

# The Existence of Final and Binding Ruling by the Constitutional Court in Constitutional Review

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## Abstract

The existence of the Constitutional Court in modern countries is considered a new phenomenon in filling the existing and established state administration system. For countries that experience a change from authoritarian to democracy, the establishment of the Constitutional Court becomes urgent because it wants to change or improve the State-administrative system. The type of research is normative-judicial that intended to discuss concepts, doctrines and theories (principles) and legislation, which correlate to philosophical construction regarding the existence of a Constitutional court ruling. In relation to this normative research, several approaches will be used, namely statutory, conceptual, analytical, philosophical, and case approaches. The results show that the existence of a final and binding ruling by the Constitutional Court in reviewing the law is clear normatively as mandated in the existing constitutional but in terms of the implementation of the existing ruling, the existence of this ruling gets more attention by the structure of the relevant institution so that in the implementation of the Constitutional Court' ruling did not experience obstacles and challenges from related institutions or structures.

**Keywords:** Final and Binding, Constitutional Court, Constitutional Review; Judge

## 1. Introduction

The Republic of Indonesia is a constitutional State (*demokratische rechtstaat*) and as democratic State based on the constitutional democracy and it is inseparable one another.<sup>1</sup> In Article 1 paragraph 3 of the 1945 Constitution, it is affirmed that "The State of Indonesia is a Constitutional State." If associated with the former sentence, then the meaning of the constitutional State is inseparable from its pillars as a rule of law.<sup>2</sup>

A law needs to be seen from its social objectives and the consequences arising from the law and not seen from the perspective of the law itself. In managing the law, people need to go beyond the positivistic regulations and legal documents, so that the essential legal social objectives can be realized or at least approach it. Thus, interpreting the legal regulations (laws and moreover the 1945 Constitution), the people cannot hold the rules absolutely or black and white. It is very important because every existing regulation or norm is very needed not only legal certainty but also benefit and justice. The regulation is only a reminder that in society there must be justice.<sup>3</sup>

Something that must be understood is much deeper that the political process that occurs when a law is made, the conditions for the actual misuse of functions may be inconsistent with the constitution substance. Hence, when looking at the reality that happens, it is very necessary for an institution that in principle this institution is able to answer the problems. In the Indonesian constitutional system, this institution is known as the Constitutional Court.

The existence of the Constitutional Court in modern countries is considered a new phenomenon in filling the existing and established state administration system. For countries that experience a change from *authoritarian* to *democracy*, the establishment of the Constitutional Court becomes urgent because it wants to change or improve the State-administrative life system more ideal and perfect, especially in the implementation of constitutional review against laws that contradict to the constitution as the highest basic

<sup>1</sup> Jimly Asshiddiqie. 2003. *Makalah Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat UUD 1945* presented on the Seminar on "Pembangunan Hukum Nasional VIII Tema Penegakan Hukum Dalam Era Pembangunan Berkelanjutan. Denpasar, p. 3

<sup>2</sup> Murkens, J. E. K. (2018). *Judicious review: the constitutional practice of the UK Supreme Court. The Cambridge Law Journal, 1-26.*

<sup>3</sup> Satjipto Rahardjo. 2008. *Membedah Hukum Progresif*, Penerbit Buku Kompas; Jakarta, p. 111.

law of the State.<sup>1</sup>

As the actor of judicial power, the constitutional function possessed by the Constitutional court is a judiciary function in order to enforce law and justice. The function of the Constitutional court can be traced from the basis of its establishment - to uphold the supremacy of the constitution. Therefore, the measure of justice and law that is enforced in the Constitutional court is the constitution itself which is interpreted not only as a set of basic norms, but also in terms of principles and moral constitution, including the principle of the rule of law and democracy, protection of human rights, and protection of citizens' constitutional rights.<sup>2</sup> A right response to the establishment of an institution that comes from the 1945 Constitution amendment to the demands of *checks and balances* between the legislature and the judiciary. By the Constitutional court, the legislative body can no longer make gratuitous laws either because of the political interests of its members or the weaknesses in understanding the substance and procedures.

