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Content

LEGAL POSITIVISM IN CONSTITUTIONAL COURT DECISION 46/PUU-XIV/2016

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Abstract

This paper examines the Constitutional Court Decision 46 / PUU-XIV / 2016 through the approach of the flow of legal philosophy, specifically legal positivism which resides behind decisions that reject the petition of the applicant. Tensions between the philosophical schools of law always occur, until the judges give their decisions. This decision was classified as a hard case, which was very full of paradigm disputes. The focus of the study in this study is to look at the judges' consideration with the logical positivism approach to law. This is done because the foothold that is the basis of legal arguments places several statutory regulations at the constitutional level and the law becomes the main analysis stone looking at the problems/premise of the major, where the authority adds norms not the authority of the Constitutional Court. Therefore, the formulation of the problem in this study is the identification and analysis of arguments with nuances of legal positivism in the Constitutional Court Decision 46 / PUU-XIV / 2016. The research method used is the Doctrinal / Normative Research, which is the main legal material to be examined in this study, which is the Constitutional Court Decision 46 / PUU-XIV / 2016. The type of approach, using the analytical approach (analytical approach) and philosophical approach (philosophical approach). Conclusions from this study: The flow of legal positivism with its arguments based on axiology, ontology, and epistemology dominates the judges so that the presence of the decision rejects the petition of the applicant. The flow of legal positivism comes with reasoning/logic that is very tight and closed, which makes the legislation as the main basis, thus limiting judges to conduct self-restraint, and submit it to the legislators to execute what is expected of the applicant. In addition, the issue of the principle of legality that upholds legal certainty is also the main reason for the judges who reject the decision. The tension between the flow of legal philosophy in this decision occurs, where legal positivism which originally had a theoretical tension with the flow of natural law and historical schools, also occurred where judges who had dissenting opinions based their arguments on the flow of natural law and historical schools.

Keywords: Legal Positivism, MK 46 / PUU-XIV / 2016 Decision

I. INTRODUCTION

This paper examines the Constitutional Court Decision 46 / PUU-XIV / 2016 through the approach of the flow of legal philosophy, specifically legal positivism which resides behind decisions that reject the petition of the applicant. Legal positivism developed more or less in the 18th century, some figures who popularized include Jeremy Bentham, John Austin, Hans Kelsen, H. L. A. Hart, and several other figures. Legal positivism is one of the streams in the philosophy of law that defines law as a product of power that must be obeyed in every line of community life. The law is something that is 'deliberately' formed by the authorities in the framework, the law is a command for whoever will organize the country. Law is no longer placed as something free and free, but the law is a formal product that is the basis of the legality of every activity. The constitutional design is established by law, so that each state administration is in regular traffic, that order is present as a means towards the goal of legal positivism, namely legal certainty. One of the constitutional designs established after the reformation is the Constitutional Court (MK).

The Constitutional Court was present as a means of judicial checks on all laws produced by the legislators through the political process. If in practice, the existence of this law is felt to be detrimental to the community, then the public can submit to the Constitutional Court to be canceled because it violates its constitutional rights. If it is proven that the norms of the law violate the constitution, the Constitutional Court will cancel to maintain the constitutional rights of citizens / the guardian of a constitutional right and enforce the constitution / the guardian of the constitution[1]. The role of the Constitutional Court also upholds the constitution to maintain the validity of a norm of the law so that it runs in harmony with what the constitution wants. So, at one time through its decision, the Constitutional Court safeguarded the constitutional rights of citizens through two things: first, protecting the constitutional rights of citizens directly to the person/community who applied, and secondly through the product of law / to the entire community because the Constitutional Court's decision was erga omnes - binds all parties.

[1] M. Ali Safa'at. Mahkamah Konstitusi dalam Sistem Check and Balances. Dalam Buku Bunga Rampai Konstitusionalisme Demokrasi. Kado Ulang Tahun untuk Prof. A Mukhtie Fadjar. Malang: Intrans Publishing, 2010. Hlm, 26.

The scheme of protecting constitutional rights through legal products, and harmonious norms between the hierarchy of laws and regulations, is one of the main variables of legal positivism thinking. The design of the legal system in the Indonesian context is indeed much influenced by legal positivism which is applied well in civil law and rechstaat schemes. Law in the sense of the product of the law is associated as a product of power that is present as a basis in the implementation of the state. All government actions must obey and obey what is ordered by the legal rules, which are formed before the action is carried out, or in legal maxim called due process of law. The sound of the law is used as a guiding light of power, which must be obeyed and followed.

Referring to the study in this paper, the Constitutional Court, as one of the state institutions, is also subject to the orders of the underlying law. The role of the Constitutional Court as the guardian of the constitution and guardian of a constitutional right in the logic of legal positivism certainly cannot be out of the rules regulated in Law Number 24 of 2003 Ju. Law Number 8 of 201 concerning the Constitutional Court (MK Law). According to the history of the formation of the Constitutional Court in the amendments to the 1945 Constitution, the Constitutional Court was focused as an institution that examines the law, and 'cancels' if it conflicts with UUD 1945,[2] and expressly, in the history of these hearings, the authority to form legislation was given to the President and the House of Representatives. The role of the Constitutional Court to cancel the product of the law in the study of constitutional law also referred to as negative legislators. This role is seen in Article 56 of the Constitutional Court Law, which regulates that the products produced by the Constitutional Court through its decision, are arranged in a limitative manner in three forms: Unacceptable, Granted, and Rejected.[3]

In its development until 2020, the Constitutional Court, which is approximately 17 years old, has developed a model of decisions produced by the Constitutional Court through

