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Implications of Constitutional Defiance of Constitutional Court Decisions by Lawmakers

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Abstract

Law Examination, when associated in the context of upholding the supremacy of the constitution, does not only stop at canceling a norm of law that is contrary to the constitution, but also how the cancellation decision is then obeyed and implemented. This is because the nature of the Constitutional Court Decision is final and binding. The problem that then arises is when looking at the final and binding nature of the Constitutional Court Decision from the aspect of law in action. It is still found that the Constitutional Court's decision is not implemented consequently by the legislators, namely by reviving the norms that the Constitutional Court has annulled in the laws to be formed or new laws. The research method used is a normative legal method, which is carried out by collecting primary, secondary, and or tertiary legal materials. The results of the study show that the final and binding nature of Constitutional Court decisions erga omnes requires all state institutions to consider the annulled norms as invalid and to follow up on them without exception. However, the study found that constitutional defiance still occurs in the form of disregard or revival of norms that have been declared unconstitutional, which triggers legal uncertainty and weakens the authority of the constitution. Therefore, stronger implementation mechanisms are needed, including post-decision compliance, constitutional impact assessment, continuous monitoring, and the application of a judicial preview model to ensure the effectiveness of Constitutional Court decisions.

Keywords: *Defiance of the Constitution; Erga Omnes; Final and Binding; Lawmakers*.

1. INTRODUCTION

After the 1998 reform, Indonesia entered a new era in its statehood, marked by the strengthening of democratic principles, the rule of law, and the protection of citizens' constitutional rights. In this context, there was a need for an institution with the authority to uphold and safeguard the purity of the constitution as the highest law in Indonesia. This institution was then realized through the establishment of the Constitutional Court. The Constitutional Court (MK) was established in 2003 because of the need to answer various legal and constitutional issues. To overcome these problems, the Constitutional Court is mandated by the 1945 Constitution of the Republic of Indonesia (UUD 1945) to exercise five constitutional authorities, namely to examine laws against the Constitution, to decide disputes over the authority of state institutions whose authority is granted by the Constitution, to decide on the dissolution of political parties and to decide disputes over general election results, and to give an opinion to the House of Representatives regarding the impeachment of the president and

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vice president.[1] The constitutional authority possessed by the Constitutional Court is basically an embodiment of the principle of checks and balances, which means that each state institution has an equal position, so that there is supervision and balance in the administration of the state.[2]

In relation to its authority to review laws against the Constitution, the Constitutional Court is based on Article 24C paragraph (1) of the 1945 Constitution, which is then regulated in its implementing legislation, namely Article 10 paragraph (1) and paragraph (2) of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court (MK Law). The technical implementation is further regulated in Constitutional Court Regulation Number 2 of 2021 concerning Procedure in Law Review Cases.

The application for judicial review of the law itself can be classified into two types, namely first, testing the content of statutory material or legal norms, commonly referred to as material testing, and second, testing the procedure for forming statutory products, commonly referred to as formal testing.[3]

The presence of the Constitutional Court (MK) as the sole interpreter of the constitution and the guardian of the constitution[4], has made a major contribution to the process of democratization and upholding the supremacy of the constitution in Indonesia. One of the authorities of the Constitutional Court that has proven to have made this contribution is the authority to review laws against the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Since its establishment until now (2003-2024), judicial review cases, the Constitutional Court has issued many decisions specifically related to judicial review of laws, and many of the decisions were granted.

The number of law reviews granted by the Constitutional Court shows that the legal products proposed by the legislators are still have legal weaknesses. In other words, the quality of legislation products is full of content that is contrary to the constitution, not participatory, aspirational, and accountable.[5] In this case, there are inconsistencies in the drafting of laws, both in text and content, and it is even considered that the laws made are only intended for momentary political interests that override aspects of justice.[6]

In such conditions, legislation products must not be allowed to conflict with the constitution. Because if this is allowed, there will be a process of delegitimizing the constitution, violating the constitutional rights of citizens, and can even lead to the collapse of democracy. That is why the Constitutional Court is required to play its role through judicial review because it is believed that it will be a balancing force in controlling legislative products that violate the constitution.[7] According to Hans Kelsen, judicial review is an institution with the power to control or regulate legislation. With this power, laws derived from the political process can be assessed or tested for

[1] Luthfi Widagdo Eddyono, "The Constitutional Court and Consolidation of Democracy in Indonesia," *Jurnal Konstitusi* 5, no. 1 (2018): 1–15, https://doi.org/10.31078/jk1511.

[2] Ivana Eka Kusuma Wardani, "Peran Mahkamah Konstitusi dalam Mengawal Prinsip Checks and Balances Terhadap Dewan Perwakilan Daerah di Indonesia," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 2, no. 2 (2019): 240, https://doi.org/10.24090/volksgeist.v2i2.2883.

[3] Tom Ginsburg, "The Global Spread of Constitutional Review," *Journal of Law and Courts* 3, no. 1 (2015): 3–25, https://doi.org/10.1086/679681.

