

# Undelivered constitutional justice? Study on how the decisions of the Constitutional Court of the Republic of Indonesia are executed

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## ABSTRACT

The constitutional design of the institution of the Constitutional Court (MK), as the guardian and the sole interpreter of the Constitution, is to ensure and guarantee the supremacy of the Constitution, constitutional compliance, and bestow constitutional justice for citizens in the practice of Indonesian administration. However, the reality of the Indonesian state administration shows that there is still disobedience or neglect of the judicial review decision produced by the Constitutional Court. This paper aims to analyze how the Constitutional Court's decision is executed and offer the alternatives to overcome non-compliance with the decision or ensure follow-up on the Constitutional Court's decision in the judicial reviews. This research is normative legal research using a statutory approach, comparison, and conceptual approach. The results of this study indicate that there is a constitutional evil in the form of neglect or disobedience to the decision. In that context, institutional improvements that can be adopted are needed to strengthen collective adherence to the supremacy of the Constitution. The three alternatives offered by this article are the amendment of the Constitution, the granting of flexibility to the PUU of the Constitutional Court, and the establishment of a Special Directorate at the Ministry of Law and Human Rights.

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## Introduction

The new life of the Indonesian state constitution based on the 1945 Constitution of the Republic of Indonesia as a result of the 1999-2002 amendments has established Indonesia as a constitutional democratic country that adopts the principle of constitutional supremacy (Limbach, 2001). As stated in Article 1, verses (2), and verse (3) of the constitution, "Sovereignty is in the hands of the people and is implemented according to this Constitution" and "The State of Indonesia shall be a state based on the rule of law". Article 1 verse (2) shows that democracy is the choice of the state system. In contrast, verse (3) guarantees that democratic practices are implemented within the constitutional design and legal corridors. These two norms emphasize that the choice of the state system of Indonesia is constitutional democracy or a democratic legal system.

In a constitutional democratic country that adopts the constitutional supremacy principle, both the state and the citizens can only act according to the constitution's provisions, namely the 1945

Constitution of the Republic of Indonesia. This is to ensure that there is no tyranny of the majority and arbitrary actions among the state administrators or officials (Trevor R S Allan, 2003), for example, in the form of legislation that is not conducive to the protection of the citizens' constitutional rights, to ensure that groups that are prone to marginalization by the democratic practices still receive equal rights and opportunities (Murphy, 2007). One of the mechanisms to ensure this goal is providing a constitutional review institution as mandated to the Constitutional Court by the 1945 Constitution to represent the political judicialization process in Indonesia (Brinks & Blass, 2017).

On a broader scope, the mechanism of constitutional review serves as the institution and instrument for human rights protection, supporting political stability, and contributing to the realization of social order and economic development in general (Trevor R S Allan, 2003), and as a whole, ensuring other constitutional rights assured by the Constitution (Alebatchew, 2019). A study by SETARA Institute which evaluates the performance of the Constitutional Court in 10 years based on the constitutional review decisions, reports that Constitutional Court has become the new national mechanism most effective for human rights protection (Hasani, 2013). This finding is based on the quality of the Constitutional Court decisions. However, the quality of decisions issued by the Constitutional Court has yet to deliver justice. In some cases, there are issues of non-compliance and follow-up, and even opposition from other state institutions that have the authority to execute the follow-up implementation.

Follow-up on the Constitutional Court decision concerns the compliance of state institutions toward the Constitutional Court decisions (Alebatchew, 2019). The position of the Constitutional Court is no higher than other branches of state authorities (Arnold, 2006). In addition to the nature of the Constitutional Court decision that is *declatoir-constitutief* meaning that it is limited to declaring whether a norm is legal not against the constitution and vice versa, (Putusan Mahkamah Konstitusi Nomor 105/PUU-XIV/ 2016; Safrina, 2013), the implementation of the court decision highly relies on the awareness and compliance of all stakeholders as there is no enforcing agency or institution for the implementation of the Constitutional Court decisions.