[2] Lihat dalam Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002, Buku Keenam, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010

[3] Lebih detail, lihat dalam pasal 56 UU MK: (1) Dalam hal Mahkamah Konstitusi berpendapat bahwa pemohon dan/atau permohonannya tidak memenuhi syarat sebagaimana dimaksud dalam Pasal 50 dan Pasal 51, amar putusan **menyatakan permohonan tidak dapat diterima**. (2) Dalam hal Mahkamah Konstitusi berpendapat bahwa permohonan beralasan, amar putusan menyatakan **permohonan dikabulkan.** (3) Dalam hal permohonan dikabulkan sebagaimana dimaksud pada ayat (2), Mahkamah Konstitusi menyatakan dengan tegas materi muatan ayat, pasal, dan/atau bagian dari undang-undang yang bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. (4) Dalam hal pembentukan undang-undang dimaksud tidak memenuhi ketentuan pembentukan undang-undang berdasarkan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, amar putusan menyatakan **permohonan dikabulkan.** (5) Dalam hal undang-undang dimaksud tidak bertentangan dengan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, baik mengenai pembentukan maupun materinya sebagian atau keseluruhan, amar putusan menyatakan **permohonan ditolak.**

constitutional judges. The decisions issued within 17 years, not only the decisions are negative legislators. The Constitutional Court developed, and slowly evolved into positive legislators / or formed new norms. In Soetandyo Wignjosoebroto's language that discusses the legal epistemology, the existence of such a Constitutional Court can be seen through a macro approach to structural theory. Soetandyo Wignjosoebroto explained in its development until 2020, the Constitutional Court, which is approximately 17 years old, has developed a model of decisions produced by the Constitutional Court through constitutional judges. The decisions issued within 17 years, not only the decisions are negative legislators. The Constitutional Court developed, and slowly evolved into positive legislators / or formed new norms. In Soetandyo Wignjosoebroto's language that discusses the legal epistemology, the existence of such a Constitutional Court can be seen through a macro approach to structural theory. Soetandyo Wignjosoebroto explained:[4]

The macro approach to structural theory, departing in terms of its structure, the law is seen as a judicial institution whose work is to transform inputs (specifically legal material in abstracto) into outputs in the form of decisions / in concreto, which in this way tries to influence and direct the forms and processes social interactions that take place within the community. Because it is conceptualized as a symptom that is and moves or operates in the empirical world, the law both as a substance of social power and as an institutional structure of decision-makers in concreto which has the power as a natural fact which will certainly be subject to agencies (regularities, nomos) or uniformity-uniformity (uniformities) which is not always absolute but always can vary. Thus, according to the concept, the law will be observable but as a variable.

The Court carried out its role as recipients of input from the community and resolved it through decisions that resolved the problem. Under these circumstances, what was ordered by the Constitutional Court Law mandating that the Constitutional Court's Decree was limited to 3 types, had been ruled out. Decisions which are of a positive legislature nature, are present in the forms of conditional constitutional or unconditional constitutional decisions, as in MK 102 / PUU-VII / 2009 Decision which allows the public to vote in the Presidential Election by showing their KTP or passport.[5]

Decisions of the Constitutional Court with a positive legislative nature finally set a new precedent in the community's discourse and mindset, which considers the Constitutional Court to absorb the legal aspirations of the people. Basic assumptions formed in the

[4] Soetandyo Wignjosoebroto, *Hukum Konsep dan Metode,* Malang: Setara Press, 2013. hlm, 123

[5] Martitah dalam penelitian disertasinya meneliti secara komprehensif tentang Putusan-Putusan yang menambah norma. Lebih lanjut lihat dalam Martitah, Mahkamah Konstitusi dari Negative Legislature ke Positive Legislature, Jakarta: Konpress, 2013.

community 'if the will of the people is slowly executed by the Parliament and the President, the Constitutional Court can be the solution'. One of the basic assumptions is seen in the petition filed by the petitioner in Decision 46 / PUU-XIV / 2016. The petitioners (Euis Sunarti, et al) want to criminalize[6] adultery crime through the judicial review process at the Constitutional Court. The petitioner is troubled by the increasing LGBT and free sex issues and gives a negative excess to the community, both from moral and public health. Seen in the petition submitted, the petitioners want the Court to add/expand the provisions in Article 284 paragraph (1), paragraph (2), paragraph (3), paragraph (4), paragraph (5), Article 285 and Article 292 of the Book Criminal Law (KUHP). In his petitum, one of the petitioners wanted that adultery as in the current Penal Code was interpreted not to be limited between one of the perpetrators who was married but expanded not to have a family. This means that when two people have sexual relations, and both are not married, the applicant wants both to be convicted/convicted of free sex.[7]

In the logic of legal positivism certainly, such a scheme is not justified. The orientation of order as one of the objectives of legal positivism is naturally disturbed, with the intervention of the Constitutional Court as the legislator through its decision. This decision was quite fierce when it was formulated in an internal judge, there were dissenting opinions with a total of 4 judges, and the judge behind the decision to reject the application amounted to 5, the difference was 1 judge. It is no exaggeration if this decision is called a hard case, in which there is a flow/paradigm dispute between the judge who decided it. Tamanaha called it a hard position. Tamanaha sees hard case as something that is a dilemma:[8] "

> *What jurists refer to as "hard cases" usually fall into one of the two preceding categories: cases involving gaps, conflicts, or ambiguities in the law, and cases involving bad rules or bad results. It confuses matters to*

