41627.

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

⁴ Ibid.

The interpretation of the Constitutional Judges has at least 2 (two) types at once, namely the interpretation of the constitution and the interpretation of the law that is being reviewed⁵. Although the interpreted are two different objects, the purpose of the interpretation is the same, which is to find the meaning of the norm being reviewed. Whereas when looking at the interpretation methods used by constitutional judges, there are at least 5 (five) types of interpretation methods that have been applied, namely: grammatical interpretation, systematic interpretation, historical interpretation, teleological interpretation and hermeneutic interpretation⁶.

These different types and methods of interpretation are further tools for Constitutional Judges to give their opinions or legal arguments. The legal opinion of the Constitutional Judges is then ensheld in the decision of the Constitutional Court. Included in the decision contains the rules of open legal policy. Some of the norms in the law are reviewed to the Constitutional Court, getting an interpretation of open legal policy by the Constitutional Judge, one of which is the norm regarding the parliamentary threshold as well as the threshold of presidential nomination in presidential election⁷.

As a result of this open legal policy decision, the parliamentary threshold remained in effect until the last election in 2019. In fact, through this open legal policy, the Constitutional Court has given freedom to legislators to interpret and formulate a parliamentary threshold that has the potential to limit the political rights of Indonesian citizens. The real evidence was seen in the simultaneous elections in 2019. Where political parties officially registered in the Ministry of Law and Human Rights (*Kementerian Hukum dan HAM/KemenkumHAM*) are as many as 73 political parties. However, not all of them registered as political parties participating in the elections. There are only 27 political parties that have registered with the General Election Commission of the Republic of Indonesia.

There were 27 political parties that passed the administrative stage and have been verified to contest the 2019 general election, only 16 national political parties, as for the parties that passed, namely⁸: 1) Partai Kebangkitan Bangsa (PKB); 2) Partai Gerakan Indonesia Raya (GERINDRA); 3) Partai Demokrasi Indonesia Perjuangan (PDI P); 4) Partai Golongan Karya

⁵ Ibid.

⁶ Ibid.

⁷ Vanu Fendabi, "Penerapan Ambang Batas Presidensil (Presidential Threshold) Sebagai Kebijakan Hukum Terbuka Dalam Pemilihan Umum Di Indonesia (Analisis Putusan Mahkamah Konstitusi Nomor.53/PUUXV/2017)" (UIN Syarif Hidayatullah Jakarta, 2019).

⁸ Komisi Pemilihan Umum, "Partai Politik Peserta Pemilu 2019," *KPU RI*, 2020.

(GOLKAR); 5) Partai Nasional Demokrat (NASDEM); 6) Partai Gerakan Indonesia Perubahan (GARUDA); 7) Partai Berkarya (BERKARYA); 8) Partai Keadilan Sejahtera (PKS); 9) Partai Persatuan Indonesia (PERINDO); 10) Partai Persatuan Pembangunan (PPP); 11) Partai Solidaritas Indonesia (PSI); 12) Partai Amanat Nasional (PAN); 13) Partai Hati Nurani Rakyat (HANURA); 14) Partai Demokrat (DEMOKRAT); 15) Partai Bulan Bintang (PBB); and 16) Partai Keadilan dan Persatuan Indonesia (PKPI).

From the 16 political parties participating in the election, only 9 political parties passed to cross the parliamentary threshold. Following are the votes acquired by the parties in the 2019 Legislative Election which have been determined by the KPU, sorted by highest to the lowest vote⁹: 1) PDI-P: 27.053.961 (19,33%); 2) Gerindra: 17.594.839 (12,57%); 3) Golkar: 17.229.789 (12,31%); 4) PKB: 13.570.097 (9,69%); 5) Nasdem: 12.661.792 (9,05%); 6) PKS: 11.493.663 (8,21%); 7) Demokrat: 10.876.507 (7,77%); 8) PAN: 9.572.623 (6,84%); 9) PPP: 6.323.147 (4,52%); 10) Perindo: 3.738.320 (2,67%); 11) Berkarya: 2.929.495 (2,09%); 12) PSI: 2.650.361 (1,89%); 13) Hanura: 2.161.507 (1,54%); 14) PBB: 1.099.848 (0,79%); 15) Garuda 702.536 (0,50%); and 16) PKPI 312.775 (0,22%).

