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Obedience to Constitutional Court Decisions: Constitutional Obligations and Moral Obligations of Legislators

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Abstract

It is stated in the constitution that the Constitutional Court is the court of first and last instance whose decision is final. Problems arise when the Constitutional Court's decision requires follow-up to make it happen and other institutions follow up on it. This research is normative research that examines compliance with the Constitutional Court's decision as a constitutional obligation to legislate and a moral obligation to legislate using a conceptual approach. The results of this research show that non-compliance with the Constitutional Court's decision is a form of disloyalty and defiance of the constitution itself or what is referred to as constitutional disobedience. In addition, with the consideration that the Constitutional Court is a negative legislature, there are no special enforcement agencies, and there are no juridical consequences for ignoring the Constitutional Court's decision. Thus, the application of Lawrence Kohlberg's 4 moral orientations must be put forward as fulfilling moral obligations. This research concluded that obedience to the Constitutional Court decisions is not only a constitutional obligation for legislators but also a moral obligation for legislators.

Keywords: constitutional court, constitutional obligation, constitution disobedience, moral.

Introduction

Aside from being free beings, humans are creatures that always live together. That shared life flows from human nature as social beings. J. J. Rousseau arrived at the idea of a social contract that from the very beginning of his life, humans were good, and their lives were happy. Nevertheless, in its development, when the number of people increased and when humans with their minds began to demand personal rights, conflicts of interest, violence, and even war began. Therefore, humans must make agreements so that the original state is maintained. This agreement (social contract) was born from general will (*volonté generale*) to restore and maintain that original state. This general will is embodied in state and state institutions into a *corpus moralist* and collective or *personne publiciqué*. In Rousseau's view, the state is good when it reflects the people's sovereignty. The sovereignty of the people is nothing but the implementation of the general will (Piter & Saeng, 2021). According to Rousseau, the general will is the only entity (which is moral and abstract) that has power in the state because the purpose of the general will



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is the common good. General will in the later phase was transformed into a new concept, namely sovereignty. The basis of a state's sovereignty is its people's general will. This sovereignty is the sole executor of the general will; thus, because it originates from the general will, it cannot be transferred or divided (Basri, 2019). The principle of people's sovereignty is one of the main pillars of the state so that the formation of laws in a country may not violate the people's sovereignty. People sovereignty was used as one of the considerations of the Constitutional Court judges in deciding the formal review case against Law Number 11 of 2020 concerning Job Creation (Job Creation Law) in Decision Number 91/PUU-XVIII/2020 (Mahkamah Konstitusi RI, 2021).

Job Creation Law has gone a long way since it was enacted and submitted for a judicial review until it was declared conditionally unconstitutional by the Constitutional Court. As if that was not enough, at the end of the year, the Government issued Government Regulation in place of Law Number 2 of 2022 concerning Job Creation (PERPPU Job Creation). PERPPU Job Creation was declared an "unwanted year-end gift," (Sujatnika, 2023) and Bivitri Susanti, an expert on constitutional law, stated it was a form of government deceit (Suryana & Raharjo, 2023). The decision of the Constitutional Court Number 91/PUU-XVIII/2020, one of which orders the legislators to make improvements within a maximum period of 2 (two) years since this decision was pronounced, and if within this period, no corrections are made, then the Law -Law Number 11 of 2020 concerning Job Creation becomes permanently unconstitutional. It was declared to suspend all actions/policies that are strategic and have broad implications. It is also not justified to issue new implementing regulations related to Law Number 11 of 2020 concerning Job Creation (Mahkamah Konstitusi RI, 2021). Instead of taking corrective steps, the Government has issued PERPPU Job Creation, which in the Consideration Section letter f states that in order to implement the Constitutional Court Decision Number 91/PUU-XVIII/2020, it is necessary to make improvements by replacing Law Number 11 of 2020 concerning Job Creation followed by the provisions of Article 185, which stipulates that with the enactment of this Government Regulation in place of Law, Law Number 11 of 2020 concerning Job Creation is repealed and declared no longer valid.

