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Resolving the Judiciary Tensions between the Constitutional Court and the Supreme Court of Indonesia

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Abstract

This paper addresses a critical issue undermining the legal coherence and judicial stability in Indonesia: the discord between the Constitutional Court and the Supreme Court in the realm of judicial review. This paper uncovers the root cause as a weak chain of validity in law formation, aggravated by divergent legal frameworks governing each court through utilizing doctrinal research methods. Drawing on Bullygin's deontic logic theory, the paper reveals a lack of explicit cross-sectoral policy synchronization. To immediately alleviate these tensions, this paper proposes the establishment of a Memorandum of Understanding (MOU) between the two courts, aiming to solidify the chain of legal norms and restore systemic stability. For a long-term resolution, a comprehensive revision of the judiciary law is advocated. This research serves as an urgent call for coordinated reforms to bolster the integrity and efficiency of Indonesia's judicial system.

KEYWORDS *Constitutional Court, Deontic Logic, Judiciary Tension, Supreme Court*

Introduction

This Paper Strives to highlight the 'friction' between The Constitutional Court of the Republic of Indonesia and The Supreme Court of Indonesia. The tension between the two judiciary institutions was triggered by the Supreme Court's disobedience over the Constitutional Court decision (abbreviated as the CC decision) related to legal norms annulled through the CC's decision previously. Recent research revealed that in an analysis of 109 CC decisions from 2013 – to 2018, 24 CC decisions, or 22.01% of the 109 decisions, were not obeyed. Even though this situation is considered an odd or weird occurrences, the Supreme Court still carries out the disobedience attitude through several decisions.[1]The first Supreme Court's disobedience is flouting the CC Decision Number 34/PUU-XI/2013, which annuls the provisions of Article 263 paragraph (3) of Act Number 8 of 1981 concerning the Indonesian Criminal Procedure Code.[2] The CC Decision Number 34/PUU-XI/2013 declared that the phrase "A request for a review of a decision can only be made once" is contrary to the Constitution of the Republic of Indonesia 1945. Ending this decision consequence, the convicts seeking justice can fill the judicial review without any frequency limitation. However, the Supreme Court of the Republic of Indonesia responded to this CC decision by issuing a Supreme Court Circular Number 7 of 2014 concerning the Plea for Judicial Review in Criminal Cases. The Supreme Court Circular remarks that the application for judicial review in a criminal case is limited to only one time.[3]

The second Supreme Court's disobedience is abandoning CC Decision Number 30/PUU-XVI/2018.[4] The CC decision's pivotal point requires that the Regional Representative Council (Dewan Perwakilan Daerah) members not be from Political Parties functionaries or internal administrators. Nonetheless, the Supreme Court, through Decision Number 65 P/HUM/2018, granted the Chairman of the Hanura Party plea, Oesman Sapta Odang, to be able to nominate himself as a candidate for the Regional Representative Council

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1 Sulistyowati, M Imam Nasef Tri, and Ali Ridho, *Constitutional Compliance Atas Putusan MK Oleh Lembaga Negara* (Jakarta: Puslitka MK, 2019).

2 Dian Agung Wicaksono and Faiz Rahman, "Influencing or Intervention? Impact of Constitutional Court Decisions on the Supreme Court in Indonesia," *Constitutional Review* 8, no. 2 (December 30, 2022): 260, https://doi.org/10.31078/consrev823.

3 Wicaksono and Rahman.

4 Muhammad Hafidz vs. The Act Number 7 of 2017 concerning General Election, the Indonesian Constitutional Court Decision Number 30/PUU-XVI/2018.

member.[5] The subsequent disobedience was the Ruteng District Court's decision, which sentenced Rikardus Hama and Adrianus Ruslin to three months imprisonment. Farmers from East Manggarai Regency, East Nusa Tenggara Province, Rikardus, and Adrianus were sentenced to "unpleasant acts" as stipulated in Article 335 paragraph (1) of the Indonesian Criminal Code.

Meanwhile, based on the CC Decision Number 1/PUU-XI/2013, dated January 16, 2014, the Constitutional Court has stated Article 335 paragraph (1) of the Indonesian Criminal Code as long as the phrase "unpleasant acts" no longer has binding impose. Apart from the debates that have surfaced, the Supreme Court's decision, as described previously, has ignored the CC decision. This paper argues that if the tension between the two institutions is allowed to drag on, it will affect the constitution delegitimization process, violate the citizens' constitutional rights, and even lead to the collapse of democracy.

A review of several publications that some Indonesian experts have submitted tends to produce no practical solutions, vague, even recommendations through their scientific paper's pull over the core problems both judiciary institutions deal with. In his publications, Dramanda offers to apply judicial restraint through certain formal forms. In his argument, Dramanda stated that the judicial restraint principle needs to be developed by judges. This action's urgency is to maintain the Constitutional Court's authority to stick to what has been outlined in the Constitution. Dramanda believes that judicial restraint in its application can minimize debates due to controversial judge's decisions.[6] However, this paper argues that Dramanda's offer is inappropriate because the Indonesian Constitutional Court model is entirely different from the one-roof model in the United States of America.[7] The judicial restraint application is feared to open a gap to perpetuate the practice of making legal products that do not reflect public justice.[8] One more critical thing Dramanda omits is that most of the judicial restraint principles can only be developed and enforced from within the judges internally. If this is

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[5] Oesman Sapta Odang vs. General Election Council, The Supreme Court Number Decision Number 65 P/HUM/2018.

[6] W Dramanda, "Menggagas Penerapan Judicial Restraint Di Mahkamah Konstitusi," *Jurnal Konstitusi* 11, no. 4 (2014): 617–31.

[7] John E Ferejohn, "Constitutional Review in the Global Context," *NYU Journal of Legislation and Public Policy* 6, no. 1 (2002): 49–59.

[8] Bojan Bugaric, "Courts as Policy-Makers: Lessons from Transition," *Harvard International Law Journal* 42, no. 1 (2001).

enforced, it will interfere with the independence of judges in determining law cases.[9]

Another solution is from Suhariyanto's ideas, where the paper's conclusion asserts that the regulations do not adjust the execution of the CC decision. No one is authorized to be the executor of the CC decision. In principle, in exercising its judicial review authority, the Supreme Court is required to pay attention to decisions or the process of examining cases at the Constitutional Court.[10] Hierarchically, the Constitutional Court's jurisdiction is different from the Supreme Court's. The Supreme Court's Justice and other judicial bodies must not exceed their authority by assessing the constitutionality or validity of a legal norm. However, the Supreme Court may interpret the application of the CC decision (as in the law) to contextualize with developing a sense of justice and societal changes.

Regarding the importance of legal interpretation in the CC decision, in this context, the decision must be supported by the juridical, philosophical, and sociological spheres.[11] This paper argues that Suhariyanto's argument is ambiguous and partial because it provides a juridical spot for the Supreme Court's Justice to interpret the CC Decision. This opinion negates the meaning of the CC Decision, which is final and binding. The final and binding meaning

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[9] Aileen Kavanagh, "Judicial Restraint in the Pursuit of Justice," *University of Toronto Law Journal* 60, no. 1 (2010): 23–40.

[10] Article 55 of Act Number 7 of 2020 concerning the Third Amendment to Act Number 24 of 2003 concerning the Constitutional Court declares that the judicial review under the Act that is being underway by the Supreme Court must be halted if the Act that is the legal basis still underway review in the Constitutional Court. However, after the Constitutional Court Decision No. 93/PUU-XV2017, the word "halted" in Article 55 of the Constitutional Court Act is contrary to the 1945 Constitution and has no binding force if it is not interpreted as "suspended" the review process. If it refers to this decision, the judicial review of regulations under the Act must be postponed until an indefinite time. This rule creates legal uncertainty for the applicant because, at the same time, there is an Act of the same thing being reviewed by the Constitutional Court, even though the substance in the norms is different.