[6] Lihat hlm, 19 46/PUU-XIV/2016. Para pemohon mendalilkan: Pasal 284 ayat (1) angka 1.a KUHP sepanjang frasa *'yang beristri'* dan frasa *'sedang diketahuinya, bahwa Pasal 27 Kitab Undang- undang Hukum Perdata (sipil) berlaku kepadanya'* adalah bertentangan dengan UUD 1945 dan tidak memiliki kekuatan hukum; sehingga harus dibaca sebagai *"laki-laki berbuat zina".* Pasal 284 ayat (1) angka 1.b. sepanjang frasa *'yang bersuami'* adalah bertentangan dengan UUD 1945 dan tidak memiliki kekuatan hukum; sehingga harus dibaca sebagai *"perempuan berbuat zina".* Pasal 284 ayat (1) angka 2.a. sepanjang frasa *'sedang diketahuinya, bahwa* kawannya *itu bersuami'* adalah bertentangan dengan UUD 1945 dan tidak memiliki kekuatan hukum; sehingga harus dibaca: "2.a. *laki-laki yang turut melakukan perbuatan itu".* Pasal 284 ayat (1) angka 2.b. sepanjang frasa '*yang tiada bersuami'* dan frasa *'sedang diketahuinya, bahwa kawannya itu beristri dan Pasal 27 Kitab Undang-undang Hukum Perdata (sipil) berlaku pada kawannya itu'* adalah bertentangan dengan UUD 1945dan tidak memiliki kekuatan hukum; sehingga harus dibaca: 2 b. *perempuan yang turut melakukan perbuatan itu.* Pasal 284 ayat (2) ayat (3) ayat (4) dan ayat (5) adalah bertentangan dengan UUD 1945 tidak memiliki kekuatan hukum.

[7] Lihat Hlm, 71 Putusan 46/PUU-XIV/2016

[8] Brian Z Tamanaha. *Beyond Formalist – Realist Devided the Role of Politics in Judging.* Princeton University. Hlm, 192. Dalam Widodo Dwi Putro. *Kritik Terhadap Paradigma Positivisme Hukum*. Yogyakarta: Genta Publishing. Hlm, 174.

> *lump the two together under same label because they raise distinct dilemmas. The former asks what a judge should do when the law is unclear; the latter asks what a judge should do when a clear law or its consequences is deemed objectionable. Both situations are "hard" in the sense that there is no easy course for the judge. They sometimes merge, for instance, when a bad result encourages a judge to see the law as less clear than initially thought, paving the way for a different result. But the distinction between these types of hard cases is generally marked. The former is continous with legal analysis in which the judge engage in difficult search for the correct legal answer, whereas the latter raises questions about the extent of the judge's obligation to follow the law*. [9]

The independent weaknesses are as follows: What legal experts refer to as "serious cases" usually "falls into one of two previous categories: 1) cases involving pleasure, conflict, or ambiguity in the law, and 2) cases that involve bad rules or bad results. This problem is confusing to unite under the same label because they pose different dilemmas. The first judge asks what to do when the law is not clear, the second judge asks what to do if a clear law or its consequences is deemed appropriate. Both situations are "hard or complicated" in the sense that nothing is easy for the judge. They (sometimes joining, for example, when the bad consequences persuade the judge to see the law as less clear than the initial thought, opened up a different revenue-sharing path. But the difference between the difficult types of cases is generally marked. The first is continuous with legal analysis in which judges involved in searching are difficult to answer the right law, while the latter raises questions about where the judge's obligation to follow the law

The reasoning/logic of legal positivism shown by the judges who are behind the decision of the ruling is an interesting thing to be studied conceptually and academically with the approach of the philosophy of law. The determination of the Constitutional Court as a negative legislature following the constitutional orders and the Constitutional Court Law is very much maintained. This research will focus on: "the method adopted" by the petitioner to criminalize an act into a criminal act through the judicial review route and the role of the Constitutional Court to be a negative legislature, not on: the "material aspects" of what the petitioner is attempting to commit, namely the Criminalization of Adultery. The 467-page decision has the consideration of judges which are quite concise, namely 26 pages. Broadly speaking, the judge's consideration is:[10]

[9] *Ibid*. Widodo Dwi Putro
[10] Lihat Hlm, 427-453 Putusan 46/PUU-XIV/2016

1. The judge positions himself as a negative legislator, as well as carrying out the principle of judicial restraint in the person of the judge. This means that the Constitutional Court does not open space for the expansion and addition of criminal law through the judicial review because that is the authority of the legislators namely the President and the Parliament.
2. The judge considers the principles of criminal law, the legal certainty aspect is highly considered in this case, because if the request is accepted, there is no attempt to harmonize the norm with the legality principle in force today (in the study of criminal law politics).

Based on the description above, the focus of the study in this study is to look at the judges' consideration with the logical positivism approach to law. This is done, because the foothold that is the basis of legal argument places several statutory regulations at the constitutional level and the law becomes the main analysis stone looking at the problems / premise of the major, where the authority adds norms not the authority of the Constitutional Court. Therefore, the formulation of the problem in this study is: identification and analysis of arguments with nuances of legal positivism in the Constitutional Court Decision 46 / PUU-XIV / 2016

This type of research is Doctrinal / Normative Research, which is the main legal material to be examined in this study, is the Constitutional Court Decision 46 / PUU-XIV / 2016. As for the type of approach, using the analysis approach (*analytical approach*)[11] and (*philosopichal approach*).[12]