[4] Jimly Asshiddiqie, *Lembaga Negara Pasca Reformasi*, Edisi Kedua (Jakarta: Sinar Grafika, 2006), 144.

[5] Derwin Tambunan, "The Intervention of Oligarchy in the Indonesian Legislative Process," *Asian Journal of Comparative Politics* 8 (2023): 10–27.

[6] Syukri Asy'ari, *et.al.*, "Model dan Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003-2012)," *Jurnal Konstitusi* 10, no. 4 (2016): 678, https://doi.org/10.31078/jk1046.

[7] Maruarar Siahaan, *UUD 1945 Konstitusi Yang Hidup* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008), 49.

constitutionality. For this reason, the judiciary is authorized to annul a law or declare a law not legally binding. In carrying out this function, the holder of judicial power acts as a negative legislator.[8] Thus, according to Hans Kelsen, parliament is placed as a positive legislature, while the negative legislative model (negative legislature) is played by the constitutional court.[9]

As is known, the decisions handed down by the Constitutional Court in the judicial review of laws vary greatly, ranging from granted, partially granted, rejected, to unacceptable.[10] There are even some new developments in the Constitutional Court's decisions as its ijtihad to uphold law and justice. The form of these decisions, of course, each has its own consequences. For example, a decision that grants the petition has an impact on the nullification of a norm.[11]

However, if it is related to the context of upholding the supremacy of the constitution, it certainly does not only stop at canceling a legal norm that is contrary to the constitution, but how the cancellation decision is then obeyed and implemented. This is because the nature of the Constitutional Court Decision as stated in Article 24C paragraph (1) of the 1945 Constitution is a final decision. In Article 10 paragraph (1) of the Constitutional Court Law, the final nature of the Constitutional Court Decision is further emphasized. The meaning of "final" in the explanation of the Article is as follows:[12]

> *"The Constitutional Court Decision is final, that is, the Constitutional Court Decision immediately obtains permanent legal force from the time it is pronounced and no legal remedies can be taken. The final nature of the Constitutional Court Decision in this Law also includes binding legal force (final and binding)".*

Theoretically and conceptually, the final decision means that the Constitutional Court Decision is the first resort as well as the last resort for justice seekers.[13] As stated by Maruarar Siahaan who said that the measure to determine whether a judicial decision is final or not, can be seen from the existence or absence of a body or institution that is legally authorized to conduct a review of the court's decision, as well as the existence or absence of procedures or mechanisms in procedural law regarding who and how the review is carried out.[14] According to Sri Soemantri, a final decision must also be binding and cannot be annulled by any institution. In English, the juridical notions of final and binding are always united, namely final and binding.[15]

Based on the above, because the Constitutional Court Decision is final and binding, it is the obligation of all elements of the nation and state to implement it consequently. However, the problem that then arises is when looking at the final and binding nature

[8] Saldi Isra, "Purifikasi Proses Legislasi Melalui Pengujian Undang-Undang," *Jurnal Legislasi Indonesia* 7, no. 1 (2010): 123.

[9] Saldi Isra, "Perkembangan Pengujian Perundang- Undangan di Mahkamah Konstitusi," *Jurnal Konstitusi* 7, no. 6 (2010): 199, https://doi.org/10.31078/jk766.

[10] Haposan Sahala Raja Sinaga and Leonardo Olefin's Hamonangan Siahaan, "Implications of the Decision of the Indonesian Constitutional Court Number 21/PUU/XIX/2021 on the Criminal Complaint of Articles of Child Molestation," *International Journal of Law* 9, no. 1 (2023): 142–48.

[11] Danang Aji Saputra, "The Problem of the Constitutional Court's Decision in the Formal Test of the Job Creation Law," *Journal of Law and Legal Reform* 3, no. 4 (2022): 521–42, https://doi.org/10.15294/jllr.v3i4.57699.

[12] Tri Sulistyowati, et.al., "Constitutional Compliance Atas Putusan Pengujian Undang-Undang Di Mahkamah Konstitusi oleh Adressat Putusan," Jurnal Konstitusi 17, no. 4 (2020): 701–2, https://doi.org/10.31078/jk1741.

[13] Bambang Sutiyoso, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, (Bandung: PT. Citra Aditya Bakti, 2006), 160.

[14] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, Cetakan Pertama (Jakarta: Konstitusi Press, 2005), 4.

[15] Ni'matul Huda, *Kekuatan Eksekutorial Putusan Mahkamah Konstitusi* (Yogyakarta: FH UII Press, 2018), 141.

of the Constitutional Court's Decision from the aspect of law in action. There are still Constitutional Court decisions that are not implemented consequently by the legislators as mandated by the laws and regulations (*non-executable*).[16] As a result, the existence of the Constitutional Court Decision is only floating.[17] Therefore, this study will raise several examples of Constitutional Court decisions that are not implemented consequently by the legislators.

