MEASURING THE EXECUTORIAL POWER OF THE
CONSTITUTIONAL COURT OF THE REPUBLIC
INDONESIA DECISIONS

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Abstract: This study aims to measure the binding strength of the Constitutional Court's decision in constitutional review cases and to analyze the juridical implications of normalizing norms declared unconstitutional by the Constitutional Court. This research is normative legal research with a statutory approach, a concept approach, and a case approach. The Legislative Approach is used to make an inventory of laws and regulations relating to the position and authority of the Constitutional Court. The conceptual approach analyses legal issues based on concepts related to the executive power of the Constitutional Court's decision. The case approach is used as an object in this research, namely the findings of the Constitutional Court, which are not followed up. The results show that the Constitutional Court's decisions are normatively final and binding, but in reality, several Constitutional Court decisions are not followed up by the legislators; this gives the impression that the Constitutional Court's findings do not have an executive nature. The juridical implication of the normalization of norms is declared unconstitutional by the Constitutional Court. Juridically the model does not have binding legal force, and the cancellation of the legal standard must be carried out.

Keywords: Executorial Power, Constitutional Norms, Constitutional Court.

Kata Kunci: Kekuatan Eksekutorial, Nprma Inkonstitusional, Mahkamah Konstitusi

Introduction

Reform state administration through amendment Constitution The 1945 Constitution of the Republic of Indonesia (UUD NRI) has been legitimizing that Indonesia is a country of
The consequence of provision is supremacy the law must established without the existence cut down selection. Through spirit constitutionalism, the 1945 Constitution of the Republic of Indonesia was as law highest (The supreme law of the land) that must be made commander highest in life nation and state.

Friedrich Julius Stahl stated at least there are four main country laws: First, protection of basic humans. Second, the separation of power between institutional countries. Third, maintenance of government according to the Constitution, and fourth, there is a Justice administration standing the country alone. As a consequence logical from the declared draft country law in the constitution, the state is obliged to provide protection, guarantee, and implementation of the elements of the rule of law.

An amendment to the 1945 Constitution of the Republic of Indonesia has an impact on changing the system of law in Indonesia. One of the important points of the amendment to the Constitution is the birth of the Constitutional Court as a branch of judicial power. Amendment Third, the 1945 Constitution of the Republic of Indonesia requires the use of system bifurcation in power justice. Where power justice shared Becomes two branches, that is branch Justice ordinary (ordinary court) culminating on the Court great and branch Justice implemented constitution by Court Constitution.

The presence of the Constitutional Court is expected to be able to provide checks and balances between state institutions and protect human rights, through its authority to examine laws against the Constitution. There are four powers and one obligation

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1 In countries Europe Continental, thought country rule of law started from Immanuel Kant and Frederich Julius Sthal with the term “Rechtstaat” and then appeared in england by A. V Dicey with the term “rule of law”.
of the Constitutional Court, including reviewing laws against the Constitution, deciding disputes over the authority of state institutions whose authority is granted by the Constitution, deciding on the dissolution of political parties, and deciding disputes over election results. The Constitutional Court must give a decision on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President according to the Constitution.5

The existence Court Constitution in the system of the state administration in Indonesia is in line with Hans Kelsen’s view which states that a guaranteed constitution will be in progress ideally, if there is an organ that judges or tests laws made by legislature, through judicial review.6 Judicial review is an institution of the law that gives authority to body executor power justice and or body other designated by the constitution to do review and or testing return with a method to do interpretation law and or interpretation constitution for give solution juridical.7

Beard stated that judicial review is part of the system of checks and balances that have been set in the Constitution Convention.8 However, some people reject the existence of a judicial review which considers legislators to have an honorable position in a country.9 Even though in reality members of the legislature are representatives of political parties whose political interests often influence a legal product. The importance of the existence Court Constitution in his authority for judicial review appears when faced with a fact that results in an institution

5 See the provisions of Article 24C paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia
representative being considered as a political forum. On content other institutions legislative considered getting a mandate from the whole people, but not yet of course have the same wish as will whole sovereign people.\textsuperscript{10}

The Constitutional Court, through its authority, decides cases submitted to it that are final and binding. This is to provide legal certainty in the legal system in Indonesia. However, in reality, there are several decisions of the Constitutional Court in judicial review cases that do not have executive power because they are not followed up by the legislature and government. Indications of the absence of executive power from the Constitutional Court's decision can be seen from several aspects; First, the emergence phenomenon of The Court's decision which is not quickly accommodated in the Constitution through revision to requested law for conducted testing to the Constitutional Court; Second, emergence phenomenon normalization return original or phrases that have been declared unconstitutional by Court Constitution. Leave from In the above phenomena, this research examines the executive power of the Constitutional Court's decision, and the juridical implications of normalizing articles declared unconstitutional by the Constitutional Court.