At this level of reality, the writer sees that needed a deep and holistic understanding of the result that have been determined in the Constitutional court ruling in the constitutional review against the 1945 Constitution of the Republic of Indonesia, in which in its practical level the Constitutional Court ruling is not fully obeyed, and also when the Constitutional court ruling did not get a follow-up by revising the law that had been canceled. Even at the executive and legislative levels it is very slow and tends not to respond positively to the Constitutional court ruling. It can cause a legal vacuum. In other facts it also shows that, the Constitutional court ruling are final and binding, sometimes do not get a positive response and seem to be put aside, powered but not effective.

Final ruling is the first and last ruling, which can be interpreted as no more legal efforts that can be taken. It should be obeyed, in fact it is ignored or even expanded (*floating execution*) and even rejected by some State organizers such as executives and other State organizers. Also, it indicates that every ruling of the Constitutional court' judges are final and binding, they will always be intercepted by problems that arise in the final ruling phase, it can be seen from several phenomena that occur.<sup>3</sup>

Looking at some of the phenomena that occur and as described above, the tendency of some phenomena that occur as if the final ruling that should be binding does not get a positive response and there is a neglect of the sustainability of this Constitutional court judge' ruling. If we look from the level of implementation of each ruling of the Constitutional court, it still raises fundamental problems, even controversy and not yet fully implemented. It certainly not in line with the ideals of the nation and democracy and has shifted from the initial will of the establishment of the Constitutional court.

## 2. Method of Research

The type of research is normative-juridical that intended to discusses concepts, doctrines and theories (principles) and legislation, which correlate to philosophical construction regarding the existence of a Constitutional court ruling. In relation to this normative research, several approaches will be used, namely statutory, conceptual, analytical, philosophical, and case approaches.

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<sup>1</sup> Iriyanto A. Baso Ence. 2008. *Negara Hukum Dan Hak Uji Konstitusionalitas Mahkamah Konstitusi*, PT Alumni; Makassar, p. 130.

<sup>2</sup> Mahkamah Konstitusi. 2010. *Hukum Acara Mahkamah Konstitusi*, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi; Jakarta, p. 10; Allan, T. R. S. (2011). Questions of legality and legitimacy: Form and substance in British constitutionalism. *International journal of constitutional law*, 9(1), 155-162.

<sup>3</sup> See decision No. 002/PUU-I/2003 concerning the reviewing of law about Oil and Gasses, whose decision is granted in part, namely Article 12 paragraph (3), Article 22 paragraph (1) and Article 28 paragraph (2) and paragraph (3) Act No. 22 of 2001 concerning Oil and Gas. In its petition, the petitioners argued that Article 12 paragraph (3) would result in the control of the national oil and gas industry by foreign companies. The article also reduces the authority of the president, and conversely, accumulates power over oil and gas resources in the hands of the Minister of Energy and Mineral Resources. However, the argument of petitioner was not approved by the Constitutional Court. In the eyes of the Constitutional Court, it was an internal problem of the government. However, the Constitutional Court was of the opinion that Article 12 paragraph (3) was not in accordance with article 4 paragraph (2) of Act No.22/2001 which states that the control by the State is held by the government as the holder of the Mining Authority. Judicially, the authority to control the State only exists with the government, which cannot be given to the business entity, said the Constitutional Court in its petition. Available online at: <http://www.hukumonline.com/berita/baca/hol11798/mk-koreksi-sebagian-materi-undang-undang-migas>.

### 3. Position and Nature of the Constitutional Court Ruling

The presence of the Constitutional court becomes a discourse and also as an assessment material in the Indonesian law and constitution that is developing at this time. The Constitutional court, through one of its authorities, namely reviewing the laws against the constitution, can oversee national legal politics so that there are no further provisions of the law that are out of the corridor of the constitution, which in this case can be categorized as check in balance in the institutional function approach. In principle, all laws and regulations, especially the law must be in line, conformity, and should not conflict with the material of the 1945 Constitution. The spirit of upholding the constitution is the highest legal basis.

