



## PROBLEMATICS OF CIRCULAR LETTER AS FOLLOW-UP TO THE CONSTITUTIONAL COURT DECISION

Irwansyah

Universitas Islam Negeri Sumatera Utara, Medan, Indonesia

Email: [irwansyahalfaqih@uinsu.ac.id](mailto:irwansyahalfaqih@uinsu.ac.id)

Submitted: 08-12-2022; Accepted: 27-03-2023

DOI: <http://dx.doi.org/10.30641/dejure.2023.V23.047-058>

### ABSTRACT

The Constitutional Court's decision is final and binding. It becomes effective as soon as it is pronounced in open. In practice, however, the Constitutional Court's decision is followed by a variety of legal products, including laws, government regulations, and presidential regulations, and some even use circular letters. The method used in this paper is normative legal research. The purpose of this study is to analyze the circular letter as a follow-up to the Constitutional Court's decision. The use of generalized letters in response to a Constitutional Court decision is deemed inappropriate. Because the dissemination is not a legal regulation, it is not necessary to follow the Constitutional Court's decision when considering the law. In an ideal world, the Constitutional Court's decision is followed by legislation.

**Keywords:** circular letter; constitutional court; decision

### 1. INTRODUCTION

When the reforms made it possible to revise the Constitution of the Republic of Indonesia in 1945, there was much discussion about the need for a system of checks and balances between the legislative body, the administrative institution, and the judicial institution. The concept of checks and balances in the interplay between the court and the Legislature allows the judicial entity to compare the law to the Constitution. Whereas the 1945 Constitution established the Constitutional Court as a new judicial entity with the power to examine legislation that violates this basic law.<sup>1</sup>

During the discussion meeting on changes to the 1945 Constitution in the DPR, initially, there were three alternative institutions, namely the MPR or MA or MK. The authority the Supreme Court was not agreed upon because the Supreme Court itself admitted that it had too much of a burden of the task of examining and deciding cases for which it was competent. Finally, it was agreed that the authority to test the law on the 1945 Constitution was carried out by a separate institution, namely the Constitutional Court as one of the actors of judicial power, although at first there was also a debate about whether the Constitutional Court institution was an independent institution or part of another institution.<sup>2</sup>

Jimly Assiddiqie revealed that the division of duties in the field of judicial review of laws and regulations between the Supreme Court and the Constitutional Court is not ideal at all, because it can cause confusion over conflicting decisions between the Constitutional Court and the Supreme Court. In the future, it is indeed necessary to think about the possibility of integrating the entire regulatory testing system under the authority of the Constitutional Court.<sup>3</sup>

Indonesian want their government to be run according to the rule of law, not by a man, which is consistent with the way they understand the power that the law has over them. As a result, they have established the constitutional court, which is inextricably linked to their desire for the government to be based on these

- 1 Ali Marwan Hsb, "Mahkamah Konstitusi Sebagai Neutralizer Terhadap Lembaga Politik," *Jurnal Rechtsvinding* 2, no. 3 (2013), 319.
- 2 Muchamad Ali Safa'at et al, *Procedural Law of the Constitutional Court*, Jakarta, Secretariat General and Registrar of the Constitutional Court of the Republic of Indonesia, 2010, 7.
- 3 Jimly Assiddiqie, *Indonesian Constitution and Constitutionalism*, (Jakarta: Constitutional Court of the Republic of Indonesia and HTN Study Center of FH University of Indonesia, Jakarta, 2004), 189.

principles.<sup>4</sup>

The Constitutional Court is a component of the Indonesian constitutional system because it ensures that political procedures like legislation, dissolution of political parties, and the impeachment of the President and/or Vice President follow the law without having any political connotations when democratic organizations are overthrown by the Constitutional Court or otherwise rendered ineffective. The requirements of the Constitutional Court also stated that judgments must be definitive, irrefutable. This indicates that the judgment made by the Constitutional Court shouldn't be reviewed.<sup>5</sup>

All parties are required to follow and implement the new state of law created by the constitutional court's decision as a result of this final judgment. The facts indicate that the law-making bodies frequently do not respond favorably to these final and binding findings, therefore it is likely that the constitutional court's decision will not be put into effect.<sup>6</sup>

In addition, the Constitutional Court is not obliged to order *de wetgevers* to revoke redactions of verses, articles, and/or laws that are declared not binding on the law from its laws but by the posting of the Constitutional Court in the state gazette, affirm that they are no longer binding on paragraphs, articles, and/or parts of the said law. However, according to Ali Marwan Hsb, the inclusion of the Constitutional Court ruling in the state gazette without follow-up from the framer of the law alone is not enough.<sup>7</sup>

In actuality, the reaction to the constitutional court's decision was unexpected. which contains an order issued by the constitutional court along with a circular letter. Following up on the constitutional court's decision, the Minister of Manpower and Transmigration of the Republic of Indonesia issued a circular letter that includes the following information: First, circular letter from the Minister of Manpower and Transmigration of the Republic of Indonesia dated January 7, 2005, with the following number: SE-13 / MEN / SJ-HK / I / 2005, regarding the constitutional court's ruling on the right to materially test Law Number 13 year 2003; Second, the Minister of Manpower's Directive Letter No. B.31 / PHIJSK / I/ 2012 on the Implementation of Decision No. 27 / PUU-IX/ 2011 of the Constitutional Court, the Notification Letter of the Indonesian Minister of Manpower No. 1 / MEN / I / 2015 Concerning the constitutional court's Ruling No. 100 / PUU-X / 2012 Regarding Article 96 of Law No. 13 of 2003 Concerning Manpower. The fourth letter is titled "Calculation of Telecommunication Tower Control Levy Rates Linked to the constitutional court Order" and was issued by the Director General of Financial Balance of the Ministry of Finance of the Republic of Indonesia on June 9, 2015.

