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Open Legal Policy Regarding the Age Limit of Notary Public Based on Constitutional Court Decision Number. 84/PUU-XXII/2024

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ABSTRACT

Open legal policy emerged when the 1945 Constitution gave an order to regulate a norm through a law, in this case the Legal Regulation of Article 8 Paragraph (2) of Law Number 2 of 2014 as an amendment to Law Number 30 of 2004 concerning the Position of Notary. The research method used is normative juridical or library research, by analyzing library materials or secondary data relevant to the topic. This research is descriptive analytical, namely the data obtained and processed and analyzed to provide a comprehensive picture of the open legal policy in the norming of Article 8 paragraph (2) which regulates the age limit of the notary office as stated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary. Research Results Show that the determination of the age limit for notaries is part of an open legal policy that is within the authority of the legislators, as long as it does not conflict with the principles guaranteed in the 1945 Constitution. However, this policy can be considered invalid if it violates constitutional principles, such as the principle of non-discrimination, equality before the law, and the feasibility and rationality of public policy.

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1. INTRODUCTION

A notary is a public official who is authorized to make authentic deeds, as long as the deeds are not specifically within the authority of another public official.(Law Number 30 of 2004 concerning the Position of Notary, 2004). The making of authentic deeds is sometimes required by laws and regulations to ensure certainty, order, and legal protection. In addition, authentic deeds made by or before a notary are not only mandatory according to the provisions of the law, but can also be made at the will of the interested parties, as a form of protection for their rights and obligations.(Illiyyin & Octarina, 2023)This is based on the authority granted by the state through attribution in Law Number 2 of 2014 as an amendment to Law Number 30 of 2004 concerning the Position of Notary (UUJN). Therefore, in carrying out their duties, notaries are truly representatives of the state in the field of civil law.

Civil cases are legal issues involving one or more individuals or legal entities with other

individuals or legal entities. Due to its very complex nature and the involvement of all levels of society, the state cannot handle it all directly. Therefore, the state grants authority through the attribution of positions to certain citizens who are considered qualified, namely by appointing them as public officials.(Aprilia et al., 2024)

The state forms and establishes the position of Notary with the aim of creating order in legal relations between Indonesian citizens. The presence of this order is important to realize the national goals as stated in the Preamble to the 1945 Constitution, namely: "protecting all Indonesian people and all Indonesian blood and to advance public welfare, educate the nation's life, and participate in implementing world order based on independence, eternal peace and social justice",(Bachrudin, 2015)

Then, what is problematic in the implementation of Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Position of Notary Public Article 8 Paragraph (2) reads: "extension of the term of office of a notary public until the age of 67 (sixty seven) years by considering Health". This norm invites legal uncertainty and is in conflict with the 1945 Constitution which is regulated in Article 27 Paragraph (2), 28C Paragraph (1), 28D Paragraph (1), 28 H Paragraph (1), Article 28I Paragraph (2).

ByTherefore, to avoid uncertainty and legal discrimination against citizens, the state must be present to provide legal protection in the form of equalizing laws and regulations regarding age limits in order to create certainty, benefit and justice for the people, this is where the Constitutional Court is present as a guardian of the constitution so that lawmakers do not just make regulations that are detrimental to the people, because in the highest law is the welfare of the people above all else, this is stated in the opening of the 1945 Constitution, Paragraph 4.(M. Yusrizal Adi & MA Lubis, 2024)As a comparison with the Constitutional Court's decision regarding the age limit as an open legal policy, which has been determined as follows:(Constitutional Court Decision Number 84/PUU-XXII/2024, nd)

First,Through Constitutional Court Decision Number 22/PUU-XV/2017, the Constitutional Court revoked the provisions on the minimum age for marriage which previously set the age limit at 16 years for women and 19 years for men as stated in Article 7 paragraph (1) of Law Number 1 of 1974 on Marriage. This decision establishes a new norm that the minimum age for marriage for men and women is the same at 18 years.