Amid the spirit of implementation of its functions, the Constitutional court passed many fundamental problems to their authority and functions which in its implementation can be carried out properly so that the writer will further examine the fundamental issues related to the existence of the Constitutional court's ruling in advance with a point fundamental is the position of the Constitutional court ruling which is seen from its normative analysis.

An institution that has the task of guarding the constitution, so that in the course of time the presence of a new institution called the Constitutional court is expected to be able to realize a constitution that truly materializes in practice. The establishment of the Constitutional court was one of the changes in the institutional structure of the Indonesian state administration, but in its development the structuring of the Indonesian constitutional structure did not necessarily go smoothly. Judicial power is held by a Supreme Court and the judiciary under it, and by a Constitutional Court. Thus, the position of the Constitutional Court is as one of the actors of judicial power, in addition to the Supreme Court. The Constitutional Court is a judicial institution established to enforce law and justice within the scope of authority.

If looking at the authority possessed by the Constitutional Court, it has been determined in Article 24C of the 1945 Constitution in paragraph (1) and (2) that is formulated as authority and obligation. These authorities include:

- a) Reviewing the laws against the Constitution;
- b) Decide the dispute over the authority of a State institution whose authority is authorized by the Constitution;
- c) Decide on the dissolution of political parties, and
- d) Decide the disputes concerns the result of the general election.

While, the obligation of the Constitutional Court is to give a decision or ruling based on the opinion of the House of Representatives regarding alleged violations of law committed by the President and/or Vice President in accordance with the constitution, the term of legislation reviewing can be divided based on the subject who conducting the reviewing, the reviewed object of the regulation, and the period of reviewing.

In terms of the reviewing subject, the review can be done by a judge (*toetsingsrecht van de rechter* or *judicial review*), legislative review, as well as executive review. Although there is no standard definition of judicial review in Indonesia, but in general it is given the understanding as a "material review right," as an authority to investigate, assess, whether a law is in accordance with or contrary to higher-level regulations, and whether a certain power has the right to issue a particular regulation. Speaking about the existence or strength the Constitutional Court ruling related to its position in the legislation, we can see actually how the position of the Constitutional Court ruling in the system of legislation.

The existence of the Constitutional Court is a branch of power in the judicial sector. It has a heavy and strategic duty because as a guardian and interpreter of the constitution, this is a challenge for the Constitutional Court to realize the ruling of the Judges to reflect justice, legal certainty and expediency while still conducting judicial power that is able to act independently and responsibly as mandated the 1945 Constitution of the Republic of Indonesia. The Constitutional Court can be called as the guardian of the Constitution and the interpreter of the Constitution.<sup>1</sup>

The ruling of the Constitutional Court is the act of the Constitutional Court judge as an authorized state official who is pronounced in a hearing open to the public and made in writing to end the dispute that is confronted with him. The Constitutional Court ruling has the binding power of all citizens, state

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<sup>1</sup> Suharizal, "Formulasi Undang-Undang Badan Hukum Pendidikan, (Pencarian Bentuk dan Batasan Pengaturan)", Jurnal Dinamika Hukum, FH UNSOED, Vol.10 No. 3, 2010, p. 235.

administrators and has general application power, so logically if the Constitutional Court reviews the legislation and cancels one material, paragraph, article and/or content of the law (negative legislator), then the output contained in the ruling also has binding force that is generally applicable (*erga omnes*) whose legal consequences also include all citizens and state administrators.