Literature review of previous research, no one has written the relationship between the circular letter and the follow-up of the constitutional court decision, the previous research was entitled "The Position of the Supreme Court Circular in Positive Law in Indonesia" with Author Irwan Adi Cahyadi from Universitas Brawijaya. Based on the foregoing, it is interesting to see how and in what form the legal product should be appropriate as a follow-up to the constitutional court's decision invalidating the provisions in the law.

This paper discusses the follow-up of the Constitutional Court Decision that must be carried out by the main *adressat* and also the use of the circular form as a follow-up to the Constitutional Court Decision which needs to be studied and analyzed from a legal perspective.

## 2. METHOD

The research method used is the normative juridical legal research method. The approach used with statutory approach is the search system used by *library research*.<sup>8</sup> Legislation is a method used to analyze laws and regulations to find answers to the problems studied.<sup>9</sup>

---

4 Ali Hsb, "Mahkamah Konstitusi Sebagai Neutralizer Terhadap Lembaga Politik.", 320.

5 Wicipto Setiadi, "Dukungan Politik Dalam Implementasi Putusan Mahkamah Konstitusi," *Jurnal Rechtsvinding* 2, no. 3 (2013)., 300.

6 Ali Marwan Hsb, "Tindak Lanjut Lembaga Legislatif Atas Putusan Mahkamah Konstitusi Yang Membatalkan Ketentuan Dalam Undang-Undang," *Jurnal Hukum Perancang Peraturan Perundang-Undangan* 2, no. 1 (2016)., 26.

7 Hsb., 27.

8 Peter M Mi, *Penelitian Hukum*, (Jakarta: Kencana, 2011), 15.

9 Eka NAM Sihombing, Cynthia Hadita, *Penelitian Hukum*, (Malang: Intrans Publishing, 2022), 48.

### 3. FINDING AND DISCUSSION

#### 3.1 Legal Consequences and Position of Constitutional Court Decisions

Satjipto Rahardjo in Sukirno and Adhim argues that the implementing agency will act in response to the rule of law as a function of the legal regulations addressed to them, their sanctions, the whole complex of social, political and other forces concerning themselves and the feedback that comes from stakeholders.<sup>10</sup> Constitutional compliance defines how the executive or legislative complies with judicial review decisions.

Based on Article 24C Paragraph (1) of the 1945 Constitution, it can be seen that the authority to conduct the constitutional review is affirmed in the first point. This means that the most important authority of the constitutional court is to conduct the constitutional review. There is one special thing about this agency, which is that the decision of the constitutional court has a final and binding nature. It is said to be final because the decision can no longer be made legal remedies and is said to be binding because the decision of the constitutional court is immediately read before a hearing that is open to the public, it immediately has binding legal force for all legal subjects in the jurisdiction of the Republic of Indonesia. Amendments to the 1945 Constitution have placed the Supreme Court no longer the sole perpetrator of judicial power but the Supreme Court is only one of the perpetrators of judicial power. The 1945 Constitution specifies that the Supreme Court and the judicial bodies subordinate to it in the general judicial environment, the religious judicial environment, the military judicial environment, and the state administrative court environment are the perpetrators of independent judicial power, in addition to the constitutional court's. The position of the Supreme Court can be seen in Article 24 Paragraph (2) of the 1945 Constitution which states that: "Judicial power is exercised by a Supreme Court and the judicial bodies subordinate to it in the general judicial environment, the religious judicial environment, the military judicial environment, the state administrative court environment, and by a Constituent Court". If it is about judicial review, then what people are concerned about must be the testing of legal norms against the Constitution by the judiciary. This kind of concept is obviously not wrong, because judicial review is indeed a test of legal norms against the Constitution by the judicial institution. If that's the answer, then what's the difference with constitutional reviews? The difference is that judicial review is only carried out by the judiciary and not by other institutions as is like a constitutional review. Then, judicial review is also wider in scope because, in addition to testing legal norms against the Constitution, it also tests conflicts between legal norms spread across various laws and regulations under the Constitution. For example, the Supreme Court of Indonesia has the authority to examine laws and regulations under the law against the law.<sup>11</sup>

Maria Farida Indrati Soeprapto stated that a legislation that has been passed or enacted can only apply to the general public if the legislation is promulgated in a State Gazette or published in a State Gazette.<sup>12</sup> The Constitutional Court's decision will be very likely to abort the Supreme Court's decisions in the same case against the interrelated regulations in the *judicial review* process in the Supreme Court and the constitutional court.<sup>13</sup>

After the reform, the role of judicial power was carried out by two institutions, namely the Supreme Court and the Constitutional court. The duties and authorities of the two institutions are regulated in the 1945 Constitution and a special Law that addresses the three institutions more specifically. Of the several powers possessed by the Supreme Court and the constitutional court, one of them is the authority to test laws and regulations. The constitutional court was empowered to test the Law against the 1945 NRI Constitution, while the Supreme Court was authorized to test legislation under the Act. The wide scope of legal products can be applied for judicial review in the Supreme Court because these rules are given by law, namely the provisions

---

10 Sukirno S., Nur A., "Implementasi Putusan Mahkamah Konstitusi No. 97/PUU-XIV/2016 Pada Masyarakat Adat Karuhun Urang Di Cigugur," *Jurnal Penelitian Hukum De Jure* 20, no. 1 (2020): 11.