Second, Constitutional Court Decision Number 112/PUU-XX/2022 changed the old provisions regarding the term of office of the KPK Leadership which was previously 4 years to a new legal norm, namely being extended to 5 years.

Third, in the Constitutional Court Decision Number 102/PUU-VII/2009, the Court established a new norm that allows Indonesian citizens (WNI) who are not listed in the Permanent Voters List (DPT) to still be able to exercise their right to vote in the Presidential and Vice Presidential elections by showing a valid KTP or passport for Indonesian citizens abroad. Previously, the right to vote was only given to Indonesian citizens registered in the DPT.

Fourth, Based on the Constitutional Court Decision Number 46/PUU-VIII/2010, the Court annulled the provisions in Article 42 of the Marriage Law Number 1 of 1974 which stated that illegitimate children only have a civil relationship with their mother and family. The Constitutional Court established a new norm that children born outside of marriage also have a civil relationship with their biological father.(Ramdani & Arisandi, 2014)

Fifth, Constitutional Court Decision Number 69/PUU-XIII/2015 expands the provisions regarding marriage agreements as stipulated in Article 29 of Marriage Law Number 1 of 1974. Initially, marriage agreements could only be made before marriage and could not be changed as long as the couple lived together as husband and wife. Through this decision, the Constitutional Court determined that marriage agreements can be changed as long as the couple is still living together, based on mutual agreement, and the changes are also binding on third parties if they are interested.

The problem discussed in this article is based on the legal norm on open legal policy related to the age limit for notary office, namely when reaching the age of 65 years and can still be extended to the age of 67 years with the condition of proper health conditions. This provision is stated in Article 8

paragraph (2) of Law Number 30 of 2004 concerning Notary Office as amended by Law Number 2 of 2014. However, this policy is considered to be in conflict with a number of articles in the 1945 Constitution of the Republic of Indonesia, namely Article 27 paragraph (2), Article 28C paragraph (1), Article 28D paragraph (1), Article 28H paragraph (1), and Article 28I paragraph (2).

2. METHODS

Legal research is conducted to find solutions to legal issues arising from the topics discussed in this paper. The research method used is normative juridical. Normative juridical legal research, or library legal research, is conducted by analyzing literature or secondary data relevant to the research topic.(Mahmud, 2005)According to Soerjono Soekanto, Normative legal research consists of: legal principles; legal systematics; Research on the level of legal synchronization; on legal history; comparative law.

Of the five types of normative legal research that exist, this research will use an approach to court decisions, legal principles, and comparative legal studies.(Sukanto, 2009)This type of research focuses on the study of legal norms, particularly regarding open legal policies in the normativeization of Article 8 paragraph (2) which regulates the age limit for the office of notary as stated in Law Number 2 of 2014 concerning Amendments to Law Number 30 of 2004 concerning the Office of Notary.

3. FINDINGS AND DISCUSSION

*Open Legal Policy Concept*Constitutional Court Decision

The concept of open legal policy or open legal policy emerged when the 1945 Constitution gave an order to regulate a norm through law, but only provided general guidelines. In this case, the legislators have the space to formulate more detailed provisions. This space is referred to as the area of legislative freedom as long as it does not deviate from the general framework set by the 1945 Constitution. This means that norms that are not explicitly regulated in the 1945 Constitution, but are needed to implement constitutional provisions, are included in the category of open legal policy. According to the Constitutional Court, this kind of norm can be changed at any time by the legislators as needed.(Harahap et al., 2023)

Based on a number of Constitutional Court decisions related to the concept of open legal policy, the definition of the term can be formulated. According to the Constitutional Court, open legal policy refers to a situation where a norm in a law is not directly regulated in the 1945 Constitution, or is the result of implementing an explicit order in the 1945 Constitution. In this case, the norm in question cannot be assessed for its constitutionality and can be changed at any time by the legislator. Thus, the concept of open legal policy gives legislators the freedom to regulate matters that are not explicitly ordered or regulated in the constitution, for the sake of the smooth running of government or state activities.(Mantara Sukma, 2020)