The Constitutional Court Decision that is not implemented or ignored by the legislators is Constitutional Court Decision Number 013-022/PUU-IV/2006. Through this decision, the Constitutional Court considered that Article 134, Article 136, and Article 137 of the Criminal Code which regulate insults against the president can cause legal uncertainty because their interpretations are very vulnerable to manipulation by the authorities and these articles have been declared contrary to the 1945 Constitution and have no binding legal force.[18] However, interestingly, Law No. 1/2003 on the Criminal Code in Articles 217, 218 and 219 again contains the criminal offense of insulting the dignity of the President and Vice President.

Another example is Constitutional Court Decision Number 137/PUU-VII/2009 dated August 25, 2010, which invalidated the phrase *"zone within a State"* and the word "zone" in Article 26C paragraph (1) and Article 36C paragraph (3) of Law 18/2009. In the Decision, the Constitutional Court partially granted the petition by stating the phrase, *"Animal product business unit in a country or zone"*, in Article 59 paragraph (2); the phrase, "Or international rules" in Article 59 paragraph (4) and the word "may" in Article 68 paragraph (4) of Law 18/2009 is contrary to the 1945 Constitution and has no binding legal force. However, the phrase was reintroduced by the legislators in Law No. 41/2014 on the Amendment to Law No. 18/2009 on Animal Husbandry and Animal Health. Finally, a judicial review of Law 41/2014 was conducted and the petition to review Law 41/2014 was decided by the Constitutional Court to be partially granted (conditionally unconstitutional) through Constitutional Court Decision Number 129/PUU-XIII/2015.[19]

Furthermore, what happened recently to the Constitutional Court Decision Number 60/PUU-XXII/2024, where the legislator, in this case the DPR, is said to discuss the possibility of returning to the old Pilkada threshold rules after the Constitutional Court lowered the threshold for regional head candidacy. The Legislative Body (Baleg) of the House of Representatives will hold a meeting on August 21, 2024 to discuss the Pilkada threshold rules. This meeting was held after the Constitutional Court lowered the threshold through Decision Number 60/PUU-XXII/2024.[20]

Various forms of defiance of the Constitutional Court's Decision by the legislators in this case can certainly be categorized as a defiance of the constitution that can threaten the supremacy of the constitution. Against this background, it is very important to study

[16] Ismail Hasani, "Undelivered Constitutional Justice? Study on How the Decisions of the Constitutional Court of the Republic of Indonesia Are Executed," *Jurnal Civics: Media Kajian Kewarganegaraan* 19, no. 1 (2022): 45–52, https://doi.org/10.21831/jc.v19i1.48378.

[17] Novendri M. Nggilu, et.al., "Constitutional Crisis: Intensifying Disobedience to Constitutional Court Decisions," *Revista Chilena de Derecho* 50, no. 2 (2023): 115, https://doi.org/10.7764/R.502.5.

[18] CNN Indonesia, "Dihapus MK, Pasal Penghinaan Presiden Coba Dihidupkan Kembali Di RKUHP," https://www.cnnindonesia.com/nasional/20220630014636-20-815289/dihapus-mk-pasal-penghinaan-presiden-coba-dihidupkan-kembali-di-rkuh, accessed on July 30, 2024 at 21.30 WIB.

[19] CNN Indonesia, "Dihapus MK, Pasal Penghinaan Presiden Coba Dihidupkan Kembali Di RKUHP.

[20] hukumonline.com, "Putusan MK Tentang Ambang Batas Pencalonan Kepala Daerah Masuk RUU Pilkada," https://www.hukumonline.com/berita/a/putusan-mk-tentang-ambang-batas-pencalonan-kepala-daerah-masuk-ruu-pilkada-lt66c5b5e87294e/, accessed on August 21, 2024 at 20.30 WIB.

more comprehensively the implications of defiance of the Constitutional Court Decision by the legislators.

2. ANALISYS AND DISCUSSION

2.1. The Authority and Legal Power of the Constitutional Court Decision

The Constitutional Court of the Republic of Indonesia is one of the high state institutions established under the post-reform amendments to the 1945 Constitution, precisely through MPR Decree No. III/MPR/2000 and is expressly regulated in Article 24C of the 1945 Constitution.[21] This institution was established to carry out the function of testing the constitutionality of the law as well as maintaining the dignity and supremacy of the constitution as the highest law in Indonesia. Its presence strengthens the system of checks and balances between state institutions, especially against the legislative power that makes laws.

The Constitutional Court has a number of main authorities as stipulated in Article 24C paragraphs (1) and (2) and further in Law Number 24 of 2003 concerning the Constitutional Court, which has been amended by Law Number 7 of 2020. The five main authorities of the Constitutional Court include: (1) to review laws against the 1945 Constitution, (2) to decide disputes over the authority of state institutions whose authority is granted by the Constitution, (3) to decide on the dissolution of political parties, (4) to decide disputes over general election results, and (5) to give a decision on the opinion of the DPR regarding alleged violations of law by the President and/or Vice President.[22]

Of the five authorities, the most frequently exercised is the authority to conduct judicial review of laws against the 1945 Constitution. Through this authority, the Constitutional Court can declare that a norm in a law is contrary to the constitution and therefore has no binding legal force. This authority is an important instrument to protect the constitutional rights of citizens and ensure that all legislation is subject to constitutional principles.[23]

Disputes over authority between state institutions usually arise when there is overlap or disagreement regarding the exercise of constitutional authority. The Constitutional Court acts as a mediator and interpreter of the constitution in resolving such disputes.[24] For example, when there is a dispute between the DPR and the President regarding the legislative process, the Court can provide normative clarity on the limits of their respective authorities.