Based on these results, 7 political parties participating in the 2019 election failed to qualify for parliament because they could not pass the parliamentary threshold. Perindo, Berkarya, PSI, Hanura, PBB, Garuda and PKPI that failed to cross the parliamentary threshold (with a total of 13,595,842 votes)¹⁰. Automatically, the votes are wasted and are not included in the calculation of parliamentary seats¹¹. The practice of wasted voting due to the application of the parliamentary threshold has occurred since the 2009 elections. At that time, of the 38 political parties participating in the election, only 9 political parties succeeded to pass the parliamentary threshold, namely Demokrat, Golkar, PDI-P, PKS, PAN. PKB, PPP, Gerindra and Hanura. Meanwhile, in the 2014 election, out of 12 political parties participating in the election, only 10 political parties managed to cross the parliamentary threshold. The parties that failed to cross the parliamentary threshold were PBB and PKPI. Their votes (parties that fail to pass the parliamentary threshold) will be included in the remaining votes conreviewed by the political parties that passed the parliament.

⁹ Kompas, "Penetapan KPU: 9 Parpol Lolos Parlemen," 2019.

¹⁰ Titi Anggraini, "Ambang Batas Parlemen Tinggi 7% Dinilai Berdampak Banyak Suara Sah Terbuang," *Detik News*, 2020.

¹¹ muh. Aziz Maftuh, "Parliamentary Threshold Dalam Pemilu Serentak Tahun 2019 (Tinjauan Filosofis Asas Kedaulatan Rakyat)" (IAIN Salatiga, 2020).

Based on that background, the author tries to analyze one of the norms in electoral law, which is related to the threshold of parliament and its relation to the interpretation or interpretation of the Constitutional Judge stipulating it as an open legal policy. The author tries to look at the interpretation methods performed by constitutional judges in some decision relating to the rules of open legal policy and compares them to the interpretations used in the legal norms of parliamentary thresholds. Through this research, the authors hope to find a link between the interpretation of Constitutional Judges in reviews related to parliamentary threshold norms and methods of legal interpretation popularized by some legal experts, such as Aharon Barak. So, in the future, there will be no more people who suffer losses due to the implementation of parliamentary threshold norms.

This research is expected to contribute in the field of law, legal philosophy and legal interpretation which may be able to provide discovery for advances in the field of electoral law and assist the judges in interpreting the law. Furthermore, this research is expected to provide suggestion and recommendation for Constitutional Judges to provide rational interpretations in decisions that contain open legal policy norms, especially in cases of reviewing the parliamentary threshold.

2. Methods

This research is a type of legal research with conceptual approach and statutory approach¹². Legal research is a study that examines norms, relating to overlap, emptiness and vague of existing norms¹³. The norms that are being reviewed in this study are related to the parliamentary threshold norm.

The concept used as a measuring instrument is the concept of interpretation of laws and open law policies, while the legislation used in this study is the Law on Elections. Through prescriptive analysis¹⁴, the authors tried to find new arguments relating to the interpretation of open legal policy by Constitutional Judges in a judicial review of parliamentary thresholds.

¹² (Marzuki, 2014)

¹³ Irwansyah, *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*, ed. Ahsan Yunus (Yogyakarta: Mirra Buana Media, 2020).

¹⁴ (Marzuki, 2017)

3. Results and Discussion

3.1. Parliamentary Threshold in Indonesia

The parliamentary threshold came into effect since the post-reform elections¹⁵. At that time, the parliamentary threshold was called the electoral threshold¹⁶, and was used as the minimum vote limit for the acquisition of seats for political parties in the parliament so that they could participate in the elections in the next period¹⁷. In its development, the electoral threshold then turned into a parliamentary threshold, as we know it today. The parliamentary threshold function is different from the electoral threshold¹⁸.