11 Rian Van Frits Kapitan, The Binding Force of the Judgment *Constitutional Review* Constitutional Court Against the Supreme Court, MMH, Volume 44 No. 4, October (2015): 511–520.

12 Maria Farida Indrati, Ilmu Perundang-undangan Jilid I: Jenis, Fungsi, dan Materi Muatan, (Jakarta: Kanisius, 2018), 78.

13 Janpatar Simamora, "Juridical Analysis of the Judicial Review Authority Model in Indonesia," *Pulpit of the Law* 25, no. 3 (2013): 388–401.

in Article 8 of Law Number 12 of 2011. Article 8 paragraph (1) of Law Number 12 of 2011 regulates the types of laws and regulations other than those regulated by Article 7 paragraph (1) including regulations stipulated by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the constitutional court's, the Financial Audit Agency, the Judicial Commission, Bank Indonesia, Ministers, agencies, institutions, or commissions of the same level established by law or the Government by order of the Law, Provincial People's Representative Council, Governor, Regency/City Regional People's Representative Council, Regent/Mayor, Village Head or equivalent. So it is not surprising that the burden of the Supreme Court can be predicted to increase from year to year as a result of the provisions of the article. Meanwhile, the constitutional court's specifically only tested the law against the Constitution.<sup>14</sup>

Legislation Constitutional Court ordering to Binawan in Sihombing as the word absorption ending in "asi" refers to a process, the word process gets emphasis because it is one of the keywords to understand the logic of legislation.<sup>15</sup>

The term constitutional interpretation is used by constitutional law experts to provide an understanding of how to interpret the constitution. Constitutional interpretation is closely related to adjudication, standards, and methods by which the judiciary exercises judicial review. Jimly Asshiddiqie states that interpretation is a process by which the court seeks certainty of understanding of a particular arrangement of a statute, interpretation is an attempt by the court to seek certainty as to what exactly the will of the framers is in term of the statute.<sup>16</sup>

Legal studies almost always associate the problem of the hierarchical arrangement of legislation with the "Stufenbouw theory" developed by Hans Kelsen and Nawiasky. If a law is deemed to be contrary to a higher regulation then to ensure its validity, it can be done through testing by the judicial institution, this test is usually called judicial review.<sup>17</sup>

Two doctrines related to the interpretation of the constitution namely judicial review and judicial supremacy. Adopting western (American) thinking, judicial review is a doctrine by which the Supreme Court has the right to declare constitutional or not a rule made by a representative body of the people that has been endorsed by the President and still allows for disapproval of the Supreme Court's actions.<sup>18</sup>

The constitutional court is not a completely new issue to analyze. Various discourses regarding the legal position in the testing of the Law came to the fore throughout the exercise of the law testing authority.<sup>19</sup>

The constitutional court's decision-making process must take the provisions of article 46 of the constitutional court Act when making a ruling regarding a law's constitutionality. Regarding the authority of judges who will render a decision based on the law, the following fundamental matters are stipulated in the article: Judges' evidence and opinions are taken into a Constitutional Court when the constitutional court renders decisions based on the 1945 Constitution. A minimum of 2 (two) pieces of evidence must support the constitutional court's decision to grant the application; facts that were made public during the trial must be included in the constitutional court's decision and the legal considerations on which the judgment is based; The decision referred to in paragraph (3) is taken by deliberation for the plenary session of the constitutional judges presided over by the chairman of the session; In consultative hearings, each constitutional judge shall submit

---

14 Sholahuddin Al-Fatih, "A One-Stop Model of Legislation Testing Through the Constitutional Court," *Scientific Journal of Legal Legality* 25, No. 2 (2018): 247.

15 Eka NAM Sihombing and Muhammad Yusrizal Adi Syaputra, "Implementasi Penggunaan Kecerdasan Buatan Dalam Pembentukan Peraturan Daerah," *Jurnal Ilmiah Kebijakan Hukum* 14, no. 3 (2020): 419, <https://doi.org/10.30641/kebijakan.2020.v14.419-434>.

16 Jimly Asshiddiqie, *Indonesian Constitution and Constitutionalism*, (Jakarta: Constitutional Court of the Republic of Indonesia and HTN Study Center of FH University of Indonesia, Jakarta, 2004), 189.

17 Maria Farida Indrati, *Science of Legislation, Types, Functions, and Content Materials*, (Yogyakarta: Kanisius 2007), 41.

18 Example the case of Marbury vs. Madison which allowed for disapproval of the Supreme Court's actions from the President.

