

RESEARCH ARTICLE

## Final and Binding Essence on Constitutional Court's Judgment in Judicial Review

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### Abstract

Mahkamah Konstitusi, has specific characters, one of the typical characters is the final and binding judgement. The reality is many judgements of the constitutional court are not complied with and tend to be ignored by the legislature. Then the petitioner who feel that their constitutional rights have been violated do not have instruments to fight for their constitutional rights that have been violated by the legislators. Based on the statement above, there are problems which is studied, what underlying the basic consideration of the formation of Constitutional Court in Indonesia? And what is the essence of the final and binding of Constitutional Court's judgements? The aim of this study is to determine and comprehend the essence contained in final and binding nature of the Constitutional Court's judgements, especially in judicial review of UUD 1945. The method of law study used was normative law research method which is law research from internal perspective with the object of the study was law norms. It can be concluded that the basic rationale of MK formation in Indonesia, from political side, the existence of MK is required to balancing the legislators' power. From the law side, the existence of MK is the consequence from the change of MPR supremacy become constitution supremacy. The essence of final and binding Constitutional Court's judgement is the stand-alone judgments, so that the judgement cannot be taken by legal action. Constitutional Court judgement is erga omnes which means binding on other parties, including state administrator.

**Keywords:** Constitutional Court; Essence of Judgement; Final

### Introduction

The existence of Constitutional Court (MK) in Indonesian constitutional structure is a form of separation power with the principle of checks and balance. The system of separation power with the principle of checks and balances aimed at each branch of power controlling and balancing the others branch power, with the expectancy there is no abuse of power from each state power institution. The authority given by the constitution should be used accordingly with the purpose and objectives from the authorizing. MK is the state institutions which has strategic function in Indonesia constitution. MK is designed to be guard including interpreter of the basic constitution. According to the article 24C paragraph (1) and (2) UUD 1945, MK has four (4) authorities and one (1) obligation which is: authorize to adjudicate on first level and the last which the decisions are final to test the constitutions on Basic Constitutions, cut off authority dispute of state institutions whose authorities are given by Basic Constitutions, cut off dissolution of political parties and ended off conflict regarding the result of general election. Constitutional Court required to give judgement in the opinion of Representatives Council regarding

violation by President and or Vice President according to Basic Constitution. One of authorities mandated to MK based on article 24C paragraph (1) UUD 1945 is judicial review. Judicial review is the authority to judge is the law is in accordance with or contrary to UUD 1945. MK as a constitutional court, has typical character which is the character of MK judgement is final and binding. This character is different with judicial judgement in Supreme Court environment that provides other legal remedies, including review mechanism and clemency. (Soeroso 2016) MK judgements are final and binding, means that all forms of court judgement both who consent petition for judicial review of the constitution, or consenting partial or completely, has automatically changed the provisions of a law by stating the contradictory to UUD 1945 and stating that the contradictory provisions have no binding legal force. The Constitutional Court's final judgement, means the first and the last judgements and there are no other legal remedies. The consequence of the final judgement is binding immediately upon the recitation of the Constitutional Court's judgements, this is based on Article 57 of Law No. 24 of 2003 concerning Constitutional Court as amended by Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 Regarding the

Constitutional Court in which the Constitutional Court Law is written which states:

(1) The judgement of MK states that the content of paragraphs, article, and/or part of the law that contrary to the 1945 Constitution of Indonesians' Republic the content of paragraphs, articles, and/or parts of the law does not have binding legal force.

(2) The judgement of MK states that the law formation does not meet the arrangement of the law formation according to 1945 Constitution of Indonesian's Republic, the law does not have binding legal force.

(3) The judgement of MK that grants the application should published in the State News of Indonesian's Republic within 30 (thirty) days of a maximum period after the judgements announced.