The authority to dissolve political parties reflects the Constitutional Court's position as the guardian of democracy. Only political parties that clearly contradict the 1945 Constitution, such as those that threaten the principles of the rule of law and democracy,

[21] Muhammad Iqbal Samsudin, "A Comparison of Judicial Review in Indonesian Constitutional Court and French Constitutional Council," *Indonesian Comparative Law Review* 5, no. 1 (2022): 11–12, https://doi.org/10.18196/iclr.v5i1.15127.

[22] M. Agus Mauladi, "Menyoal Kekuatan Eksekutorial Putusan Final Dan Mengikat Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 2 (2019): 339, https://doi.org/10.31078/jk1627.

[23] Irman Putra and Arief Fahmi Lubis, "Judicial Review and Constitutional Interpretation: The Development of the Role of the Indonesian Constitutional Court," *West Science Law and Human Rights* 1, no. 4 (2023): 320–22, https://doi.org/10.58812/wslhr.v1i04.1167.

[24] Benny Bambang Irawan, *et.al.*, "The Authority of Indonesia's Constitutional Court: A Comprehensive Analysis of Its Role in Settling Disputes Among State Institution," *Pakistan Journal of Life and Social Sciences* 2, no. 2 (2024): 20975–86, https://doi.org/10.57239/PJLSS-2024-22.2.000194.

can be dissolved through a legal process at the Constitutional Court.[25] But so far, this authority has rarely been used because the standard of proof and political impact is very high.[26]

In terms of disputes over election results (PHPU), the Constitutional Court plays a central role in ensuring the integrity of elections. The Constitutional Court can cancel or order a re-vote if there are proven violations that are structured, systematic and massive in nature that affect the election results.[27] The PHPU process covers legislative, presidential, and regional head elections (prior to the transfer to the Supreme Court for local elections after the 2016 Pilkada Law).[28]

In addition to its authority, the Court also has the obligation to give a decision on the DPR's opinion regarding alleged violations of law by the President or Vice President (impeachment). In this process, the Court acts as an objective assessor of the substance of the allegations. If proven, then the DPR can continue the dismissal process to the MPR. This obligation shows that the Court is also a guardian of the stability of the presidential system.[29]

The legal force of the Constitutional Court's decision is final and binding. This means that there are no further legal remedies against the Constitutional Court's decision. This nature is emphasized in Article 24C paragraph (1) of the 1945 Constitution and Article 10 of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court.[30] Thus, once the decision is rendered, all parties are obliged to respect it and implement it. In the context of judicial review, the Constitutional Court's decision can directly invalidate the enactment of norms in the law.

In Article 10 paragraph (1) of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. The binding clause is then emphasized in the explanation of Article 10 of Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, which states that "The final nature of the Constitutional Court Decision in this Law also includes binding legal force (final and binding)". This provision is also found in Article 29 paragraph (1) of Law Number 48 of 2009 concerning Judicial Power, which states that "The Constitutional Court has the authority to hear cases at the first and final instance and its decisions are final".

The juridical consequence of the provisions as described above is that the decision of the Constitutional Court has a clear and firm legal effect, and there are no further legal remedies since the decision was pronounced in a plenary session that is open to the public. The juridical footing of this provision can also be found in Law Number 7

[25] Juwai Riyah, "Position and Authority of the Constitutional Court as a State Institution," *JUSTICES: Journal of Law* 3, no. 2 (2024): 76–85, https://doi.org/10.58355/justices.v3i2.52.

[26] Pan Mohamad Faiz, "The Dissolution of Political Parties in Indonesia: Lessons Learned from the European Court of Human Rights," *Journal of Legal, Ethical and Regulatory Issues* 22, no. 4 (2022): 45–60.

[27] Amiruddin and Rizki Ramadani, "Judicial Activism in Regional Head Election Dispute: The Practice and Consistency of The Indonesian Constitutional Court," *Substantive Justice International Journal of Law* 6, no. 1 (2023): 56–70, https://doi.org/10.56087/substantivejustice.v6i1.230.

[28] Andi Muhammad Asrun, "Burden Proof Dilemma of Election Disputes in the Constitutional Court," *Journal of Law and Sustainable Development* 11, no. 7 (2023): 1–22.

[29] M. Wildan Humaidi and Inna Soffika Rahmadanti, "Constitutional Design of State Policy as Guidelines on Indonesia's Presidential System Development Plan," *Volksgeist: Jurnal Ilmu Hukum Dan Konstitusi* 6, no. 1 (2023): 61–76, https://doi.org/10.24090/volksgeist.v6i1.7981.

