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PROBLEMATICS OF CIRCULAR LETTER AS FOLLOW-UP TO THE CC DECISION

ABSTRACT

In general, the CC's decision, which is considered final and binding, does not require execution because it becomes effective and is executed as soon as it is pronounced in open court and published in state news. In practice, however, the CC's decision is followed by a variety of legal products, including laws, government regulations, and presidential regulations, and some even use periodic letters. The method used in this paper is normative legal research. The use of generalized letters in response to a CC decision is deemed inappropriate. Because the publication is not a legal regulation, it is not necessary to follow the CC's decision when considering the law. In an ideal world, the CC's decision is followed by legislation.

Keywords: Decision, CC, Circular Letter.

INTRODUCTION

The inclusion of a system of checks and balances between the legislative body, the executive institution, and the judicial institution was extensively discussed when the reforms opened the way to the amending of the Constitution of the Republic of Indonesia of 1945. It is possible for the judicial institution to compare the legislation to the Constitution thanks to the idea of checks and balances in the interaction between the court and the Legislature. Whereas the CC (CC) was given the authority to review legislation that violates this fundamental law as a new judicial body founded by the Republic of Indonesia's 1945 Constitution.[1]

The people of Indonesia want their government to be run according to the rule of law, not of man, which is consistent with the way they understand the power that law has over them. As a result, they have established the CC, which is inextricably linked to their desire for the government to be based on these principles.[2]

the CC is a part of the Indonesian constitutional system because it ensures that political processes like the passing of laws, the dissolution of political parties, and the impeachment of the President and/or Vice President adhere to the law without any political overtones. when the CC strikes down or otherwise neutralizes political institutions. The CC's standards also stipulate that decisions made by the court must be final, conclusive, and initial. This suggests that the CC's ruling shouldn't be reexamined.[3]

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[1] Ali Marwan Hsb, "Mahkamah Konstitusi Sebagai Neutralizer Terhadap Lembaga Politik," *Jurnal Rechtsvinding* 2, no. 3 (2013)., pp. 319.

[2] Ibid., pp. 320.

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

All parties are required to follow and implement the new state of law created by the CC'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 CC's conclusions will not be put into effect.[4]

Additionally, the CC is not required to direct de wetgevers to undo the redaction of statutes, articles, or verses that have been declared non-binding of the law from its laws; rather, the inclusion of the CC in state gazettes affirms that it is no longer binding on the clauses, articles, or parts of the said law. Ali Marwan Hsb contends that it is insufficient only to publish the CC's decision in the state press without also calling for legislative action.[5]

In reality, the response to the CC's ruling was not what was anticipated. which includes a circular that follows a decision by the CC. Following up on the CC's ruling with a circular, it says things like: First, circular letter from the Republic of Indonesia's Minister of Manpower and Transmigration dated January 7, 2005, with the following number: SE-13 / MEN / SJ-HK / I / 2005, regarding the decision of the CC on the right to material test Law Number 13 of 2003 concerning Manpower against the Constitution of the Republic of Indonesia of 1945.Second, Circular Letter No. B.31 / PHIJSK / I / 2012 from the Minister of Manpower on the Application of Decision No. 27 / PUU-IX / 2011 of the CC. Third, 1. Circular Letter of the Indonesian Minister of Manpower No. 1 / MEN / I / 2015 Concerning the CC's Decision No. 100 / PUU-X / 2012 Regarding Article 96 of Law No. 13 of 2003 Concerning Manpower. The fourth, Letter from the Director General of Financial Balance of the Ministry of Finance of the Republic of Indonesia Number: S-349 / PK / 2015 regarding the Calculation of Telecommunication Tower Control Levy Rates Related to the CC (MK) Decision Dated June 9, 2015. This Letter was followed by a Letter from the Director General of Financial Balance of the Ministry of Finance of the Republic of Indonesia Number: S-743 / PK / 2015 concerning Calculation of Telecommuni

Literature review of previous research, no one has written the relationship between the circular and the follow-up of the CC 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 CC's decision invalidating the provisions in the law.

