



Legal Force of Conditional Unconstitutional Verdicts by the Constitutional Court in Decision Number 91/PUU-XVII/2020 Regarding the Omnibus Law on Job Creation

Meri Yarni¹, Kosariza¹, Yetniwati¹, Khofifah Rizki Amanda¹

¹ Department of Law Jambi University, Jambi, Indonesia
meri_yarni@unja.ac.id

Abstract. The aim of this research is to ascertain and analyze the legal force of conditional unconstitutional verdicts by the Constitutional Court in Decision Number 91/PUU-XVIII/2020 concerning the Omnibus Law on Job Creation. The research methodology employed in this paper is juridical-normative, indicating that the study originates from legal issues by analyzing a legal problem through legislation, literature, and other reference materials. This research employs several approaches, including legislative, historical, and conceptual approaches. The outcomes of this research indicate that the decisions of the Constitutional Court during the examination of laws can vary, encompassing full acceptance, partial acceptance, rejection, and even inadmissibility. A novel development is evident in the Constitutional Court's decisions, representing an *ijtihad* (independent juridical reasoning) aimed at upholding the law and justice. Thus, Constitutional Court Decision Number 91/PUU-XVIII/2020 fundamentally differs from various prior Constitutional Court decisions, where the conditional unconstitutional verdict was issued. This distinction arises because Decision Number 91/PUU-XVIII/2020 constitutes a conditionally unconstitutional verdict concerning formal review, specifically the legislative process. In contrast, in various previous decisions, conditionally unconstitutional verdicts were directed towards the substantive review of a law. The legal force of conditional unconstitutional verdicts involves binding legal authority and must be considered correct, allowing no alternative other than to implement them. Given that Constitutional Court decisions are final and binding, this aspect is closely linked to the principle of *res judicata pro veritate habetur* (what is decided by the judge must be considered true and must be implemented). As Indonesia operates as a state governed by the rule of law, it is imperative that state organs act based on positive law. The author suggests establishing a legal foundation for the implementation of the practice of conditional verdicts in the Constitutional Court, achieved through the revision of Constitutional Court laws to include types of conditionally unconstitutional and conditionally constitutional verdicts as a framework for the exercise of constitutional judicial authority."

Keywords: Legal force, verdict, conditional unconstitutional, Constitutional Court.

1 Introduction

The existence of the Constitutional Court institution in modern states is considered a novel phenomenon for enhancing the existing constitutional system. For countries that have transitioned from authoritarianism to democracy, the establishment of the Constitutional Court is crucial as it aims to reform and enhance the constitutional system, making it more ideal and perfect, particularly in conducting constitutional reviews of laws that are in conflict with the constitution, which serves as the highest fundamental law of the state[1] As a judicial authority, the constitutional function held by the Constitutional Court is the function of adjudication to uphold the law and justice. Without the law, there would be no limits on the government's behavior. Therefore, in the concept of the separation of powers, there must be other institutions to restrain government power. This is why the Constitutional Court was established as the guardian of the constitution, where the constitution serves as the source of all legal principles.[2]

The function of the Constitutional Court can be traced back to its formation background, which is to uphold the supremacy of the constitution. Therefore, the standard of justice and law upheld by the Constitutional Court is not solely based on the constitution as a collection of fundamental norms but also on the principles and moral values of the constitution, including the principles of the rule of law and democracy, the protection of human rights, and the safeguarding of citizens' constitutional rights.

The amendment to the 1945 Constitution places the Constitutional Court as a state institution within Indonesia's constitutional system. This institution is expected to function in executing judicial authority within the constitutional framework. Furthermore, it also plays a more significant role in promoting mechanisms of checks and balances in the administration of the state and contributes to the realization of a democratic rule of law.[3] The Constitutional Court is grounded in Article 24C paragraph 1 of the 1945 Constitution, and it is further regulated in Law Number 7 of 2020, the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court. Regarding the authority of the Constitutional Court, Article 24C of the 1945 Constitution stipulates that: "The Constitutional Court has the authority to adjudicate in the first and final instance, with its decisions being final, to examine laws against the Constitution, resolve disputes over the authority of state institutions granted by the Constitution, decide on the dissolution of political parties, and settle disputes related to the results of general elections."