An example of the non-compliance or disobedience by other branches of state authorities against Constitutional Court decisions can be seen in the Circular Letter of the Chief Justice of the Supreme Court Number 07 of 2014 on the Submission of Requests for Judicial Review in Criminal Cases (Suhariyanto, 2016),. In Constitutional Court Decision 34/PUU-XI/2013 which examined Law 8/1981 on Criminal Procedure Code Article 268 verse (3) which reads "A request for a judicial review of a decision can only be made once," (Putusan Mahkamah Konstitusi Nomor 34/PUU-XI/2013), the Constitutional Court stated the *a quo* provision was against the Constitution and had no binding legal power (Putusan Mahkamah Konstitusi Nomor 34/PUU-XI/ 2013), because it was against the principles of justice (Putusan Mahkamah Konstitusi Nomor 34/PUU-XI/2013, n.d.: 88). However, the Supreme Court responded by issuing a Circular Letter, which publicly contradicted the Constitutional Court decision, in which the Chief Justice of the Supreme Court reiterated that "... judicial review in criminal cases is limited to only 1 (one) time" using the argument that other legal bases for judicial reviews are still valid (Surat Edaran Nomor 07 Tahun 2014 Ketua Mahkamah Agung tentang Pengajuan Permohonan Peninjauan Kembali Dalam Perkara Pidana). The Chief Justice of the Supreme Court solely uses normative provisions as a foundation and sets aside both constitutional provisions and constitutional facts, as well as constitutional logic, which states that judicial reviews in criminal cases can be carried out more than once.

In the constitutional review case on the Law on People's Consultative Assembly, House of Representatives, Regional Representatives Council, and Regional Legislative Council, it is the Constitutional Court's opinion that the Regional Representatives Council has the same position and level as the House of Representatives and the President in submitting a bill relating to matters

specified in Article 22D verse (1) (Putusan Mahkamah Konstitusi 92/PUU-X/2012, 2012), in discussing a bill as stipulated in Article 22D verse (2), (Putusan Mahkamah Konstitusi 92/PUU-X/2012, 2012), and has the authority to participate in the development of the national legislation program for a bill as regulated in Article 22D verse (1) (Putusan Mahkamah Konstitusi 92/PUU-X/2012, 2012). However, in the revision of the Law, the House and the President again readopted the provisions of norms that had been declared unconstitutional by the Constitutional Court, allowing the constitutional authority of the Regional Representatives Council to remain reduced and re-negated through Law Number 17 of 2014 (Ruliah, 2018), which was later re-examined in case Number 79/PUU-XII/2014.

Statistical data on non-compliance against Constitutional Court decisions have been reported in a study by Trisakti University on 109 Constitutional Court decisions between the years 2013-2019, in which there are 24 decisions (22.01%) were not complied with, 59 decisions (54.12%) were fully complied to, six decisions (5.5%) were partly complied to, and 20 decisions (18.34%) were not identified (Kustiasih, 2020). From 89 decisions with an identifiable level of compliance, 24 decisions did not comply. Although the research data did not involve the implementation of Constitutional Court decisions as a whole, it still presents a need for a mechanism to actualize the implementation of Constitutional Court decisions.

Disobedience and non-compliance against Constitutional Court decisions, as evident in several cases and the study mentioned above, are a violation of the law and insubordination against the Constitution (Kustiasih, 2020). Non-compliance against Constitutional Court decisions means negating constitutional provisions as the highest law, resulting in undelivered constitutional justice, including constitutional rights, obligations, and authorities. With no further action, it may lead to a broken state administration system, which fundamentally should comply with and be based on the Constitution (Putusan Mahkamah Konstitusi Nomor 2/PUU-XVI/ 2018).

This study aims to uncover the issue of compliance with the decisions of the Constitutional Court, with two key questions: 1) How is the practice of the decisions execution of the Constitutional Court of the Republic of Indonesia and in other countries? 2) What are the institutional steps that can be adopted to improve compliance with the decisions of the Constitutional Court?

## **Method**

This research is normative legal research that examines legal materials regarding the proposed research problem. The author uses a statutory approach, comparison, and conceptual approach. Sources of data used are legal materials such as laws and regulations of Indonesia or other countries, decisions of judicial bodies in Indonesia and other countries, and other secondary legal materials as research aids. The data analysis technique used is qualitative data analysis, which includes 1) data reduction, 2) data display, and 3) conclusion and verification—testing the data's validity using triangulation, a data validity checking technique that utilizes something other than the data to check or compare the data.

## **Result and Discussion**

### **The Issue of Enforcement of Constitutional Review Decisions by the Constitutional Court**

As the state's objective is to ensure justice for all by using the constitutional framework, the Constitutional Court's main task is to guarantee a reliable assurance of constitutional supremacy (Harutyunyan, 2009). In many state administration systems worldwide, Constitutional Court is mandated to deliver and ensure constitutional justice. In principle, the delivery of constitutional justice is the end goal of establishing the Constitutional Court (Moroşteş & Stoicu, 2017) and the key element in keeping and strengthening the fundamental values reflected in the constitution.