[11] Budi Suhariyanto, "Masalah Eksekutabilitas Putusan Mahkamah Konstitusi oleh Mahkamah Agung," *Jurnal Konstitusi* 13, no. 1 (October 11, 2016): 171, https://doi.org/10.31078/jk1318.

is clearly stated in the Constitutional Court Act.[12] In this context, there is no need for interpretation, which has the potential to cause legal perplexity.[13]

In another response to the tension, Aziezi expressed that the legislative body should immediately respond to the change in revoked legal norms by formulating new norms.[14] Aziezi believes that legal revision follows up on the CC decision imposed on the legislative body, indirectly lessening judiciary tension. At a glance, this is a simplified idea, but not in the empirical realm. This paper argues that the Supreme Court's disobedience of the CC decision is not solely caused by norms that the legislative body has not adjusted. This paper presumes more on the pretext of the Supreme Court's Justice freedom and independence, which are used as 'shields' when making decisions that disregard the CC decision. Moreover, this paper asserts that even though the democratic system provides unlimited space for a judge's independence and freedom in determining legal cases,[15] the freedom and independence taken by the Supreme Court's Justice must be bound by ethics, moral values, and public justice.[16]

The separation of powers to conduct judicial review held by the Supreme Court and the CC is not an excuse for disobedience. From Brazil's experience as a country that does not have a particular institution to carry out the judicial review process, the decision of legal enforcement still does not fully result in compliance.[17] The government has to reform the judiciary by strengthening the Federal Supremo Tribunal (STF) role in judicial review procedures. Before the 1988 constitution finally came into force in this country, the STF's authority

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[12] Article 10 paragraph (1) of Act Number 7 of 2020 concerning the Third Amendment to Act Number 24 of 2003 concerning the Constitutional Court is clear. It explicitly states that the CC decision is final, i.e., the CC decision immediately has permanent legal execution when it was a loud public announcement, and no legal remedy could be reached. The final character of the CC decision in this Act includes the definitive and binding.

[13] Malik, "Telaah Makna Hukum Putusan MK Yang Final Dan Mengikat," *Jurnal Konstitusi* 6, no. 1 (2009).

[14] Muhammad Tanziel Aziezi, "Ineffectiveness of Enforcement of the Constitutional Court's Decision in Indonesia," in *The Asian Conference on Politics, Economics & Law* (www.iafor.org: The International Academic Forum, 2016).

[15] Aharon Barak, "The Judge in a Democracy," *Choice Reviews Online* 44, no. 04 (2006): 44–2338, https://doi.org/10.5860/CHOICE.44-2338.

[16] Raymond A Belliotti, "Steven J. Burton., Judging in Good Faith," *International Studies in Philosophy* 26, no. 2 (1994): 107–8, https://doi.org/10.5840/intstudphil1994262135.

[17] Marco Antonio Loschiavo Leme de Barros, "Constitutional Design and the Brazilian Judicial Review: Remarks About Strong and Weak-Form Review in the Brazilian Federal Supreme Court," *Revista Opinião Jurídica (Fortaleza)* 15, no. 20 (July 8, 2017): 180–206, https://doi.org/10.12662/2447-6641oj.v15i20.p180-206.2017.

in conducting judicial review could not entirely apply to the Getúlio Vargas authoritarian regime, which was later taken over by the military.[18] After the military intervention terminates, strengthening the judiciary can have a strong influence on carrying out democracy under the Constitution.

Several cases of tension between the Constitutional Court and the Supreme Court can be seen in the existing constitutional structure in European countries. As an example of a comparison related to this problem, this research will review the issue of the separation judicial review authority in Poland, Italy and Germany. These three countries were chosen with the consideration that they are part of democratic countries that are trying to implement the separate constitutionality testing system popularized by Kelsen. Even though they have independent Constitutional Court, just like Indonesia, these three countries still need help with problems related to the complexity of the juridical impact of this separation of authority.

From a philosophical perspective, this paper directs a scholarly examination of the friction between Indonesia's Constitutional Court and the Supreme Court. It provides a venue for an in-depth analysis of foundational principles such as justice, democracy, and the doctrine of separation of powers. This inquiry enables a nuanced understanding of how such abstract philosophical tenets find concrete expression in institutional frameworks. Additionally, it raises essential queries regarding the designated roles and mutual interactions of these judicial bodies in upholding a societal structure that is both equitable and just. From a legal standpoint, the systematic documentation of the points of contention between Indonesia's apex judicial institutions is indispensable for advancing legal clarity and jurisprudential development. Insight into these institutional disagreements is instrumental in pinpointing deficiencies, ambiguities, or contradictions within the existing legal landscape that might necessitate reformative action. Such an understanding is of particular relevance to legal scholars, practitioners, and policymakers who are actively involved in the interpretation and formulation of legal statutes. In a jurisprudential context, it lays the groundwork for potential legislative amendments aimed at enhancing the legal system's efficiency and fairness.

Last, from a sociological stance, the interplay between Indonesia's Constitutional Court and Supreme Court is far from being an insular institutional phenomenon; rather, it has both direct and collateral implications on the social fabric and the level of public confidence in judicial institutions.

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[18] Miyuki Sato, "Judicial Review in Brazil. Nominal and Real," *Global Jurist Advances* 3, no. 1 (2003): 1–22.

Scholarly discourse on these tensions allows for a comprehensive sociological scrutiny of the myriad social, cultural, and political determinants that may impact judicial actions and inter-institutional relationships. Such an endeavor also offers an evaluative lens through which public attitudes and trust towards these central judicial bodies can be gauged, thereby providing valuable data for policy deliberations and broader societal discussions. In simple words, this paper urges that the scholarly engagement with the tensions between Indonesia's Constitutional Court and Supreme Court is not merely an academic exercise but a critical undertaking that elucidates the intricate facets of the Indonesian legal framework and its corresponding societal ramifications.

The paper's analysis will be performed through the use of doctrinal legal research methods. This paper intends to build a perspective using a conceptual approach derived from the deontic logic theory. This approach will serve as an analytical tool to determine the position of decisions made by the CC, which is an institution with authority to carry out judicial reviews. By doing so, this paper proposes to establish the basis for an argument that will help understand the position of the CC decision in the hierarchical system of Indonesian legislation from the perspective of a statutory approach. Ultimately, this paper intends to use this analysis to determine the position of the SC in response to the decision of the CC. In short, this paper outline is portrayed in four sections: the first section begins with the coercive power of the CC decision with all its criticisms. In the next section, the paper explores the rational arguments used by the Supreme Court to disobey the CC decision. Last, this paper considers several alternative solutions to resolve the existing two institutional issues.

Enforceability the Indonesian Constitutional Court Decision

Born as an institution resulting from the constitutional amendments, the Indonesian Constitutional Court has declared itself a modern and trusted judicial institution. This condition demands that the Constitutional Court be able to carry out a prompt, sterile, transparent, impartial judicial process and render decisions that uphold the principles of justice. Since its establishment in 2003 until December 31, 2019, the Constitutional Court has registered 3,005 cases. A total of 1,321 cases (43.96%) regarding the Judicial Review, 982 cases (32.68%) related to the Settlement of Disputes over the Results of Regional Head Elections, 671 cases (22.33%) related to Disputes over the Results of Legislative Elections, 5 cases (0, 17%) related to Disputes on the Results of the

Presidential/Vice-Presidential Election, as well as 26 cases (0.87%) for Disputes on the Authority of State Agencies. Of all these cases, 2,974 have been settled, with details of 397 cases, or 13.93%, being approved; 1,305, or 45.81%, cases being rejected; 1,005 cases, or 35.28%, being unacceptable; 60, or 2.11%, failing cases; the Petitioners, withdrew 171 cases or 5.75%; 25 cases or 0.84% were a follow-up to the interlocutory decision; and 11 cases or 0.32%, the Constitutional Court declared it was not authorized. As many as 30 cases are still in the process of being examined at the Constitutional Court.[19]

As regulated in Article 24C paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia in conjunction with Article 10 of the Constitutional Court Act, it is stated that the Constitutional Court has four essential authorities and one compulsory obligation, *i.e.*: (1) constitutional reviewing of the law against the 1945 Constitution of the Republic of Indonesia; (2) deciding on disputes over the authority of state agencies whose authority is granted by the Constitution; (3) decide on the dissolution of political parties; (4) decide on disputes of the general election result ; and (5) The Constitutional Court is obliged to give a decision on The House of Representatives of the Republic of Indonesia opinion that the President and/or Vice President are suspected of having violated the law in the form of treason against the State, corruption, bribery, other serious crimes, or disgraceful acts, and/or are no longer eligible as President and/or Vice President as directed to in the 1945 Constitution of the Republic of Indonesia. By adopting the model in South Korea, the Indonesian Constitutional Court has developed into an institution that is trusted by the public to translate the country's Constitution into the proper corridor. If observed, the implementation of decisions granted by the Constitutional Court can be categorized into two, namely, self-executing and non-self-executing decisions.[20] In the practical dimension, the self-executing implementation of the CC decisions, in general, can only be carried out on types of decisions that are declared legally null and void.[21] Meanwhile, decisions that are (1) formulating new legal norms, (2) conditionally

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[19] Mahkamah Konstitusi Republik Indonesia, "Laporan Tahunan Mahkamah Konstitusi 2020: Meneguhkan Supremasi Konstitusi Di Masa Pandemi" (Jakarta, 2020).

