A Utility, Justice, and Security Perspective on the "Final and Binding" Constitutional Court's Decisions

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Abstract*—The issue of judicial review has undergone a profound dynamic development throughout the history of Indonesia. The development of this matter has been concerned not only with material considerations but also with the formal legal issues that have arisen as a consequence of constitutional events. This is of particular importance and strategic value in ensuring the role of a democratic system and in protecting the fundamental rights of citizens set out by the 1945 Constitution. It is essential to establish a separate body other than the legislative body to implement constitutional rules regarding legislation to be effectively guaranteed, with the duty of examining the constitutionality of legislation. Moreover, establishing a Constitutional Court is an excess of the development of modern legal and constitutional thought that emerged in the 20th Century. The Constitutional Court's decisions are "final and binding" and apply the *erga omnes* principle. This signifies that no further legal recourse may be taken against the Constitutional Court's decision, which must be respected by all individuals and institutions in Indonesia, including the Supreme Court. A normative juridical method was employed in this study, outlining the approaches mentioned above, such as the statutory, conceptual, and historical approaches. The findings indicate that the Constitutional Court's decisions are final and binding, precluding any further legal action against its decisions. Meanwhile, several problems concerning decisions issued by the Constitutional Court have emerged, which have frequently been the subject of public debate, particularly in cases where the constitutionality of legislation has been reviewed. It is not uncommon for the Constitutional Court's decisions to be highly contentious, giving rise to a range of views within society. This may affect the judiciary's sense of justice, leading to disappointment amongst those who had expected the Constitutional Court's decisions to be different, which is final and legally binding.

***Keywords*—Decisions, Constitutional Court, Final and Binding**

I. INTRODUCTION

The Constitutional Court's role includes the judicial review of the 1945 Constitution of the Republic of Indonesia (UUD NRI 1945). Its decisions are binding and final, following the *erga omnes* principle. This implies that no further legal action may be taken in opposition to the Constitutional Court's decisions, which the Indonesian people, including the Supreme Court, must obey. The Supreme Court, however, did not comply with the Constitutional Court's decision in the 2014 judicial review case, as evidenced by its failure to overturn the decision in question. In this case, the Constitutional Court granted the petitioners' petition, invoking Article 268 paragraph (3) of the Criminal Procedure Code, which states, "A request for review of a decision may only be filed once." This is in contrast to the 1945 Constitution of the Republic of Indonesia.[1] An examination of the historical development of these regulatory clauses is also crucial for elucidating the import and attributes of the Constitutional Court's adjudications. The objective was to ascertain the original objectives of the drafters. This seems to align with the explanation outlined in the 1945 Constitution before the amendment, which asserted that a country's constitution should not be fully understood without considering its underlying principles.

To fully comprehend the import of a country's legislation, examining the genesis and rationale behind the text and the broader historical, cultural, and political context in which it was formulated is essential. Doing so can achieve

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a deeper understanding of the implications embedded within its provisions.[2] From the constitutional law perspective, the Constitutional Court's decisions represent the most prudent course of action as the final and binding authority. Hamdan Zoelva proposed that the Constitutional Court was constituted to safeguard the constitutionality of the constitution at the time this clause was included. Authorities with direct constitutional authority must rely on this interpretation to resolve constitutional issues. Therefore, the interpretation must be final and binding.[3]

II. LITERATURE REVIEW

A. Rule of Law

The notion of a rule of law is a relatively recent phenomenon that has spawned many interpretations, making it a constantly evolving concept. The term "rule of law" has been directly translated from its Germanic origin as *Rechtsstaat*. In elucidating its notion, there is a tendency to prioritize assessing both the words "state" and "law." The rule of law can be understood in light of at least two distinct traditions. One is the continental European tradition known as the *Rechtsstaat*. The other is the Anglo-Saxon tradition called the "rule of law." [4]

Rechtsstaat (the rule of law) has a relatively recent origin, only emerging in the nineteenth century, compared to other well-established terms in state administration, such as democracy, constitution, and sovereignty. In conjunction with the advent of democracy, the concept of a *Rechtsstaat* legal state was also formulated as a counterpoint to absolute government. The ideas of several thinkers at the time, including those of the Reformation, the Renaissance, natural law, the Enlightenment, the bourgeoisie, and *monarchomachism*, were among those that gave rise to the movements mentioned above and thoughts. Therefore, it is expected that thoughts would gravitate towards the notion of freedom and democracy.