One means to achieve constitutional justice is through the constitutional court's constitutional review using constitutional analysis and standard of review based on the constitution. The constitutional review uses the constitution as the constitutional boundaries (Baker & Williams, 1999), specifically to promote the constitutionality of laws principle, in which every law and regulation of the law it manages should not contradict the constitution (Kelsen, 2019; *Putusan Mahkamah Konstitusi Nomor 98/PUU-XVI/2018*).

The constitutional analysis carried out by Constitutional Court in reviewing the constitutionality of laws is based on texts, history, logic (Baker & Williams, 1999), unity, coherence, and proper enforcement of the constitution (*Putusan Mahkamah Konstitusi Nomor 3/PUU-XVII/2019*). The essence of the review is to interpret the constitution against the norms of the law by considering the philosophical and sociological feasibility as well as using constitutional reasoning under the objectives of the constitution (Asshiddiqie, 2006; *Putusan Mahkamah Konstitusi Nomor 24/PUU-XVII/2019*, n.d.), in order to find constitutional facts that regulate the law (Baker & Williams, 1999). As described by T.R.S Allan (2003) constitutional review essentially examines various conflicting claims regarding national interests, personal interests, or constitutional rights in which constitutional judges in deciding cases are bound by interpretations solely based on the constitution (Troper, 1995).

After undergoing a process of constitutional review by passing the standard of review or constitutional boundaries determined by the *a quo* Constitution, namely the Constitution, Constitutional Court decisions are effective from the time they are pronounced in a trial which are open to the public (*Putusan Mahkamah Konstitusi Nomor 98/PUU-XVI/2018*), are final (Pasal 10 ayat (1) huruf d (Undang-undang nomor 12 tahun 2011 tentang Pembentukan Peraturan Perundang-undangan) and have the *erga omnes* power which binds and creates a burden or obligation for all stakeholders related to the law (Putusan Mahkamah Konstitusi Nomor 105/PUU-XIV/, 2016), and are mandatory for all, including state administrators without exception (Mahfud-MD, 2009; Putusan Mahkamah Konstitusi Nomor 105/PUU-XIV/ 2016).

As the Constitutional Court confirms in their legal opinion, each provision of the law that contradicts the 1945 Constitution loses its binding legal power. The provision shall no longer be valid as a legal foundation for any event, action, matter, or circumstance regulated within the provision of the law or for every legal reasoning that is constructed in an event, action, matter, or other circumstances that refer to the provision of the law as a part of the justifying foundation of the argumentation (*Putusan Mahkamah Konstitusi Nomor 98/PUU-XVI/2018*).

As mentioned in the background, the overall responsibility of implementing Constitutional Court decisions fully belongs to the government in a broader scope to realize or execute the decisions (Natabaya, 2008). However, the legislative authorities, namely the House of Representatives and the President, are the first subjects that must comply with the constitution when making a. On the one hand, the provisions stipulate that the state administrators must comply with Constitutional Court decisions. Still, on the other hand, it presents a disadvantage in the enforcement of the implementation of court decisions that solely rely on the follow-up actions by relevant institutions. The main reason for this is that there is no state body that the enforcement of Constitutional Court decisions can depend on specifically to enforce or conduct a follow-up on the enforcement of Constitutional Court decisions.

This notion is supported by Maulidi (2017), who affirms that Constitutional Court decisions are not implemented due to the lack of a special enforcement agency, the lack of timeframe set in the implementation of decisions, and the lack of consequences for neglecting Constitutional Court decisions. In the reality of the Indonesian state administration, non-compliance or disobedience against the Constitutional Court decisions may be committed by state bodies in the form of:

1. Readopting norms canceled by the Constitutional Court;
2. Buying time;
3. Inaction;
4. The lack of follow-up by state bodies on the Constitutional Court decisions.

The point of issue in neglecting Constitutional Court decisions by legislation makers indicates the government's lack of awareness of the constitution (Putusan Mahkamah Konstitusi Nomor 105/PUU-XIV/2016, n.d.: 52). Nevertheless, it must be admitted that no legal provision regulates the urgency for conducting an immediate follow-up on Constitutional Court decisions, which is a manifestation of the constitutional democracy that upholds constitutional supremacy. The assumption of the Constitutional Court on the *declaratoir-constitutief* nature of constitutional review decisions, which supposedly requires no agency to enforce the decisions to be implemented.