19 Dian AW, Andy O, Ratio Legis Kedudukan Hukum Pemohon, *Jurnal Penelitian Hukum De Jure*, Vol. 20, No. 4, Desember 2020.

a written consideration or opinion on the application; In the event that the deliberations of the plenary session of the constitutional judges referred to in paragraph (4) cannot produce a decision, the deliberations are postponed until the deliberations of the next plenary session of the constitutional judges; In the event that the deliberations of the plenary session after earnest efforts cannot be reached a unanimous consensus, the verdict is taken by a majority vote; In the event that the deliberations of the plenary session of the constitutional judges referred to in paragraph (7) cannot be taken by majority vote, the final vote of the chairman of the plenary session of the constitutional judges determines; The decision of the constitutional court may be handed down on that day or postponed on any other day to which the parties must notify; In the event that the judgment is not reached unanimous consensus as referred to in paragraphs (7) and (8), the opinions of the different members of the Panel of Judges are contained in the judgment.<sup>20</sup>

Article 56 of Law Number 24 of 2003 concerning the constitutional court regulates the form of decisions of the constitutional court in cases of testing laws and regulations as follows (1) if the constitutional court determines that the Petition (Petitioner) vs Application (Applicant) do not meet the requirements set out in articles 50 and 51, the judge declares the petition inadmissible. (2) if the constitutional court found the application to be well-founded, the judgment stated that it was granted. (3) If the application is approved as stated in clause (2), the constitutional court expressly declares the clauses, articles, and/or sections of the law at issue as violating the Republic of Indonesia's 1945 Constitution. The judgment declares that the application is granted if the formation of the relevant law does not adhere to the requirements of the formation of law based on the Republic of Indonesia's 1945 Constitution. (4) The judgment states that the application is granted if the formation of the relevant law complies with the guidelines established by the Republic of Indonesia's 1945 Constitution for the formation of laws. (5) If the in question law does not, in whole or in part, violate the Republic of Indonesia's 1945 Constitution, the application is denied.

Based on the provisions in Article 56, there are 3 (three) types of Constitutional Court decisions, namely (i) inadmissible, (ii) granted and (iii) rejected. So that which has legal consequences, of course, only the judgment that grants the application for statutory testing whereas if the application cannot be Constitutional Court accepted or rejected it does not provide any legal consequences.

Maruarar Siahaan asserts that the majority of constitutional court decisions are declared to be constitutional, particularly those that deal with the application of laws. This suggests that a new law is created by the constitutional court's decision, whether it is valid or not, or whether it establishes new legislation as a negative legislator. The constitutional court Judges' decisions do not have to be carried out by a single officer due to the *declaratoir's* unique nature.<sup>21</sup>

Constitutional Court rulings are not retroactive, but rather apply forward (progressively) from the time they are pronounced. That is, the new state of law became effective the moment the constitutional court's decision was pronounced or read aloud in a public plenary session. As a result, the government, other state agencies, and the general public are required to respect and implement the judgment.<sup>22</sup>

As for the decision of the constitutional court which states that a rule of law does not have binding legal force, it means that the law is *not legally binding*. This means the constitutional court did not overturn the rule of law but declared it had no binding legal force anymore.<sup>23</sup>

Furthermore, in Article 57 of Law Number 24 of 2003 concerning the constitutional court, it is also stated that:

- (1) The constitutional court's ruling that some clauses, sections, or portions of the statute violate the Republic of Indonesia's 1945 Constitution is not legally obligatory.

20 Bachtiar, *Problematisasi Implementasi Putusan Mahkamah Konstitusi Pada Pengujian UU Terhadap UUD* (Jakarta: Raih Asa Sukses, 2015), 149 – 150.

21 Maruarar S, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*, (Jakarta: Sinar Grafika, 2012), 212.

22 H.A.S. Natabaya, *Menata Ulang Sistem Peraturan Perundang-Undangan Indonesia; Jejak Langkah Dan Pemikiran Hukum Prof. H.A.S Natabaya, SH, LLM (Hakim Konstitusi Periode 2003 – 2008)* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008), 287 – 288.

23 M. Laica M, *Dari Timur Ke Barat Memandu Hukum; Pemikiran Hukum Wakil Ketua Mahkamah Konstitusi Prof. Dr. H.M Laica Marzuki, SH* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008), 117.

- (2) The constitutional court ruled that the in-issue law was not formed by the requirements of law based on the Republic of Indonesia's 1945 Constitution and did not possess binding legal authority.
- (3) The State Gazette must publish the constitutional court's ruling approving the application no later than 30 days after it was made (thirty) working days from the time the decision is pronounced.

According to Article 57, the legal consequence of the constitutional court's decision granting the application is that the content of the paragraph, article, and/or part of the law has no binding legal force. That is, the material content of paragraphs, articles, and/or parts, and even all provisions in a law is declared to no longer have binding legal force, in other words, it no longer has marketability.