[20] Sulistyowati, Tri, and Ridho, *Constitutional Compliance Atas Putusan MK Oleh Lembaga Negara.*

[21] Syukri Asy'ari, Meyrinda Rahmawaty Hilipito, and Mohammad Mahrus Ali, "Model dan Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003-2012)" 10 (2013): 34, https://media.neliti.com/media/publications/110911-ID-model-dan-implementasi-putusan-mahkamah.pdf.

constitutional, (3) conditionally unconstitutional, and (4) limited constitutional decisions tend not to be implemented directly (non-self-executing). Applying not-self-executing decisions to parties who are the addressees of the CC decisions is generally pursued through case-by-case interpretation or by the legislative process (changing the Act or making a new one).[22]

This non-self-executing CC decision type often causes many problems later. One common issue that often emerges is the question of the CC decision enforceability. Observing the regulations in several countries that generally adhere to the Kelsenian Model,[23] such as Austria,[24] Germany,[25] Italy,[26] Colombia,[27] Russia,[28] South Korea,[29] and South Africa,[30] it reinforces that the CC decision is categorized as *erga omnes* so that by itself, it must be implemented by all branches of the State in carrying out the State life. At the theoretical level, Indonesian regulations have a firm position if the CC decision is final and binding.[31] The final CC decision is generally identified as a *res judicata* decision. A *res judicata* decision means that only a higher court's decision can annul a lower court's decision. Whereas in this context, all legal experts know that there is no decision higher than the CC decision. Moreover,

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[22] Maruarar Siahaan, "Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi," *Jurnal Hukum Ius Quia Iustum* 16, no. 3 (2009): 357–78, https://doi.org/10.20885/iustum.vol16.iss3.art3.

[23] Tom Ginsburg, *Comparative Constitutional Design*, ed. Tom Ginsburg (Cambridge: Cambridge University Press, 2012), https://doi.org/10.1017/CBO9781139105712.

[24] Constitutional Court of Austria, "The Constitutional Court: Overview," *Verfassungsgerichtshof Österreich*, 2024.

[25] Anke Eilers, "The Binding Effect of Federal Constitutional Court Decisions Upon Political Institution," in *Federal Constitutional Court, The Effects of Constitutional Court Decisions* (Tirana: Karlsruhe Seminar, 2003).

[26] David G Farrelly and Stanley H Chan, "Italy's Constitutional Court: Procedural Aspects," *The American Journal of Comparative Law* 2, no. 3 (1957).

[27] Luz Estella Nagle, "Evolution of the Colombian Judiciary and the Constitutional Court," *Indiana International & Comparative Law Review* 6, no. 1 (1995).

[28] Kirill Koroteev and Sergey Golubok, "Judgment of the Russian Constitutional Court on Supervisorry Review in Civil Proceedings: Denial of Justice,Denial of Europe," *Human Rights Law Review* 7, no. 1 (2007).

[29] James M West and Dae-Kyu Yoon, "The Constitutional Court of the Republic of Korea: Transforming the Jurisprudence of the Vortex?," *The American Journal of Comparative Law* 40, no. 1 (1992).

[30] Neil Parpworth, "The South African Constitutional Court: Upholding the Rule of Law and the Separation of Powers," *Journal of African Law* 61, no. 2 (2017): 273–87, https://doi.org/10.1017/S0021855317000158.

[31] Malik, "Telaah Makna Hukum Putusan MK Yang Final dan Mengikat."

the CC decision cannot be canceled or revised with another decision for the identical case, which contradicts the principle of *ne bis in idem*.

The CC decision *mutatis mutandis* is final and binding since the judge takes it in a public trial loudly. Although (naturally) the Constitutional Court is interested in seeing that its decisions are respected and obeyed, *ipso facto*, the Constitutional Court does not have any legal apparatus or juridical instruments to enforce its decisions. According to the decision, there are no police or court bailiffs or other legal mechanisms to carry out whatever CC decision must be made or implemented later. Therefore, primarily in the judicial authority, the Constitutional Court is like a fragile branch of state power or assumed as the least dangerous power, with neither purse nor sword.[32] The authority of the CC decision execution is thus dependent on the other institutions or organs, whether the decisions are accepted, and whether the address of the CC decision is ready to comply. In this position, the factual instrument of the Constitutional Court's authority as its application is to bear on the Constitution itself. Preferably, the execution of CC's judgment is a guardian of the State's legal grounds sacredness. This paper considers that the CC decision's disobedience can be considered a denial of the Constitution itself. As the authorized authority, the Constitutional Court should be able to guarantee that the essence of the basic values adopted by the State must be embedded in society's lives as a genuine reflection of the constitutional review implementation that has been carried out.

Assuming that the CC decision is final and binding, then the burden lay on the judges will be extremely considerable. For this reason, apart from procedural and administrative concerns, judges are demanded to have a comprehensive legal understanding and the legal dialectic integrated into the interpreting articles or laws under constitutional review. As seen in the Article or the Act interpretation during the US Supreme Court's underway constitutional review, this judiciary activity must be done to maintain the Constitution's supremacy. The sanctity of the Supreme Court Justice's analytical process must be strictly maintained through a testing procedure for all controversial elements to produce a precise decision based on fairness, independence, and integrity. Concomitant with these circumstances, the majority of judicial review processes conducted in the US Supreme Court will be guided by IRAC, which is defined as (1) [i]dentify the issue; (2) state the [r]ule of law; (3) [a]nalyze the fact and the law, and (4) reach some

[32] Georg Vanberg, "Constitutional Courts in Comparative Perspective: A Theoretical Assesment," *Annual Review Political Science* 18, no. 1 (2015): 167.

[c]onclusion.[33] The procedure becomes a reference in resolving problems that cause controversy in the community based on the applicable legal provisions. Thus, the Supreme Court's decision in interpreting the rule of law can be applied without impairing the law and has concrete benefits for anyone as a subject of the law.

Legal Reasoning of Constitutional Court's Decision Disobedience

Although the Supreme Court and the Constitutional Court have different authorities in the Indonesian judicial system, sometimes these authorities intersect with each other. The following Table distinguishes the two judicial institution's authorities.

TABLE 1. The Distinction between the Supreme Court and the Constitutional Court Power

Categories	The Supreme Court of the Republic of Indonesia	The Constitutional Court of the Republic of Indonesia
Legal Base	Article 24A of the 1945 Constitution of the Republic of Indonesia; Act Number 3 of 2009 concerning the Second Amendment to Act Number 14 of 1985 concerning the Supreme Court.	Article 24C of the 1945 Constitution of the Republic of Indonesia; Act Number 7 of 2020 concerning the Third Amendment to Act Number 24 of 2003 concerning the Constitutional Court.
Competency	The Supreme Court's authority is limited to underway the judicial review of the regulations under the Act.	The Constitutional Court's authority is to review the Act and Government Regulations in Lieu of Laws before the Constitution.
The impeachment trial	The Supreme Court has no authority to roll out an impeachment trial.	The Constitutional Court has the authority to hold an impeachment trial.
Delivering the sentence at the cassation level	The Supreme Court has the right to deliver a sentence at the cassation level under its authority as regulated in Article 24A of the 1945 Constitution.	The Constitutional Court has no obligation to deliver a sentence at the cassation level.

[33] Inosentius Samsul, "Laporan Akhir Pengkajian Hukum Tentang Mahkamah Konstitusi" (Jakarta: Badan Pembinaan Hukum Nasional Kementerian Hukum dan Hak Asasi Manusia RI, January 31, 2009), https://www.bphn.go.id/data/documents/pkj_mk.pdf.

Categories	The Supreme Court of the Republic of Indonesia	The Constitutional Court of the Republic of Indonesia
Authorize and supervise the judiciary system on the lower layer	The Supreme Court has a compulsory obligation to monitor and foster the judiciary layer under its auspices.	The Constitutional Court has no judiciary layer under its auspices.

The apparent distinction is explained in the Table. 1, makes it possible that there are intersection points between the two judicial institutions. The linking point here may occur when the judicial review of the regulation under the law carried out by the Supreme Court is very dependent on the validity of the CC decision in interpreting the 1945 Constitution of the Republic of Indonesia as the fundamental or ground norm when doing the constitutional review.[34]

This paper analyses that the Supreme Court's disobedience towards the CC decisions often uses reasons that are identified into three categories. *The first* pretext is independence, where independence is then divided into two interpretations: the independence of the Supreme Court institutionally and the independence of the Supreme Court's Justice in determining a sentence. At the theoretical level, the judicial independence concept can be described as a situation where judges can make decisions free from external influences, both from the executive and legislative branches of power, the private sector, or from within the judicial branch itself.[35] As an institution, the judicial branch attaches the authority to determine the legality or illegitimacy of government actions, uphold the neutrality of justice, and significantly determine legal and constitutional values. Therefore, judicial independence can also be interpreted where judges cannot be manipulated because of particular political interests and impartiality to the disputing parties.[36] Judicial independence is also a fundamental principle in the rule of law because it allows judges to enforce the law impartially to the legislative and executive authorities, where judges are only bound by law and conscience.[37] The main objective of judicial independence is

[34] Saldi Isra, "Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi," *Jurnal Hukum Dan Peradilan* 4, no. 1 (February 5, 2015): 17–30, https://doi.org/10.25216/JHP.4.1.2015.17-30.