According to Inosentius Samsul, Constitutional Court's judgement have binding legal force *ex nunc* (*van nu af, slechts voor de toekomst van kracht*), helpless in the means of *ex tunc* (*van toen af*). It is confirmed in the article 47 and article 57 paragraph (2) UU MK. (Eddyono 2019) The fact in society, Final and Binding Constitutional Court's judgement can not just be realized based in accordance with the purpose of the judgement itself. According to the result of the study carried out by Indonesian Legal Roundtable known that many MK judgements is not implemented. The research carried out on judgement of judicial review MK on 2003-2018, especially on decisions which granting the application. (Eddyono 2019)

One of the legal events that occurred in the judgement of Court Constitution Number 33/PUU-XIV/2016 where in the judgement states Article 263 paragraph (1) KUHAP contradicted with UUD 1945. The consequence from that judgement is review effort may only be submitted by prisoner or the heirs. This decision was ignored by the prosecutors. Even Prosecutor Yudi Kristiana explicitly states that the judgements will be not followed by the presecutors. (M Agus Maulidi 2019) That legal events is one of the MK judgements which are not obeyed by the legislators, it is because the nature of final court judgements which means there is no other legal remedies. Then the petitioners whose feels their constitutional right violated, doesn't have instruments to fight for their constitutional rights which violated by legislator.

The essence of Court judgement is a full reflection of the ideals of the law, namely justice (*gerechtigheid/equality*), legal certainty (*rechtszekerheit/certainty*), and benefit (*zweckmaes sigkeit*). According to Maruarar Siahaan, the effectivity of checks and balances may be viewed from the implementation or not implementation of the Constitutional Court's judgements by the legislature. (Asy'ari, Hilipito, and Ali 2016)

Based on the explanation above, there are problems that need to be studied by the writer that is what underlines the formation of MK in Indonesia? And what is the essence of MK judgements final and binding nature on judicial review?

## **Research Methods**

The legal research used is the normative legal research method. Normative legal research is the legal research from internal perspective with the object of the study is legal norms. (Diantha 2017) The research approach used is constitutional approach, conceptual approach, legal rule history. The legal material source used in this study were primary legal material, secondary and tertiary. After the legal material collected then carried out the analysis to obtained the last argumentation which in the form of answer to the research problems.

## **Results and Discussion**

### **The History of Thought and Formation of Constitutional Court**

The formation of Constitutional Court is a new phenomenon in the world of state administration. The idea of the formation of Constitutional Court is excess of the development of legal thought and modern state administration that occurs on 20 century. (Bachtiar 2019) The beginning of Constitutional Court's Formation begin with judicial review in United States Supreme Court, under management of John Marshall in the case of *Marbury versus Madison* on 1803. In this case, provisions that give the supreme court authority to issuing writ of *mandamus* on Article 13 Judiciary Act deemed to exceed the powers granted by the constitutions, then the Supreme Court declared that it was against the constitution as the supreme of land. But, on the other side declared that William Marbury in accordance with the law is rightful to a letter of his appointment. The courage of John Marshall in the case of *Marbury vs Madison*, become new precedent of American History and its influence is widespread in legal though and practice in many countries. This case then become milestone of judicial review and become authority of judicial review by the Constitutional Court. (Salim 2013) Austria who firstly establish Constitutional Court in Europe Continent on 1919-1920. But there is other record which state that actually Czechoslovakia firstly establish the Constitutional Court which was on February 1920. (Palguna 2018) Austria Country considered a pioneer on the establishment of Constitutional Court in Europe because adopt the shape of idea in UUD 1920. (Asshiddiqie and Syahrizal 2011) The idea of the instutional format of the Austrian Constitutional Court was pioneered by Hans Kelsen, according to Hans Kelsen, the implementation of constitutional rules on Legislation can effectively guarantee only if one organ besides legislative institution was given task to test wheter a legal product is constitutional or not, and not enforce it if according to this organ the product of the legislature is unconstitutional. For that sake, it is necessary to establish a special judicial organ like constitutional court or constitutional control of constitutions which called by judicial review, that can be given by ordinary court and especially Supreme Court. After the world war two, the ideas of Constitutional Court with judicial review

spreading all over Europe, by constructing Constitutional Court separately from Supreme Court. Constitutional Court as special Court which initiated by Hans Kelsen, furthermore known as European model or centralized model or Kelsenian Model. Special Court which is Constitutional Court is having authority to declared that a constitution that made by legislature against without requirements of a concrete case but rather based on theoretical reason (in the abstract).(Palguna 2018)