It is stated in the constitution that the Constitutional Court is the first and last level of the court whose decision is final. It is reaffirmed in Article 10 of Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court that the meaning of the final nature of the Constitutional Court's decision also includes binding force. This means that the Constitutional Court's decision immediately obtains permanent legal force from the moment it is pronounced, and no legal remedies can be taken. Problems arise when the Constitutional Court's decision requires follow-up to make it happen and other institutions follow up on the decision. The final and binding power of the Constitutional Court's decision cannot be implemented concretely (non-executable) and only floats (floating execution) (Maulidi, 2017).

Previously, in 2014, Law Number 17 of 2014 was issued concerning the People's Consultative Assembly, the People's Representative Council, the Regional Representative Council, and the Regional People's Representative Council (MD3 Law) as a substitute for Law Number 27 of 2009 the People's Consultative Assembly, the People's Representative Council, the



Regional Representative Council, and the Regional People's Representative Council (UU 27/2009), which were formed after the Constitutional Court Decision No. 92/PUU-X/2012. As an interpreter of the constitution, the Constitutional Court Decision No. 92/PUU-X/2012 has restored the true meaning of the legislative function in the 1945 Constitution. However, the replacement law for Law 27/2009, namely the MD3 Law, still contains provisions in articles that reduce, negate, or even erode constitutional authority, as Constitutional Court emphasized. Even in establishing the MD3 Law, there have been procedural flaws. The founders of the MD3 Law did not appreciate and respect the Constitutional Court's decision No. 92/PUU-X/2012. This means that the Constitutional Court, which was given the mandate of the 1945 Constitution as an interpreter of the constitution and guardian of the constitution, essentially contains the soul of the constitution and contains the findings of constitutional law theory (constitutional jurisprudence). Not respecting, complying with, and implementing the Constitutional Court's decision shows defiance of the decision of the state institution appointed by the constitution to guard the purity of constitutional implementation, namely the Constitutional Court, and against the constitution itself (Widiarto, 2016).

Many researchers have studied the study of ignoring the Constitutional Court's decision. Among other things, Aan Eko Widiarto found that legislators should adhere to self-respect or self-obedience. The meaning contained in this principle is that state administrators must respect the Constitutional Court's decision because there is no known coercive effort directly through bailiffs, as is the case in civil law procedures (Widiarto, 2016). Furthermore, Rifai Rofiannas found that the departmentalist stance taken by the Supreme Court by issuing a Supreme Court Circular as a response to the Constitutional Court's decision which substantively constituted a disregard for the Constitutional Court's decision, could not be justified (Rofiannas, 2017). More than that, Novendri M. Ngilu found 1) there was a form of disobedience to the decisions of the Constitutional Court either by reviving articles that had been canceled by the Constitutional Court or even defiance of the decisions of the Constitutional Court through court decisions within the Supreme Court; 2) disobedience to the Constitutional Court's decision results in legal uncertainty resulting in a constitutional justice delay; 3) alternative sanctions that can be imposed on parties who disobey the Constitutional Court's decision are contempt of court sanctions through expanding the meaning of contempt of court, or by imposing *dwangsom* or forced money (M. Nggilu, 2019).

This research is a continuation of previous studies that have not examined the disregard for the Constitutional Court's decision from a moral perspective. Academics from the Islamic University of Indonesia stated, "The issuance of this Perppu on Job Creation has harmed relations between state institutions, namely between the President, the Parliament, and the Constitutional Court. The President does not respect the Constitutional Court's decision and at the same time does not respect the Parliament as the constitutional institution." (Wardhana, 2023). As Rousseau explained, the constitution or basic laws approved in a social pact must be obeyed by all citizens. A country's constitution contains guidelines for the life of the nation and state, including Government (Wijaya, 2016). Concerning relations between state institutions through a check and balance mechanism, the Constitutional Court is guarding the implementation of the 1945



Constitution carried out by the Government (Robuwan, 2018). Furthermore, in the teachings of morality, those who do not behave according to the agreement in the social contract will be considered deviant. In contrast, those who adhere to the principles outlined in the social contract will be considered reasonable (Aprita & Adhitya, 2020).