Research on the decision of the Constitutional Court has been carried out by several researchers, among others Mesraini, \textsuperscript{11}Rian Van Frits Kapitan, \textsuperscript{12}and Fajar Laksono Soeroso, \textsuperscript{13}who studied the interconnection between the decisions of the Supreme Court and the Constitutional Court, in several cases the Supreme Court ignored the decisions of the Constitutional Court. Another

\begin{itemize}
  \item \textsuperscript{10}Ni’matul Huda, \textit{Negara Hukum, Demokrasi, Dan Judicial Review}, Cetakan-1. (Yogyakarta: UI PRESS, 2005).
  \item \textsuperscript{13}Fajar Laksono Soeroso, “‘Disobedience’ Against the Constitutional Court Decision No. 153/G/2011/PTUN-JKT,” \textit{Judicial Journal} 6, no. 3 (2013): 227–49.
\end{itemize}
research conducted by M. Agus Maulidi. Barjamaj A. Dumi, and M. Agus Maulidi, studied several factors that caused the Constitutional Court's decision to be unenforceable. Research conducted by Mr. Gunars Kutirs. examines the Constitutional Court of the Republic of Latvia which is not authorized to oversee the implementation of its decisions because the law does not regulate how the decisions of the Constitutional Court are executed. Further research was conducted by D. Dvozdetsky. and Gunars Kutirs. examines the decision of the Constitutional Court must be implemented, the uncertainty of its implementation will cause ambiguity and legal uncertainty. The research conducted by the author is more focused on measuring the binding power of decision Court Constitution in constitutional review cases and analyzing the juridical implications of normalizing norms declared unconstitutional by the Constitutional Court.

This research is normative legal research which makes norms and rules basics, principles laws, regulations legislation, and doctrine as the object. The approach used in a study is the statute approach, conceptual approach, and case approach.

Statute approach in use for inventory Rules relevant legislation with the position and authority of the Constitutional

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Court. The conceptual approach used to analyze issue law is based on concepts related to the executive power of the decisions of the Constitutional Court. Case approach used as an object in study these are the decisions of the Constitutional Court which have not been followed up. Some of the decisions of the Constitutional Court that became the object of study were the Constitutional Court's Decision No. 011/PUU-III/2005, Constitutional Court Decision No. 5/PUU-X/2012, Constitutional Court Decision No. 97/PUU-XI/2013, Constitutional Court Decision No. 34/PUU-XI/2013, and Constitutional Court Decision No. 50/PUU/XII/2014.

Strength to Bind Constitutional Court Decisions in Constitutional Review Cases

In every state power that declares itself as a state of law, then in it, there must be judicial power. Based on the doctrine of separation of powers, the function of judicial power is to exercise control over state power to prevent the instrumentation process from placing the law as part of power. Thus, the judicial power must be a power that is free and independent from the intervention of any party.

Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia states that judicial power is exercised by a Supreme Court and judicial bodies under it in the general court environment, religious court environment, military court environment, state administrative court environment, and by a Constitutional Court. Changes in this article indicate that the Supreme Court is no longer the single top authority in judicial power, this is due to the presence of a new state institution in judicial power, namely the Constitutional Court.

The Constitutional Court is one of the state institutions that was born after the third amendment to the 1945 Constitution of the Republic of Indonesia. Its birth in the constitutional system in Indonesia can be understood through two dimensions. First, from the political dimension of the state administration, the presence of the Constitutional Court is needed to balance the legislature's power in the legislative and executive domains. This is very
important to ensure that the laws produced by these two institutions do not become legitimate for the tyranny of the majority of the people’s representatives.

Second, from the legal dimension, the birth of the Constitutional Court is a trigger mechanism for changing the concept of the supremacy of the MPR to the supremacy of the Constitution. In a legal state with a unitary group, it is very essential to always ensure that the national legal system must be in harmony with the highest source of validity, namely the 1945 Constitution, according to the constitution.