Referring to the construction of a democratic rule of law state, the authority of the Constitutional Court to review laws against the 1945 Constitution can be observed or approached from the perspective of a democratic rule of law state.[4] In exercising its authority in testing laws against the 1945 Constitution, the decisions of the Constitutional Court have actually sparked many debates. Firstly, there are several Constitutional Court decisions that are *ultra petita* (beyond the scope of the request), which tend to intervene in the legislative domain. Because of this, the Constitutional Court is often criticized for positioning itself as a super body institution, as it consistently relies on the provisions of the 1945 Constitution that its decisions are final and binding. This

institution sometimes renders decisions that can be seen as exceeding its constitutional authority[4]

Law Number 7 of 2020, the third amendment to Law Number 24 of 2003 concerning the Constitutional Court, states that the decisions that can be rendered by the Constitutional Court are in the form of decisions declaring petitions as inadmissible, granting petitions, or rejecting petitions. However, in some of its decisions, the Constitutional Court has conducted reviews of legislative products, ensuring that the norms or laws under examination meet constitutional requirements. The Constitutional Court's decisions provide interpretations (guidance, direction, guidelines, and even conditions for creating new norms) that can be classified as conditionally constitutional and conditionally unconstitutional decisions[5] the interpretation determined by the Constitutional Court is met, a norm or law remains constitutional. However, if the interpretation set by the Constitutional Court in its decision is not met, the legal norm or law becomes unconstitutional and must be declared in conflict with the Constitution, losing its binding legal force[6]

In practice, with the emergence of conditionally unconstitutional decisions, which definitively means that the tested norm becomes in conflict with the constitution unless interpreted according to the Constitutional Court's formulation, this is considered a juridical violation because it is not in accordance with Law Number 7 of 2020, the Third Amendment to Law Number 24 of 2003 concerning the Constitutional Court, thus not clearly legitimizing the concept of conditionally unconstitutional. The examination of laws, when considered in terms of its scope, is divided into Formal Review (*formele toetsingrecht*) and Material Review (*materiele toetsingrecht*). Concerning the Formal Review, in its evolution, the Constitutional Court granted partial formal review requests for the first time. The Constitutional Court justices affirmed that Law Number 11 of 2020 concerning Job Creation had formal flaws; hence, the Court declared the Job Creation Law conditionally unconstitutional. Regarding the Conditionally Unconstitutional Decision, particularly in Constitutional Court Decision 91/PUU-XVIII/2020, the Court decided to conditionally annul Law Number 11 of 2020 concerning Job Creation, also known as the Omnibus Law on Job Creation.

In the context of formal testing, when a requested law is declared by the Constitutional Court to lack binding legal force in accordance with the petitioner's request and is subsequently declared conditionally unconstitutional, this diverges from the provisions in Constitutional Court Regulation Number 2 of 2021 regarding Procedures for Testing Laws. Concerning conditionally unconstitutional decisions, it is clarified that they are applicable to material testing, as stipulated in Article 73 paragraph (2). Therefore, it implies that in formal testing, the concept of conditionally unconstitutional, as specified in the Constitutional Court Procedure Law, does not exist, and the provision of conditionally unconstitutional is explicitly stated only in the context of Material Testing. This leads to ambiguity in the norm during the formal testing of laws against the 1945 Constitution. The author's viewpoint is also supported by Faiz Rahman's perspective, suggesting that the Constitutional Court should reconsider the use of conditionally unconstitutional rulings in the formal testing of the Job Creation Law due to inconsistencies in the Court's interpretation of conditional clauses. Given that the formal testing request has been granted, it signifies that the law under examination is entirely null and

void. In this context, the exercise of the Constitutional Court's authority does not adequately reflect the Court's role in providing legal certainty in the implementation of the tested Job Creation Law.