However, Constitutional Court according to Article 58 of Law No. 24 of 2003 concerning the constitutional court, "the law tested by the constitutional court remains in force until a ruling is issued stating that the law is contrary to the 1945 constitution of the republic of Indonesia." that is, the constitutional court's decision is not retroactive. the legal ramifications of the judgment begin constitutional court the moment the judgment is rendered in a public hearing. as a result, the legal consequences of the enactment of a law remain valid and binding from the time of promulgation until the pronouncement of a judgment stating that the law has no binding legal force.<sup>24</sup> it also implies that any previously deemed valid or legally invalid legal act does not become invalid or become valid simply because the constitutional court's ruling is binding because its pronouncement in a plenary sitting is open to the public.<sup>25</sup>

As a consequence of the constitutional court's decision granting the petition, since the judgment was read, there are constitutional legal norms or provisions of some laws and regulations that have changed, and there are even laws that have been overturned in their entirety because they are considered contrary to the 1945 Constitution.<sup>26</sup>

The legal consequences of the final and normatively binding decision of the constitutional court can be divided into 2 (two) parts, namely legal consequences in a positive sense and legal consequences in a negative sense. In a positive sense, there are two consequences. *First*, the Constitutional Court's ruling encourages a political process. A law that has been declared contrary to the 1945 Constitution, has prompted a political process in parliament to amend the law. *Second*, the constitutional court's ruling ended a legal dispute. the filing of a case requested to be decided by the constitutional court, based on the characteristics of its final and binding decision, has ended a legal dispute.<sup>27</sup>

There are also two legal consequences in a negative sense. *First*, a constitutional court ruling can overturn a law resulting from a political product, produced through a political mechanism in parliament that is elected by the people through a democratic election mechanism. *Second*, the Court's decision may result in a sense of justice for the aggrieved party by the existence of the judgment, as a result of the final nature of the judgment which closes the space for him to pursue legal remedies in order to realize his sense of legal justice.<sup>28</sup>

It is related to the constitutional court's capacity to evaluate legislation and the classification of laws and regulations in terms of their order of precedence. The list below outlines the progression of laws and regulations: The Republic of Indonesia's 1945 Constitution, the People's Consultative Assembly's resolutions, government acts and regulations that take the place of laws, government regulations, presidential orders, provincial bylaws, district bylaws, and city bylaws are just a few examples of the sources of law. Since the Constitutional court has the authority to determine whether laws comply with the Constitution, the court's decision should be regarded as having the same legal weight as a binding law since it was made.

### 3.2 Forms of Follow-Up to The Constitutional Court's Decision

In line with the establishment of the constitutional court, Soerjono Soekanto and Sri Mamudji stated that in Constitutional Court with the principles of the state of law, every law must be based and firmly sourced to

24 Maruarar S., *Op. Cit.*, 218 – 219.

25 Jimly Asshiddiqie, *Hukm Acara Pengujian Undang-Undang*, (Jakarta: Sinar Grafika, 2012)., 220.

26 Bachtiar, *Problematika Implementasi Putusan Mahkamah Konstitusi Pada Pengujian UU Terhadap UUD.*, *Op. Cit.*, 165.

27 Bachtiar., 166.

28 Bachtiar., 166 – 167.

the applicable laws and regulations, which are higher level.<sup>29</sup>

In negative terms, defiance of the law is aimed at calling the actions or behaviors of a particular party to disobey the law. In such disobedience, there is a motive of disrespect for legal institutions for a certain mission and reason that is usually related to economic, political, and other interests. In other words, defiance is carried out with self-interest, destructive, and egoistic motives. At the concrete level, disobedience to the law in negative terms can be seen some cases of neglect or against court decisions. Of the cases that have come to the fore, 3 (three) cases are interesting examples. In all three cases, it is clear the disobedience of the losing party by the judgment of the court. Meanwhile, defiance of the law in positive terms is often tolerated as a form of critical legal consciousness of certain parties. In positive terms, defiance of the law is done because the “dissident” understands and is fully aware of what the law should be. In the constitutional court decision related to statutory testing, for example, when the constitutional court decides a law is contrary to the Constitution and declares it has no binding force, the decision is not only binding on the parties who file cases (inter parties) in the constitutional court, but also binding on all citizens as well as the law is generally binding for all citizens. In the case of law testing, for example, what is tested is the norms of the Law that are abstract and generally binding. Although the basis of the application for testing is the constitutional right of the aggrieved petitioner, it is essentially representative of the legal interests of the whole society, namely the establishment of the constitution. Therefore, those who are bound by the decision of the constitutional court are not only and must not always be the framers of the Law, but all parties related to the provisions decided by the constitutional court. On that basis, the constitutional court’s ruling is erga omnes. In much of the literature, erga omnes is often used in law to explain the terminology of obligations and rights towards all.<sup>30</sup>

The decision of the constitutional court does not require an executor institution, because the judicial review decision in the constitutional court is the same as the law, effective immediately as it is stated in the state gazette. The law is immediately enacted and executed in practice once promulgated without having to have a specific executor, as does the decision of the constitutional court.<sup>31</sup>

Mahfud MD explained that there were three reasons John Marshall implemented a review mechanism carried out by judges, namely; First, judges swear to uphold the constitution so that if there is a law that contradicts it, the judge must have the courage to overturn it; second, the constitution is the supreme law of the land so there must be a testing body against the regulations under it so that the constitution is not perverted; third, the judge may not reject the case so that if anyone asks for a judicial review the judge must do so.<sup>32</sup>