The German philosopher Immanuel Kant (1724–1804) articulated the notion of a liberal legal state in his book "The Metaphysics of Morals," also known as *Methphysische Grundsätze der Rechtslehre*. It further posited that state power should be kept as distant from society as possible. The state's role is limited to a guarantor of public order and security. The administration of the economy and society is left to the people, based on free-market (*laise faire*) and free-trade competition (*laise passer*).

The evolution of the rule of law as a field of academic inquiry began in the 20th century. The state's traditional role as a guardian of order and security is transforming. With the advent of the welfare state, the notion of the *nachwachterstaat* (also known as 'after-state') was transformed into that of the state as a provider of welfare services. This new notion, also called a *verzorgingsstaat*, represents a significant shift in the relationship between the state and its citizens in modern times. P. De Haan posited that "*De modeme staats is niet alleen rechtsstaat in de negentiende eeuwse zin, maar ook verzorgingsstaat – of zo men will – sociale rechtsstaat* (The modern state is not only a state of night watchman law, but also a state of welfare law or social law)".

The implementation of the principle of the rule of law generates a variety of characteristics and models. The notion of the rule of law can be broadly divided into three categories: (1) the *Rechtsstaat*, which originated in Continental Europe; (2) the rule of law, which emerged within the context of the Anglo-Saxon world; and (3) socialist legality, which developed in and was implemented in communist countries.

A legal state is founded upon the evolution of an effective and just system of laws established through a structured and organized political, economic, and social infrastructure. This was further underpinned by cultivating a rational and impartial legal culture and consciousness at the societal, national, and state levels. Accordingly, the legal system must be constructed (law-making) and executed (law enforcement) rationally and impartially, considering the Constitution as the supreme legal instrument.

The fundamental principles of the rule of law can be summarized as follows: (1) The supremacy of law; (2) Equality before the law; (3) The principle of legality; (4) The limitation of power; (5) The independence of supporting bodies; (6) The free and impartial judiciary; (7) The State Administrative Court; (8) The constitutional court; (9) The protection of human rights; (10) Democracy; (11) The function as a means of realizing state goals (welfare *rechstaat*); (12) Transparency and social control.

In addition to its associations with the notions of a *rechtsstaat* and the rule of law, the latter is also related to that of nomocracy. It derives from the Greek terms *nomos* and *cratos*, which refer to law and power. The term "nomocracy" is comparable to *demos* and *cratos* or *kratien* in democracy. The term *nomos* denotes a norm, while *cratos* signifies power. How power is exercised is often perceived as influenced by norms or laws. As a result, the term "nomocracy" is intimately connected to the notion of legal sovereignty or the doctrine that law represents the ultimate authority. In the English term developed by AV Dicey, this is linked to the principle of "the rule of law," which developed in the

United States into the jargon “The Rule of Law,” [5] as opposed to the rule of man. In the final analysis, the law is genuinely regarded as a leader, not an individual. In Plato's work, “Nomoi” (translated into English as The Laws), the notion of nomocracy is elucidated, demonstrating the evolution of its conceptualization since the era of ancient Greece.[4]

B. Limitation of Power

The idea that the state possesses substantial control over its citizens can be traced back to ancient Greece. Plato and Aristotle proposed that the state must exercise absolute power to educate its citizens with rational moral values. The underlying premise of their argument is that individuals tend to act in their self-interest. As a result, it is essential to establish robust institutions to guide individuals to prevent societal chaos. However, as time has passed, the aggregation of all branches of state power in a single entity has led to the rise of absolute power. For illustration, the constitutional history of England offers a case where the monarchy was once so powerful that it combined the three traditional branches of state power, comprising lawgiver, law enforcer, and law judge, in one individual. Therefore, the history of the division or limitation of state power commences with the separation of power into distinct or separate bodies, thereby preventing its concentration in the hands of a monarch (absolute king).