The parliamentary threshold aims to simplify the number of political parties in parliament, not to limit the number of political parties participating in the forthcoming elections. Through those simplifications, it is hoped that a simple multiparty system will be formed in the parliament¹⁹. The hope is that, through a simple multi-party system in parliament, the parliament will be easier in making policies. Initially, the electoral threshold was set at 2.5% and continued to rise until the 2019 election to 4%²⁰. In every election period, it is almost certain that the size and application of the parliamentary threshold is disputed²¹, especially by human rights activists²². Because, they argue that the application of the parliamentary threshold has the potential to derogate and violate the political rights of the people.

Those who disagreed with the size and application of the parliamentary threshold, conducted a judicial review to the constitutional court²³. Unfortunately, the Constitutional Court always issued the same verdict, namely stating that the parliamentary threshold policy was constitutional. Meanwhile, the size of the parliamentary threshold is an open legal policy for

¹⁵ Sholahuddin Al-Fatih, "Penerapan Threshold Dalam Pemilu," *Audito Comparative Law Journal* 1, no. 2 (2020): 78–84, doi:<https://doi.org/10.22219/audito.v1i2.13973>; Sholahuddin Al-Fatih, Muchammad Ali Safaat, and Muhammad Dahlan, "Reformulasi Parliamentary Threshold Yang Berkeadilan Dalam Pemilu Legislatif Di Indonesia," *Jurnal Hukum*, 2014, 20.

¹⁶ Sholahuddin Al-Fatih, "Eksistensi Threshold Dalam Pemilu Serentak" (Universitas Airlangga, 2016).

¹⁷ Al-Fatih, "Electoral Regulation in Indonesia : Is It Modern Law ?"

¹⁸ Agus Effendi, "Studi Komparatif Pengaturan Sistem Pemilihan Umum Anggota Dewan Perwakilan Rakyat Di Indonesia," *Fiat Justisia* 10, no. 2 (2017): 295–316, doi:10.25041/fiatjustisia.v10no2.746.

¹⁹ Ilham Fajar Septian, "Mengefektifkan Sistem Pemerintahan Dan Menyederhanakan Sistem Partai Politik: Belajar Kepada Pemilu Jerman," *Majalah Hukum Nasional* 49, no. 2 (2019): 57–85, doi:10.33331/mhn.v49i2.28.

²⁰ Sholahuddin Al-Fatih, "Implementasi Parliamentary Threshold Dalam Pemilihan Anggota Dprd Provinsi Dan Dprd Kabupaten/Kota," *Ahkam: Jurnal Hukum Islam* 6, no. 2 (2018), doi:10.21274/ahkam.2018.6.2.363-388.

²¹ Sholahuddin Al-Fatih, "Pembentukan Norma Ambang Batas Parlemen Dalam Perspektif Teori Kritis Jurgen Habermas," *Audito Comparative Law Journal (ACLJ)* 1, no. 1 (2020): 24–37, doi:10.22219/audito.v1i1.12783.

²² Erfandi Erfandi, *Parliamentary Threshold Dan HAM Dalam Hukum Tata Negara Indonesia* (Malang: Setara Press, 2014); Michael Freeman, *Human Rights: An Interdisciplinary Approach* (Cambridge University Press, 2004); Nur Kholis, "Parliamentary Threshold And Political Rights Limitation," *Journal of Law and Legal Reform* 1, no. 3 (2020): 445–56, doi:<https://doi.org/10.15294/jllr.v1i3.36702>.