[30] Auliya Hanidatul Masdiah and Budi Kristanto, "The Influence of the Constitutional Court Ruling No 90/PUU-XXI/2023 on the Authority and Marvel of the Constitutional Court as Guardian of the Constitution," *International Journal of Science and Society (IJSOC)* 6, no. 2 (2024): 437–45, https://doi.org/10.54783/ijsoc.v6i2.1161.

of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court.

Based on the explanation above, it can be concluded that there is no other choice but to implement the Constitutional Court Decision consequently. Moreover, the decision of the Constitutional Court is binding not only for the parties who are litigating in the Constitutional Court, but also binding for all parties (erga omnes).[31] According to Bagir Manan, erga omnes is:[32]

> *"A decision whose consequences apply to all cases that contain similarities that may occur in the future. So when legislation is declared invalid because it contradicts the Constitution or other higher laws and regulations, it becomes void and invalid for everyone. The erga omnes decision can be considered to enter the legislative function, the judge no longer merely establishes the law for future events (abstract) and this contains elements of law formation. The formation of law for abstract events is a legislative function, not a judicial function."*

According to Saldi Isra as every legislation is considered to have the power of practice and binding force for each or all parties.[33]

> *"Along with the nature of the validity of the Law, when the Law or part of the Law is canceled through the process of judicial review, the inapplicability of the norm also applies generally. The invalidity of the Law is not only for the Applicant who submits a Law review, nor is it only for the legislator, but applies to all parties. Therefore, there is no reason to reject the decision of the Constitutional Court that has eliminated the validity of a norm in the Law."*

The final and binding nature of the Constitutional Court Decision when viewed from the aspect of law in book, is indeed the best choice. Hamdan Zoelva explained that when the clause was formulated in the Constitution, the Constitutional Court was established to protect the purity of the Constitution with a more detailed interpretation. The interpretation will be used as a basis for resolving issues by certain authorities who are given direct authority by the Constitution. Therefore, it is appropriate that the interpretation is only done once, which applies in a binding manner, so that the decision must be placed at the first and last level where no attempt can be made to cancel it.[34] In addition, it must also be understood that the Constitutional Court as a constitutional court can resolve issues and provide legal certainty quickly in accordance with the principles of quick and simple justice. This is because the case submitted to the Constitutional Court is a case related to state administration so that it requires legal certainty and is bound by time limitations so as not to interfere with the continuity of other state administration agendas.[35]

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[31] Maruarar Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi," *Jurnal Hukum Ius Quia Iustum* 16, no. 3 (2009): 357, https://doi.org/10.20885/iustum.vol16.iss3.art3.

[32] Machfud Aziz, *Pengujian Peraturan Perundang-Undangan Dalam Sistem Peraturan Perundang-Undangan Di Indonesia* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 132-133.

[33] Saldi Isra, "Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi," https://www.saldiisra.web.id/index.php/21-makalah/makalah1/635-titik-singgung-wewenang-mahkamah-agung-dengan-mahkamah-konstitusi.html, accessed August 22, 2024 at 14.30 WIB.

[34] M. Agus Mauladi, 339.

[35] Fajar Laksono Soeroso, "Aspek Keadilan Dalam Sifat Final Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 11, no. 1 (2014): 78, https://doi.org/10.31078/jk1114.

2.2. Implications of Defiance of Constitutional Court Decisions by the Lawmakers

In the 1945 Constitution and Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, it has been emphasized that the Court's decision is final, which immediately has permanent legal force and there are no other legal efforts to change it. In reality, not all decisions of the Constitutional Court are followed up and even tend to be ignored by the decision adressat. Recently, there has been unrest in the community related to the non-follow-up of the Constitutional Court Decision, such as the Constitutional Court Decision being ignored by the legislators (President and DPR) in the law-making process and even reappearing norms that have been canceled by the Constitutional Court into a new draft law or a new law.

An example of a Constitutional Court Decision that was not implemented by the legislators is Constitutional Court Decision Number 013-022/PUU-IV/2006. Through this decision, the Constitutional Court considered that the articles regulating insults against the President could cause legal uncertainty because their interpretation was very vulnerable to manipulation by the authorities and the articles had been declared contrary to the 1945 Constitution and did not have binding legal force. However, Law No. 1/2023 on the Criminal Code reintroduced articles regulating insults against the President/Vice President.

Another example is the Constitutional Court Decision Number 137/PUU-VII/2009 dated August 25, 2010 which canceled the phrase "zone in a country" and the word "zone" in Article 26C paragraph (1) and Article 36C paragraph (3) of Law 18/2009. In the Decision, the Constitutional Court partially granted the petition by stating the phrase, "Animal product business unit in a country or zone", in Article 59 paragraph (2); the phrase, "Or international rules" in Article 59 paragraph (4) and the word "may" in Article 68 paragraph (4) of Law 18/2009 is contrary to the 1945 Constitution and has no binding legal force. However, the phrase was reintroduced in Law No. 41/2014 on the Amendment to Law No. 18/2009 on Animal Husbandry and Animal Health (Law 41/2014). In the end, a judicial review of Law 41/2014 was conducted and the petition for judicial review of Law 41/2014 was decided by the Constitutional Court to be partially granted (conditionally unconstitutional) through Decision Number 129/PUU-XIII/2015.