[35] Kapiszewski, Diana, and Matthew M Taylor, "Doing Courts Justice? Studying Judicial Politics in Latin America," *Perspectives on Politics* 6, no. 4 (2008): 741–67.

[36] Christopher M Larkins, "Judicial Independence and Democratization: A Theoretical and Conceptual Analysis," *The American Journal of Comparative Law* 44, no. 4 (1996): 605–26.

[37] Jonathan Soeharno, *The Integrity of the Judge: A Philosophical Inquiry* (England: Routledge, 2016).

to guarantee the judge's impartiality when adjudicating cases and (also) enable reflection on the values of stringency and competence in law enforcement.[38]

The judge's independence, primarily Supreme Court Justices, has been held in the Code of Ethics for Judges worldwide through The Bangalore Principles of Judicial Conduct. The essence of the Code of Ethics rests on 6 main principles, namely independence, impartiality, integrity, property, competence and diligence, and wisdom. The principle of independence of judges is a prerequisite for realizing the ideals of the rule of law and is a guarantee for upholding law and justice. In order to adjust The Bangalore Principles of Judicial Conduct, the basis for the Indonesian Judges Code of Ethics is made, which binds judges in several rules and practices. The Joint Regulations made between the Supreme Court, and the Judicial Commission of the Republic of Indonesia contain guidelines for the enforcement of the Indonesian Judges Code of Ethics and Code of Conduct, which are binding on Supreme Court Justices and all of the judges who are hierarchically under the auspices of the Supreme Court. In Article 3, Paragraph (1), it is stated that the supervision and enforcement of the Code of Ethics are carried out with due regard to the principle of independence of judges and courts to diminish the judge's freedom to examine and decide cases.

In ample literature, it is firmly noted that the independence of the Supreme Court Justices is an indispensable right or, sometimes called, an innate right. The independence of the Supreme Court Justice should not be interpreted as judicial isolation because it has the potential to stimulate public criticism and suspicion. The independence of judges must be seen as a judge's integrity and impartiality. Furthermore, Article 8 of the Joint Regulation on the Code of Ethics explains that this principle makes all judges independent and free from influence, pressure, threats, or inducements from any party.[39] Relationships built by a judicial institution with other institutions, both executive, legislative, and certain groups, must pay attention to the values of propriety so as not to interfere with the independence of judges and courts. This independence is also stated in Article 3 paragraph (2) of Law Number 48 of 2009 concerning Judicial Power that the judiciary is seen as an independent institution and must be free from the intervention of other parties outside the judiciary's power. The independence of the Supreme Court Justices and the Supreme Court as part of the judiciary institution is a means to maintain their

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[38] James E Moliterno, *Global Issues in Legal Ethics*, Global Issues Series (St. Paul, MN: Thomson/West, 2007).

[39] Owen M Fiss, "The Limits of Judicial Independence," *The University of Miami Inter-American Law Review* 25, no. 1 (1993): 57–76.

integrity and independence in decision-making. This condition reaffirms the concept of independence by the judicial power possessed, which is not a kind of judge's isolation but refers to efforts to ensure that the executive or legislative branch carries out no intervention.

As stated in Act Number 48 of 2009 concerning Judicial Power, the significance of the Supreme Court's independence, both institutionally and individually (independence of the Supreme Court Justices), does not necessarily break the respectful relationship between other institutions. Why? This exemplary relationship led to the legal system's performance as a whole. As one of the Supreme Court's authorities, the judicial review process is a part of the authority that must pay attention to legal instruments produced by other Ministries or other agencies. As explained in Article 31 paragraph (1) of Act Number 3 of 2009 concerning the Second Amendment to Act Number 14 of 1985 concerning the Supreme Court, it is stated that the Supreme Court has the authority to conduct a judicial review of regulations that are hierarchically under the Act. Formally, the Act is a legal product produced by the legislative body and the government. At the same time, the existing regulations under the Act are categorized as a legal instrument issued by Ministries and other Government Agencies under Article 7 paragraph (1) and Article 8 paragraph (1) of Act Number 15 of 2019 concerning Amendments to Act Number 12 of 2011 concerning the Formulation of Legislation. Examining the regulatory hierarchy, when the Supreme Court is doing the judicial review, the Act that is the material source must be ensured that it follows the values in the 1945 Constitution. Thus, it is increasingly apparent that the Supreme Court and Supreme Court Justice's independence in bringing out Judicial Review is not interpreted as a kind of esoteric attitude towards other institutions' existence.

The second motive for the Supreme Court's disobedience is different legal norms as a legal basis for judicial review's reasoning. In a judicial review, the Supreme Court Justice's authority is absolute in determining the content of paragraphs, articles, or parts of the Act contrary to a higher the Act, including the essential case experienced by the applicant's plea. However, applying the different legal norms from the CC decision as the legal basis for the Judicial Review decisions breaks the juridical reasoning and is not considered the judge's independence consequence. Referring to Article 53 of Act Number 24 of 2003 concerning the Constitutional Court, it is stated that the Constitutional Court is obliged to notify the Supreme Court that the constitutional review is still underway. According to Article 53 interpretation, the Supreme Court rationally should halt the Judicial Review process until the Constitutional Court delivers a final and binding decision. This judicial review postponement aims to

determine whether the Act used as the legal basis for the judicial review is yet valid or has been annulled by the Constitutional Court.

As a form of parallel integration between the two institutions, this paper argues that with the Constitutional Court's obligation to deliver an official notice on the running of the Constitutional Review process, the Supreme Court should respond promptly. The Supreme Court's response was to temporarily cease the Judicial Review process when the Act used as the legal basis for the Judicial Review was reviewed in the Constitutional Court. Nonetheless, the Supreme Court trial process statute does not set this trial halt. The absence of this regulation can potentially trigger the practice of different regulatory content even within the same legal system. The difference in legal grounds application often triggers the neglection of the Constitutional Court's decision. The Constitutional Court's decision formally can be used by the Supreme Court as a legal basis for decision consideration. This paper supposes that the sectoral ego in the judiciary has led to the inconsistency of the resulting legal judgments. The CC decision, which was legally recognized in the hierarchy of laws, is no longer seen as a unified legal system. This empirical fact is very paradoxical when related to Raz's opinion that every legal system has a common thread that connects one norm with another.[40] In Raz's thinking, every legal norm has an attachment built based on the similarity of values, particularly for legal norms in the same family.

In the climax justification, using different legal norms by the Supreme Court in a judicial review is not mistaken. Nonetheless, to prevent legal mystification, the Supreme Court should remain for the judgment results issued by the Constitutional Court. The spirit of *erga omnes* in the CC decision must also be contemplated by the Supreme Court in re-evaluating the Article's value and meaning, which the Constitutional Court amended. *Ipso facto*, this contemplation can be analogous to the judicial review authority carried out by the Constitutional Court to examine the normative values brought in an Article or the Act as a whole. If the Act's value is expressed to violate the Constitution, then by analogy, the Articles in other Acts containing similar values will still violate the Constitution. In the logic of Raz's legal system, even though a law has independence, they are bound by a basic norm that becomes the tie in the legal system.

The third justification for the Supreme Court's disobedience is averting a legal void. Commonly understood in constitutional theory is that the CC

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[40] Pablo E Navarro, José Juan Moreso, and Jose Juan Moreso, "Applicability and Effectiveness of Legal Norms," *Law and Philosophy* 16, no. 2 (January 30, 1997): 201–19, https://doi.org/10.2307/3505025.

decision is final and binding when enunciated and presently executable. Nevertheless, the application of the CC decision comprises at least two dimensions, *i.e.*, the praxis and the normative dimension. From the praxis dimension, all the CC decisions are self-executing, meaning that the other institutions or agencies do not demand a follow-up to the CC decision that annuls or revises the legal norms. Without waiting for a follow-up from the relevant institutions, the new norm scope formed by the Constitutional Court can immediately turn into legally binding or become a legal basis for decision consideration. Nevertheless, the CC decision allows postponing the binding force and enforceable decision by a specific time limit in particular circumstances. The Supreme Court then interprets the CC decision delay in the binding force as a legal vacuum, so this paper assumes that the legal vacuum is applied as an avenue to provide legal certainty for parties who are undergoing judicial review at the Supreme Court.