²³ Wibowo, "Menakar Konstitusionalitas Sebuah Kebijakan Hukum Terbuka Dalam Pengujian Undang-Undang."

lawmakers. Whereas, in several legal products or regulations regarding elections, legislators often make vague definitions of the parliamentary threshold. In fact, determining the electoral threshold and parliamentary threshold size does not have a mathematical basis. Thus, the 2.5%, 3% to 4% figures in the parliamentary threshold are often feared as a political policy, not a mathematical and scientific one²⁴.

In fact, scientifically, there are several mathematical formulas to determine the size of the parliamentary threshold. The Taagepera formula²⁵, some literature from Arend Lijphart²⁶, as well as the ideas expressed by researchers Perludem²⁷, should be a reference for the government to formulate a fair parliamentary threshold. Through the application of a fair parliamentary threshold, it is hoped that a strong party system will be born, a solid parliamentary composition and an impact on a fairly presidential system. Apart from implementing a fair parliamentary threshold by the legislator, the constitutional court also needs to determine the meaning of open legal policy in its decisions regarding the parliamentary threshold. Is it open legal policy clear or not as a part of interpretation of law.

3.2. Open Legal Policy on Parliamentary Threshold

Interpretation of the law is an intellectual activity used to give meaning to the text of the law or written law, which focuses on the explanation of the normative message that arises from the text²⁸. There are several methods of interpretation or interpretation of the law, such as: 1) Analytical Method, is an analytical reasoning process that relies on deduction logic as opposed to a definitive and decisive premise²⁹; 2) Grammatical Method, is the process of reasoning by reading a series of words or sentences in a paragraph or article containing the provisions of the law that are being interpreted then associate it with common words or sentences that apply in the community³⁰; 3) Systematic Method, is the process of reasoning by linking such articles, verses, and/or phrases with all provisions in the same legislation, or linking them with different laws and

²⁴ Al-Fatih, "Akibat Hukum Regulasi Tentang Threshold Dalam Pemilihan Umum Legislatif Dan Pemilihan Presiden: Kajian Putusan Mahkamah Konstitusi Nomor 52/PUU-X/2012 Dan Nomor 14/PUU-XI/2013."

²⁵ Ibid.

²⁶ Arend Lijphart, *Patterns of Democracy, Government Forms & Performance in Thirty-Six Countries*, 2nd ed. (Yale: Yale University Press, 2012).

²⁷ Didik Supriyanto and August Mellaz, "Ambang Batas Perwakilan: Pengaruh Parliamentary Threshold Terhadap Penyederhanaan Sistem Kepartaian Dan Proporsionalitas Hasil Pemilu" (Jakarta, 2011); Harun Husein, *Pemilu Indonesia: Fakta, Angka, Analisis Dan Studi Banding* (Jakarta: Perkumpulan untuk Pemilu dan Demokrasi (Perludem), 2014).

²⁸ Aharon Barak, *Purposive Interpretation in Law* (New Jersey: Princeton University Press, 2005).

²⁹ Achmad Sodiki, "Interpretasi Hukum" (2020).

³⁰ Sudikno Mertokusumo and A. Pitlo, *Bab-Bab Tentang Penemuan Hukum* (Bandung: Citra Aditya Bakti, 1993).

regulations but governing the same thing³¹; 4) Historical Method, is the process of reasoning in search of linking to the authors or in general in the context of society in the past³²; 5) Teleological Method, is the process of reasoning by associating the provision stipulated with the purpose or intent of the establishment of legislation³³; 6) Hermeneutic Method, is the process of reasoning by understanding the text, understanding the context, then contextualizing³⁴. Some such interpretation methods are used by judges in an attempt to unearth the meaning of a legal norm. That is why, the judge cannot be called making the law, but rather is digging into the content of the legal norm³⁵. Judges do such excavations or interpretations because there is a blurring of the law that requires explanation and can only be done by interpretation or digging into the legislative or policy will behind the provision in order to determine its proper meaning and breadth³⁶. The custom also occurs to the Constitutional Judge in giving his legal opinion.