Before discussing more deeply the characteristic of the Constitutional Court' ruling, the writer should first discuss the theory related to the implementation of the nature of the Constitutional Court' ruling. It is the sovereignty theory approach in which the term *Sovereignty* comes from the Arabic "*dawlah*" or *dulah*. In the Az-Zurjawi' Dictionary it is said that *dawlah* or *dulah* means rotation or turn. The difference is that *dulah* is related to turnover of assets, while *dawlah* is related to a turn or era for political power. In theoretical studies, there are at least 4 (four) types of sovereignty theory, namely the theocracy theory, the theory of law sovereignty, the theory of State sovereignty, and the theory of people sovereignty.<sup>1</sup>

Based on these theories, the law is binding not because the will of the State, but the formulation of the legal awareness of the people. Legal awareness that makes the rule of law obeyed. The application of the law is due to its inner value, which is incarnate in the law. Legal awareness is based on the legal feeling of each individual, namely the feeling of how the law should be, but the theory has a weakness that cannot be interpreted clearly in terms of what is legal awareness and what is interpreted as the legal feeling.

The law embodied in a legislative product is considered as the implementation of legal awareness. The law is obeyed because humans have the mind to think about the law and its consequences. According to Hugo Krabbe, that the law comes from the legal feeling that exists in the majority of members of the community, therefore the State should be a legal or constitutional State (*rechtsstaat*). Every State action must be accountable in law. In the context of this study, the Constitutional Court' ruling in the case of reviewing the laws against the Constitution has binding legal force. Such ruling in the process of reviewing the laws against the Constitution is a court statement that terminates and resolves the dispute filed regarding the interpretation of one norm or principle contained in the constitution which is concretized in the provisions of the law as the implementation of state objectives and ordered by the constitution.

The Constitutional Court has the authority to adjudicate at the first and final level whose decisions are final. The definition of the final of the Constitutional Court' ruling is that legal proceedings or legal resistance cannot be done. The final (*legally binding*) in the Constitutional Court' ruling is the ruling is binding as a legal norm since it was pronounced in the trial. Final means that the Constitutional Court' ruling is directly obtaining permanent legal force since it is pronounced and there is no legal effort that can be taken. This final decision is directly binding, which also means that all parties, whether people, public bodies or state institutions must comply with and implement the decisions that have been made. A decision if no legal remedy can be used means that the decision has permanent legal force (*in kracht van gewijsde*) and obtains binding force (*resjudicata pro veritate habetur*).

About the legally binding of the Constitutional Court' ruling, it means that (1) directly obtaining legal force, (2) because it has obtained permanent legal force, the Constitutional Court' ruling has legal consequences for all parties relating to the ruling. It is because the Constitutional Court' ruling is different from the general court ruling which only binds parties (*interparties*). All parties must comply with and implement the Constitutional Court' decision, (3) because it is the first and last court, there is no other legal effort that can be taken. A decision if there are no legal remedies that can be pursued means that it has permanent legal force (*in kracht van gewijsde*) and obtains binding force (*resjudicata pro veritate habetur*). Strictly speaking, the Constitutional Court' ruling which has permanent legal force immediately has binding legal force to be implemented.

#### 4. Feature of Final and Binding Ruling of the Indonesian Constitutional Court

If we examine comprehensively, we will find that there are decisions that can be directly implemented by the Constitutional court, such as to cancel certain norms that do not disturb the existing norm system and do not require further regulation. Another decision that can be implemented immediately is the Constitutional Court' ruling to cancel articles on President' humiliation in the Criminal Code, namely Articles 134, 136

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<sup>1</sup> See Masdar Farid Mas'udi, 2010. *Syarah Konstitusi: UUD 1945 dalam Perspektif Islam*, Pustaka Alvabet bekerjasama dengan Lakip, pp. 45-47

and 137. Since this decision was pronounced in the Constitutional Court session no one can be convicted under those articles. The police cannot make these articles as a basis for investigation. Likewise, the prosecution by the prosecutor. The Constitutional Court' ruling was immediately valid, although no changes had been made to the decision that had been canceled.