II. DISCUSSION

A. The Flow of Legal Philosophy as a Guide for Judges

Philosophy of law is a scientific family that discusses the law at a high level of abstraction and wisdom, as well as the search for the ultimate truth, which is an important orientation in this family. Carl Joachim Friedrich illustrates, legal philosophy is part of general philosophy because it offers a philosophical reflection based on general law, where the object of legal philosophy is in the law itself. The characteristics of legal philosophy always strive towards perfection, that is, legal philosophy always moves in its silence systematically or irregularly, by discovering, analyzing and analyzing and evaluating one part and the other, intending to open insight, uncover natural secrets and uncover doubts within the human.[13]

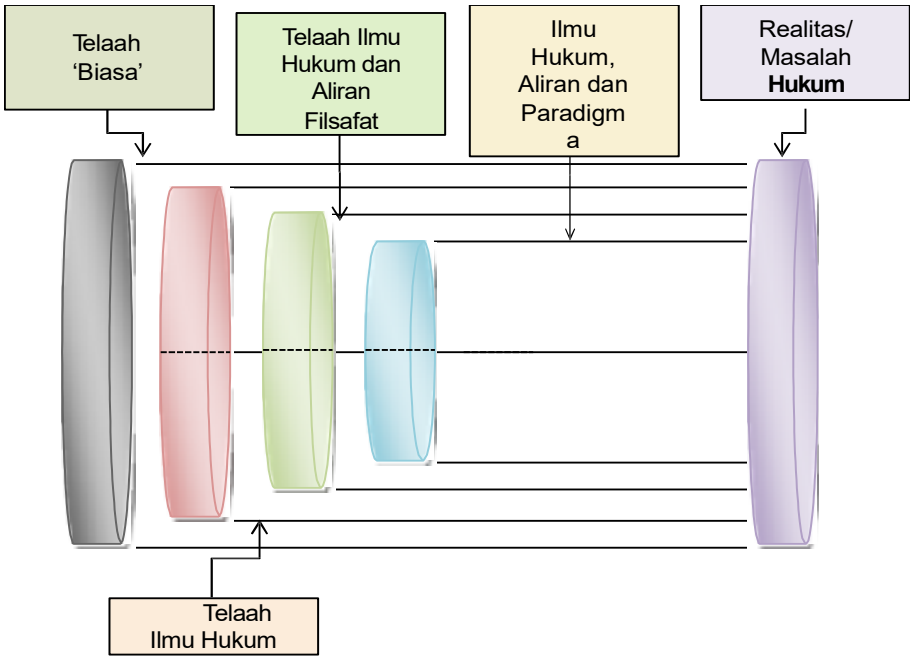
[11] Johny Ibrahim, Teori dan Metodologi Penelitian Hukum Normatif. Malang: Bayumedia Publishing, 2007. Hlm, 306.
[12] Ibid. Hlm, 307.
[13] Ibid. M. Erwin. Hlm 126

Every school of law Philosophy is a part of things and can be said to be manifest or born or rooted from a certain 'paradigm'. Paradigms thus overshadow various streams of existing legal philosophy, or in a simple illustration: Paradigms are the parent of the flow of legal philosophy. The community is always faced with various problems, which often shake life. The legal problem is one of the many problems that plague humans. In principle, every legal problem that occurs in the community asks to get away to solve it (problem-solving). The paradigm is part of the scientific approach used by humans to understand all the legal problems that occur. It is said to be part of the scientific approach because the scientific approach to understanding legal issues can also use the study of legal science and the flow of legal philosophy. All three (legal science, the flow of legal philosophy and paradigm) offer ways in which a problem is understood and answered to get a problem-solving.

Law becomes a tool that is more widely used in answering existing legal problems. Law seems to be a kind of "fetish" that is very interesting throughout the legal awareness of the academic community. Borrowing other health terms, legal experts seem to experience compulsive gaming and am addicted to using the perspective of legal science as the only way to answer legal problems. To get a deeper answer there is a guilty perspective of legal philosophy that can be used. Legal philosophy is like a park that is rarely visited.

Erlyn Indarti illustrates how the scientific approach of legal science, legal philosophy and paradigmatic studies, is like a lens. All three are lenses used to gain a comprehensive, detailed, smooth and sharp understanding. By using the frame of mind constructed by Erlyn Indarti, the following is an illustration of a scientific approach in looking at each legal issue:

Legal Philosophy and Paradigmatic Studies in Viewing Problems
(Diadopsi dari Erlyn Indarti)



The picture above in principle implies that reality will be understood differently depending on how the study/perspective is carried out, whether done 'normally', with the help of legal science, legal science and the philosophy of legal philosophy or - with legal science, the philosophy of law and paradigm. This will have implications for the sharpness of the answers generated to the legal issues studied. Besides, the paradigmatic study also makes it possible to find out the paradigm that guides each adherent in terms of answering the problems that are asked to be answered.

Law as an instrument creates social order, is something that crosses time and space. Every age, legal thinkers always have their cosmological colors as a radiant spirit of the times. This has become one of the reasons for the emergence of a diversified school of legal philosophy. Legal philosophy is built on three central themes that are interconnected with one another, namely legal ontology, legal epistemology, and legal axiology. Legal Ontology as a means to discuss the nature of law and reality. Epistemology of law as a way to find a way in the formation of law and its truth. The axiology of law as a space to connect existing values with law. Three central themes between one school and another have differences, and in the end, those differences certainly have implications for forming a different reasoning model.

R. A. S Wasserstrom explained, the reasoning model in the field of law can be interpreted:[14]

[14] Sidharta, Hukum Penalaran dan Penalaran Hukum. Yogyakarta: Genta Publishing, 2013. Hlm, 198

A model of rationality means a class of reasons which may be cited by an official in order to justify a legal decisions when more than on decision can be given without infringing legality or constituionility. It is nor a description of the psychological processes by which officials, reach decisions.