In the judgment that formulates a new norm, the constitutional court not only invalidates the norm but changes or makes a new part of the content of a law that is tested so that the norm of the law also changes from the previous one. Although the entrance of variants of judgments that formulate new norms can take the form of conditional constitutional rulings or conditional unconstitutional rulings. Therefore, the two variants of such a ruling will certainly have a broad impact so it is necessary to know the follow-up by the court’s decision. This is intended to avoid the emergence of the presumption that there has been a legal vacuum, so the framers of the law have an obligation to respond to the constitutional court’s decision. The absence of follow-up arrangements for variants of conditional constitutional rulings, conditional unconstitutional rulings, and rulings formulating new norms makes these rulings one of the content materials in the legislative and regulatory process. The constitutional court’s decision is required to form laws through the legislative process and laws and regulations under the law through a regulatory process in the Constitutional Court ordinance with the orders of the constitutional court through its rulings. The legislative process carried out by the DPR together with the President can materially take over the decision of the constitutional court for adoption in the revision or new formation of law. Ideally, the Constitutional court’s decision is followed up with changes

---

29 Soerjono Soekanto and Sri Mamudji, *Normative Law Research*, (Jakarta: PT. RajaGrafindo Persada, 1995), 18.

30 Fajar Laksono Soeroso, “‘Defiance’ against the Constitutional Court’s Decision (Review of Decision No. 153/G/2011/PTUN-JKT),” *Judicial Journal* 6, no. 3 (2013): 227–249, <https://jurnal.komisiyudisial.go.id/index.php/jy/article/view/100>.

31 Martith, *Mahkamah Konstitusi: Dari Negative Legislature Ke Positive Legislature* (Jakarta: Konstitusi Press, 2013), xix – xx.

32 Moh. Mahfud MD, *Building Legal Politics, Upholding the Constitution*, LP3ES Indonesia Library, 2006, 37.

in the law by the framers of the law as a product of legislation, but some constitutional court's decisions are implemented by the constitutional court's decision through a regulatory process without having to wait for changes in the law, which can also take over the decision of the constitutional court's to be adopted in the revision or new formation of law. Likewise with follow-up through the regulatory process whose formation must be based on the law or the decision of the constitutional court.<sup>33</sup>

The long history of testing legislative products by a judicial review will continue to grow. It started in America in 1803 in the case of *Madison versus Marbury* until the establishment of a special constitutional court in Austria in 1920. The points of thought of John Marshall and Hans Kelsen have influenced the "way" of punishing in many countries. Indonesia itself then implemented the concept in the third amendment to the 1945 Constitution. Constitutional court of the Republic of Indonesia. The idea of concept of judicial review in Indonesia is actually not something new. However, this concept began to develop and found its form at the level of law and constitutional practice in Indonesia since the amendment to the 1945 Constitution. Unfortunately, the testing of laws and regulations in the design of the 1945 Constitution by providing two institutions (MA and MK) to test laws and regulations cannot then end the problems and debates that have existed so far. In fact, it is precisely the tendency to cause new problems both at the theoretical level and in its empirical articulation which has certainly triggered subsequent debates.<sup>34</sup>

Is the authority of review by the judiciary part of the concept of '*des pouvoir*' (separation of power) where separation of powers does not mean that each institution of power holders stands alone? Or is judicial review a violation of the concept of separation of state powers that fosters the concept of division of powers? Even more real debate arising from this concept of judicial review is between the understanding of the *Geschlossenheit der Rechtsordnung* which saw that there was no law outside of positive law (law) and the understanding of *Freirechtslehre* which was a teaching that developed in the early XX century, where judges were given freedom in finding laws.<sup>35</sup>

Its status as a state institution of reform products, the constitutional court is the fulcrum of people's expectations who want improvements in the field of law enforcement. So far the Constitutional court has responded to public expectations through a clean judicial process and rulings that uphold the principle of justice.<sup>36</sup>

However, Constitutional Court according to Ali Marwan Hsb, the publish of the constitutional court's ruling in *state gazette* without the follow-up of the lawmakers is not enough. this is because in the Indonesian legal system which is the main source of law and becomes a reference is legislation with one of the laws in it and often ignores decisions issued by the constitutional court in order to make the practice of the constitutional court's decision more meaningful, it still needs follow-up from the framers of the law.<sup>37</sup>

But in practice, a number of constitutional court rulings were followed up variously. This diversity is demonstrated by the plurality of legal or regulatory forms used to implement the decisions of the constitutional court, among others, followed up through:<sup>38</sup>

- a. Law;
- b. Government Regulations;

---

33 Mohammad Mahrus Ali, Meyrinda Rahmawaty Hilipito, Syukri Asy'ari., "Interpretation of the Constitution in the Statutory Test of the Constitution," *Research Report* (2016): 1–94.

34 Achmad and Mulyanto, "Problems of Judicial Review of the Supreme Court and the Constitutional Court," *Yustisia Law Journal* 2, no. 1 (2013): 57–65.

35 Martiman Prodjohamidjojo, *Independence of Judges, Pure Free Decision (meaning and meaning)*, (Jakarta: Simplex Publishers, 1984), 9.

36 Moh. Mahfud MD, Remarks by the Chief Justice of the Constitutional Court in Six Years of Overseeing the Constitution and Democracy, A Brief Overview of the Implementation of the Duties of the Constitutional Court 2003-2009, *General Secretariat and Registrar of the Constitutional Court*, Jakarta, 2009, vii. Op. Cit., 27.