This research was conducted based on the argument that obedience to the Constitutional Court's decision is a manifestation of constitutional obligations and the moral obligations of legislators as the opinion of Professor of Agrarian Law Maria S.W. Sumardjono in response to the Government's actions after the Job Creation Law was declared unconstitutional, which issued various regulations related to Agrarian Reform, which were directly or indirectly the implementing regulations of Job Creation Law. Maria S.W. Sumardjono thinks that whatever policy is made, it should be carried out by respecting and complying with the Constitutional Court's decision as a manifestation of the Government's constitutional and moral obligations (MR, 2022). For the Constitutional Court, the meaning of the constitution is not just a set of fundamental norms but also in terms of constitutional principles and morals, including the principles of a rule of law and democracy, protection of human rights, and protection of citizens' constitutional rights. This function is carried out by the Constitutional Court through its authority, namely examining, adjudicating, and deciding certain cases based on constitutional considerations. Thus, every decision of the Constitutional Court interprets the constitution (Triningsih et al., 2022). Furthermore, Michael B. Likosky argues that obedience to the rule of law is due to one's moral reasons. The moral obligation to comply with the law is based on several standards, including the moral duty to support institutions in earnest (an argument that applies if the legal system is just). Disobedience to the law, according to Ronald Dworkin, has 2 (two) different dimensions, namely defiance because the law is considered and felt to be contrary to one's conscience (conscientious disobedience) and defiance because of an attitude of disregard for the law (lawlessness) (Wijayanti & Pasaribu, 2020).

This research is normative or doctrinal research or dogmatic research examining obedience to the Constitutional Court's decision as a constitutional obligation and a moral obligation to legislators using a conceptual approach (Marzuki, 2005). Legal materials are classified into two, first primary legal materials in the form of laws and regulations and secondly secondary legal materials in the form of views of experts or doctrines obtained from legal articles from legal journals or books related to the issues raised (ND & Achmad Yulianto, 2007).

Obedience to Constitutional Court Decisions as Constitutional Obligation

Looking at the Constitutional Court's decision is categorized into the type of constitutive *declaratoir* decision. *Declaratoir* means a decision where the judge states what is the law and does not carry out the punishment. This can be seen in the verdict on the review of the law, which states that the contents, paragraphs, articles, and/or parts of the law do not have binding legal force. Constitutive means a decision stating the absence of a legal condition and/or creating a new one. In contrast to the nature of a *condemnatoir* decision, it is a decision that can be implemented, namely a decision that contains punishment, in which the losing party is punished



for doing something. Therefore, the decision automatically creates a new legal situation after the Constitutional Court's decision declaring a law is not binding due to contradiction with the Constitution (Prang, 2011).

Since the Constitutional Court's decision was pronounced before a hearing opened to the public, it can have 3 (three) powers, namely 1) binding power, 2) evidentiary power, and 3) executorial power. This type of decision power is known in the theory of civil procedural law in general, and this can be applied to the procedural law of the Constitutional Court. The binding power of the Constitutional Court's decision, in contrast to ordinary court decisions, does not only cover the parties to the litigation, namely the Petitioner, the Government, the Parliament/the Senate, or related parties who are permitted to enter the case, but the decision is also binding on all people, state institutions and legal entities within the territory the Republic of Indonesia. It applies as law as legislators create law. Constitutional Court judges are said to oppose legislators whose decisions are *erga omnes*, aimed at everyone. Unlike the Supreme Court decision, which is *inter partes* and only binds the parties to the dispute (Prang, 2011).

In the judicial tradition that has developed for a long time, a decision must have binding nature or power because this is related to the absolute authority of the judiciary, which has the power to make judgments. Of course, it is not helpful if a decision that the process of making sometimes requires a very long and tiring time but, in the end, does not have binding legal force; the result is just a waste (Indrayana & Mochtar, 2007).