Sidharta explained, there are at least 6 known legal reasoning patterns, namely the flow of natural law, legalities, utilitarianism, schools of thought, socialism, legalism, and legal realism. Each of these patterns in a variety of streams that certainly guide the judges in determining their arguments.

The Reasoning Pattern of Every School of Law philosophy [15]

Flow of Legal Philosophy	Legal Ontology	Legal Epistemology	Legal Axiology
Natural law	Law as a principle, self evident namely truth and justice.	Doctrinal-deductive (from the normative premise *self evident*)	Justice
legal positivism	Laws are positive norms in the legal system	Doctrinal-deductive (from positive law)[16]	Certainty
Utilitarianism	Laws are positive norms in the legal system	Deductive doctrinal (from positive law), followed by inductive doctrinalism	Certainty, followed by expediency
History Madzhab	Law is a pattern of institutionalized behavior (law as an abstraction of behavior)[17]	Non-doctrinal inductive. Deductive doctrinal internalization (structural / macro approach)	Benefit and fairness (simultaneous)
Sosiological Jurisprudence	The law is the judge's decision in concreto	Inductive nondoctrinal and deductive doctrinal. (Top down and bottom up pattern)	Usability and certainty (simultaneous)
Legal Realism	Law is a manifestation of the symbolic	Inductive nondoctrinal (interactional	Usefulness

[15] Dikutip dari Sidharta, dan diolah oleh Penulis.
[16] Bedakan dengan hukum alam, yang doktrinal deduktif dari *self-evident*.
[17] Tambahan penjelasan dari penulis.

	meanings of social actors	approach)	

Each of these central themes always has their respective spirits in every stream of legal philosophy. that is what will later become a discussion in this paper, the author wants to see the logic of legal positivism in the Constitutional Court Decision Number 46 / PUU-XIV / 2016, which guides and inherits all legal considerations in giving the decision

B. The Logic of Legal Positivism in the Constitutional Court Decision

The existence of legal positivism can be categorized as the antithesis of the flow of natural law. The flow of natural law that puts norms on high abstraction is based on divine values, which are then derived from principles relating to truth and justice, and the position of morality becomes a central point in the flow of natural law. In contrast to legal positivism, which is at a more concrete level, and has a solid demarcation line to separate law and morality.[18] Augusto Comte has a large role in this genre, but John Austin, Jeremy Bentham, and Hans Kelsen are better known as promoters of this genre. Legal positivism means that law is a set of juridical rules, made by the authorities. This flow does have its background, Comte explained that legal positivism wants to capture the rule of law as a sensual fact. As a result, this flow only cares about aspects that can be captured by the human senses. The law is captured by sensual senses.[19] The reasoning method used in legal positivism is dominated by rational processing, which is different from the flow of natural law that uses intuition.

The nuances of legal positivism become the central thought that wins dialectics in internal judges' deliberations so that this flow dominates judges' considerations for rejecting petitioners' petition. Considerations with the nuances of legal positivism, illustrated in the judge's judgment as follows (in outline):

1. The Constitutional Court positions itself as a negative legislator, as well as carrying out the principle of judicial restraint in the person of the judge. That is, the Court did not open space for the expansion and addition of criminal law.
2. The judge considers the principles of criminal law, the legal certainty aspect is highly considered in this case, because if the request is accepted, there is no attempt to harmonize the norm with the legality principle in force today (in the study of criminal law politics). Untuk menentukan derajat kepekatan positivisme hukum dalam pertimbangan tersebut, perlu dilakukan pendekatan

[18] Saldi Isra, dalam M. Erwin, hlm IX

[19] Bernar L Tanya, dkk. *Teori Hukum: Strategi Tertib Manusia Lintas Ruang dan Generasi*, Yogyakarta: Genta Publishing, 2013. Hlm, 112

terhadap tiga tema sentral dalam filsafat hukum, yakni ontologi, epistimologi dan aksiologi.

Ontology aspects in legal positivism, the law is interpreted as a set of rules made by the authorities and systematized between one sub-system with another. Shidarta explained ontologies in legal positivism are positive norms in the legal system. The meaning reflects the combination of idealism and materialism. Such an explanation can refer to the John Will theory of the law (the will theory of law) and the pure norm theory of law from Hans Kelsen. According to Austin, *a positive legal rule is to be equated with the expression of an act of wishing,* sedangkan A *legal system is to be equated with all the positive legal rule emanating from the sovereign will.* [20] The law is the will of the authorities, this will is not something empty, this is explained by Hans Kelsen by saying a positive legal rule is to be equated with a pure norm, that is with an ought or much meaningful content. The collection of norms that are systematically arranged, is a meaningful formula because it becomes a source of legal discovery activities by the legal bearer. The content of the meaning (ought or want meaning content) is obtained by the approach of idealism and materialism, then it is processed with epistemological aspects of rationalism. [21]

The law is the will of the authorities, this will is not something empty, this is explained by Hans Kelsen by saying a positive legal rule is to be equated with a pure norm, that is with an ought or much meaningful content. The collection of norms that are systematically arranged, is a meaningful formula because it becomes a source of legal discovery activities by the legal bearer. The content of the meaning (ought or want meaning content) is obtained by the approach of idealism and materialism, then it is processed with epistemological aspects of rationalism

Ontology of law (legal positivism) in the consideration of judges, illustrated in two ways namely the law is interpreted as an order of the authorities that must be obeyed, not an abstraction of social order. It was seen, when the judge considered the position of the Constitutional Court as a negative legislator and judicial restraint in the person of each judge. The power represented by the law provides limiting signs, for each Constitutional Court Judge to give a verdict that is realized in only three forms, namely to grant, declare the law contrary to the 1945 Constitution, and state the law does not have binding legal force . Other positive legal provisions, which become restrictive barriers to judge judge, are Article 20 of the Constitution concerning the legislative process, MD3 Law, and Laws Formation of Regulations. All positive legal provisions command that every policy of the

[20] Sidharta, op.cit. Hlm, 198
[21] Sidharta, op.cit. Hlm ,199

laws and regulations is carried out by the legislators, in this case the President and the DPR-DPD, as powers that get direct legitimacy from the people.