The technical issue of the follow-up process on the Constitutional Court decisions that require the same procedure and mechanism as the making of a new law becomes one of the challenges related to the compliance issue against Constitutional Court decisions (Kustiasih, 2020). In the implementation context by the law enforcement agencies, their lack of awareness of constitutional review decisions by the Constitutional Court reflects the institutional, sectoral ego because these government bodies are mandated by the constitution and rely on it as the source of legitimization of actions.

Non-compliance against the constitution is a severe challenge to constitutional democracy. Both in theory and practice, neglecting Constitutional Court decisions is the same as a betrayal of the constitutional state design (Putusan Mahkamah Konstitusi Nomor 105/PUU-XIV/2016), which eventually leads to neglect of the recovery of citizen's constitutional rights (Putusan Mahkamah Konstitusi Nomor 105/PUU-XIV/2016). Moreover, this reflects a poor precedent for Indonesia's constitutional democratic state system, as the role of the Constitutional Court as the state's balancing power is negated (Moros̄teş & Stoicu, 2017). Therefore, an applicable pathway must be applied to ensure compliance and effective follow-up on Constitutional Court decisions.

### **Practices of Execution of Constitutional Review Decisions in the World**

History shows that resistance and the fight against constitutional review decisions are common in various state administration systems worldwide. The 1950 to the 1960's, the United States Supreme Court decision in *Brown v. Board of Education*, which states "separate but equal" as unconstitutional, was not complied with for decades after the Supreme Court decision was issued (Alebatchew, 2019). For this reason, some countries support their Constitutional Court with means that ensure compliance with the Constitutional Court decisions.

In the Russian system, Constitutional Court ensures the execution of court decisions. It monitors the implementation of the findings (Alebatchew, 2019). The Law of the Constitutional Court of the Russian Federation firmly states that Constitutional Court contains the legal power of the decisions, the procedure, date, and description of the execution and law-making of the decisions (Rupp, 1969). Further, the Law also guarantees that provisions deemed unconstitutional by the Constitutional Court shall not be appealed by re-legalizing the same provisions.

The state constitutions of Ghana and Gambia regulate sanctions for failure to comply with the constitutional review decisions. Even a president who refuses to yield to the constitutional review decisions shall be removed from office (Alebatchew, 2019). The two countries have no Constitutional Court, and the authority of constitutional review lies with the Supreme Court. To ensure constitutional supremacy, the constitutional provisions in the two countries allow the Supreme Court to give order and direction in the constitutional review decisions.

In Germany, the binding power of Constitutional Court decisions is *erga omnes*, which means binding to parties outside the case, not only state bodies but also individuals (Arnold, 2006; Rupp, 1969). The German Federal Constitutional Court independently determines how and which institution shall execute the decisions (Anker, 2003). In a case of the constitutional status of a political party, the Constitutional Court tasks the Ministry of Home Affairs with executing the decision (Alebachew, 2019; *BVerfG, Order of the First Senate of 26 March 2019, 1 BvR 673/17*). In a case of the constitutional status of a political party, the Constitutional Court tasks the Ministry of Home Affairs with executing the decision (Alebachew, 2019).

In another case, the German Constitutional Court delivers constitutional review decisions to the ministry responsible for legislation making, namely the Federal Ministry of Justice and Consumer Protection (*Rules of Procedure of the Federal Constitutional Court of 19 November 2014*). The Federal Ministry of Justice and Consumer Protection then forms an understanding of the judge deemed unconstitutional, certain orders, as well as the considerations of the Constitutional Court. The Federal Ministry of Justice and Consumer Protection, in the implementation, has discretion in understanding and interpreting the essence of Constitutional Court decisions. Next, the legislative implements the order in the Constitutional Court decisions (Alebachew, 2019).

In carrying out their task, the Federal Ministry of Justice and Consumer Protection appoints Directorate General IV to manage constitutional matters. Directorate-General IV is a special directorate with a set of responsibilities, one of which is to attend hearings at the Federal Constitutional Court Federal and provides legal opinion for the government. As a whole, the directorate is responsible for matters that are decided by the Law of the Federal Constitutional Court (*Federal Ministry of Justice and Consumer Protection, Task and Organisation of the Federal Ministry of Justice and Consumer Protection, 2018*)

In the German system, the implementation of Constitutional Court decisions is not only supported by the constitutional awareness of state bodies and various public authorities and the citizens, but the flexibility of the authority of the Constitutional Court in deciding which government body shall execute the decisions, and the flexibility of the authority of Federal Constitutional Court in deciding the appropriate legislation steps (*BVerfG, Judgement of the First Senate of 05 November 2019, 1 BvL 7/16, n.d.; BVerfG, Order of the First Senate of 26 March 2019, 1 BvR 673/17*), but also by technical assistance through the presence of a special directorate that ensures a follow-up on the German Federal Constitutional Court decision as a result of a constitutional review of a norm. Therefore, it is crucial to confirm the presence of a mechanism that conducts a follow-up on constitutional review decisions to prove that Constitutional Court decisions do not only end in a paper but truly deliver real justice for the citizens.