The following examination leads to the normative dimension. The Government and The House of Representatives' sluggish response to the CC decision resulted in disobedience. This paper exposes the complicated and tiered law-making process, the complex harmonization phase among regulations, and the significant budget requirement for legislation, making the new norms that should have been corrected ineffective. After the CC decision, the nullified norms are still binding, directing the Supreme Court to generate contradictory judgments. This paper argues that in Fuller's eight principles of legality, one of the essential criteria that become the benchmark for an excellent administering of regulation stands on the publication aspect. At this point, the publication is not only clerking activity and notifying the Act that has been made or revised but also ensuring all legal subjects acknowledge and comprehend that the government or the Legislative body has released the new Act. Concerning this provision, Article 57 paragraph (3) and Article 59 of the Constitutional Court Act denote that the Act's changes because of the CC decision will be registered in the State Gazette and notified to the House of Representatives, Regional Representative Council, The President, and the Supreme Court. Occasionally, this attempt does not make an ideal result when the Constitutional Court has annulled an Act can still be found in other Acts, derivative regulations, or a constitutional review has not yet been underway. This situation potentially leads to incongruity among regulations in the inner legal system.

Limits of Judicial Review Authority in the European Continent: Case Study of Poland, Germany, Italy

Kelsen's view regarding the centralized judicial review model carried out by the Constitutional Court as a traditional judicial branch has spread widely throughout the European Continent.[41] This mechanism can protect and control the applicable legal system so that it follows the mandate of the Constitution. The separation of judicial review powers has quite complex juridical implications for the judicial systems of countries that adhere to civil law. Even though it is structurally separate, this provision can only sometimes guarantee the independence of the Constitutional Court in making decisions, especially when this authority conflicts with the authority of other jurisdictions.[42] It is not uncommon for the Constitutional Court's authority to undergo modifications to find the right place and build good relations with other higher judicial institutions.

The judicial review authority possessed by the Constitutional Court, which Kelsen initiated, wanted to show that there are different legal dimensions to determine the constitutionality of a law.[43] The Constitutional Court should be able to utilize this authority to handle all cases related to the values in the Constitution. Apart from that, the Supreme Court can still conduct a review process on applying ordinary laws. This model of separation of authority began to develop in Austria in 1920 and limits the authority of the Constitutional Court to only carrying out judicial reviews of laws that do not directly regulate the application of legal rules.[44] The constitutional complaints procedure or *verfassungsbeschwerde* or amparo was introduced in Austria on a limited basis.

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[41] Pablo Castillo-Ortiz, "The Dilemmas of Constitutional Courts and the Case for a New Design of Kelsenian Institutions," *Law and Philosophy* 39, no. 6 (2020): 617–55, https://doi.org/10.1007/s10982-020-09378-3.

[42] L Garlicki, "Constitutional Courts versus Supreme Courts," *International Journal of Constitutional Law* 5, no. 1 (October 10, 2007): 44–68, https://doi.org/10.1093/icon/mol044.

[43] Christoph Bezemek, "A Kelsenian Model of Constitutional Adjudication," *Zeitschrift Für Öffentliches Recht* 67, no. 1 (March 10, 2012): 115–28, https://doi.org/10.1007/s00708-012-0127-5.

[44] Michael Holoubek and Ulrich Wagrandl, "A Model for the World: The Austrian Constitutional Court Turns 100," *ICL Journal* 17, no. 3 (September 26, 2023): 251–76, https://doi.org/10.1515/icl-2023-0029.

This authority then developed an incidental review model that allows the review of ordinary laws.

The shift in the limits of the authority of the Constitutional Court, which can carry out judicial review procedures on ordinary laws, creates new problems. The Constitutional Court is no longer within the dimensions of 'pure' constitutionality. Changes in the authority of the Constitutional Court began to develop after World War II, especially with the introduction of various human rights instruments, which allowed the Constitutional Court to take a role in controversial cases. The need to transform the nature and scope of the Constitution occurs because the cases being handled are increasing in number and require more comprehensive answers. However, on the other hand, the text of the Constitution is abstract. The constitutionality case is comprehensive and must be compatible with changes in the country's political, social, and developmental context.

Expanding the scope of the Constitutional Court's authority to examine laws produced by legislative institutions and court decisions has sparked controversy in various countries because it concerns different branches of law. It is not uncommon for the Constitutional Court's decision to be considered to have exceeded the limits of its authority. General courts must be able to identify the impact of decisions made by the Constitutional Court, especially when a law considered unconstitutional turns out to be related to laws in other fields. These conditions then gave rise to tensions between the Constitutional Court and higher judicial institutions in Poland, Italy, and Germany.

Poland has the most established jurisdiction of the Constitutional Court compared to other countries. The Constitutional Court in Poland was established in 1986 with three authority models: abstract review, legal questions asked by administrative judges in dealing with individual cases, and constitutional complaints. This country's main problem is determining the limits of the Constitutional Court's authority to carry out judicial reviews and interpret laws.[45] In judicial review procedures, the Constitutional Court can review ordinary laws and other legal products if they do not follow the Constitution and international law provisions that Poland has approved.[46] In the context of this authority, problems arose because several judges at the

[45] Anna Adamska – Gallant, "Backsliding of the Rule of Law in Poland – a Systemic Problem With the Independence of Courts," *International Journal for Court Administration* 13, no. 3 (December 5, 2022), https://doi.org/10.36745/ijca.474.

[46] Marcin Szwed, "The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights," *European Constitutional Law Review* 18, no. 1 (March 30, 2022): 132–54, https://doi.org/10.1017/S1574019622000050.

Supreme Court refused to implement the decision, declaring the unconstitutionality of the law as a result of an incidental review. They argue that ordinary courts also have the authority to carry out incidental reviews and thus have the right to reject the Constitutional Court's interpretation.

The authority to interpret the law rests with the Supreme Court and the State Administrative Court. Controversy arose when the Constitutional Court began to develop an interpretive decision model that emphasized that disputed provisions would be deemed to remain constitutional when 'understood correctly' according to the current case. Questions arose among the judiciary and other judges about how much they should follow the Constitutional Court's interpretation model. This tension continued until 1996 and 1997, when the Supreme Court openly refused to implement the Constitutional Court's interpretative resolution.[47] This view is based on the mandate of the Polish Constitution, which states that judges are only bound by the law. The Supreme Court then interpreted these provisions to mean they could apply the Constitutional Court's interpretive resolution when the results followed the judge's opinion handling the case. Apart from that, the 1997 Constitution also states that the Constitutional Court can make interpretive decisions. All courts and judges on duty will have the obligation to apply the results of these interpretations when they are deemed to be following the provisions of the court decision. Thus, it is clear that the tensions in Poland result from the blurred authority boundaries between the Constitutional Court and other judicial institutions in carrying out judicial reviews and interpreting laws.

Compared with Poland, the tensions between the Constitutional Court and other High Courts in Italy can be seen more clearly.[48] The Constitutional Court or The Corte Constituzionale does not accept individual applications. Judicial review at the Constitutional Court can only be carried out through a request in the form of a 'legal question' submitted by a general judicial institution when handling a case. This request is generally made to ensure the law's constitutionality is used as the basis of reference in deciding a case. The constitutional court's decision is then considered part of the law in the case. This modification of the Constitutional Court's authority was made because of the awareness that no matter how simple a decision regarding the unconstitutionality of a law is, it will have universally applicable implications. Based on this awareness, the Constitutional Court avoided canceling the law.

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[47] Garlicki, "Constitutional Courts versus Supreme Courts."

[48] John Henry Merryman and Vincenzo Vigoriti, "When Courts Collide: Constitution and Cassation in Italy," *The American Journal of Comparative Law* 15, no. 4 (1966): 665, https://doi.org/10.2307/838371.

The examination of the law's constitutionality, which is carried out using an interpretive approach, means that the Constitutional Court's decision is not absolute but only limited to the issue at issue. Regarding this procedure, there are at least two types of Constitutional Court decisions,[49] namely 'admission' (*sentenza interpretativa di accoglimento*), which means that if read in a certain way, the provision can be considered unconstitutional. Decisions like this still maintain the formal integrity of the law and only provide limited exceptions to interpreting the law. Meanwhile, the second type of decision is 'rejection' (*sentenza interpretiva di rigetto*). This decision explains that the law can only be interpreted this way and is still considered constitutional. In this case, the Constitutional Court limited the most appropriate interpretation model.