On the other hand, there is a decision that for its implementation requires further rules, namely the decision to cancel a norm that affects other norms, or to implement it requires more operational rules. The Constitutional Court' ruling regarding individual candidates in the General Election and regarding the majority of votes are examples of this type of decision. However, the absence of regulations following up on the Constitutional Court' decision does not reduce the binding power that has been attached since it was read. Each party concerned must carry out the decision. If a regulation is implemented it turns out to be contrary to the Constitutional Court' ruling, then the legal basis is the Constitutional Court' ruling.

The mechanism is similar to the establishment of a new law. A law has binding legal force since established. However, there are provisions that can be directly implemented, but some also require implementing regulations. If the implementing rules have not been made or adjusted, it does not reduce the binding nature of the law itself. In fact, in each the closing provisions of the laws, it is always stated that all implementing regulations remain in force as long as they do not conflict with the law itself.

Also, the Constitutional Court made a legal breakthrough that was not based on written or unwritten law in response to the realization of upholding justice, legal certainty and the benefits conceptualized by Gustav Radbruch.<sup>1</sup> Legislation has a theoretical understanding as the process of establishing legislation or the process of establishing state regulations, both at the central and regional levels.<sup>2</sup> To produce a populist legal product and maintain constitutionality in the administration of the constitution, law enforcement is needed. One way of law enforcement and legislation is to review the legislation through judicial review.<sup>3</sup>

The Constitutional Court' ruling will bring legal consequences which are not only about individuals or applicants, but also other people including state institutions, this will be felt when reviewing the law against the Constitution. The nuance of public interest will be a differentiator from other matters such as civil, criminal, and state administrative matters involving personal interests with other individuals even with the government, this is the characteristic of a case filed with the Constitutional Court and at the same time differentiator with procedural law from other cases. The implications that arise in the implementation of the Constitutional Court' ruling are as follows. *The first*, the obligation to revise the laws. Judicial decisions are not part of legislation, but can bind legislation. It can be categorized into written law. In general, changes in a rule of law that is made through decisions per trial are based on the reviewing authority of the judiciary, both formal and material reviewing.

According to Sri Soemantri, the right of formal reviewing is an authority to judge or assess whether a legislative product such as the law is incarnated through means (procedures as determined or regulated by the applicable legislation or not), while, Harun Alrasid argues that the right of material reviewing is about the legislator' authority and whether the content is contradictory or not with a higher regulation. As positive legislator, the legislative state is the House of Representatives and together with the President as legislator. Article 20 of the 1945 Constitution of the Republic of Indonesia paragraph (1), stated that the House of Representatives held the power to form the laws, while paragraph (2) determined that each draft laws was discussed by the House of Representatives and the President for mutual approval. "Definition of the formulation of Article 20 paragraph (2) of the 1945 Constitution of the Republic of Indonesia has been determined that each draft laws are discussed by the House of Representatives with the President with mutual agreement. The discussion of the draft laws was carried out by the House of Representatives and the President does not mean that it is discussed together but must get mutual agreement. It means that the draft can be discussed separately by the House of Representatives and the President separately, until finally get mutual approval.

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<sup>1</sup> Muhammad Fauzan, "Terobosan Hukum Mahkamah Konstitusi (Analisis Tentang Putusan MK No: 41/PHPU.DVI/2008)", Jurnal Dinamika Hukum, FH UNSOED, Vol. 9 No. 1 Tahun 2009, p. 4

<sup>2</sup> Aditya D. Dony, Jurnal Konstitusi, Vol. III No. 1 Juni Tahun 2010, P3KHAM LPPM UNS. MK RI, p. 47.

<sup>3</sup> Faqih Maryadi, "Nilai-Nilai Filosofis Putusan Mahkamah Konstitusi yang Final dan Mengikat", Jurnal Konstitusi, Vol. 7 No. 3 Tahun 2010, p. 103.