In the context of state administration, the Constitutional Court is constructed as (1) The guardian of the Constitution whose function is to uphold constitutional justice in people’s lives; (2) must encourage and ensure that the Constitution is respected and implemented by all components of the state consistently and responsibly; (3) the interpreter amid the weakness of the existing constitutional system so that the spirit of the constitution always lives and colors the sustainability of the state and society.  

The presence of the Constitutional Court as one of the actors in the judicial power gives the Constitutional Court an equal position with other state institutions in the executive and legislative branches of power. This is a logical consequence of the concept of a democratic legal state, where every state institution that carries out state administration is the executor of people’s sovereignty under the auspices of the constitution. The concept of a functionalist horizontal division of power makes existing state institutions independent and eliminates the super body concept which places one state institution in a higher position than the others.

As an actor of judicial power, the constitutional function of the Constitutional Court is stated in the general explanation of the Constitutional Court Law that the task and function of the Constitutional Court is to handle certain constitutional cases or

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constitutional cases to maintain the Constitution so that it is carried out responsibly by the will of the people and the ideals of democracy. The presence of the Constitutional Court is also intended as a correction to the constitutional experience caused by the double interpretation of the Constitution. So automatically every decision of the Constitutional Court is an interpretation of the Constitution itself.

As a guardian of the Constitution, the Constitutional Court has the authority to hear all cases related to violations of the Constitution. “The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine laws against the Constitution, decide on disputes over the authority of state institutions whose authority is granted by the Constitutional Law, decide on the dissolution of political parties, and decide disputes regarding election results.”

Based on the authority possessed above, there are at least five functions attached to the existence of the Constitutional Court and implemented through its authority. The five functions are as the guardian of the constitution, the final interpreter of the constitution, the protector of human rights, the protector of the constitutional rights of citizens, the citizen’s constitutional right), and the protector of democracy (the protector of democracy).

The existence of the Constitutional Court as an institution that has the authority to conduct judicial review of laws against the Constitution has the meaning that all laws that are considered to be contrary to the Constitution can be requested for testing by the Constitutional Court to assess whether they are contrary to the Constitution or unconstitutional so that they have no power. So at this stage, the existence of the Constitutional Court has broken the system of power that is only focused on by the executive and legislature. However, the spirit of reform that

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21See the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia
wants our constitutional system to be more democratic in the end could not last long. Although the presence of the Constitutional Court is equipped with the authority to examine laws against the Constitution, in practice it still causes many problems.

One of them is the decision of the Constitutional Court which does not have executive power until the inclusion of unconstitutional norms in the amendment of a law. The Constitutional Court's authority as stated in Article 24C of the 1945 Constitution of the Republic of Indonesia states that the Constitutional Court's decision is final and binding. This means that the Constitutional Court's decision has permanent legal force since it was pronounced and does not have legal remedies that can be taken. The Constitutional Court's binding decision can be interpreted that the Constitutional Court's decision does not only apply to the parties but also applies to all Indonesian people (erga omnes). So in this case, the judge's decision which has legal force still has the same binding legal force as the law.

In carrying out its functions and duties as a guardian of the Constitution, the Constitutional Court has the authority to interpret the Constitution. The forms of interpretation of the Constitution are set forth through the decision of the Constitutional Court. Although the Constitutional Court's decision is declarative, it has final and binding force. The Constitutional Court's decision which is final means that the decision immediately has permanent legal force from the moment it is pronounced and there is no legal remedy that can be taken. The final nature of the Constitutional Court's decision in this law includes the final and binding legal force.\(^{23}\)

The Constitutional Court's binding decision can be interpreted that the Constitutional Court's decision as a court product must be obeyed. However, in practice, there are still many decisions of the Constitutional Court that are not immediately followed up by the DPR and the President by accommodating the norms of the legislation. Several decisions of the Constitutional

\(^{23}\) Ibid.
Court that were not followed up by the executive and legislative institutions include:

The Constitutional Court’s decision No. 97/PUU-XI/2013 states that disputes arising in regional head elections are not within the constitutionality of the Constitutional Court. In the decision, the Constitutional Court requires the existence of a special election court that has special authority to adjudicate election disputes. However, since the pronouncement of the decision, until now this special institution has not been formed or followed up by the DPR and the President. This is a condition sine qua non that the regional election dispute is still in the hands of the Constitutional Court and is one of the main factors in the accumulation of cases within the Constitutional Court.