Tensions in the judicial review process in Italy occurred between the Constitutional Court and the Court of Cassation. Problems arise when the interpretation issued by the Constitutional Court differs from general court jurisprudence. At the end of 1965, the Supreme Court decided that the Constitutional Court's decision only applied prospectively.[50] The two institutions avoid open disputes. The intersection between the authority of the Constitutional Court and the authority of the Court of Cassation exists in determining the constitutionality of the living law when applied by other judicial institutions. The Constitutional Court can review whether the final decision issued by the Supreme Court still follows the limits set by the Constitution.

The most significant tension between the Constitutional Court and the Italian Court of Cassation occurred in the interpretation of Article 303 of the Criminal Procedure Code relating to calculating the maximum time for preliminary detention. The Constitutional Court believes that Article 303 of the Criminal Procedure Code must be interpreted following the provisions of Article 3 and Article 13 of the Constitution.[51] The Cassation Court could not accept this interpretation and applied it directly to the Constitutional Court. However, because the Constitutional Court had decided, the application was rejected and stated that Article 303 of the Criminal Procedure Code was by the Constitution. Due to this decision, the Cassation Court still refused to follow

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[49] Elisa Rebessi and Francesco Zucchini, "The Role of the Italian Constitutional Court in the Policy Agenda: Persistence and Change between the First and Second Republic," *Italian Political Science Review/Rivista Italiana Di Scienza Politica* 48, no. 3 (November 12, 2018): 289–305, https://doi.org/10.1017/ipo.2018.12.

[50] Garlicki, "Constitutional Courts versus Supreme Courts."

[51] Monika Florczak-Wątor, *Judicial Law-Making in European Constitutional Courts* (London: Routledge, 2020), https://doi.org/10.4324/9781003022442.

the Constitutional Court's interpretation. The Court of Cassation believes that the Constitutional Court's interpretive decision only has a determinative statement for the reference case and that this mechanism does not have erga omnes implications. For this reason, in other cases, following Article 101 paragraph (2) of the Constitution, judges have the duty and authority to interpret the contents of legal norms independently. Thus, the tension between the Constitutional Court and the Court of Cassation in Italy can be seen from the contextuality of the Constitutional Court's decision, which was initially intended to avoid a widespread and universal impact but, in the end, became a boomerang and limited the reach of the Constitutional Court's decision.

Next, a third country that provides a comparative example in analyzing tensions between the Constitutional Court and other judicial institutions can be seen in Germany.[52] The Bundesverfassungsgerich was the first Constitutional Court established after the war. It marked the existence of a judicial review process in Germany. When this institution was formed, Germany had at least five judicial branches. Compared to Austria and Italy, Germany gives stricter authority to the Constitutional Court because it is considered the guardian of the supremacy of law. Individuals can invoke the judicial review procedure in Germany to review the final decision of a special court.[53] The authority of the Constitutional Court continues to expand and strives to maintain its independence from the executive branch and the Supreme Court. The problem arises because there are no limits to the Constitutional Court's authority written in the Constitution.

The German Constitution only states that the duties of the Constitutional Court are related explicitly to constitutional law and its review of law-making eels in completing trials in some instances. Meanwhile, other judicial institutions believe the Constitutional Court should act as something other than a superrevisionsgericht court. This view arises because the Constitutional Court's authority can be used to assess whether there is arbitrariness in jurisprudence regarding facts—the judge. However, only a few complaints have been successful because this process can stop the general trial and act like a cassation court. Based on the authority of the Constitutional Court, other branches of the judiciary refused to follow the Constitutional Court's decision even though the refusal was carried out calmly. However, the problematic tension between branches of the judiciary in Germany has arisen due to the overpowering of the Constitutional Court in this country.

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[52] Rudolf Streinz, "The Role of the German Federal Constitutional Court Law and Politics," *Ritsumeikan Law Review* 31, no. 1 (2014): 95.

[53] Garlicki, "Constitutional Courts versus Supreme Courts."

Designing Argumentative Solution

By observing the previous description, this paper offers two reasonable proposals to end the tension between the two judicial institutions. The first solution tends to be provisional so that it can be implemented instantly, namely through a Memorandum of Agreement (MOA). Suppose we look at the reasoning disobedience of the previous Supreme Court, especially the publication procedures carried out by the Constitutional Court on the constitutional review's result. In that case, it appears that the submission of the Constitutional Court's decision to the executive branch, legislative body, and judicial institutions is still not effective enough to be followed up and obeyed by all its legal subjects. Article 59 of the Constitutional Court Law implies that the active obligation to submit decisions to other institutions rests solely on the Constitutional Court's shoulders. On the opposite, this publication procedure is not reciprocal to the Supreme Court's decision. The active publication by the Constitutional Court is due to an order from the elucidation of Article 10, Paragraph (1) of the Constitutional Court Act, which states that the CC decision is final and binding. However, this concept is slightly different from the publishing mechanism for the constitutional review result conducted by the Constitutional Court of Austria, where the history of the constitutional court began. Apart from the constitutional court itself, the executive and legislative bodies are also responsible for actively conveying the CC decision to the public. Hence, it can be ensured that there is an understanding and coordination between institutions regarding the change in norms carried out by the Constitutional Court. The Constitutional Court of Spain has a similar problem. Impediments in implementing the decision issued by the Constitutional Court became a legal issue that was considered influential and could underlie the juridical revolution carried out to strengthen the Constitutional Court's role.[54]

This paper argues that the Supreme Court's disobedience to the CC decision indirectly impacts the strengthening of the institutional ego that hinders regulatory synchronization and leads to the existing legal system destruction. The sectoral ego in these judicial institutions has succeeded in making the Supreme Court and the Constitutional Court look like two institutions separated based on judicial independence. This paper argues that the two institutions' agreement will indirectly guide that the Supreme Court's

[54] Enrique Álvarez Conde, "La Ejecución de Las Resoluciones Del Tribunal Constitucional. ¿Un Cambio de Modelo de Justicia Constitucional?," *Revista de Derecho Político*, no. 101 (January 31, 2018): 661–701, https://doi.org/10.5944/rdp.101.2018.21975.

decision naturally follows the CC decision. However, the Supreme Court's inquiry to wait for the Constitutional Review results before conducting a Judicial Review based on the same Ac has been weakly hinted at through the recent Constitutional Court Act. In this issue, the absence of the two judiciary understanding leads to the institutional ego that dominates the occurrence of decision inconsistencies in Indonesia because this kind of procedure is not contained in the Supreme Court Act. On behalf of legal consistency and certainty, this paper emphasizes the understanding necessary that the Constitutional Court's decision, which will be a reference for the Supreme Court, is not only what is textually interpreted as what the Constitutional Court has annulled the Article or the Act, but what values are considered by the Constitutional Court to have been violating the Constitution. As a concrete action on this MOA, the substance of this agreement can be stated by the Supreme Court through the issuance of a Supreme Court Circular regarding Judicial Review Procedures on the Plea Object, which the CC decision has decided. This agreement can prevent other legal bases' utilization and the Supreme Court's disobedience over the CC Decision.

This paper assumes that cooperation, consolidation, and perception equalization between institutions, both among judicial institutions and judicial institutions with the executive and legislative branches, are necessary to revive the dignity of the 1945 Constitution of the Republic of Indonesia. This agreement is expected to build the two judicial institutions' awareness hence that legal certainty and regulatory consistency in the Indonesian legal system are always maintained. Compared with other experiences, coordination and integration between executive, judicial, and legislative branches also occur in the US. Although the Supreme Court has the authority to undertake the Constitution interpretation, it is not uncommon for the executive to take part in its considerations. This experience can be seen in the conditions of the judicial review process on political content, such as those contained in foreign policy. However, all institutions in the US are aware that the final decision will be the authority of the Supreme Court.

Another example of the importance of inter-agency compliance can be seen in Brazil. After its independence, the Brazilian Constitution in 1890, as the first republican Constitution, provided room for all courts to declare unconstitutionality under the rule of law. In the hierarchy of applicable regulations, the federal Constitution is the highest law, which then becomes the

basis for the formation of statutes and administrative-legal acts.[55] Each court can decide whether an Act is unconstitutional when a case arises due to its implementation. However, in its development, the implementation of the hybrid system in the judicial review process in Brazil has given special authority to the STF to undertake its duties. Violations of the judicial review authority have at least come from the Senate, the president, and the military. In 1934, a Direct Action of Unconstitutionality Intervention (*ação direta de unconstitucionalidade interventiva*) could be carried out by the Senate to solve federal problems. Then, in 1937, under the authoritarian regime of Getúlio Vargas, two-thirds of the congressional votes overturned the STF's ruling. After that, the intervention from the military that occurred in 1964 also strengthened the immunity of military institutions. The STF cannot take judicial proceedings against the military government's actions.