37 Ali Marwan Hsb, "Tindak Lanjut Lembaga Legislatif Atas Putusan Mahkamah Konstitusi Yang Membatalkan Ketentuan Dalam Undang-Undang.," *Op. Cit.*, 27.

38 Ni'matul Huda et al. *Formulasi Knsep Tindak Lanjut Putusan Pengujian Undang-Undang Oleh Mahkamah Konstitusi Yang Bersifat Mengatur* (Jakarta: Pusat Penelitian dan Pengkajian Perkara dan Pengelolaan Perpustakaan, 2019)., 8.



- c. Presidential Regulation;
- d. Presidential Decrees;
- e. Ministerial Regulation;
- f. Ministerial Circular;
- g. Ministerial Decree;
- h. Circular Letter of the Director General of the Ministry;
- i. Election Commission Circular;
- j. Election Commission Regulations;
- k. Election Supervisory Board Regulations;
- l. Local Regulations.

Several reasons cause the constitutional court's decision to be followed up with various laws and regulations and more operational legal products, including the following:<sup>39</sup>

- a. Urgent legal needs for the constitutional court's decision to be implemented immediately, the decision of the constitutional court, which is final and binding, certainly cannot be remedied anymore, so it is legally valid and binding in general like a law. Therefore, no reason can be used as a basis for affirming the decision of the constitutional court, other than to implement it. The urgent legal need for the constitutional court's decision to be implemented immediately, among other things, is because the constitutional court's decision can affect the stages of the constitutional and/or governmental agenda, or affect the ongoing legal process/stage, where several constitutional court rulings oversee the election process as one of the constitutional agendas. the stages of the general election have been regulated quite strictly, so as not to interfere with the process of changing government powers and filling state offices. Any new legal circumstances that arise while the stages/agenda of the general election are underway, and may affect the stages must be acted upon immediately. meanwhile, if you have to wait for the legislative process in the house of representatives which takes a long time/process, it can certainly hinder the holding of general elections as one of the constitutional agendas that must be held on time. In addition to the constitutional court's decisions that can influence the constitutional agenda and urge immediate action are decisions related to the implementation of government functions. Broadly speaking, the functions and affairs of this government include the function of making laws and regulations and enforcing them, making decisions, and making policies. In addition, the government is also attached to the obligation to provide public services or carry out service functions. Public services are the basic social rights of the community, which the government is obliged to give to the people. Therefore, if the Constitutional Court's decision is directly related to the implementation of government functions, especially public service functions, it is certainly urgent to follow up immediately.
- b. The constitutional court's ruling, which creates a legal vacuum, urgently requires follow-up to address the legal vacuum; the constitutional court's decision to invalidate all or part of the norms in the law, certainly results in a legal vacuum. if based on law number 12 of 2011 concerning the establishment of laws and regulations, then the president and the house of representatives are institutions that have the mandate to follow up on the decision of the constitutional court so that there is no legal vacuum. however, the legislative process in the house of representatives certainly takes a long time because it has to go through a series of stages. if this state of legal vacuum is allowed to drag on, it can actually hinder the achievement of legal goals to realize expediency, certainty, and justice. it was this situation that *prompted the institution* to appreciate the decision of the constitutional court by following up through the issuance of regulations as a basis for new laws due to the decision of the constitutional court.
- c. The constitutional court's decision requires follow-up with operational laws and regulations, the model of conditional constitutional rulings, conditional unconstitutional rulings, pending rulings, and rulings formulating new norms are *non-self-implementing* rulings. These modeled rulings usually mandate them to take certain legal actions. Legal acts can be in the form of exercising certain authorities, changing

---

39 Huda et al., 67 – 77.

procedures for implementing previously established authorities, making changes, or forming new regulations of an operational nature.

Sometimes the legal product used to follow up on the constitutional court's decision is circular letter. Circular letter used as legal platforms to follow up on constitutional court decisions are not necessarily unproblematic. the first issue is that circulars are not included in the type of legislation. as a legal product that does not include legislation, it certainly cannot be an object in testing in the judiciary, if the content material is allegedly contrary to higher legislation. although the content of the circular letter is to explain and provide guidelines for the implementation of the constitutional court's decision, the content material tends to be nuanced.<sup>40</sup>

#### 4. CONCLUSION

A circular letter is not the proper way to respond to the constitutional court's ruling. it is inappropriate to use the circular as a vehicle for following up on the constitutional court's ruling because it is not a statutory regulation. "the content material that must be regulated by law contains follow-up to the decision of the constitutional court,". Law No. 12 of 2011 Concerning the Establishment of Laws and Regulations goes even further in Article 10 paragraph (2), It is stated that either the President or the House of Representatives is responsible for carrying out the consequences of the constitutional court's ruling. Therefore, the establishment of a change law is required to implement the constitutional court's ruling; it may be submitted by the House of Representatives or by the President in his capacity as the law's shaper.