In classical constitutional theory, as proposed by Aristotle, the notion of the rule of law stands in opposition to the notion of the rule of man. The preceding discussion elucidated the restrictions on power inherent to the rule of law. In a contemporary constitutional state, a defining feature of a legal state, otherwise known as the rule of law or *rechtsstaat*, is the limitation of power exercised by the state. As outlined by Julius Stahl, the separation of powers is an integral aspect of Continental European legal theory and was initially implemented through legal restrictions, which later became the foundational principle behind modern constitutionalism.

The notion that power should be limited is inseparable from concentrating all branches of state power in the hands of a single individual, thereby giving rise to absolute authority. Essentially, this separation of power aims to ensure that power is divided and mutually supervised (checks and balances) to prevent abuse of power. Following this, the idea of limiting state power became even more prevalent. This was in response to Lord Acton’s well-known aphorism, “Power tends to corrupt, but absolute power corrupts absolutely.” This implies that individuals with power are likely to abuse it, whereas those possessing unlimited (absolute) power are even more prone to doing so.

III. METHOD

The present study belongs to normative legal research, a type of legal research conducted using an examination of materials held in the library or of secondary data or library legal research. Normative legal research includes the following areas: (1) Research on legal principles; (2) Research on legal systematics; (3) Research on the level of vertical and horizontal synchronization; (4) Comparative law; (5) Legal history. Subsequently, the relevant classifications are carried out to form a comprehensive, inclusive, and systematic source of legal material. The research on legal principles is conducted by identifying the existing legal rules, such as legislation.[6]

The primary focus of this study is to examine materials in the form of documents. Therefore, the qualitative approach will be utilized to investigate the selected materials. In their classification of research in the field of law, Soerjono and Sri Mamudji identify normative legal research methods as the primary category. Normative legal research methods will be employed to investigate documents on the judicial control of governmental authority and the role of the President, as outlined in the Constitution. Finally, this qualitative study employed descriptive and analytical techniques.[7]

IV. RESULTS AND DISCUSSION

A discussion of the Constitutional Court of Indonesia inevitably leads to examining the historical development and current status of the institution's authority regarding judicial review. This is arguably the court’s most important role. Four moments from the historical exploration of judicial review that are of particular interest include the Madison vs. Marbury case in the United States, Hans Kelssen’s ideas in Austria, Mohammad Yamin’s ideas in the BPUPKI session, and the PAH I MPR debate in sessions regarding amendments to the 1945 Constitution.

The Constitutional Court was initially conceptualized by Hans Kelsen (1881-1973), a renowned constitutional expert and professor of Public Law and Administration at the University of Vienna. In his writings, Kelsen proposed that the effective guarantee of constitutional rules on legislation hinges upon an independent body, distinct from the legislative body, examining constitutionality. If such a body determines a legislative product to be unconstitutional, it

must refrain from enforcement. According to Kelsen, establishing an independent constitutional court or supervising the constitutionality of laws by ordinary courts is necessary. Kelsen's ideas were adopted by the Constitutional Court in Austria, which was initially the only court of this kind. It was the first such institution to be established in the world.[8]

The notion of establishing a Constitutional Court represents the point of the evolution of modern legal and constitutional thought that emerged in the 20th century. In countries transitioning from authoritarianism to democracy, establishing a constitutional court has emerged as a significant topic of discussion. A constitutional crisis is often a consequence of transitions to democratic regimes. During this transition period, a Constitutional Court is established to provide a framework for the newly emerging democratic system. The repeated violation of the Constitution in a democratic context not only diminishes the Constitution's semantic value but also undermines the principle of popular sovereignty.[8]

The third amendment to the 1945 Constitution, enacted in 2001, confirmed the independence of the judicial power as an institution tasked with administering justice, upholding the law, and ensuring justice. Article 24, paragraph (1), states that the judicial power in Indonesia is exercised by the Supreme Court and the Constitutional Court, each with distinct competencies. In addition, new provisions were incorporated into the 1945 Constitution in Article 24B, which outlines the Judicial Commission in four separate paragraphs.[9] The Constitutional Court was established as a state institution endowed with the authority to perform judicial review (or, specifically, constitutional review) of legislation on the Constitution, in addition to other specialized duties. These include establishing a particular privilege forum or judiciary, which is tasked with determining whether the President or Vice President no longer fulfills the constitutional requirements for the role and whether the President has breached specific provisions outlined in the Constitution.