Along with the development, the use of the term open legal policy no longer only appears in the considerations of the Constitutional Court when referring to norms in the law being tested. This term is now also used by the DPR and the Government to defend the validity of a law in the constitutional testing process at the Court. In fact, the applicant for the material review and experts from both the applicant and the party defending the law also use this concept in their arguments and statements.(Perdana et al., 2022)

In simple terms, a law or legal norm in a law can be categorized as part of an open legal policy if the norm is not explicitly regulated or limited by provisions in the 1945 Constitution. If a norm is not included in the scope determined by the constitution, then the norm can be considered a form of open legal policy.(MA Lubis et al., nd)

Furthermore, there are several criteria for a legal norm to be classified as an open legal policy. ***First,*** These norms must not conflict with or be detrimental to the 1945 Constitution.***Second,***norms must consider justice based on morality, religious values, as well as maintaining public security and

order.***Third,***These norms must guarantee protection of citizens' rights.***Fourth,***norms must be legally acceptable and have a strong logical basis.***Fifth***, the norm must have practical benefits. However, not all norms that are classified as open legal policies are always directly related to the decisions of the Constitutional Court.(Ajie, 2016)

Therefore, the Constitutional Court does not explicitly discuss open legal policy but this actually comes from the applicant, expert statements to the legislators, both the DPR and the Government, which in conclusion the basis for saying that the articles/legal norms/materials being tested include open legal policy is because it is not regulated in detail in the 1945 Constitution. Indicators of the content of the term open legal policy in several Constitutional Court decisions can be examined at least into several things: (a) the content of the open legal policy from the applicant, (b) the content of the term open legal policy from the legislator, and (c) the content of the term open legal policy from the tester. Based on these three aspects, it is identified that the term and concept of open legal policy are not only used by the Constitutional Court in providing decisions on judicial review of laws but are also used by legislators to maintain the legal norm of open legal policy and in its development are also used by the applicant when testing laws.

Comparison of Open Legal Policy Age Limit Threshold

a. Comparison of the Age Limit for the Advocate Profession with the Notary Position based on the law

The notary profession is regulated by legal norms that set a maximum age limit for ending one's term of office honorably, namely at the age of 65 years, and can still be extended to the age of 67 years if one's health condition allows. This provision is stated in Article 8 paragraph (1) letter b and paragraph (2) of Law Number 30 of 2004 concerning the Position of Notary, as amended by Law Number 2 of 2014. On the other hand, the advocate profession, which is also a legal profession and does not receive a salary or allowance from the state, does not have similar regulations regarding the age limit for termination. Law Number 18 of 2003 concerning Advocates only regulates in Article 9 paragraph (1) that advocates can resign or be dismissed by the Advocates Organization, without mentioning a specific age limit.

This difference in treatment shows inequality before the law between notaries and advocates, which is considered to be in conflict with Article 28D paragraph (1) of the 1945 Constitution which guarantees the right to recognition, guarantees, protection and fair legal certainty as well as equal treatment before the law.

In addition, the age limit provisions for honorable dismissal for notaries, which are not regulated in the legal profession, are considered a form of discriminatory treatment. This is considered to be in conflict with Article 28I paragraph (2) of the 1945 Constitution which guarantees the right of every person to be free from discriminatory treatment on any basis and the right to obtain protection from such discriminatory treatment. The applicant asserts that as long as the norm on honorable dismissal only applies to notaries and is not also applied to the legal profession—which is also not funded by the state—notaries have not received equal legal protection from discriminatory treatment.