#### REFERENCE

- Achmad, and, Mulyanto. "Problematika Pengujian Peraturan Perundang-Undangan (Judicial Review) Pada Mahkamah Agung Dan Mahkamah Konstitusi." *Yustisia Jurnal Hukum* 2, no. 1 (2013): 57–65. <https://doi.org/10.20961/yustisia.v2i1.11070>.
- Al-Fatih, Sholahuddin. "Model Pengujian Peraturan Perundang-Undangan Satu Atap Melalui Mahkamah Konstitusi." *Jurnal Ilmiah Hukum Legality* 25, no. 2 (2018): 247. <https://doi.org/10.22219/jihl.v25i2.6005>.
- Asshiddiqie, Jimly. *Hukum Acara Pengujian Undang-Undang*. Jakarta: Sinar Grafika, 2012.
- Bachtiar. *Problematika Implementasi Putusan Mahkamah Konstitusi Pada Pengujian UU Terhadap UUD*. Jakarta: Raih Asa Sukses, 2015.
- Bisariyadi, Intan Permata Putri, Ananthia Ayu Devitasari, Titis Anindyajati, Alia Harumdani Widjaja, Mohammad Mahrus Ali, and Meyrinda Rahmawaty Hilipito. "Penafsiran Konstitusi Dalam Pengujian Undang-Undang Terhadap Undang-Undang Dasar." *Laporan Hasil Penelitian*, 2016, 1–94.
- Efendi, Jonaedi, and Johny Ibrahim. *Metode Penelitian Hukum Normatif Dan Empiris*. Depok: Prenada Media, 2016.
- Hsb, Ali Marwan. "Mahkamah Konstitusi Sebagai Neutralizer Terhadap Lembaga Politik." *Jurnal Rechtsvinding* 2, no. 3 (2013).
- . "Tindak Lanjut Lembaga Legislatif Atas Putusan Mahkamah Konstitusi Yang Membatalkan Ketentuan Dalam Undang-Undang." *Jurnal Hukum Perancang Peraturan Perundang-Undangan* 2, no. 1 (2016).
- Huda, Ni'matul, Allan Fatchan Gani Wardhana, Yuniar Riza Hakiki, and Suha Qoriroh. *Formulasi Konsep Tindak Lanjut Putusan Pengujian Undang-Undang Oleh Mahkamah Konstitusi Yang Bersifat Mengatur*. Jakarta: Pusat Penelitian dan Pengkajian Perkara dan Pengelolaan Perpustakaan, 2019.
- Indrati, Maria Farida., *Ilmu Perundang-undangan Jilid I: Jenis, Fungsi, dan Materi Muatan*, Jakarta: Kanisius, 2018.

---

40 Huda et al. 77.

- Martitah. *Mahkamah Konstitusi: Dari Negative Legislature Ke Positive Legislature*. Jakarta: Konstitusi Press, 2013.
- Marzuki, M. Laica. *Dari Timur Ke Barat Memandu Hukum; Pemikiran Hukum Wakil Ketua Mahkamah Konstitusi Prof. Dr. H.M Laica Marzuki, SH*. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008.
- Marzuki, Peter Mahmud. *Penelitian Hukum*. Jakarta: Kencana, 2011.
- Natabaya, H.A.S. *Menata Ulang Sistem Peraturan Perundang-Undangan Indonesia; Jejak Langkah Dan Pemikiran Hukum Prof. H.A.S Natabaya, SH, LLM (Hakim Konstitusi Periode 2003 – 2008)*. Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2008.
- Setiadi, Wicipto. “Dukungan Politik Dalam Implementasi Putusan Mahkamah Konstitusi.” *Jurnal Rechtsvinding* 2, no. 3 (2013).
- Siahaan, Maruarar. *Hukum Acara Mahkamah Konstitusi Republik Indonesia*. Jakarta: Sinar Grafika, 2012.
- Sihombing, Eka NAM, and Muhammad Yusrizal Adi Syaputra. “Implementasi Penggunaan Kecerdasan Buatan Dalam Pembentukan Peraturan Daerah.” *Jurnal Ilmiah Kebijakan Hukum* 14, no. 3 (2020): 419. <https://doi.org/10.30641/kebijakan.2020.v14.419-434>.
- Simamora, Janpatar. “Analisa Yuridis Terhadap Model Kewenangan Judicial Review Di Indonesia.” *Mimbar Hukum* 25, no. 3 (2013): 388–401.
- Soeroso, Fajar Laksono. “‘Pembangkangan’ Terhadap Putusan Mahkamah Konstitusi (Kajian Putusan Nomor 153/G/2011/PTUN-JKT).” *Jurnal Yudisial* 6, no. 3 (2013): 227–49. <https://jurnal.komisiyudisial.go.id/index.php/jy/article/view/100>.
- Sukirno, Sukirno, and Nur Adhim. “Implementasi Putusan Mahkamah Konstitusi No. 97/PUU-XIV/2016 Pada Masyarakat Adat Karuhun Urang Di Cigugur.” *Jurnal Penelitian Hukum De Jure* 20, no. 1 (2020): 11. <https://doi.org/10.30641/dejure.2020.v20.11-24>.
- Terhadap, Konstitusi, and Mahkamah Agung. “Kekuatan Mengikat Putusan,” no. 1 (2015): 511–20.
- Wicaksono, Dian Agung., Andy Omara, Ratio Legis Kedudukan Hukum Pemohon Dalam Pengujian Undang-Undang Oleh Mahkamah Konstitusi (Legal Ratio of the Litigant’s Legal Standing in Judicial Review by the Constitutional Court’s), *Jurnal Penelitian Hukum De Jure*, Vol. 20, No. 4, Desember 2020.