Furthermore, the court is empowered to rule on the dissolution of political parties and arbitrate disagreements regarding electoral process results. In the meantime, the Supreme Court has been hearing other conventional cases as well as judicial reviews or cases in which a court may review a statutory regulation against a higher statutory regulation.[9]

First, it is vital to define the term 'judicial review.' As with many legal experts, the terms 'constitutional review,' 'judicial review,' and 'right to review' (*toetsingsrecht*) are often used without any clear distinction between the concepts. The concept of judicial review is more expansive than that of constitutional review. The latter is constrained to the constitutional review of a legal rule against the constitution (UUD). In contrast, the former has a broader review object that can encompass the legality of a legal rule concerning the Constitution and its conformity with other existing legislation. In terms of the subject of review, however, the meaning of judicial review has been narrowed. Judicial review can only be performed through a judicial mechanism by judges. [9] In contrast, if the subject of constitutional review is performed by a court institution, a legislative institution, an executive institution, or another institution appointed to carry out this function, the right to review constitutes the meaning of the right to test. A judicial review is only applicable when the examination is conducted about general and abstract norms and in a manner that occurs 'a posterior or after the legislative promulgation of the relevant legal norms.[10]

In terms of judicial review, it is also crucial to distinguish between the terms 'judicial review' and 'judicial preview.' In the context of the legal process, the verb 'review' denotes a method of examining, evaluating, and reconsidering. This definition is derived from the Latin prefix "re-," which signifies "again," and the Latin verb 'videre,' meaning "to see." In contrast, a preview is examining an object before it reaches its optimal condition. There is considerable disagreement among scholars as to the precise meaning of the term "judicial review of the constitution." Judicial review is often interpreted as examining laws against the Constitution. The idea of judicial review encompasses a more expansive understanding of the object of the test. This concept also includes the examination of the legitimacy of legislative measures by the established legal framework, which is typically undertaken by the judicial branch.

Similarly, the examination of lower court decisions by higher courts, particularly in the context of extraordinary legal measures, may also be requested for review by the Supreme Court. This is particularly relevant in instances where decisions have obtained permanent legal force. In this way, judicial review can be understood as a form of review. [11] Therefore, the judicial review of the Constitution, which judges also perform, is called a constitutional review.[12] Jimly Asshiddiqie has stated that judicial review is an effort by judicial institutions to examine legal products determined by the legislative, executive, and judicial branches of power in implementing the principle of checks and balances based on separation of power. [11]

Meanwhile, the term "judicial review" refers to a review conducted by a judicial institution of legislative products regarding the constitution (basic law) and other legal products. Constitutional review is a specific process of testing laws against the Constitution. Researchers tend to employ the term "constitutional review," which is deemed to be more appropriate for use than "judicial review" in the context of a review of the Basic Law (constitution). Using the term "constitutional review: avoids confusion, as it is distinct from the more general concept of "judicial review." [11]

The absence of further legal action was deliberately made with the aim that the Constitutional Court, through its decision, could resolve the issue and provide legal certainty promptly and straightforwardly by the principle of expeditious and simple justice. The cases submitted to the Constitutional Court pertain to matters of state administration and, therefore, require legal certainty and are subject to time limitations to ensure the continuity of the state administration agenda. [2]

V. CONCLUSION

The "final and binding" Constitutional Court's decisions imply that no further legal action was made to allow the Constitutional Court to resolve the issue and provide legal certainty promptly and straightforwardly by the principle of expeditious and simple justice. It is, therefore, essential to include the binding clause explicitly to create legal certainty while minimizing the possibility of a decision that may be just "paper tigers" that lack practical impact and are perceived as a mere symbolic act.

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