### **Schemes for the Execution of Constitutional Review Decisions of the Constitutional Court in Indonesia**

In this section, the writer wants to discuss several proposed solutions that can be done to overcome non-compliance with the decision of the Constitutional Court. A solution to the issue of compliance is changing the reviewed provisions of norms through legislation. Making changes through legislation is considered to offer easier access for the public by assuming that with the new legislation, there is no more excuse to not comply with the Constitutional Court decisions that automatically have the binding legal power to all citizens (Aziezi, 2016).

This scheme has become an existing instrument in the Indonesian state administration system to accommodate Constitutional Court decisions. Law 12/2011 on the Establishment of Regulations of the Lawshas stipulated that a bill resulting from the Constitutional Court decision is just one of the available cumulative lists of the National Legislation Program. The problem is that this mechanism

fully depends on the political will of the legislation makers with no urgency to execute the constitutional review decisions of the Constitutional Court in an immediate manner (Program Legislasi Nasional, 2020).

### 1. Constitution Amendments

Through amendments to the constitution, the state bodies that amend the Indonesian constitution guarantees constitutional supremacy by including more detailed regulations in implementing Constitutional Court decisions. Crucial issues can be accommodated by making constitutional provisions that regulate constitution enforcement, involving the obligation to comply with Constitutional Court decisions, sanctions for disobedience or failure in implementing the Constitutional Court decisions, and timeframe setting for legislation makers in renewing the laws based on the Constitutional Court decisions, or timeframe management in the implementation of state power to take follow-up steps on the Constitutional Court decisions.

### 2. Giving Flexibility to Constitutional Court for Constitutional Reviews

As discussed in the German practices, the Federal Constitutional Court has flexibility in appointing which ministry shall be responsible for the execution (implementation) of the decisions. In the Indonesian state administration system, the Constitutional Court has conducted a practice in which legislation makers are asked to follow up on the Constitutional Court decisions within a certain period. Such practice can be maintained by the Constitutional Court, with the addition of appointing the relevant institution or agency responsible for executing Constitutional Court decisions. With a clear scheme, the implementation of Constitutional Court decisions can be accelerated.

### 3. Establishing a Special Directorate at the Ministry of Law and Human Rights

Forming a Special Directorate in the Ministry of Law and Human Rights to conduct a follow-up on Constitutional Court decisions as done in the German system is another way to address the issue of compliance with Constitutional Court decisions. An advantage of this option is that it will make the implementation process of the decisions more integrated and allow the new body to coordinate easily with the Constitutional Court or externally with other state institutions. The directorate will also assist technically and in detail with the legislation makers explicitly ordered by the Constitutional Court decision.

## Conclusion

Non-compliance against constitutional review decisions of the Constitutional Court is a reality in the Indonesian state administration which requires an immediate response. At a certain scale, non-compliance against Constitutional Court decisions not only delays or rejects constitutional justice among citizens but also impairs the order of state administration that demands the balance of power among branches of state authorities, as well as the assurance of constitutional supremacy or the rule of law in general.

There are several possible pathways to address neglect or disobedience against constitutional review decisions of the Constitutional Court by adopting practices in other countries to ensure proper implementation of constitutional review decisions. Assurance of obligation for compliance and sanctions for disobedience against Constitutional Court decisions are ideal and must be provided by the state to preserve the notion of constitutional supremacy and constitutional interpretation by the Constitutional Court. A more accommodating anticipatory step is to renew the implementation mechanism of Constitutional Court decisions by establishing a special agency that can coordinate

with the Constitutional Court and other state bodies or authorities to ensure proper execution or follow-up on constitutional review decisions.

Finally, there is an urgency to educate society on the state and constitution, including understanding human rights education. Each nation has its constitution, which must preserve its legitimacy and integrity. Tolerating non-compliance against Constitutional Court decisions paints a poor portrait and reflects an inadequate education on the legitimation and integrity of the constitution.

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