The judges (include Constitutional Judge) need to interpretate for³⁷; 1) understand the meaning of legal principles and rules; 2) linking a legal fact with the rule of law; 3) ensure the application of law or law enforcement carried out appropriately, correctly, and fairly; and 4) actualizing the law, in the sense of bringing together the rules law with the changes that happened in society with the intention that legal principles is still able to meet the needs in accordance with change in society. In some of its decisions, the Constitutional Court, through the Constitutional Judges, conducted legal interpretations to dig into the legislative or policy will behind the provision through open legal policy rules. An open legal policy in the view of the Constitutional Court is a policy on the provision stipulated in a particular article of law that is the authority of the legislator³⁸. Some of the Constitutional Court's decisions that contain the following open legal policy rules, mentioned below:

³¹ Ibid.

³² Eddy O.S. Hiariej, *Asas Legalitas & Penemuan Hukum Dalam Hukum Pidana* (Jakarta: Erlangga, 2009).

³³ Mertokusumo and Pitlo, *Bab-Bab Tentang Penemuan Hukum*.

³⁴ Jazim Hamidi, *Hermeneutika Hukum: Sejarah, Filsafat, & Metode Tafsir* (Malang: UB Press, 2011).

³⁵ Sodiki, "Interpretasi Hukum."

³⁶ Ibid.

³⁷ Raden Viola, "Penafsiran 'Open Legal Policy': Studi Terhadap Putusan Pengujian Konstitusionalitas Undang-Undang Di Indonesia" (Universitas Padjajaran, 2018).

³⁸ Iwan Satriawan and Tanto Lailam, "Open Legal Policy Dalam Putusan Mahkamah Konstitusi Dan Pembentukan Undang-Undang," *Jurnal Konstitusi* 16, no. 3 (2019): 559–84.

Table 1.
The Constitutional Court Decisions containing the Rules of Open Legal Policy³⁹

No.	Constitutional Court Decision Number	About
1.	Constitutional Court Decision Number 6-10/PUU-III/2005	The provision of 15% of the number of DPRD seats or from the accumulation of valid votes to be able to apply for candidates of regional heads in elections is a policy of legislators that does not conflict with the 1945 NRI Constitution.
2.	Constitutional Court Decision Number 5/PUU-V/2007	The provision stipulated in the election procedure is a policy of legislators that does not conflict with the 1945 NRI Constitution.
3.	Constitutional Court Decision Number 16/PUU-V/2007	The provision stipulated on the existence of the Electoral Threshold in elections is a policy of legislators that does not conflict with the 1945 NRI Constitution.
4.	Constitutional Court Decision Number 51-52-59/PUU-VI/2008	The provision stipulated in Article 3 paragraph (5) and Article 9 of Law No. 42 of 2009 concerning Presidential and Vice Presidential Elections is a policy of legislators that does not conflict with the 1945 NRI Constitution.
5.	Constitutional Court Decision Number 3/PUU-VII/2009	The provision stipulated on the existence of the Parliamentary Threshold and its magnitude in elections is a policy of legislators that does not conflict with the 1945 NRI Constitution.
6.	Constitutional Court Decision Number 15/PUU-V/2007, Number 37-39/PUU-VIII/2010, Number 49/PUU-IX/2011, Number 7/PUU-XI/2013 and Number 74/PUU-XII/2014	The provision stipulated on the minimum age requirement in filling government positions or activities is a policy of legislators that does not conflict with the 1945 NRI Constitution.
7.	Constitutional Court Decision Number 34/PUU-X/2012, Number 56/PUU-X/2012	The provision stipulated on the age limit of judges is a policy of legislators that does not conflict with the 1945 NRI Constitution.
8.	Constitutional Court Decision Number 86/PUU-X/2012	Provisions regarding BAZNAS's position and its non-structural institutional nature are a policy of legislators that do not conflict with the 1945 NRI Constitution.
9.	Constitutional Court Decision Number 02/PUU-XI/2013	The provision stipulated in the establishment of the constituency in elections is a policy of legislators