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[4] 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)., pp. 26.

[5] Ibid., pp. 27.

RESEARCH METHOD

The research method used is the normative juridical legal research method. The approach used with the statutory approach, the search system used by the *library research*.[6] Legislation is a method used to analyze laws and regulations to find answers to the problems studied.[7]

RESULT AND DISCUSSION

A. Legal Consequences and Position of CC 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.[8]

Legislation according 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 key words to understand the logic of legislation.[9]

The CC 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.[10]

The CC's decision-making process must take the provisions of Article 46 of the CC Act into account when making a ruling regarding a law's constitutionality. Regarding the authority of judges who will render a decision on the basis of the law, the following fundamental matters are stipulated in the article: Judges' evidence and opinions are taken into account when the CC renders decisions based on the Republic of Indonesia's 1945 Constitution. A minimum of 2 (two) pieces of evidence must support the CC's decision to grant the application; Facts that were made public during the trial must be included in the CC'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

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[6] Peter Mahmud Marzuki, *Penelitian Hukum* (Jakarta: Kencana, 2011), hlm. 15.

[7] Eka NAM Sihombing, Cynthia Hadita, *Penelitian Hukum*, (Malang: Intrans Publishing, 2021), hlm. 48.

[8] 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, 1 (2020): 11.

[9] 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.

[10] Dian Agung Wicaksono, 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), *Jurnal Penelitian Hukum De Jure,* Vol. 20, No. 4, Desember 2020.

judges presided over by the chairman of the session; In consultative hearings, each constitutional judge shall submit a written consideration or opinion on the application; In the event that the deliberations of the plenary session of the plenary judges of the constitutional judges referred to in paragraph (4) cannot produce a verdict, 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 CC 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.[11]

Article 56 of Law Number 24 of 2003 concerning the CC regulates the form of decisions of the CC in cases of testing laws and regulations as follows (1) If the CC determines that the petitioner and/or his application do not meet the requirements set out in Articles 50 and 51, the judgment declares the petition inadmissible. (2) If the CC 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 CC expressly declares the clauses, articles, and/or sections of the law at issue as being in violation of the Republic of Indonesia's 1945 Constitution. The judgment declares that the application is granted in the event that the formation of the relevant law does not adhere to the requirements of the formation of a 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 CC 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 accepted or rejected it does not provide any legal consequences.

Maruarar Siahaan asserts that the majority of CC 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 CC's decision, whether it is valid or not,

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[11] Bachtiar, *Problematika Implementasi Putusan Mahkamah Konstitusi Pada Pengujian UU Terhadap UUD* (Jakarta: Raih Asa Sukses, 2015)., pp. 149 – 150.

or whether it establishes new legislation as a negative legislator. The CC Judges' decisions do not have to be carried out by a single officer due to the declatoir's unique nature.[12]

CC 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 CC'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.[13]

As for the decision of the CC which states that a rule of law does not have binding legal force, it means that the law is *not legally binding*. Which means the CC did not overturn the rule of law , but declared it had no binding legal force anymore.[14]

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

(1) The CC's ruling that some clauses, sections, or portions of the statute are in violation of the Republic of Indonesia's 1945 Constitution is not legally obligatory.
(2) The CC ruled that the in issue law was not formed in accordance with the requirements of a law based on the Republic of Indonesia's 1945 Constitution and did not possess binding legal authority.
(3) The State Gazette must publish the CC'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 CC'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, according to Article 58 of Law No. 24 of 2003 concerning the CC, "the law tested by the CC 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 CC's decision is not retroactive. The legal ramifications of the judgment begin to

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[12] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* (Jakarta: Sinar Grafika, 2012)., pp. 212.

[13] 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)., pp. 287 – 288.