In addition, in connection with Constitutional Court Decision Number 60/PUU-XXII/2024, which lowered the threshold for regional head candidacy, there has been discussion that the legislature, in this case the House of Representatives (DPR), will consider the possibility of reinstating the old regional election threshold. To discuss this matter, the DPR's Legislation Body (Baleg) plans to hold a meeting on August 21, 2024. This meeting will be held after the Constitutional Court decided to lower the threshold through Decision No. 60/PUU-XXII/2024. In this regard, there are plans to reinstate the previous regional election threshold provisions, which are likely to be submitted through a Government Regulation in Lieu of Law (Perppu) or a Draft Law (RUU) on Regional Elections. The bill proposes amendments to the current Regional Election Law, specifically by including Article 201B, which stipulates that regional head candidacy must still follow the old threshold provisions, even though the Constitutional Court has lowered the threshold. In its ruling, the Constitutional Court stipulated that the regional election threshold would be calculated based on the number of valid votes for political parties registered in the Final Voters List (DPT) for the 2024 elections,

replacing the previous provisions. If the Regional Election Bill is passed by the House of Representatives, the Constitutional Court's decision to lower the regional election threshold could be overturned. Any action taken by the House of Representatives that contradicts or alters a decision of the Constitutional Court may be considered a violation of the fundamental principles of the Constitution.

There is defiance of the Constitutional Court's decision because there is a tendency not to be obeyed and ignored by the addressee of the decision. In fact, according to Maruarar Siahaan, the effectiveness of checks and balances can be seen from whether or not the Constitutional Court's decision is implemented by lawmakers. Compliance in the implementation of the Constitutional Court's decision can also be a measure of whether the 1945 Constitution, which is the highest law in the country, is truly a living law.[36]

The existence of a form of defiance of the constitution has the following consequences: First, the non-implementation of the decision of the Constitutional Court, which reflects the defiance of the decision of the Constitutional Court, can disrupt the legal certainty that has been issued by the Constitutional Court. Second, the disobedience to the decision of the Constitutional Court results in constitutionalism justice delay or justice delay which is based on the values of the Indonesian constitution, because justice to the constitutional rights of citizens protected by the decision of the Constitutional Court is not implemented because of the disobedience to the decision of the Constitutional Court not only by state institutions in this case the DPR, the President, but also by the Supreme Court as a judicial institution. Third, the rivalry of judicial institutions shown by the Supreme Court through decisions issued as if ignoring the decisions of the Constitutional Court. This condition certainly causes instability in law enforcement, especially the enforcement of constitutional values as stated in the 1945 Constitution of the Republic of Indonesia.[37]

In the relationship between lawmakers and law examiners, namely the Constitutional Court, they have the same domain in the legislative function, but with different roles. As Laica Marzuki argues, "when the Constitutional Court (MK) is the negative legislator, the parliament that forms the law is called the positive legislator".[38] Based on this view, a coherence between the two is needed to achieve the ideal process of creating laws (legislation). The legislative process in the relationship between the two functions is not only the formation of laws an sich, but also the positioning of law testing in this case the results of the Constitutional Court's decision in the legislative process.[39]

However, there is a vague area in the relationship between the two functions. Coupled with the large number of petitions for judicial review, there is an understanding that the process of law-making has not been effective and efficient, while the re-regulation and synchronization of a law after it has been tested has not shown the same flow as law-making.[40]

Furthermore, the Constitutional Court Decision as described above, most of its types, especially in judicial review of laws, are declaratoir constitutief in nature. This means that the Constitutional Court Decision creates or negates a new legal situation or forms

[36] Syukri Asy'ari, *et.al.*, 679-670.

[37] Novendri M. Nggilu, "Menggagas Sanksi Atas Tindakan Constitutional Disobadiance Terhadap Putusan Mahkamah Konstitusi," *Jurnal Konstitusi* 16, no. 1 (2019): 56–57, https://doi.org/10.31078/jk1613.

[38] Laica Marzuki, "Membangun Undang-Undang Yang Ideal," *Jurnal Legislasi* 4, no. 2 (2007): 6.

[39] Nurrahman Aji Utomo, "Dinamika Hubungan Antara Pengujian Undang-Undang Dengan Pembentukan Undang-Undang," *Jurnal Konstitusi* 12, no. 1 (2015): 827, https://doi.org/10.31078/jk1248.

[40] Nurrahman Aji Utomo.

a new law as a negative legislator, which Hans Kelsen calls through a statement. Such a declaratory nature does not require an apparatus that carries out the implementation of the Constitutional Court Decision. Such execution is required in the types of ordinary condemnatoir court decisions that punish one of the parties to do something, for example paying a sum of money.[41]

The decision of the Constitutional Court is declaratory in nature, so whether or not it is implemented by the legislators (President and DPR), depends on the political will of the institution. There must also be a way out of this, so that the decisions of the Constitutional Court are not just toothless tigers.[42]

If the legislators do not comply with the decision and instead continue to enforce norms that have been declared by the Constitutional Court to have no binding legal force, it is an action whose supervision is in the mechanism of law and order itself. Actions that are carried out on the basis of norms in laws that have been declared null and void and do not have binding legal force are unlawful.[43] The legal acts in question are legal acts in the context of constitutional law.