³⁹ Wibowo, "Menakar Konstitusionalitas Sebuah Kebijakan Hukum Terbuka Dalam Pengujian Undang-Undang"; Radita Ajie, "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; Satriawan and Lailam, "Open Legal Policy Dalam Putusan Mahkamah Konstitusi Dan Pembentukan Undang-Undang"; Lutfil Ansori, "Telaah Terhadap Presidential Threshold Dalam Pemilu Serentak 2019," *Jurnal Yuridis* 4, no. 1 (2019): 15–27, doi:10.35586/v4i1.124; M Reza Baihaki, Fathudin Fathudin, and Ahmad Tholabi Kharlie, "Problematisasi Kebijakan Hukum Terbuka (Open Legal Policy) Masa Jabatan Hakim Konstitusi Open Legal Policy Problems in Constitutional Court Judges' Tenure," *Jurnal Konstitusi* 17, no. september (2020): 652–75, doi:10.31078/jk1739.

No.	Constitutional Court Decision Number	About
		that does not conflict with the 1945 NRI Constitution.
10.	Constitutional Court Decision Number 14/PUU-XI/2013	The provision stipulated in the Presidential Threshold in the Presidential Election is a policy of legislators that does not conflict with the 1945 NRI Constitution.
11.	Constitutional Court Decision Number 38/PUU-XI/2013	The provision stipulated on health care quality standards is a policy of legislators that does not conflict with the 1945 NRI Constitution.
12.	Constitutional Court Decision Number 73/PUU-XII/2014	The provision stipulated on the procedure for the selection of the chairman of the House of Representatives and the head of the house of representatives is a policy of legislators that does not conflict with the 1945 NRI Constitution.
13.	Constitutional Court Decision Number 46/PUU-XIV/2016	The provision stipulated in the meaning of adultery in the Constitution is a policy of legislators that does not conflict with the 1945 NRI Constitution.

There are 13 of Constitutional Court decisions that apply open legal policy rules according to the table above. These decisions relate to elections (regional head elections, legislative elections and presidential elections), age limits and ways of filling public office, to the public interest (i.e., related to the institutional of BAZNAS and interpretation of adultery). 3 (three) types of such legal norms are interpreted by the Constitutional Court as an open legal policy. The method of interpretation carried out by the Constitutional Judge in determining a norm as an open legal policy, looking at the meaning textually, the context when reviewed until its implementation in society. The method of interpretation is relevant to one method, namely the hermeneutic method⁴⁰.

Hermeneutic laws have been known since the 20th century. Some legal figures and experts such as Gregory Leyh, Jurgen Habermas, Richard E. Palmer, and so on, although not textually refer to the term hermeneutic law, but their ideas are heading in that direction⁴¹. Hermeneutic law is considered a model of interpretation that is useful for harmonizing between the law and the text of literature⁴². It is this hermeneutic method used by Constitutional Judges in determining open legal policy rules over a legal norm, including parliamentary thresholds.

⁴⁰ Hamidi, *Hermeneutika Hukum: Sejarah, Filsafat, & Metode Tafsir*.

⁴¹ Ibid.

⁴² Michael Pantazakos, "Ad Humanitatem Pertinent: A Personal Reflection On The History And Purpose Of The Law And Literature Movement," *Law & Literature* 7, no. 1 (1995): 31–71, doi:<https://doi.org/10.1080/1535685X.1995.11015763>.

Radita Ajie gives restrictions on the open legal policy, namely: 1) does not contradict the NRI Constitution of 1945; 2) does not exceed the authority of the legislator; and 3) does not constitute an abuse of authority⁴³. In other hand, Mardian Wibowo also provides conditions for a norm law is considered as an open legal policy, namely: 1), it does not conflict with or it does not injure the 1945 Constitution; 2) it must pay attention to fair guidance in accordance with moral considerations, religious values, security and order general; 3) guarantee the rights of citizens; 4) logical and acceptable legally; and 5) it has uses⁴⁴. The process of forming it, the norm regarding the parliamentary threshold does not violate the boundaries as mentioned above. Thus, a move that can be taken by the public if it feels the constitutional disadvantage caused by the legal norms of the parliamentary threshold, then it can propose a legislative review or changes to the legislator.