The problem at the level of implementation/execution of decisions like this often plagues the Constitutional Court because there is no executorial institution for such court decisions, and there is no threat of severe sanctions if organ decisions are not carried out. So far, the implementation of the Constitutional Court's decisions has only relied on cooperation/good relations between the Constitutional Court as a judicial institution and the law-forming organs (the Parliament and President), as well as the law-executing organs (government). Suppose there is no goodwill from the three organs, which are affected by the implication of the issuance of the Constitutional Court's decision, of course. In that case, the Constitutional Court's decision will only be in vain, or it will become a paper tiger with no implementation power. Indeed, according to the view of several jurists, the judicial branch is the weakest of the three existing branches of power. Therefore, its authority is only a matter-of-fact decision. The rest is to execute the decisions issued, and the judicial organ requires intervention from the executive to become the executor (Indrayana & Mochtar, 2007).

In addition to the factor of the absence of special enforcement agencies above, the Constitutional Court's decision has not been consistently implemented due to several factors, including:

a) Constitutional Court as Negative Legislature

Since its inception, the Constitutional Court has only been given a constitutional task to review legislative products with the touchstone of the constitution as the supreme law. The Constitutional Court has the authority to annul laws or declare laws not legally binding as an external control in the legislative process. The limited and weak authority of the Constitutional Court certainly influences the follow-up of its decisions. In general, the nature of court decisions



can be classified into three types: *declaratoir*, *constitutief*, and *condemnatoir*. The verdict is said to be *condemnatoir* if the decision contains a punishment for the defendant or the respondent to perform a feat. A *declaratoir* decision is a decision that states what becomes law or confirms a legal situation. Meanwhile, a constitutive decision means a decision that eliminates a legal situation or creates a new legal situation. Based on this framework, Constitutional Court decisions can be qualified into declaratory and constitutive decisions (Maulidi, 2017).

Article 56, paragraph (3) of the Constitutional Court Law is the foundation of this opinion that the Constitutional Court expressly states that the contents of a law, article, and/or paragraph are contrary to the Constitution. Such a decision will also automatically qualify as constitutive. Declining a law contrary to the 1945 Constitution will also create a new legal condition: the binding power of law will be lost. However, for decisions that require follow-up, the Constitutional Court cannot follow up on its decisions. The rest depends on the institution concerned whether the decision will be implemented or not. In such circumstances, the Constitutional Court cannot take action because its authority has ended since deciding that the article in question is unconstitutional. Its existence is only limited to a hostile legislator who cannot form new norms as a follow-up to his decisions (Maulidi, 2017).

b) Absence of Juridical Consequences for Abandonment of Decisions

Normativitation of law is not enough to contain orders and prohibitions. This situation is very vulnerable to being violated or not obeyed. Therefore, behind the orders and prohibitions, it is also essential to adopt provisions regarding sanctions for non-compliance. Until now, it must be recognized that legal sanctions are the most powerful tool to maintain legal authority, in this case, to maintain compliance with the substance of the law. Presumably, this is also a loophole for the Constitutional Court's decision which still needs to be implemented. The results of interviews with the People's Consultative Assembly Review Board regarding several Constitutional Court decisions that needed to be implemented said that ignoring the decisions of the Constitutional Court does not have strict sanctions. Cases submitted to the Constitutional Court were completed when the Constitutional Court's decision was issued. Both the applicant who has filed for review of a particular law and the Constitutional Court has no interest in the follow-up to the Constitutional Court's decision. In the end, the Constitutional Court's decision which is not implemented, will float. Referring to some of the Constitutional Court's decisions above, the non-implementation of the Constitutional Court's decisions has no particular consequences. Neither the Constitutional Court, the institution that issued the decision, nor other institutions have the right to enter this realm. The Constitutional Court cannot act actively to resolve a problem, even if its decision is ignored (Maulidi, 2017).

The authority of the Constitutional Court in reviewing laws and the nature of their decisions which are final and binding must be addressed by legislators by forming new laws that ignore the decisions of the Constitutional Court (in the last case forming PERPPU Job Creation). Especially when viewed from the principle of *erga omnes*. The legal consequences arising from a decision with permanent legal force will be binding not only on the parties to the dispute but also on the principle that the decision will be binding on anyone. In the end, ignoring the



Constitutional Court's decision is equivalent to violating the constitution. The constitution is a solemn agreement (solemn pledge) made by the Indonesian people, so it is more a spiritual document than a legal one. It is not quantitative but qualitative, not concrete but general. Furthermore, according to Manfred Nowak, the constitution as a basic rule consists of two parts, formal and material. The formal part contains rules relating to state agencies or institutions and basic structural principles of the state, for example, regarding the separation of powers and the system of government. In contrast, the material part of the constitution contains the values, aims, and objectives to be achieved by the state and human rights (Widiarto, 2016).