The strengthening of the legal umbrella for the STF as enshrined in the Constitution, is a legal avenue for the government to ensure that the dark history of inhibiting democracy is not recurring. The government carried out reforms to strengthen the judiciary's role by giving special authority to the STF to conduct judicial reviews. Although all courts can conduct concrete judicial reviews, only the STF has the authority to conduct an abstract judicial review (*ação direta de unconstitucionalidade*-ADI) and declare that unconstitutional laws are no longer valid.[56] Strengthening the legal umbrella for the nature of the STF's decisions, which are erga omnes, ex-tunc, and binding on all courts and branches of the executive branch, is a mandate from the 1946 constitution or amendment 16/1965. After that, based on the 1988 constitution, the STF also has the authority to conduct a judicial review of the ongoing legislative process. Experience from the development of the judicial review process in Brazil can show the importance of strengthening the legal framework that states the strength of judicial review decisions. Amendments to the Constitution have ensured that STF decisions can bind all judicial, legislative, and executive institutions (*súmula viculante*). All institutions must comply with these authorities without eliminating the separation of powers.

No less important, apart from establishing an understanding through an agreement, the two judicial institutions' understanding is expected to return to

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[55] Luis Otavio Barroso da Graca, "Judicial Review of the Legislative Process in Brazil," *UCL Journal of Law and Jurisprudence* 7, no. 1 (July 8, 2018): 55–81, https://doi.org/10.14324/111.2052-1871.096.

[56] Marcus Flávio Horta Caldeira, "Concentrated Judicial Review in Brazil and Colombia: Which (or Whose) Rights Are Protected?," *Revista de Investigações Constitucionais* 7, no. 1 (July 8, 2020): 161–87, https://doi.org/10.5380/rinc.v7i1.69583.

the spirit of the 1945 Constitution as the foundation for all applicable laws in Indonesia. Compliance with the Constitution's objectives is a logical choice to maintain the consistency of intertwined norms within the same legal system. Through this agreement, both judicial institutions are required to be conscious that the new norms because of the Constitutional Court and the Supreme Court review have the same legal strength as other legal norms, as stated in Article 8 of Act Number 15 of 2019 concerning Amendments to Act Number 12 of 2011 concerning the Formulation of Legislation.

The second solution considered permanent is through the revision of the Constitutional Court Act. Several crucial issues that are weak points in the Constitutional Court Act need to be reformulated adequately. The first revision's essence is to affirm the CC decision position and legal status in the existing norm hierarchy. At the theoretical level, no one denies that the new norms resulting from constitutional review and judicial review have the same legal force as other legal norms. However, as a follow-up to this recognition, there are no provisions in normative law that clearly explain the position of the Supreme Court and Constitutional Court decisions in the hierarchy of laws and regulations. For some countries that adhere to the judge-made law tradition, the judge's decision is the law. However, this situation is quite different from Indonesia, which does not adhere to this tradition. Based on this acquaintance, further explanation concerning the CC decision position and execution is required, which authoritatively has the highest sovereignty in conducting reviews in the Indonesian hierarchy of laws.

This paper argues that if the strengthening of the CC decision status and legal position has been regulated in the Constitutional Court Act revision, this revised provision becomes the ground for the Supreme Court's obligation to comply with the CC decision in conducting Judicial Reviews and issuing other regulations. Why is the issue of status and position significant? This paper considers that the root problems that arise in the normative system logic lead to legal gaps that occur due to the absence of the CC decision position, primarily the CC decision in the hierarchy of laws that are not assumed to be positive law.[57] This legal gap can trigger the silence of law, where the law does not provide a complete statement over legal questions.[58] The emergence of

[57] Pablo E Navarro and Jorge L Rodriguez, *Deontic Logic and Legal Systems* (New York: Cambridge University Press, 2014), http://ebooks.cambridge.org/ref/id/CBO9781139032711.

[58] Anne-Marie Ho Dinh, "Le « vide juridique » et le « besoin de loi ». pour un recours à l'hypothèse du non-droit," *L'Année sociologique* 57, no. 2 (February 6, 2007): 419, https://doi.org/10.3917/anso.072.0419.

uncertainty must distinguish genuine legal gaps caused by unclear legal concepts and excessive legal decisions. The legal system is considered to have legal gaps when it does not provide any statement on the normative status of a particular act.[59] Usually, this arises because the action is not regulated in the legal system. An illustration of the legal gap's existence, which triggers the silence of law, defines when there is a 'positive permit' in the legal system but no supporting legal norms that communicate what must be accomplished or what an institution may be allowed to do. Analogously, in this context, the Constitutional Court received positive permission to undertake the constitutional review, but no further regulations explained the position of the decision.

What has been explained previously is actually tied to the discussion of Leibniz's deontic logic, where he formulated legal modalities (*iuris modalia*) into obligations (*debitum*), permission (*licitum*), prohibitions (*illicitum*), and the facultative (*indifferentum*).[60] The logical consequence of the formula 'what is not forbidden is allowed' becomes a tautology of 'what is not forbidden, is not prohibited.' This statement forms the basis of a more substantive deontic logic. Meanwhile, for Bulygin, the absence of a prohibition is not the same as granting a permit in a normative system. Further information is needed on whether there is a permit or prohibition textually contained in positive law. Therefore, in Bulygin's premise, the P- operator of deontic logic refers to 'permissory' rather than 'permission'. This deontic logic concept can serve as a bridge to analyze the position of the CC decision in the hierarchy of law, primarily when determining the CC decision cannot find credible information regarding this circumstance textually in Act Number 15 of 2019 concerning Amendments to Act Number 12 of 2011 concerning the Formulation of Legislation.

Furthermore, according to Bulygin's analysis, a permit must be expressed with the right logic, not just based on the omission of the provision that prohibits it. This condition will affect the permissibility that is strong and weak. We can see problems between promissory norms and legal gaps by considering normative prepositions. If S is the legal system and A is an obligatory action, [61] then:

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[59] Navarro and Rodriguez, *Deontic Logic and Legal Systems.*

[60] Eugenio Bulygin, *Essays in Legal Philosophy* (Oxford University Press, 2015), https://oxford.universitypressscholarship.com/view/10.1093/acprof:oso/9780198729365.001.0001/acprof-9780198729365.

[61] Bulygin.

(1) S: O¬A
turn into,
(2) S: FA

By referring to the prepositions (1) and (2), it is stated that in a system S, the action of A is prohibited (forbidden). In contrast to the permissibility of A against S, which is not in the condition that S prohibits A's actions;

(3) ¬ (S:FA)

Moreover, if to express that A is allowed by S, then:

(4) S: ¬FA

Thus, there is no difference between the external and internal negation of the preposition with this model. If we assume form (3) as weak permissibility and (4) as a form of strong permissibility, then there is no difference between the two forms, so there cannot be legal gaps. If not in the case of S, action A is prohibited, then according to S, action A is permitted. If S is a set of norms and (3) is equivalent to (4), then:

(5) ¬ (FA ∈ S) ↔ (PA ∈ S)

where according to deontic logic standards, it is equivalent to:

(6) ¬ (O ¬ A ∈ S) ↔ ¬ O ¬ A∈S

Bulygin's deontic logic formulation can be a legal avenue to understanding the fundamental difference between granting permission and the absence of prohibitions written in it. The actions supported by the permissory norms in a system of norms can be distinguished from unregulated actions. In other words, the positive permission is displayed to the right side of the prepositions (5) and (6) does not follow the form 'S does not prohibit A'. If A is not permitted in the system (A is weakly permitted), adding PA to S will change S and its normative order without compromising any obligation norms. This formula can be seen when considering a normative order with several hierarchically organized authorities. As a reference for analyzing the CC decision position in the hierarchy of laws and regulations, Bulygin's deontic logic invites an in-depth examination of the basic legal reasoning on the judicial review authority by the Constitutional Court and the implications of this authority. Hierarchically, the 1945 Constitution as the Constitution of the Republic of Indonesia occupies the highest hierarchy in the current legal system. At the same time, the Act is in the second position in the hierarchy. Thus, although the Act of Establishment

of Legislation does not reveal the CC decision position in the hierarchy, it can be said that Bulygin's deontic logic has justified that the CC decisions have the same legal status or position as the Act. The self-executing of the CC decision portrays robust evidence that the decision is the same as the Act. The legislative body authorized to make laws does not need to follow up on the CC decision, which changes the law content. The declaratory of the CC decision indicates that the decision has a similar legal position to the Act, which is underway in the review. Concomitant with Bulygin's deontic logic analysis over the CC decision, the legal position in the hierarchy of legislation indicates that the CC decision is considered weak. Revision of the Constitutional Court Act is immediately required to strengthen the Constitutional Court by mandating positive law-making that contains textually regarding the CC decision's legal position and the obligation for other legal subjects to obey the CC decision.