Regarding legal acts in the context of constitutional law, it is clearly outlined in the Constitutional Court Decision Number 105/PUU-XIV/2016 on the Review of Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court, Law Number 48 of 2009 concerning Judicial Power and Law Number 30 of 2014 concerning Government Administration, the Constitutional Court emphasized that if there are parties who do not comply with the Constitutional Court's Decision, then this action can be categorized as an illegal act. As follows.[44]

> *"If disobedience to the law causes harm to others, this attitude can be classified as an act against the law and can be questioned through the courts. The same applies to decisions on judicial review of laws; such decisions are binding and must be obeyed by everyone, including state officials. If there are parties who do not comply with it, then such actions will be classified as unlawful acts that can be challenged through the existing legal process."*

According to Irfan Nur Rachman, actions that do not comply with the Constitutional Court Decision can be categorized as unlawful acts and if the neglect is carried out by the legislator, this can be categorized as unlawful acts by the authorities (onrechmatgedad over heizdad).[45] Even in Decision Number 98/PUU-XVI/2018 on the Examination of Law Number 8 of 2011 concerning amendments to Law Number 24 of 2003 concerning the Constitutional Court, if an institution or society does not carry out the Constitutional Court Decision, this is a clear form of defiance of the constitution. The following is the full opinion of the Constitutional Court.[46]

> *"..in the event that an institution or society does not implement the decision of the Consti-*

[41] Maruarar Siahaan, 2005, 206.

[42] Ni'matul Huda, *Perkembangan Hukum Tata Negara Perdebatan dan Gagasan Penyempurnaan* (Yogyakarta: FH UII Press, 2014), 62.

[43] Soepomo, *Hukum Acara Pengadilan Negeri* (Jakarta: Pradnya Paramita, 1993), 57.

[44] Paragraf [3.9.10], Putusan Nomor 105/PUU-XIV/2016 Tentang Pengujian Undang-Nomor 24 Tahun 2003 Sebagaimana Telah Diubah Dengan Undang-Undang Nomor 8 Tahun 2011 Tentang Perubahan Atas Undang-Undang Nomor 24 Tahun 2003 Tentang Mahkamah Konstitusi, Undang-Undang Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman Dan Undang-Undang Nomor 30 Tahun 2014 Tentang Administrasi Pemerintah, 54.

[45] Irfan Nur Rachman, *Politik Hukum Yudisial Sumber Pembangunan Hukum Nasional* (Depok: PT. RajaGrafindo Persada, 2020), 196.

[46] Putusan Nomor 98/PUU-XVI/2018 Tentang Pengujian Undang-Undang Nomor 8 Tahun 2011 Tentang Perubahan Atas Undang-Undang Nomor 24 Tahun 2003 Tentang Mahkamah Konstitusi, 26.

tutional Court, this is a clear form of defiance of the constitution."

The Constitutional Court also clearly emphasized that the element of unlawful action due to non-compliance with the Constitutional Court Decision is the existence of a loss. The loss referred to in the field of constitutional law is called loss of constitutional rights. Since Decision No. 006/PUU-111/2005 dated May 31, 2005 and Decision No. 11/PUU-V/2007 dated September 20, 2007 as well as subsequent decisions, the Constitutional Court has provided criteria or measures of constitutional rights losses, namely as follows.[47]

1. The existence of the Plaintiffs' constitutional rights granted by the 1945 Constitution of the Republic of Indonesia.
2. The constitutional rights of the Plaintiffs are considered by the Plaintiffs to have been impaired by a law being tested.
3. The constitutional loss of the Plaintiffs in question is specific or particular and actual or at least potential in nature which according to reasonable reasoning can certainly occur.
4. There is a causal relationship between the loss and the enactment of the law petitioned for review.
5. The possibility that by the granting of the petition, the constitutional loss argued will not or no longer occur.

The five conditions for measuring the existence of constitutional losses above have confirmed that the losses referred to in unlawful acts by state administrators due to ignoring the Constitutional Court Decision are immaterial because the measure is constitutional losses, in contrast to the meaning of losses in the fields of State Administrative Law and Civil Law which are material because they cause the party causing the loss to pay a sum of compensation to the injured party, in the context of Constitutional Law, the cause of constitutional losses is the legislature. The legal remedy to eliminate this constitutional loss is through the mechanism of judicial review. If the Constitutional Court grants a judicial review of a law and declares that an article or paragraph or part of a law is unconstitutional and has no binding legal force, then this decision is ignored, meaning that the legislators still include or re-include the norms that have been canceled by the Constitutional Court, then there will be a violation of constitutional rights again. Against this, the Constitutional Court in its legal considerations stated as follows.[48]

"...As an institution that is given constitutional authority by the constitution to examine the law against the 1945 Constitution, the most likely step taken by the Court is to respond and at the same time anticipate all kinds of neglect of norms or certain parts of a law that has been declared contrary to the 1945 Constitution but revived in the revision of the law or in a new law, then for the Court it will be irrefutable evidence to declare the norm of the law concerned contrary to the 1945 Constitution."