The legal provisions that allow the extension of a notary's term of office up to the age of 67 years by taking into account his/her health condition are contrary to the basic principles contained in Article 28D paragraph (1) in conjunction with Article 28I paragraph (2) of the 1945 Constitution, therefore the Applicant considers it reasonable that at the end of his/her application to the Constitutional Court, he/she requests that the provisions be declared contrary to the 1945 Constitution and not have binding legal force. However, the Applicant submits an alternative interpretation, namely: a notary is honorably dismissed upon reaching the age of 65 years, and his/her term of office can be extended every five years as long as he/she is physically and/or mentally healthy, as evidenced by a certificate from a doctor appointed by the state.

b. Comparison of the Age Limit for Public Accountant Profession with Notary Position based on Law

The legal basis for the practice of the Public Accountant profession in Indonesia is currently regulated in Law Number 5 of 2011 concerning Public Accountants, which came into effect on May 3, 2011. Based on Article 5 paragraph (1) and (2) of the law, a Public Accountant practice permit is issued by the Minister with a validity period of five years and can be extended. Applications for extension of this permit must be submitted no later than 60 days before the previous permit expires, as regulated in Article 8 paragraph (3). If within 30 days after all requirements have been met the Minister has not issued an extension of the permit, then according to Article 8 paragraph (6), the practice permit is considered to have been automatically extended. However, if a Public Accountant does not apply for an extension within the five-year period, then he can apply for a new permit.

This licensing system shows that the regulation of the practice of the Public Accountant profession provides convenience, both in the form of a permit extension every five years, the opportunity to apply for a new permit if the extension is not done on time, and an automatic extension mechanism if the Minister does not immediately issue a decision within a certain time limit. However, there is a legal vacuum in Law No. 5 of 2011 because there is no provision regulating the age limit for honorable dismissal of a Public Accountant, which means there is no maximum age limit for someone to continue practicing their profession.

The absence of rules regarding age limits is considered a form of legal inequality between the profession of Public Accountant and the profession of notary, which actually has an age limit provision of up to 65 years and can be extended to 67 years based on health considerations. This difference in treatment is considered discriminatory and does not comply with the principles of justice and legal certainty as guaranteed in Article 28D paragraph (1) in conjunction with Article 28I paragraph (2) of the 1945 Constitution. Therefore, the Constitutional Court stated that the provisions on the age limit for the office of notary are contrary to the 1945 Constitution and no longer have binding legal force, unless interpreted as follows: "Notaries are honorably dismissed after reaching the age of 65 years and can be extended every five years as long as their physical and/or mental condition is still healthy, proven by a certificate from a doctor appointed by the state." This will eliminate discriminatory treatment, provide equal legal protection, and guarantee justice and equality before the law between the professions of notary and Public Accountant.

Comparison of Age Limits for Notaries in Indonesia and Abroad

The age limit for a notary in Indonesia to be honorably dismissed from his/her position is set at 65 years old and can be extended to 67 years old provided that his/her health condition still allows. When compared to the retirement age provisions for notaries in other countries, such as the Netherlands which sets the retirement age at 70 years old, the provisions in Indonesia appear to be far behind.

However, if the notary retirement age policy in Indonesia merely adopts practices from other countries, then this can reflect that the direction of national legal development is not yet fully independent and is still imitative or transplantative. Therefore, the example of the notary retirement age provisions abroad is used by the Applicant only to show that regulations in Indonesia need to be updated because they are lagging behind other countries.

According to the Applicant, a person's ability to continue working should not be measured by age alone, because age only shows how long a person has lived and is not a measure of work capacity. What is more relevant to be an indicator of work ability is health conditions, both physical and mental. As long as a person is still physically and/or mentally healthy, then he or she can basically still work. Conversely, at any age, a person cannot work if his or her health is impaired.

Thus, the legal provisions that limit the term of office of a notary to a maximum age of 67 years are not only lagging behind the retirement age limits for notaries in various other countries, but are also in principle contrary to the basic norms in the 1945 Constitution. These provisions violate Article 27 paragraph (2) which guarantees the right of every citizen to obtain decent work and a decent living,

Article 28C paragraph (1) which guarantees the right of individuals to develop themselves in order to improve the quality of life through knowledge, and Article 28D paragraph (1) which guarantees recognition, protection and certainty of fair law as well as equal treatment before the law.