## 5. Legal System Approach to the Existence of Final and Binding Ruling

If we explore more deeply, the existence of the Constitutional Court' ruling is inseparable from Lawrence Mier Friedman's concept of "the three elements of the legal system in which this legal system also supports the existence of a final and binding ruling namely; (a) legal structure, (b) legal substance (c) legal culture.<sup>1</sup> But in this discussion, the author only emphasizes one of the three approaches to the operation of a law in society or in its enforcement in this case the existing legal structure.

Legal structure, in a legal system in Indonesia is the institutional structure of the judiciary by police and prosecutors. Ahmad Ali stated that what is included in the structure is the number and type of judicial institutions, this jurisdiction can also remind us of fundamental issues, where the Constitutional Court' ruling is not infrequently affected by related structural institutions such as the Constitutional Court Decision No. 002/PUU/2003 regarding the Reviewing of Oil and Gas Laws, the decision was granted in part, namely Article 12 paragraph (3), Article 22 paragraph (1) and Article 28 paragraph (2) and paragraph (3) of Act No. 22 of 2001 concerning Oil and Gas.

Such final and binding ruling should be followed up. However, the fact is the government issued PERPRES No. 55 of 2005 concerning Retail Prices of Domestic Fuel, in 2005 the Government issued Presidential Regulation No. 55 of 2005 which also revoked Presidential Regulation No. 22 of 2005 concerning Retail Prices of Domestic Fuels and their implementing regulations. In the terms of considering the Presidential Regulation, it was stated that in order to alleviate the financial burden of the country for the provision of domestic fuel, it is necessary to reduce subsidies.

By looking at this case, it requires the effectiveness of every ruling of the Constitutional Court, even though it has been regulated in the Constitutional Court law that the Constitutional Court' ruling to grant the request must be contained in the official gazette.<sup>2</sup> So that the problem arises in the community is the regulation of the existing Presidential Regulation is very liberalized, because it is usually imagined if it is observed its content: the retail selling price of fuel as intended in Article 2, then adjusted to the economic price which can be an increase or decrease in price.<sup>3</sup> Also, such regulation the economic price in question is the price calculated based on *Mid Oil Platt's Singapore* (MOPS) is the price of buying and selling transactions on the Singapore oil market.

Because the Constitutional Court' ruling is general-binding, the parties related to the implementation of the provisions that has been decided by the Constitutional Court must implement the ruling. However, considering the norms in the law are a unified system there is the implementation of decisions that must go through certain stages, depending on the substance of the decision. There are decisions that can be implemented directly without having to make new rules or changes, some of which require further regulation. This gives an illustration that the Constitutional Court' ruling which states that a statutory law does not have binding legal force, means that the Constitutional Court did not cancel the law, but stated that it no longer has binding legal force.

Considering the law loses the legally binding as a method and changes, then the Constitutional Court' ruling brings a change in legal consequences, namely changes that occur through judicial review by the court. The Constitutional Court is not obliged to govern or revoke the editorial of articles, paragraphs or laws which are not legally binding from their laws, but with the issuance of the Constitutional Court' ruling in the State Gazette it has been stated that it does not bind the article, paragraph, chapter, section and paragraph the laws in question. The Constitutional Court' ruling in reviewing the laws does not have strict legal sanctions if it is not obeyed and the concept of a ruling without sanctions in constitutional law is called "*lex imperfecta*."

## 6. Conclusion

The existence of a final and binding ruling by the Constitutional Court in reviewing the law is clear normatively as mandated in the existing constitutional but in terms of the implementation of the existing ruling, the existence of this ruling gets more attention by the structure of the relevant institution so that in the implementation of the Constitutional Court' ruling did not experience obstacles and challenges from

<sup>1</sup> Achmad Ali, 2008, *Mengungkap Realitas Hukum Rampai Kolom & Artikel Pilihan dalam Bidang Hukum*. Kencana Prenada Media Group. p.9

<sup>2</sup> Article 59 Act No. 24 of 2003

<sup>3</sup> See the Presidential Regulation No 55 of 2005 in Article 9 paragraph (1)

related institutions or structures.

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