The development of constitutional testing European model there are three forms:

1. Austria Model or Continental Model, that apply centralized system in which a Constitutional Court establish by exclusive authority controlled the constitutionality of law
2. German Model, that apply centralized system in which Constitutional Court establish by exclusive authority declared the law and action or activity against with constitution, but all courts (others) could rule out the law that considered against the constitution.
3. France Model, that apply centralized system in which Constitutional Council only has presentive supervision authority, that is able to check the constitutionality of law that has been validated but not yet constitutionalized by parliament.(Palguna 2018)

The idea of Constitutional Court in Indonesia was firstly discussed on MPR Institutions meeting when discussing impeachment regarding with the case of dismissal of Predisent of Abdurrahman Wahid on 2001, then come up the ideas to introduce special court institutions, so that the president is not arbitrarily demanded by MPR by the process that solely relying on the political process. In the relation, come up idea to made Constitutional Court Institution. The changed of the three amendments of the 1945 Constitution, means since that time Constitutional Court was existed. Because, the existence of Constitutional Court has been regulated on Article 24C paragraph (1) until (6) the third changed of amandements of the 1945 Constitutions on 9 November 2001. On the third changed of UUD 1945 contains article that is related to impeachment of President, which is on Article 7B that regulate the existence of Constitutional Court. That article stated that the Presidents could be dismissed by MPR after going through the judicial examination process at the Constitutional Court. On 10 August 2002, the arrangement of Constitutional Court was included on Article of the transisional regulations the fourth changed of UUD 1945. Article III of transisional regulations states, Constitutional Court formed the latest on 17 August 2003, and before it was formed all authorities carried out by Constitutional Court. Juridically MK was formed on the fourth changed of UUD 1945, which is Article III Transisional Regulations. Regarding on these the authority is temporary given to the Supreme Court. On 2002 until 2003, Constitutional Court act as MK. Then, it can be said on 2002-2003, Supreme Court is Interim

Constitutional Court. The legalization of UU MK carried out on 13 August 2003.(Bachrain 2016)

The idea of MK establishment strengthened in reformation era, but actually the idea of judicial review had been existed since the discussion of UUD 1945 by BPUPKI on 1945. Prof Muhammad Yamin, express the opinion that Supreme Court or MA should be given the authority to compare the law. On that time Prof Soepomo refused that opinion because consider that UUD that still arranged at that time was not follow the concept of trias politica supported by the conditions at that time many bachelors of law did not have experience regarding the authority of judicial review.

During the validity period of the RIS Constitutions (UUD 1949), judicial review ever become one of the MA Authorities, but limited to test the state law on Constitution, based on Article 156 paragraph (2) RIS Constitution (UUD 1949) and the Articles 157 RIS Constitution. Article 158 RIS Constitution that consist of 4 paragraphs, in general describe the substance of the Supreme Court's Judgement on their authority of judicial review of state laws on Constitution. Next on UUDS 1950, was unregulated regarding laws testing institution, it is because the laws were seen as the implementation of populace sovereignty running by the governments with the DPR.

The new order period was formed by the Committee Ad Hoc II MPRS (1966-1967) that recommend the given of the right to examine law materials to MA, it was based on the determination of MPRS No. XIX/MPRS/1966 jo determination of MPRS No. XXXIX/MPRS/1968 regarding judicial review of Legislative Law Product outside of MPRS Law Product which was not suitable with UUD 1945. The idea of judicial review re-emerged during the discussion of laws structural, at that time the Indonesian Judges Association proposed that the Supreme Court be given judicial review authority over the Constitution. However, because these provisions are considered as material for the content of the constitution while in UUD 1945 was not regulated so that the proposal is not approved by the legislators, MA was determined to have limited judicial review authority, that was to examine statutory regulations below the law against the law.