The open legal policy rules attached to the parliamentary threshold norms make the Judges of the Constitution unable to directly root out the size of the parliamentary threshold applied in elections. Thus, open legal policy makes room for lawmakers to interpret it because it is textually and contextually not regulated in the 1945 NRI Constitution⁴⁵. Nevertheless, the model of legal interpretation carried out by the Constitutional Court in establishing an open legal policy over a legal norm, needs to get a clear benchmark. The benchmark is at least through the political question process (an issue that must be answered and decided by politicians/legislators, and not through a court decision by a judge)⁴⁶ to review the formil and materil terms of a legal norm⁴⁷.

Moreover, according to Mukthie Fadjar, it is an open legal policy appeared when the NRI 1945 Constitution ordered to regulate certain norms in form of the law, but only provides broad directions⁴⁸. Meanwhile, the laws that are formed must regulate in more detail. Arranging in more detail what is meant here is open or free areas for legislators to determine if it is still within

⁴³ Ajie, "Batasan Pilihan Kebijakan Pembentuk Undang-Undang (Open Legal Policy) Dalam Pembentukan Peraturan Perundang-Undangan Berdasarkan Tafsir Putusan Mahkamah Konstitusi."

⁴⁴ Mardian Wibowo, *Kebijakan Hukum Terbuka Dalam Putusan Mahkamah Konstitusi (Konsep Dan Kajian Dalam Pembatasan Kebebasan Pembentuk Undang-Undang)* (Jakarta: Rajawali Press, 2019).

⁴⁵ Fahmi Ramadhan Firdaus, "Apa Itu Open Legal Policy?," *Pusat Pengkajian Pancasila Dan Konstitusi (PUSKAPSI) FH Universitas Jember*, 2020.

⁴⁶ Fritz W. Scharpf, "Judicial Review and the Political Question: A Functional Analysis," *The Yale Law Journal* 75, no. 4 (1966): 517–97, doi:10.2307/794865; Louis Henkin, "Is There a 'Political Question' Doctrine?," *The Yale Law Journal* 85, no. 5 (1976): 597–625, doi:10.2307/795454.

⁴⁷ Muhammad Addi Fauzani and Fandi Nu Rohman, "Urgensi Rekonstruksi Mahkamah Konstitusi Dalam Memberikan Pertimbangan Kebijakan Hukum Terbuka (Open Legal Policy)," *Justitia Et Pax: Jurnal Hukum* 35, no. 5 (2019): 127–52, doi:https://doi.org/10.24002/jep.v35i2.2501.

⁴⁸ 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): 1–19, doi:10.20885/jlr.vol5.iss1.art1.

the outline stipulated by the 1945 NRI Constitution. Norms laws that are not regulated by the 1945 NRI Constitution, but these norms must exist for the sake of carrying out the orders of the 1945 NRI Constitution, then such norms are legal norms that fall into the category of open legal policy. According to the Constitutional Court, such legal norms may be changed by the legislators any time desired⁴⁹.

The practice of implementing open legal policy can also split constitutional judges between adherents of positive and negative legislatures⁵⁰, between camps that use the judicial activism approach and those that use the judicial restraint approach⁵¹. So, if it continues to be ignored, the practice of using open legal policies in the Constitutional Court decisions could be quite dangerous to the life of the nation and state. Therefore, it would be better if the Constitutional Judges began to abandon this model of interpretation and return to the style or model of general interpretation, boldly interpreting the legal norms being reviewed.