Therefore, the provisions in Article 8 paragraph (2) of Law Number 30 of 2004 in conjunction with Law Number 2 of 2014 which regulate the retirement age limit for notaries at 65 years and an extension to the age of 67 years with health requirements, are contrary to the 1945 Constitution and should be declared to have no binding legal force, unless interpreted as: "Notaries are honorably dismissed from their positions after reaching the age of 65 years and their term of office may be extended every five years as long as they are still physically and/or mentally healthy, based on a certificate from a doctor appointed by the state."

Reasons for Legal Rationality

One of the important points in the Constitutional Court Decision Number 112/PUU-XX/2022 states that although open legal policy is the authority of the legislator, this principle can be set aside if it conflicts with the principle of rationality (referring to the considerations of the Constitutional Court Panel of Judges on page 116 of the decision). Based on these considerations, the Applicant is of the opinion that the provision regarding the extension of the notary's term of office which is only for two years does not meet the criteria of rationality for the following reasons:

First,The rule stating that a notary is honorably dismissed after reaching the age of 65 years and can only be extended to the age of 67 years based on considerations of health conditions, is considered by the Applicant to be in conflict with Article 28D paragraph (1) of the 1945 NRI Constitution which guarantees the rights of every citizen to receive recognition, protection, guarantees, and fair legal certainty and equal treatment before the law. This is because other professions such as Public Accountants, Curators, and Doctors have a mechanism for extending their term of office every five years, while Advocates do not even have a provision for a retirement age limit.

Second,The legal provisions governing the honorable dismissal of a notary at a maximum age of 67 years are also considered to be in conflict with Article 28I paragraph (2) of the 1945 Constitution of the Republic of Indonesia, which guarantees the right of every person to be free from discriminatory treatment on any basis, and to receive protection against such discriminatory treatment. This inconsistency is reaffirmed by the differences in treatment of other professions such as Public Accountants, Curators, Doctors and Advocates, which have more flexible retirement age provisions or are not even limited.

Third, the legal provisions regarding honorable extension of the term of office generally only apply in employment relationships between the payer (employer) and the payee (worker), where the work carried out as a form of responsibility has been carried out well by the party being paid. In the context of this kind of relationship, the use of the term "honorable dismissal" is considered reasonable. However, it would be unreasonable if a similar norm were applied to a profession such as a notary, who does not have a reciprocal relationship in terms of salary provision from the state. The state does not provide a salary to a notary even though it has appointed him to office.

Fourth, in general practice, honorable dismissal is usually carried out by the employer based on considerations such as reaching a certain age, physical and/or mental health conditions that no longer allow work, resignation, or death. As a logical consequence of the implementation of the "honorable dismissal" norm, the employer is usually obliged to provide compensation in the form of money or other equivalent forms, either paid at once or in installments. According to the Applicant, if someone is honorably dismissed without any compensation, then this is basically not an "honorable dismissal", but rather a form of "dishonorable dismissal", because it is not followed by appropriate awards and is based on different reasons.

4. CONCLUSION

Based on the Constitutional Court Decision Number 84/PUU-XXII/2024, the legal provisions related to the age limit for notary positions are categorized as open legal policy, namely an open legal policy that is within the authority of the legislator, as long as it does not conflict with the 1945 Constitution. However, this policy can be set aside if it conflicts with constitutional principles, such as the principle of anti-discrimination, equality before the law, and the appropriateness and rationality of public policy. In this case, the Court views that the regulation on the honorable dismissal of notaries at the age of 65 with the possibility of extension to 67 years to 70 years must still guarantee the principle of justice, not contain discrimination, and be legally logical, especially when compared to other legal professions such as advocates or public accountants who do not have a similar age limit. Therefore, the Court emphasized that even though it is included in the open legal policy, the legal norms must still be based on the principles of justice, legal certainty, and protection of the constitutional rights of citizens.

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