2 Research Methods

2.1 Research type

This research employs a normative juridical research approach. Normative juridical research has long been used by legal scholars to analyze and resolve legal issues. The distinctive feature of normative juridical research is the absence of a need for supporting data or real-world facts, as the issues under investigation are grounded in legal materials derived from legal sources. Additionally, the primary focus of this research is on positive law [7] In the current legal framework, besides the 1945 Constitution, there are several legislative regulations that also govern issues related to Constitutional Court decisions. This further reinforces the author's choice to conduct normative juridical research on this matter, focusing on legal sources juxtaposed with the legal issues contained in the regulation concerning Conditional Unconstitutional Decisions of the Constitutional Court.

2.2 Research Approach

In legal research, Morris L. Cohen mentions that there are several approaches used in legal research, namely the statute approach, conceptual approach, analytical approach, comparative approach, historical approach, philosophical approach, and case approach.[8] In reference to these approaches, this research employs the statutory approach (statute approach) and the conceptual approach (conceptual approach). The statutory approach is among the mandatory prerequisites that must be met to yield satisfactory answers. It involves viewing legal products as the central focus of the research. The conceptual approach is a research type that scrutinizes legal issues by examining legal concepts as the primary references, including legal sources, legal institutions, legal functions, and more.

3 Result and Discussion

3.1 The legal force of conditional unconstitutional decision

The Constitutional Court's decisions in testing laws can vary, ranging from being granted, partially granted, rejected, to declared inadmissible. There is a new development in the Constitutional Court's decisions as part of its jurisprudence to uphold the law and justice[9] As seen in Decision Number 91/PUU-XVIII/2020, the Constitutional Court did not choose one of the three options for decisions stipulated in Article 56 of the Constitutional Court Law, which are: granted, rejected, or inadmissible. Instead, it

issued a conditional decision, conditionally annulling the validity of the Job Creation Law, as reflected in its conditionally unconstitutional decision.

Constitutional Court Decision Number 91/PUU-XVIII/2020 represents a significant departure from various preceding Constitutional Court decisions, as its ruling does not fall under the category of conditionally unconstitutional, as was frequently the case in the past. This difference stems from the fact that Constitutional Court Decision Number 91/PUU-XVIII/2020 constitutes a conditionally unconstitutional decision specifically related to formal testing, particularly the legislative drafting process. In contrast, in numerous prior rulings, conditionally unconstitutional decisions were applied to the material testing of laws, typically based on conditions such as the interpretation of the Articles or Clauses within the tested law. Consequently, the usual nature of conditionally unconstitutional decisions, contingent on conditions like the interpretation of Articles or Clauses within the tested law, does not apply. The approval of formal testing of a law by the Constitutional Court in this Decision represents a groundbreaking development, marking the first instance of such an action since the establishment of the Constitutional Court. It's important to note that the concept of conditionally unconstitutional is not recognized in formal testing, as it is not regulated in either the Constitutional Court Law or the Law on the Procedure of Law Testing.

Regarding this matter, Mahfud MD, as explained by Ikhsan Fatah, suggests that the Constitutional Court may issue decisions that are not guided by procedural law, and in extreme cases, may even go beyond the boundaries of the law if the law fails to deliver justice[10] In line with Mahfud MD's perspective, according to Fajar Laksono, the Constitutional Court's practice of opting for conditional decisions is a necessity to prevent a legal vacuum. If the Constitutional Court were strictly bound to three types of decisions, it could potentially create legal loopholes that lead to legal chaos. To preempt this, the Constitutional Court issues decisions with the necessary prerequisites and/or provides new interpretations of the laws under scrutiny[11]

When the Constitutional Court is granted the authority to create norms and even go beyond the law without clear boundaries, it appears as if the Constitutional Court functions as a superbody within the state. This contradicts the purpose of amending the 1945 Constitution, which aims to prevent excessive power concentration within specific branches of government, whether through power limitations, constitutional provisions, the transformation from the principle of the distribution of power to the separation of power, or oversight efforts based on checks and balances.[12]

Exceeding its normative boundaries as regulated by law is not an uncommon occurrence for the Constitutional Court. This departure from its normative limits is often motivated by various reasons, one of which is the insufficiency of existing laws in offering a legal remedy. In such scenarios, attaining the intended benefits becomes a challenging endeavor. Nevertheless, it is crucial to recognize that, concurrently, any constitution invariably centers on three fundamental principles: justice, certainty, and utility[13] While at the same time, decisions issued by the Constitutional Court and possessing legal force must be considered correct, leaving no alternative but to execute them, given that Constitutional Court decisions are final and binding. On one hand, the Constitutional Court disregards its own limitations, while on the other hand, decisions issued as its products must be carried out because they are final and binding.