[14] M. Laica Marzuki, *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)., pp. 117.

accrue the moment the judgment is rendered in a public hearing. As a result, the legal consequences of 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.[15] It also implies that any previously deemed valid or legally invalid legal act does not become invalid or become valid simply because the CC's ruling is binding because its pronouncement in plenary sitting is open to the public.[16]

As a consequence of the CC'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.[17]

The legal consequences of the final and normatively binding decision of the CC 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 CC'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 CC's ruling ended a legal dispute. The filing of a case requested to be decided by the CC, based on the characteristics of its final and binding decision, has ended a legal dispute.[18]

There are also two legal consequences in a negative sense. *First*, a CC ruling can overturn a law resulting from a political product, produced through a political mechanism in parliament that is actually 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.[19]

It is related to the CC'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

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[15] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia*., *Op. Cit.*, pp. 218 – 219.

[16] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang* (Jakarta: Sinar Grafika, 2012)., pp. 220.

[17] Bachtiar, *Problematika Implementasi Putusan Mahkamah Konstitusi Pada Pengujian UU Terhadap UUD*., *Op. Cit.*, pp. 165.

[18] Ibid., pp. 166.

[19] Ibid., pp. 166 – 167.

orders, provincial bylaws, district bylaws, and city bylaws are just a few examples of the sources of law. Since the CC has the authority to determine whether laws are in compliance with the Constitution, the court's decision should be regarded as having the same legal weight as a binding law since it was made.

C. Forms of Follow-up to the CC's Decision

Basically, the decision of the CC does not require an executor institution, because the judicial *review* decision in the CC 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 CC.[20]

However, according to Ali Marwan Hsb, the posting of the CC's ruling in state news 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 CC. In order to make the practice of the CC's decision more meaningful, it still needs follow-up from the framers of the law.[21]

But in practice, a number of CC rulings were followed up variously. This diversity is demonstrated by the plurality of legal or regulatory forms used to implement the decisions of the CC, among others, followed up through:[22]

a. Law;
b. Government Regulations;
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.

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[20] Martitah, *Mahkamah Konstitusi: Dari Negative Legislature Ke Positive Legislature* (Jakarta: Konstitusi Press, 2013)., pp. xix – xx.

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

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

There are several reasons that cause the CC's decision to be followed up with various laws and regulations and more operational legal products, including the following:[23]

a. Urgent legal needs for the CC's decision to be implemented immediately, The decision of the CC, which is final and binding, certainly cannot be remedied anymore, so that it is legally valid and binding in general like a law. Therefore, there is no reason that can be used as a basis for affirming the decision of the CC, other than to implement it. The urgent legal need for the CC's decision to be implemented immediately, among other things, is because the CC's decision can affect the stages of the constitutional and/or governmental agenda, or affect the ongoing legal process/stage. Where several CC 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 CC'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 CC'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 CC's ruling, which creates a legal vacuum, urgently requires follow-up to address the legal vacuum, the CC's decision to invalidate all 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 CC 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

[23] Ibid., pp. 67 – 77.

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 CC.

c. The CC'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 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 CC's decision is a circular. Circulars used as legal platforms to follow up on CC 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 is to explain and provide guidelines for the implementation of the CC's decision, the content material tends to be nuanced.[24]

CONCLUSION

A circular letter is not the proper way to respond to the CC's ruling. It is inappropriate to use the circular as a vehicle for following up on the CC's ruling because it is not a statutory regulation. "The content material that must be regulated by law contains: d. follow-up to the decision of the CC," according to Article 10 paragraph (1) of Law Number 12 of 2011 concerning the Establishment of Laws and Regulations. This indicates that a CC decision should be implemented through the law. The 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 CC's ruling. Therefore, the establishment of a change law is required to implement the CC's ruling; it may be submitted by the House of Representatives or by the President in his capacity as the law's shaper.

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[24] Ibid. Pp. 77.

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