The idea of forming MK with the authority to review materially the law on 1945 Constitution can be viewed from two sides, which is from the political side and from the legal side. In the terms of constitutional politics, the existence of MK is required to balancing the power of constitutions' establishment that is owned by the DPR and the President. It is necessary so that the law does not become legitimacy for DPR and the President who are directly elected by the populace.(Bachrain 2016) From a legal perspective, the existence of the Constitutional Court is the consequence of the change from the supremacy of MPR to the supremacy of the constitution, the principle of a unitary state, the principle of democracy, and the principle's rule of law. Article 1 paragraph (3) of the 1945 Constitution stated that the Indonesia is a legal state. Law is a hierakis unitary system and culminating on

the Constitution. Therefore, the law supremacy itself also means the supremacy of the constitution. In order to make the constitution truly implemented and not violated, then it should be guaranteed that the legal provisions under the constitution is not against with the constitution itself by granting the authority to review and cancel if the legal provisions indeed against with the constitution.

### **The Identification of Constitutional Court Judgement on Constitutions Testing**

The judgements in court are the action of judges as state officials, stated in open session for the public and made in writing to end the disputes. As the action of law, judges' judgement aimed to end the disputes, then the judge's judgement is a state action in which its authority delegated to the judges both based on UUD 1945 or Law. The existence of MK in Indonesia Constitutional is a progress of law development and democracy in Indonesia. The existence of MK has changed the doctrine of parliamentary supremacy replaced it with constitutional supremacy.(Faqih 2016) As part of state power in the judiciary, this is based on Article 24 paragraph (2) of the 1945 Constitution which states that judicial power carried out by a Supreme Court and institution within the general judiciary, religious courts, military courts, state administrative courts, and by a Constitutional Court. Based on Article 24 C paragraph (1) UUD 1945 and Paragraph 10 UU MK emphasized that Constitutional Court is competent to judge and decide at the first and the last level which the judgment is final, certain constitutional matters. One from the four powers of Constitutional Court based on Article 24 C paragraph (1) UUD 1945 is to examine the laws against the basic Constitutions. The right to examine the law or judicial review is the right to examine (toetsingrecht) of the judicial power to test the legislation. The function of judicial power in conducting the test is based on supervision authority as the consequence of the principle of checks and balances between the organs of implementing state power.(Soebechi 2016) The examination of laws and regulations is inherently inherent with judicial power and is the nature from the task of judges in carried out the function of adjudicate. According to Harun Alrasyid, as long as it is not denied, the right to review is owned by the judge, which is not only a permanent right but also an obligation. According to Moh. Koesno, judicial power is not only to maintain the validity of the law, but to maintain and realize the basic law.(Bachtiar 2019) Regarding to the authority of the Constitutional Court in reviewing the laws on the Constitution (judicial review) based on Article 24C paragraph (1) of the UUD 1945, it is emphasized that the decision of the Constitutional Court is final. This provision is emphasized in Article 10 paragraph (1) and Article 47 of the Constitutional Court Law which stated that the decisions of the Constitutional Court have permanent legal force since it was stated in a plenary session which was open for public. Regarding the final and binding nature of MK judgement, it often become the

subject of discussion in legal circles. Regarding the emergence of the word binding that accompanies the final word, there are those who question the reason that Article 24 C paragraph (1) of the UUD 1945 does not mention the existence of a binding term. This is actually not a substantial problem. Every judge's judgement that has permanent legal force should have a binding nature.