The existence of this article is locking in, that positive law only allows judges to decide in accordance with existing guidelines (in the Constitutional Court Law, deciding is unacceptable, granting and refusing an application). Grammatically the law does not open space for the existence of a Constitutional Court ruling which is conditional / added to the norm. The existence of this article is an affirmation to the institution's marwah institution as a negative legislator.[22] Whereas judicial restraint, is an affirmation of the judge's personal passion, to limit himself to the guidelines stipulated by law. In legal ontology (legal positivism) can also be interpreted, these signs as norms that give meaning to action. The pure theory of law perspective, which is the object in law is the (single) norm, not behavior or social impulse / fact.[23] Whereas judicial restraint, is an affirmation of the judge's passion, to limit himself to the guidelines stipulated by law. In legal ontology (legal positivism) can also be interpreted, these signs as norms that give meaning to action. The pure theory of law perspective, which is the object in law is the (single) norm, not behavior or social impulse / fact**.**

Erlyn Indarti incorporated the flow of legal positivism into the positivism paradigm.[24] This is based on the legal meaning that is believed by this flow, namely law as what it is written in the books or the law in the domain of ius constitutum. When asked to decide upon the petition for review of Article 284 of the Criminal Code, the views of judges who rejected the petition had shown that the judges were guided by the legal positivism paradigm. This can be identified from the beginning through the legal meaning used. The Constitutional Court believes that the source of law to declare an act as an offense (adultery) is the law. The law which in this case contains written legal norms is the basis for declaring acts referred to as adultery. In other words, the limitation of an act as a crime of adultery is if the act is expressly stated as adultery in written legal norms.

The above view can be taken as its essence, by looking at the description of the considerations of the Mahakamah which is based on the principle of legality contained in criminal law in Indonesia. The Constitutional Court in full states:

The principle of legality derived doctrinally from the adage of nulla poena sine lege; nulla poena sine crimine; nullum crimen sine poena legali, which in its development was later

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[22] *Negative legislator* Adalah sebuah skema legislasi yang menempatkan MK sebagai lembaga yang hanya menegatifkan suatu norma, luaran dari skema ini, MK hanya memberikan putusan secara deklaratif, bahwa norma yang diuji bertentangan dengan UUD, dan tidak memiliki kekuatan hukum mengikat.

[23] Khuzaifah Dimyati dan Kelik Wardiono, *Paradigma Rasional Dalam Ilmu Hukum: Basis Epistemologis Pure Theory of Law Hans Kelsen,* Yogyakarta: GENTA Publishing, 2014. Hlm, 10

[24] Erlyn Indarti, *Opc.cit*., halaman 27.

"summarized" into an adumum nullum delictum, nulla poena sine praevia lege punali, containing four meanings as a unanimity of understanding, namely:

1. There is no criminal offense and therefore there is no crime if there is no law that has been set before (nullum crimen, nulla poena sine lege praevia). This statement contains the understanding that norms of criminal law must not be retroactive or retroactive.
2. There is no criminal offense and hence there is no criminal offense if there are no written legal norms or laws (nullum crimen, nulla poena sine lege scripta). This statement contains the understanding that the norms of criminal law must be written, as well as the criminal. That is, both prohibited and criminal acts that are threatened with prohibited acts must be explicitly written in the law.
3. There is no criminal offense and hence there is no criminal offense if there are no written rules or laws that are formulated (nullum crimen, nulla poena sine lege certa). This statement contains not only the prohibition to impose unwritten laws in criminal law and in imposing penalties but also the prohibition of imposing penalties if the formulation of norms in written law (law) is unclear.
4. No criminal offense and therefore no criminal if there are no strict written law (nullum crimen, nulla poena sine lege stricta). This statement contains the understanding that the provisions contained in criminal law must be interpreted strictly. From here also born an understanding that has been accepted in the legal community that in criminal law is prohibited from using analogies.

Furthermore, the Constitutional Court stated, "in criminal law, the terminology" of the law "contained in the four meanings of the principle of legality above is referring to the definition of the law in the true sense, namely the written legal product made by the legislators (in Indonesia, by the House of Representatives with the President). That is, legal products that are born from criminal policy or criminal law politics (criminal policy) are the legislators". Thus, an act is said to be adultery when the law has formulated the act normatively. The meaning of adultery, in this case, has been explicitly formulated in positive legal norms, namely Article 284 of the Criminal Code so that the article becomes a limitation to adjudicate and act qualifying as adultery. The article is a positive norm that explicitly has clearly defined what is referred to as adultery, so it must be upheld to ensure legal certainty.