The legality of such decisions, from a juridical perspective, the conditional unconstitutional character of decisions is not regulated in the Constitutional Court Procedural Law. The juridical foundation regarding conditional unconstitutional decisions did emerge in Article 57, paragraph (2a) of Law Number 8 of 2011 on Amendments to Law Number 24 of 2003 concerning the Constitutional Court, which pertains to the prohibition of the Constitutional Court from creating new norms in its decisions. However, this provision was annulled by the Constitutional Court through Decision Number 48/PUU-IX/2011, thereby not serving as an obstacle for the Constitutional Court to issue decisions with conditional characteristics[14] therefore this decision cannot be separated from the principle of *erga omnes*, which carries legal binding force on all components of the nation, mandating that all parties adhere to and obey the decision. Given that Constitutional Court decisions are also final and binding, this is closely related to the principle of *res judicata pro veritate habetur*. Mahfud MD in Agus Maulidi, even affirms that, regardless of whether it is right or wrong, a judge's decision that has already gained legal force remains binding and, therefore, must be followed or implemented[9] The decision of the Constitutional Court obtains legally binding force when it is announced during an open plenary session accessible to the public. This is a consequence of the nature of Constitutional Court decisions as stipulated by the 1945 Constitution, where they are deemed final. Therefore, the Constitutional Court serves as both the initial and ultimate stage of judicial review, for which no legal remedies can be pursued.

In Law Number 12 of 2011 concerning the Formation of Legislation, it is stipulated that the President and the People's Consultative Assembly (DPR) are authorized to follow up on Constitutional Court decisions as a response or product that has been issued and noted for improvement by the Constitutional Court. Failure to promptly follow up on a Constitutional Court decision can result in a legal vacuum and potentially impact the national agenda. Constitutionally and legitimized by the 1945 Constitution of the Republic of Indonesia, it is stipulated that the state institutions authorized to formulate laws are the People's Consultative Assembly (DPR) and the President. This is clarified in the provisions of Article 5, paragraph (1), and Article 20 of the 1945 Constitution of the Republic of Indonesia. Article 20, paragraph (1) of the 1945 Constitution explicitly declares that the DPR possesses the power to formulate laws. In the meantime, the Constitutional Court, acting as a judicial authority performing its judicial functions, operates within the framework of the DPR's authority, which serves as the legislative body. If a law contradicts the Constitution, the Constitutional Court also has the authority to review such a law at that time.

The decision of the Constitutional Court in the case of testing laws possesses a declaratory constitutive nature, implying that the Constitutional Court's decision either creates or nullifies a new legal condition or establishes a new norm. The characteristic of the Constitutional Court's decision, which gives rise to a new norm or abolishes an existing one, renders it declaratory. This aspect should be regarded as an integral part of the judiciary's role in rectifying norms resulting from political processes. However, the self-centered tendencies of each state institution have caused the Constitutional Court's decisions to appear as mere words spoken in court and documented in official

records, devoid of implementation or remedial action. It should be evident that neglecting the Constitutional Court's decisions is tantamount to disregarding the constitution itself. The Constitutional Court serves as an institution for interpreting the constitution; thus, the implementation of its decisions becomes imperative to uphold constitutional values. It is crucial to underscore that ignoring the Constitutional Court's decisions equates to a disregard for the constitution itself. As an institution responsible for interpreting the constitution, the Constitutional Court's decisions must be implemented to demonstrate respect for constitutional values.