In this context, parliamentary threshold norms should be interpreted analytically, systematically and historically. Analytically, it can use the mathematical formula approach that has been introduced by Taagepera and so on. Through this mathematical formula, based on the author's calculations, the ideal parliamentary threshold applies in Indonesia of approximately 1% considering the number of seats contested and the size of the electoral district⁵². This amount can change if the parameters also change, namely the number of seats contested and the size of the electoral district⁵³.

While systematically interpreted, the norms of parliamentary thresholds can be interpreted by Constitutional Judges by looking at similar definitions and norms, such as the Presidential Threshold and Electoral Threshold, that have been in effect in Indonesia. Through systematic interpretation, Constitutional Judges can explore the definition and function of parliamentary thresholds in legislative elections. Meanwhile, based on historical interpretation, Constitutional Judges can look at the history of parliamentary thresholds. The parliamentary threshold was originally referred to as the electoral threshold, which serves to limit the number of political

⁴⁹ Wibowo, *Kebijakan Hukum Terbuka Dalam Putusan Mahkamah Konstitusi (Konsep Dan Kajian Dalam Pembatasan Kebebasan Pembentuk Undang-Undang)*.

⁵⁰ Sukma, "Open Legal Policy Peraturan Perundang-Undangan Bidang Politik Dalam Putusan Mahkamah Konstitusi (Studi Terhadap Putusan MK Bidang Politik Tahun 2015-2017)."

⁵¹ Satriawan and Lailam, "Open Legal Policy Dalam Putusan Mahkamah Konstitusi Dan Pembentukan Undang-Undang."

⁵² Al-Fatih, Safaat, and Dahlan, "Reformulasi Parliamentary Threshold Yang Berkeadilan Dalam Pemilu Legislatif Di Indonesia."

⁵³ Al-Fatih, "Implementasi Parliamentary Threshold Dalam Pemilihan Anggota Dprd Provinsi Dan Dprd Kabupaten/Kota."

parties participating in the next election. Meanwhile, the parliamentary threshold is used to limit the number of political parties that enter parliament.

Through historical interpretation, it is hoped that Constitutional Judges will be able to find relevant correlations and functions related to the application of parliamentary thresholds. In this case, the Constitutional Judge can explicitly interpret that the parliamentary threshold can also be used to limit the number of political parties entering parliament as well as to limit the number of political parties participating as participants in the elections in the next period. Through these three models of legal interpretation, it is hoped that the Constitutional Judge can be separated from the norms of open legal policies in the case of reviewing the parliamentary threshold norms. The results of the three types of legal interpretation can be used by Constitutional Judges as the basis for deciding the definition, function and extent of parliamentary thresholds that fulfill the elements of justice, benefit and legal certainty.

4. Conclusions

Based on the descriptions and discussions above, it can be concluded that the interpretation of open legal policy by the Constitutional Judge in the judicial review of the parliamentary threshold is a breakthrough made by the Constitutional Court that raises the pros and cons. Open legal policy opens up opportunities for legislative review or changes to a law, although on the other hand, it can cause dissatisfaction for the public. From some decisions of the Constitutional Court containing the rules of open legal policy, there are limits in determining open legal policy, namely: 1) not directly contrary to the Constitution of the NRI 1945; 2) does not exceed the authority of the legislator; 3) does not constitute an abuse of authority; 4) it must pay attention to fair guidance in accordance with moral considerations, religious values, security and order general; 5) guarantee the rights of citizens; 6) logical and acceptable legally; and 7) it has uses.

In 2013, the Constitutional Court set a benchmark for assessing the rules of open legal policy. The benchmark is at least through a political question process to review the formal and material requirements of a legal norm. Thus, Constitutional Judges can choose whether to interpret it progressively by interpreting a norm or establishing it as an open legal policy. As a recommendation, the author provides suggestions to Constitutional Judges to have the courage to interpret parliamentary threshold norms using the interpretation method analytically, systematically and historically. The results of the three types of legal interpretation can be used

by Constitutional Judges as the basis for deciding the definition, function and extent of parliamentary thresholds that fulfill the elements of justice, benefit and legal certainty.

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