Besides, in other contexts, the constitutional court in this case also tries to base its arguments on positive legal principles that are in abstracto to assess whether the

court has the authority to carry out a criminal law policy or in this level acts to reform the norms of criminal law within formulation stage. The quo petition according to the court is no longer merely asking to give meaning to adultery offense but to formulate a criminal act (read: adultery offense), something that only the legislators are authorized to do. In this case, it appears that the Mahakamah uses normative rules to postulate that the establishment of norms of criminal law to formulate norms of criminal law is the authority of lawmakers. This can be understood, because normatively criminal law norms according to Article 15 of Law Number 12 of 2011 concerning the Formation of Legislation (P3U Law) states that material content concerning criminal provisions can only be contained in-laws, provincial regional regulations; or district/city regional regulations.

One type of legislation that can formulate actions that can be convicted / offense/criminal is the law. The law, in this case, the formation is in the hands of the legislature. Article 1 number 3 of the P3U Law emphasized the normative definition of the law. Laws are laws and regulations established by the House of Representatives with the joint agreement of the President. Even in the first stage the formation of norms of criminal law in the law in this case through the National Legislative Program whose drafting is carried out by the Parliament and the Government. In a higher regulation, Article 20 paragraph (1) of the 1945 Constitution reinforces that the House of Representatives holds the power to form a law. In other considerations, related to the formulation of the legal norms of criminal law the Court may not explicitly enter this realm. The court believes it must position itself as a negative legislator, not in understanding as a legislator (positive legislator). Thus, as stated by Richard C. Fuller *a crime, considered as a legal category, is an act punishable by the state*.[25]

Epistemological aspects. the scope of discussion in legal epistemology is an attempt to uncover how legal knowledge can be obtained and how well the level of truth so that it can be a determinant of legal methodology.[26] In the flow of legal positivism, the way to achieve truth is emphasized in the pattern of doctrinal and deductive reasoning,[27] which is based on two main values, namely rational and objective.[28]

Doctrinal/normative reasoning is a model of reasoning that makes the rule of law positive, becoming a factoring point for all behaviors/facts. This reasoning will start

[25] Richards C. Fuller, *Morals and the Criminal Law*, Journal of Criminal Law and Criminology, Volume 32, Issue 6. (1941-1942).
[26] I Dewa Gede Atmaja, dalam M. Erwin. Op.cit. Hlm 149
[27] Shidarta. Op.cit, hlm. 200
[28] Ibid.

from a question, followed by intellectual guessing, which ends in answering that question. Then, followed by a series of subsequent activities to find legal norms that can function as a justification that justifies the answer to that question, through *guessing.*[29]

If you pay attention, the whole process runs according to the deduction syllogism, which consists of three stages. First, the legal basis (positive law) is positioned as a major premise. Second, sitting the case (factual concrete case) is propelled as a minor premise. Third, the verdict which is a logical-juridical consequence of a minor premise (a factual concrete case) is called a conclusion. In this structure, the legal basis (positive law) becomes the main proposition and has a central point.[30]

In the judge's consideration, there are at least two matters relating to epistemology in legal positivism. First, relating to doctrinal reasoning. The main thing done by the Court, is asking the question "whether the Constitutional Court has the authority to expand and establish norms of criminal law (criminalization)?". This question was then followed by an inventory of positive laws relating to it, namely article 20 of the Constitution relating to the legislation process, MD3 Law, Laws Formation of Laws and Regulations, and the Constitutional Court Law. All norms are then read with a closed logical and grammatical system, and produce answers, that those authorized to expand and add norms are lawmakers (the President and the DPR), so arguably a contrary MK has no authority. Doctrinal reasoning does not open space for non-legal factors, in conducting the reasoning process, legal norms are instructive to law enforcers.

Second, deductive logic. In this position, the rule of law would be the first proposition in this reasoning. The major premise is composed of 20 constitutions regarding the legislative process, MD3 Law, Law on the Formation of Laws and Regulations, and the Constitutional Court Law. The entire rule of law provides a proposition that all legislative authority, whether in the form of changes to the formation of new legal norms, is the domain of legislative authority, which is carried out at a systematic stage, starting from the submission of the Draft Bill accompanied by Academic Manuscript, to the Enforcement stage. Positive law does not open space for the Constitutional Court to carry out legislative activities in the form of updating or adding, the Constitutional Court is only designated as a cancellation of the rule of law (negative legislator). Furthermore, the minor premise is composed of the petitioner's request to expand and form new norms in criminal law through the judicial review

[29] Op.cit. Soetandyo Wignjosoebroto. Hlm, 77
[30] Op.cit. Soetandyo Wignjosoebroto. Hlm, 78

channel in the Constitutional Court. concerning the major and minor premise, then the syllogism of deduction in legal positivity will result in the Constitutional Court not having the authority to do what is requested by the applicant because such authority is the domain of the legislators.

Major premise	It is composed of Article 20 of the Constitution concerning the legislation process, MD3 Law, Law for the Establishment of Legislation, and the Constitutional Court Law. The entire rule of law provides a proposition that all legislative authority, whether in the form of changes to the formation of new legal norms, is the domain of legislative authority, which is carried out at a systematic stage, starting from the submission of the Draft Bill accompanied by Academic Manuscript, to the Enforcement stage. Positive law does not open space for the Constitutional Court to carry out legislative activities in the form of updating or adding, the Constitutional Court is only designated as a cancellation of the rule of law (*negative legsilator*)
Minor premise	Petitioners' petition to expand and form new norms in criminal law (regarding adultery) through the judicial review path in the Constitutional Court.
Conclusion	The Constitutional Court is not authorized to do what the petitioner requests.

In the same breath with the nature of legal positivism, the law is interpreted as the will of the authorities in the form of a law, which does not open space other than the law, to enter influencing the law. So, in this case, the reasoning that is carried out is identical to the closed logical system, where positive law is the only determinant and becomes the main proposition (major premise).