The Constitutional Court’s decision No. 34/PUU-XI/2013 annulled Article 268 paragraph (3) of the Criminal Procedure Code. The decision requires that a review in a criminal case can be carried out more than once as long as it still meets the requirements specified in Article 268 paragraph (2) of the Criminal Procedure Code. What has been decided by the Constitutional Court should be able to be accommodated immediately through revisions to the law in question. On the other hand, the Supreme Court as the addressee issued SEMA No. 7 of 2014 which stated that the PK for criminal cases could only be done once. The substance is a form of contrary to the decision of the Constitutional Court on judicial review in criminal cases.

The Constitutional Court’s Decision No. 5/PUU-X/2012 concerning the review of Article 50 paragraph (3) of Law No. 20 of 2003 concerning the National Education System. At the implementation level, the government through the Ministry of Education and Culture is still pursuing a transitional policy to abolish the policy of having International Standard Schools and/or International Standard School Pilots. The Constitutional Court’s decision does not recognize a transition period to be implemented but has binding legal force since it was pronounced. That is, since then the decision must be obeyed and implemented.
The Constitutional Court’s decision No. 011/PUU-III/2005 states that the explanation of Article 49 paragraph (1) of the National Education System Law does not have binding legal force. In the decision expressly verbis the Constitutional Court stated that the education budget from the APBN was 20 percent and stated that the implementation of the constitution should not be delayed. On the other hand, through the 2005 State Budget Law, the DPR’s budget committee only allocated a budget of 36 trillion, or equal to 8.1 percent of the total existing budget.

This situation then led to speculation about the bias like the final and binding decision of the Constitutional Court.

Some of the decisions above show that the decisions of the Constitutional Court only have firmness at the normative level. This means that the Constitutional Court’s decision only appears populist and progressive on the surface, but at the implementation level, it is not uncommon for these decisions to fail in imparting justice to the people seeking justice. In addition to obscuring the nature of the decision of the Constitutional Court, which is final and binding, this fact leads to the conclusion that as the judiciary, we are regarded as a custodian society. The Constitutional Court does not yet have a strong position in the constitutional system in Indonesia. So it is not wrong to say that the Constitutional Court is the weakest branch of power among other branches of power (the least dangerous power, with no purse nor sword).24

Second, the emergence of the phenomenon of normalizing articles or phrases that have been declared unconstitutional by the Constitutional Court. Decisions of the Constitutional Court which are final and binding will inevitably lead to legal consequences in the form of guarantees that articles that have been ruled unconstitutional by the Constitutional Court cannot be revived. On a practical level, there are often attempts to revive phrases that have been annulled by the Constitutional Court. At first glance,

this is a natural phenomenon considering the dynamic development of legal needs, thus requiring existing legal regulations to follow the dynamics of these needs. The legal need likely requires norms that have been declared unconstitutional to be revived solely to fulfill the legal demands.

Moreover, often the posita and petitum from stakeholders who submit a judicial review to the Constitutional Court are based on the sociological fact that an article or phrase in a law violates the constitutional rights of citizens in terms of the application of the article. Whereas the assessment of the application of a certain article or norm is not the same as the assessment of the norm itself. That is, even though there has been a constitutional violation of the application of the norm, it does not mean that the relevant norm is permanently abolished and declared unconstitutional. It was not because of a mouse's fault that eating rice in the rice barn was the main reason for the burning of the rice barn. When a violation occurs due to the application of a norm, what needs to be corrected is the provision for that application. In this case, it opens the opportunity to revive the norms that have been canceled by the Constitutional Court with the provision of improvements to the application of these norms.

But the problem is, of course, this will be very contrary to the nature of the decision of the Constitutional Court which is stated explicitly in Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia. The article states that the nature of the decision of the Constitutional Court is final and cannot be taken legal action. The process of revitalizing norms that have been declared unconstitutional will open up more entry points for speculation about the bias in the position of the Constitutional Court as the final interpreter of the Constitution. This will also give the impression that as a state institution, the Constitutional Court does not have a strong bargaining position in the administrative system. Therefore, it is very important then to determine the qualifications for norms that can be revived after being declared unconstitutional by the Constitutional Court. In addition to meeting the demands of the law, this step can maintain
the dignity of the Constitutional Court as a state institution that has the nature of final and binding decisions.