The second substance of the revision is the Constitutional Court's procedural law, primarily relating to the execution of decisions to support the effectiveness of the constitutional review enforcement. By observing internal regulation, the Constitutional Court's procedural law has been regulated, but this procedure is only regulated through internal regulation. In the administrative law doctrine, this Constitutional Court's regulations regarding judicial procedural law are classified as administrative actions that are internally regulatory and cannot be imposed externally. Ideally, this procedural law should be attached or embedded in the substance of the Constitutional Court Act's revision. Particularly concerning the execution of the CC decision, this paper encourages it to be firmly regulated. Hence, in the future, there will be no more gaps for the Supreme Court or other institutions to interpret the CC decision in the opposite order. The Constitutional Court's procedural law in Austria is obviously visible to regulate and explain the CC decision execution. In Austria, this non-self-executing CC decision requires the Government and the Legislative Body to revise or make a new law to conform to and be in line with the essence of the Austrian Constitution for a maximum of 18 months.[62] A similar situation also occurs in Germany, where the enforcement of non-self-executing CC decisions imposes the burden on the government to make new laws or revise laws that have been revoked. Although there is no time limit for

[62] Johannes Schnizer, "National Report Prepared for the XVth Congress of the Conference of European Constitutional Courts by The Austrian Constitutional Court," in *The XVth Congress of the Conference of European Constitutional Courts*, 2011, https://webcache.googleusercontent.com/search?q=cache:hkaDEGiNr2EJ:https://www.confeuconstco.org/reports/rep-xv/AUSTRIA%2520eng.pdf+&cd=1&hl=en&ct=clnk&gl=id.

amendments or making new laws in Germany, in general, the government and other official institutions always comply with the CC decision.[63] The Federal Constitutional Court (*Bundesverfassungsgericht*) expressly states that a decision that cannot be contested based on a law declared null and void is still not valid with the provisions of other laws and regulations.[64] Following the rules of appropriateness[65] in a democratic system that is mostly adopted by countries today, obeying the court's decision, primarily the CC decision, indicates that enforcement of the CC decision enforcement should be an essential reference in implementing a decent system of norms.

Progressing from the substance of the Constitutional Court Act's revision previously, this paper proposes a solution through 'sanctions,' which is possible by issuing a separate law, the Contempt of Court Act. This Act will closely align with the sanctions given to people who do not comply with court decisions. In this context, sanctions can also conceivably be given to Supreme Court Justices who deliver decisions or make internal regulations, such as Supreme Court Circular and Supreme Court Regulation, contrary to the CC decision values. A moral obligation of judicial officials to be faithful to the Constitution would prohibit deviations from the written Constitution. Although the Supreme Court Justice has the principle of independence attached to them when sentence-making and the Supreme Court has the authority to make internal regulations, this does not mean that they must override the obligation to conform with a valid constitutional value. As regulated in the Establishment of Legislation Act, the legal validity is applied according to the hierarchy based on higher laws or their authority. This provision implies more than one moral obligation that judges have when carrying out their assignments. According to Seidman, "a morally responsible person is sensitive to the 'secondary' obligations that follow from an obligation's being overridden."[66] Every judge is bound by moral values that must be upheld in carrying out their responsibilities.

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[63] Maartje de Visser, *Constitutional Review in Europe : A Comparative Analysis* (bloomsbury: Hart Publishing, 2014).

[64] Gertrude Lübbe-Wolff, Rudolf Mellinghoff, and Reinhard Gaier, "National Report Prepared for the XVth Congress of the Conference of European Constitutional Courts by The Federal Constitutional Court of Germany," in *The XVth Congress of the Conference of European Constitutional Courts*, 2011, 47.

[65] James G March and Johan P Olsen, "The Logic of Appropriateness," in *The Oxford Handbook of Political Science* (Oxford : Oxford University Press, 2007, 2011), https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199604456.001.0001/oxfordhb-9780199604456-e-024.

[66] David Lyons, "Reason, Morality, and Constitutional Compliance," *Boston University Law Review* 93, no. 1381 (2013): 1381–88.

Then, in this situation, the Supreme Court Justice has a moral obligation to comply with the values contained in the Constitution and his compulsory obligations as a Supreme Court justice. Relate to the Constitution compliance, *mutatis mutandis*, and it is appropriate that there should also be an obligation to comply with the CC decision value as to the guardian of the Constitution in Indonesia.

Furthermore, the final solution is permanent and long-term, i.e., enhancing and harmonizing the prevailing norms. Various legal systematic problems related to numerous laws and regulations in Indonesia are considered praxis evidence that cannot be avoided. The overlapping of laws and regulations, differences in regulatory standards, and the emergence of conflicts between laws and regulations or at the level of norms, often called norm conflict, sometimes becomes an acute problem. One of them is an irresolvable norm or unresolved norm conflict. Norm conflict occurs when one norm causes a violation of another norm.

Meanwhile, Jeutner called this unresolvable norm conflict a "legal dilemma." Referring to Jeutner's proposition, this situation occurs when an actor faces an unresolvable and unavoidable conflict between at least two legal norms, so complying with or applying one norm always requires an undue reduction from the other.[67] Lindroos calls norm conflicts to become "dangerous conflicts," particularly when those cannot be resolved. These types of 'dangerous conflicts' include apparently independent normative orders, sub-regimes, or areas of law that are difficult to resolve. The system is only threatened by conflicts that cannot be resolved, in other words, by conflicts involving different sub-regimes or normative orders, such as conflicts between human rights law, environmental law, trade law, constitutional law, or the law of the sea. Only these 'dangerous conflicts,' which are challenging to resolve in a fragmented legal order, can create uncertainty and inconsistency and threaten the coherence of the legal system.[68]

This paper argues that the irresolvable conflict of norms, as in many cases in Indonesia, is caused by the layering of law as a character of a mixed legal system. In the context of legal functions, the emergence of conflicting norms has the potential for failure to achieve one or more of the objectives of the law,

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[67] Samantha Miko, "Norm Conflict, Fragmentation, and the European Court of Human Rights," *Boston College Law Review* 54, no. 3 (2013): 1351, https://lawdigitalcommons.bc.edu/bclr/vol54/iss3/18.

[68] Anja Lindroos, "Addressing Norm Conflicts in a Fragmented Legal System: The Doctrine of Lex Specialis," *Nordic Journal of International Law* 74, no. 1 (June 9, 2005): 27–66, https://doi.org/10.1163/1571810054301022.

including social control, conflict resolution, social change, the preservation of individual rights, and the expression of social values. Norm conflicts in dispute resolution through the courts give rise to dilemmas of choice and prioritizing norms. The civil law tradition, the dominant layer of the Indonesian judicial system, provides space for judges to interpret statutory regulations, where this situation possibly neglects previous court decisions. Therefore, judges have the freedom to interpret the laws and regulations, which may differ from the interpretations that other judges in similar cases have made. In dealing with conflicts of norms, judges allow different legal considerations, even giving birth to different legal meanings in social practice. Legal norms become unclear, so they do not provide definite guidelines for social behavior. In public policymaking, this conflict of uncertain norms weakens development innovation and government dynamics and even thwarts legal goals for social change. This irresolvable norm conflict cannot reach an end unless reviewed by the legislature (legislative review) and the government. In the long term, the successful regulation's synchronization and harmonization, either vertical or horizontal, apart from reducing conflicting norms, leads to lessening the Supreme Court's decision and the Constitutional Court's distortions. This effort also unravels the tangled threads of law cases, provides legal certainty to citizens, and fulfills constitutional guarantees for every citizen. Lastly, through this final solution, it is expected that there will be an active effort from the government to synchronize and harmonize regulations that exist in the circle of the system of norms.

Conclusion

This paper evaluates that many regulations, coupled with the legislative process formulated without cautious planning and tiered harmonization, often create conflicts that lead to the Supreme Court's disobedience. This paper finds that several legal reasons are occasionally utilized by the Supreme Court to ignore the substance of the CC decision. This situation is a precarious alarm to the sustainability of the system of norms, public justice, and the development of Indonesian democratization. Several solutions need to be implemented immediately to end the tension between the two judiciaries. A short-term solution can be reached by implementing an MOA between the two judiciary institutions. This paper offers a permanent solution for legal certainty by revising the Constitutional Court Act and harmonizing regulations, either vertically or horizontally.

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