This reasoning is very rigid and closed, which in the development of legal science, this reasoning is identified with originalism (or called interpretivsm), which is a view that states "judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution. That is, judges when deciding matters of state administration (whether related directly or indirectly) must limit themselves to enforce the rules that are clearly stated implied.[31] Proponents of interpretation that limit themselves to the text of this law, have at least two main arguments, *first the very nature of interpreting a document requires that is meaning be limited to its specific text and ist framer intentions. Second, and more commonly to constrain the power of unelected judges in democratic society*.[32] In theory, the originalism approach is divided into two categories, *strict originalism,* and

[31] Bagir Manan dan Susi Dwi Harijanti, Memahami Konstitusi: Makna dan Aktualisasi, Jakarta: PT RajaGrafindo Persada, 2015. Hlm, 176

[32] Ibid. Bagir Manan dan Susi Dwi Harijanti. Hlm, 178

moderate originalism. For those who support strict originalism, the court must follow the literal text and specific intent of the legislators. While moderate originalism, more emphasis on the purpose or general purpose (general purpose) shaper of the constitution, rather than the intention of the shaper in a specific sense (*precisense*).[33]

The axiological aspect championed by adherents of legal positivism is legal certainty. By taking formal legal sources in the form of legislation, it is believed that this can be realized.[34] Legal certainty is identified to create order and avoid arbitrariness. These two things become the aim of the adherents of this school, to keep away the deeds, from officials who do not have the authority to do so. In addition, in the realm of legal formalism, law is also used to exercise social control in order to ensure certainty so that behavior is always appropriate and can be predicted / nomological logic, Soentandyo Wignjosoebroto said that legal positivism is motivated to regulate/*to regulate.*[35]

In this decision, it is reflected in the judges' consideration of the legal certainty aspects championed by the judges. Judges cover themselves to act outside their authority, which is sourced from laws and regulations, it is seen when the judge rejects the expansion and establishment of new criminal law norms. Judges of the Constitutional Court fight for legal certainty, so that there is no contradiction between what is mandated by statutory regulations, which in this case the 1945 Constitution, the Constitutional Court Law, MD3 Law, and the Law for the Establishment of Laws and Regulations. All the rules indicate that the authority of the Constitutional Court is to decide, and position itself as a negative legislator, while the positive authority of the legislator is the full authority rather than the legislators. order in the formation of law and aspects of legal certainty, really guide the judges, and finally, reject the petition of the petitioner who wants the expansion and addition of criminal law norms through the path *judicial review*.[36]

Besides, there are judges' concerns about the inaccuracy of the application of norms if the Constitutional Court forms new norms. This is due to the absence of a comprehensive study of both material and formal aspects (criminal procedural law) in its later application. And in the end, the Constitutional Court handed it over to the legislators, to fulfill what the petitioners wanted.

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[33] Ibid, Bagir Manan dan Susi Dwi Harijanti. Hlm 178

[34] Op.cit. Shidarta. Hlm, 201

[35] Adjie Samekto, *Pergeseran Pemikiran Hukum dari Era Yunani Menuju Post-Modernisme*, Jakarta: Konpress, 2015. Hlm, 88.

[36] Kriminalisasi, seperti positivisasi suatu hal yang dilakukan melalui proses judicial, seperti yang diungkapkan oleh Ter Haar lewat pemberdayaan *de Landraden.* Dalam Soetandyo. W. op, cit, hlm 25

Tensions between the philosophical schools of law occur not only in theoretical studies but also in the enforcement that houses judges for example. This verdict is one of the fiercest decisions between judges who stand on the basis different. In the same verdict, but different places, the judges who agreed with what the applicant said had a high quantity, totaling 4 judges. A brief search of arguments in dissenting opinions, the nuanced philosophical flow of natural law, and schools of history. Tensions re-occur, but one thing that needs to be understood clearly from this decision is: the judges who are behind the decision that refuse, are more identical in the "path/way" taken, not on the material criminal aspects, because after all the problems raised by petitioners about free sex, and LGBT, are deeds that are oriented towards Pancasila and morality, but it is the path/way to control them that continues to be discussed.

III. CONCLUSION

Based on the description above, the following conclusions can be drawn: Searching and analyzing the Constitutional Court's decision in the perspective of legal philosophy, shows that the basic problems experienced by the applicants are classified as Hardcase, namely problems that lead to paradigm problems, seen from the composition of agreed and disagreeable judges very fierce, which is 5 versus 4 judges. The flow of legal positivism with its arguments based on axiology, ontology, and epistemology dominates the judges, so the presence of the decision rejected the petition of the petitioner. The flow of legal positivism comes with reasoning/logic that is very tight and closed, which makes the legislation as the main basis, thus limiting judges to conduct self-restraint, and submit it to the legislators to execute what is expected of the applicant. Also, the issue of the principle of legality that upholds legal certainty is the main reason for the judges who reject the decision. The tension between the flow of legal philosophy in this decision occurs, where legal positivism which originally had a theoretical tension with the flow of natural law and historical schools, also occurred where judges who had dissenting opinions based their arguments on the flow of natural law and historical madzab.

Although tensions reoccur, Indonesian judges have the freedom to determine which footing is underlying. Collaboration in article 5 of the Judicial Power Law has ensured that judges base their decisions on law and the sense of justice of the community. However, what needs to be a sign is, the use of every footing of the flow of legal

philosophy, must use strict, consistent reasoning, which refers to the ontology, epistemology, and axiology of each school of legal philosophy.

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