**Juridical Implications of Re-Normalization of Norms Declared Unconstitutional by the Constitutional Court**

In the previous discussion, it has been explained that not a few decisions of the Constitutional Court are followed up by lawmakers, and there are even some decisions of the Constitutional Court that are not obeyed by other state institutions. Whereas normatively the decision of the Constitutional Court is final and binding. This means that the decision of the Constitutional Court applies erga omnes since it was pronounced in the plenary session of reading the decision. In addition, the nature of the Constitutional Court's decision is binding on all Indonesian citizens and also interested state institutions.

This situation shows that the decision of the Constitutional Court only has firmness at the normative level. The Constitutional Court's decision only appears progressive and populist on the surface but has failed to impart justice and legal certainty because it cannot be implemented based on the address in the decision.

This phenomenon has shown that the existence of the Constitutional Court until now has not had strong bargaining power as the only institution that has the authority to oversee and interpret the Constitution. Moreover, the existence of the Constitutional Court is not designed to have the authority in the process of implementing its own decisions. So it is not wrong to say that the Constitutional Court is the weakest state institution among other high state institutions (the least dangerous power, with no purse nor sword).  

If this situation is continuously ignored, the development and position of the Constitutional Court in the constitutional structure in Indonesia will only become a stamp plan, while also

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increasing the number of declines in public trust in the Constitutional Court. Under certain conditions, the Constitutional Court will lose its dignity as the body of guardian and sole interpreter of the Constitution, as was the original intent of the establishment of the Constitutional Court.

In the aspect of legal certainty, the problems described above certainly become very fundamental problems. The Constitutional Court as the guardian of the Constitution and the form of institutionalization towards constitutional supremacy will certainly be far from its ideals. Logically, the decision of the Constitutional Court can be implemented as the main indicator of the establishment of the supremacy of the Constitution. In the context of a wider scope, the non-implementation of the Constitutional Court's decision is a form of infringement of the values of the rule of law. 26

It does not stop there, other problems have fundamentally ignored the existence of the Constitutional Court's decision through the phenomenon of normalizing decisions that have been declared unconstitutional. Whereas every decision of the Constitutional Court whose norms have been declared contrary to the Constitution is binding on all citizens (erga omnes). Therefore, the revival of norms that have been declared unconstitutional has the potential to injure the constitutional rights of the citizens of the state. In addition, it will also result in not achieving legal certainty.

Explicitly the prohibition on the normalization of articles that have been declared unconstitutional is indeed not found in the laws and regulations. However, implicitly based on the nature of the decision, the normalization of articles that have been declared unconstitutional is a form of betrayal of the Constitution itself. In addition, the normalization of articles that have been declared unconstitutional also has the potential for a judicial review to be carried out again, so that in this aspect legal certainty as one of the basic legal objectives will never be achieved.

So that within the limits of reasonable reasoning, when the norm in law has been declared unconstitutional, it does not need to be normalized again in the legislation. Because it is clear that norms that have been declared unconstitutional do not have binding legal force.

**Conclusion**

Normatively, the decisions of the Constitutional Court are final and binding, but in reality, several decisions of the Constitutional Court have not been followed up by the shapers of the law, this gives the impression that the decision of the Constitutional Court does not have an executive nature, including the Constitutional Court Decision No. 97/PUU-XI/2013, Constitutional Court Decision No. 34/PUU-XI/2013, Constitutional Court Decision No. 5/PUU-X/2012, Constitutional Court Decision No. 011/PUU-III/2005, and the Constitutional Court Decision No. 50/PUU/XII/2014.

The juridical implication of the normalization of norms declared unconstitutional by the Constitutional Court, juridically the canceled norms do not have binding legal force so if the norms declared unconstitutional are normalized again in the law, then these norms do not have binding legal force and must be enforced. cancellation of the legal norms through judicial review or legislative review. Therefore, to avoid disobedience to the decisions of the Constitutional Court related to the constitutional review, the legislators must emphasize in the Constitutional Court Law, that the decisions of the Constitutional Court are final and binding along with the legal implications if they are not adhered to.

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