Academically, this is a juridical consequence to emphasize that the judge's or court's judgement should be obeyed.(Palguna 2018) In the other word, on the obligation to obey the decision, the form of the binding nature of the decisions situated. Because if it is not binding, what is the function of a judge's or courts' decision. Referring to the opinion above, it can be stated that MK judgement is a reflection of the judge's statement as a state official who is authorized by the UUD 1945 or by law to decide the disputes that submitted by applicants who feel that their constitutional rights have been impaired due to the enactment of law to obtain justice and certainty. In the terms of legal force, the final nature of MK judgement in this law includes binding legal force (final and binding). MK judgement has final and binding legal force since it was declared in a plenary session open for public, means that since it was declared it had permanent legal force there was no legal remedy in the form of appeals and cassation.(Mohammad Agus Maulidi 2017) This is clearly explained in the explanation of Article 10 paragraph (1) of the Constitutional Court Law, stated that the judgement of the Constitutional Court is final, i.e. the judgement of the Constitutional Court immediately acquires permanent legal force from the moment its was declared and there was no legal remedies that can be taken. Thus, the Constutional Court is the first and the last Court. Reviewed from the nature of the judgement divided into (3), which is a declatory judgement is a judge's judgement that states what is becoming law or judgement that contains a statement of affirmation of a situation or legal position only. A Constitutive judgement is a judgement that excluded a legal situation and or creates a new legal situation. Meanwhile, a condemnatoir judgement is a judgment that contains the punishment of one of the litigants or a judgement that contains an imposition.

MK judgement in its jurisdiction of judicial review of laws on Constitution is declaratoir-constitutive, this is because MK judgement only stated what is become the law of a statutory norm, which against to UUD 1945, and at the same time the judgment excluded the legal situation based on the law. Cancelled norms and create new legal conditions.(Bachtiar 2019) This is explicitly regulated in Article 56 paragraph (3) of the Constitutional Court Law which states, in the event that the application is granted as referred to in paragraph (2), the Constitutional Court expressly states the material content of the article, paragraph, and/or part of the law that contradicts with the 1945 Constitution of the Republic of Indonesia. The final judgement of the Constitutional Court cannot be released with the principle of erga omnes. Erga Omnes means that it can apply to anyone, not only the disputing parties. The Constitutional Court's judgement applies as a law that

binds everyone in the Indonesian community. (Soebechi 2016) Based on Article 10 paragraph (1) of the Constitutional Court Law and reaffirmed in Article 47 of the Constitutional Court Law and Article 39 of the Regulation of the Constitutional Court Number: 06/PMK/2005 concerning Guidelines for Proceeding in Cases of Judicial Review which states, the Constitutional Court's judgement has legal force as of completion declared in a plenary session open for the public. Because the judgement of the Constitutional Court immediately has binding legal force since it was declared, the legal consequences of the judgement of the Constitutional Court are not only binding on the parties (interparties), but all parties, including citizens, are obliged to implement the judgement of the Constitutional Court. The nature of erga omnes is attached to the decision on the right to judicial review because the object of the test is a written regulation that regulates and is binding on the public. Thus, if the Panel of Judges accepts the application and it is granted as well as the material content of the articles, paragraphs, and/or parts of the law that have been cancelled, the whole community will automatically be bound by the judgement. Regardless of whether the judgement of the Constitutional Court are in accordance with the expectations of justice seekers, the reality is that the judicial review reflects the urgency of the existence of MK in administering judicial power after the amendment of the 1945 Constitution. The judicial review is a form of guarantee for the constitutional rights of citizens and aims to limit the government's authority in terms of legal products issued. The authority to review laws on the 1945 Constitution that given to the Constitutional Court is a form of strengthening the realization of purpose of the rule of law concept itself.

## **Conclusion**

Based on the result of discussions above, the conclusions obtained were:

1. The idea or rationale of the establishment of the Constitutional Court in Indonesia, is viewed from two sides, which is from the political side and from the legal side. On political side, the presence of MK is required to balancing the law power establishment that are owned by the DPR and the President. On the legal side, the existence of MK is the consequence of the change from the supremacy of MPR to the supremacy of the constitution, the principle of a unitary state, the principle of democracy, and the principle of the rule of law.
2. The essence of the Constitutional Court Decision is final and binding in the judicial review, it is an independent judgement, so that the judgement cannot be taken by legal action. The Constitutional Court's judgement is final and binding not only binding on the litigants, but also binding on other parties including state officials (erga omnes), the nature of erga omnes is attached on the judgement of the right to a judicial

review because the testing object is a written regulation that regulates and binding for general. Thus, if the Judges Council accepts the application and it is granted as well as the material content of the articles, paragraphs, and/or parts of the law that have been cancelled, the whole community will automatically be bound by the decision.

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