3.2 Establishing The Constitutional Law: Conditional Unconstitutional Decisions In Achieving Legal Certainty.

To achieve the desired legal certainty in the future, there is a significant need for (*Ius Constituendum*) concerning Constitutional Court decisions. Considering the essential role of the Constitutional Court in upholding the supremacy of law and justice, certainty is a fundamental concern. Law, by its nature, must be clear and just. Legal certainty is a question that can only be addressed normatively, not sociologically. Normative Legal Certainty occurs when a regulation is created and enacted precisely to govern in a clear and logical manner[15] In connection with the many issues mentioned above, it is important for the Indonesian nation to start attempting to formulate *Ius Constituendum* related to Constitutional Court decisions, especially Conditional Unconstitutional Decisions. Therefore, the following models will be formulated, which can be used as considerations in regulating the formulation of Constitutional Court decisions in future legislative reviews.[16]

Firstly, by strengthening the decisions. In practice, the Constitutional Court, when exercising its authority, encounters certain conditions that extend beyond the established context. As a result, the Constitutional Court makes decisions with the necessary prerequisites and/or provides new interpretations of the examined norms. The decision model involving new norms, distinct from what is stipulated in the law, is grounded in specific situations deemed urgently requiring immediate implementation. Consequently, an implementation issue arises if the Constitutional Court's decision merely identifies a conflicting norm without possessing legally binding force, potentially resulting in normative gaps. Hence, the Constitutional Court formulates new norms to address the unconstitutionality of such provisions. However, the Constitutional Court's new norms are temporary in nature, and ultimately, these new norms will be incorporated into the creation or revision of relevant laws. Therefore, it is imperative for future lawmakers, both the Government and the Parliament (DPR), to promptly update the Constitutional Court Law and include conditional decision matters within it.

The second aspect involves the need for Collaborative Actions and the Development of Collective Awareness Among State Institutions. Constitutional Court decisions that have been rendered necessitate the involvement of other state institutions in the follow-up phase. Therefore, there must be practical clarity that elucidates the relationship between the Constitutional Court and the legislature. In this context, the Constitutional Court should ideally engage in collaborative cooperation among state institutions or

bolster mutual interdependence between the DPR (Parliament) and the President as partner state organs tasked with implementing Constitutional Court decisions. Mechanisms of control can be instituted by the Constitutional Court institution to ensure the enforcement of its decisions. Without such cooperation and a collective spirit, the final and binding decisions will remain mere pieces of paper, unenforceable, and will undermine efforts to establish the rule of law. The aforementioned exposition should serve as an understanding and collective awareness for other state institutions that Constitutional Court decisions in Indonesia are a product of constitutional mandate. Therefore, the follow-up to Constitutional Court decisions should be executed correctly. When this collective understanding is established, the follow-up to Indonesian Constitutional Court decisions, which encompass the fundamental principles of the 1945 Constitution, should not be solely binding on the DPR or the President but should carry a dimension of responsibility that must be collectively embraced by other state institutions, such as the MPR (People's Consultative Assembly), and other relevant bodies.

4 Conclusion

Based on the discussions presented above, a conclusion can be drawn: the legal force of a Conditional Unconstitutional Decision is that it possesses binding legal authority and must be deemed correct, leaving no alternative but to enforce it, considering that Constitutional Court decisions are final and binding. This is closely connected to the principle of *res judicata pro veritate habetur* (what the judge decides must be considered correct and must be executed).

Nevertheless, despite Indonesia being a state of law (supreme of law), it is crucial that state organs act in accordance with positive law. The author suggests establishing a legal foundation for the implementation of conditional decision practices in the Constitutional Court, namely, by amending the Constitutional Court Law to incorporate types of conditional unconstitutional and conditional constitutional decisions within the Constitutional Court as a basis for exercising the authority of the constitutional judiciary.

The government and the DPR (People's Consultative Assembly) should formulate *Ius Constituendum* by strengthening Constitutional Court decisions. The author recommends that every decision with conditional clauses should receive affirmations from the Constitutional Court and involve collaborative efforts among all state institutions to foster collective awareness of the position of Constitutional Court decisions as a manifestation of constitutional interpretation.

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