Thus, to assess whether or not the legislator committed an unlawful act, especially related to the defiance of the Constitutional Court Decision by the legislator, it needs to be proven through a re-examination of the law related to the norms that have been canceled, but revived by the legislator. Meanwhile, for sanctions against unlawful acts in

[47] Putusan Nomor 98/PUU-XVI/2018.
[48] Putusan Nomor 98/PUU-XVI/2018., 55.

the context of constitutional law, especially related to ignoring the Constitutional Court Decision, until now there have been no provisions and rules regarding this matter.

However, this condition cannot be left unchecked, because it is feared that it will set a bad precedent for the enforcement of Indonesian constitutionalism, in other words, the more frequent defiance of the constitution through defiance of the Constitutional Court's decision will actually reduce the position of the 1945 Constitution as the supreme of constitution, including reducing the function of the Constitutional Court as the guardian of constitution. Prolonged and widespread defiance of the Constitutional Court's decision will result in the nature of the Constitutional Court's decision having semantic characteristics, which textually exist, but are not obeyed at all and seem to be a floating decision.

Therefore, in order to implement the Constitutional Court's decisions, which are final and binding in nature, a series of normative, institutional, and procedural steps are needed to ensure that each decision does not remain merely declarative, but actually results in concrete legal changes. First, it is necessary to establish a binding post-decision compliance mechanism for the legislative and executive branches, for example through the obligation to prepare an action plan by the relevant ministries/institutions within a certain period of time after a norm has been revoked. Second, the DPR and the government must establish a constitutional impact assessment at every stage of legislation to ensure that the formation of post-Constitutional Court ruling laws does not repeat the same flaws. Third, it is necessary to strengthen the supervisory function of the Constitutional Court in the form of periodic follow-up reviews of the implementation of rulings to ensure harmony between the new norms and the constitutional parameters set by the Constitutional Court.

Furthermore, the effectiveness of the implementation of Constitutional Court decisions can also be improved through the reformulation of the constitutional review process in the form of judicial review of draft laws (judicial preview) as applied in France. In the French system, the Conseil Constitutionnel has the authority to conduct a priori testing before a bill is enacted, so that potential constitutional violations can be prevented from the outset, rather than corrected after the law comes into force. This model is relevant as a recommendation for Indonesia, given the large number of Constitutional Court decisions that have invalidated norms due to formal or material defects that could actually have been detected at an early stage of the legislative process, such as issues of meaningful participation, disharmony with the 1945 Constitution, or violations of the principles of the rule of law. The adoption of this pre-enactment review mechanism can be a structural corrective measure that reduces the repetition of constitutional violations, strengthens the quality of law formation, and ensures that Constitutional Court decisions are not merely ex post facto remedies, but also function as a preventive mechanism (preventive constitutional control).

Thus, these implementative measures and the option of applying the French judicial preview system provide a combination of effective enforcement of Constitutional Court decisions and prevention of constitutional violations before they occur. This not only strengthens the authority of the constitution and the Constitutional Court, but also advances the quality of national legislation by ensuring that every bill has undergone strict constitutional review before becoming a law that is binding on the public.

3. CONCLUSION

The final and binding nature of the decision, as well as its erga omnes effect, means that any norm that is annulled by the Constitutional Court must be considered invalid for everyone and must be followed up by all state institutions. Experts such as Bagir Manan, Saldi Isra, and Hamdan Zoelva emphasize that these final and erga omnes characteristics are necessary to guarantee the supremacy of the constitution, avoid dualism of interpretation, and ensure the rapid achievement of legal certainty in the administration of the state. Therefore, there is no other option for every state organ but to consistently implement the Constitutional Court's decisions, because ignoring them not only violates constitutional principles but also undermines the Constitutional Court's function as the guardian of the constitution and damages the democratic rule of law.

Although Constitutional Court decisions are final and binding as mandated by the 1945 Constitution and the Constitutional Court Law, in practice there are still cases of constitutional defiance by legislators and other state institutions that fail to follow up, ignore, or even revive norms that have been declared unconstitutional. This situation not only creates legal uncertainty, delays constitutional justice, and causes rivalry between judicial institutions, but also has the potential to reduce the authority of the constitution and render Constitutional Court decisions mere texts without coercive power. Therefore, implementative measures are needed, such as binding post-decision compliance mechanisms, constitutional impact assessments in the legislative process, continuous supervision by the Constitutional Court, and the application of the French judicial preview model as a preventive instrument so that Constitutional Court decisions are effectively implemented and constitutional violations do not recur, thereby truly safeguarding the supremacy of the constitution and the role of the Constitutional Court as the guardian of the constitution.

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