The essence of the published Constitutional Court decision is the essence of the fundamental law (1945 Constitution), so the norm value of the Constitutional Court decision is higher than the law. Borrowing Stufenbau Hans Kelsen's theory, the higher the position in the normative order, the richer it will be in moral content or general principles. The lower the position, the more concrete and thinner the moral content will be, as expressed by Satjipto Rahardjo. Law formation should not be separated from other laws with higher normative values. As stated by Roger Cotterrell namely: That is, other legal norms authorize the creation of legal norms (Widiarto, 2016).

Submission and obedience to the Constitutional Court's decision is a fundamental form of loyalty to the constitution itself; in other words, non-compliance with the Constitutional Court's decision is a form of disloyalty and defiance of the constitution itself or what is referred to as constitutional disobedience. This postulate is based on the premise that the Constitutional Court is functionally carrying out the task of upholding constitutional values as contained in the 1945 Constitution; of course, the decisions issued by the Constitutional Court are a reflection of the ongoing constitution. Therefore, disobedience to the Constitutional Court's decision is disobedience to the constitution itself (constitution disobedience) (M. Nggilu, 2019).

Obedience to Constitutional Court Decisions as Moral Obligation

The term moral comes from the Latin *mos* (plural *mores*), which means custom or habit. Moral, in terms, is the values or norms that become a guideline for a person or a group in regulating his behavior. Morality is the moral character or overall principles/pillars and values relating to good and bad. K. Bertens said that morality is a characteristic of humans that cannot be found in other creatures below the human level (Aprita & Adhitya, 2020).

Concerning the relationship between law and morals, Lon F. Fuller argues that the purpose of the law is to achieve a high level of morality. It is highly improbable that morals are born from a legal system that does not look at the moral side and instead separates itself from morality. Fuller's opinion is related to general legal theory, according to which the legal system is not based on the leader's perspective internally and on what is considered a legitimate legal instrument but rather on the orientation shared by officials and legal subjects who both regulate their interactions. Each other in a way that displays adherence to the principles of legality. Fuller called this the internal morality of law. In the end, the antithesis offered by Fuller is morality as the goal



and foundation of law. The existence of law must follow morality, and morality cannot be separated from law (Rusydi, 2021).

Immanuel Kant discusses the relationship between law and morals, which in essence has a close relationship with 5 close interrelationships including: a) Law requires morals; b) Laws are codified and more objective than unwritten morality; c) Law is related to external actions while moral concerns related to one's inner self; d) Morality is "the contents of the drink of law". Legal norms and moral norms both contain rules that serve as guidelines for humans to behave, and; e) The law concerns normative and spiritual binding morally when believed in the heart, while morality is only related to the attitude of the human mind (Wulandari, 2020)

Furthermore, Lawrence Kohlberg initiated the following 4 moral orientations: 1) normative orientation, namely defending rights and obligations and obeying standard rules; 2) honesty orientation, namely emphasizing justice with a focus on freedom, equality, exchange of rights, and agreements; 3) utilitarian orientation which emphasizes the consequences of one's moral well-being and happiness on others; 4) perfectionism orientation emphasizes achievement: dignity and autonomy, awareness and reasonable motives, harmony with others (Aprita & Adhitya, 2020).

The above moral orientation will significantly influence one's moral judgments because moral judgments result from a reasoning process in which there is an attempt to prioritize specific values based on moral orientation and consideration of the consequences. Concerning compliance with the decisions of the Constitutional Court with the consideration that the Constitutional Court is a Negative Legislature, there are no special enforcement agencies. Also, there are no juridical consequences for ignoring the decisions of the Constitutional Court, the application of Lawrence Kohlberg's 4 moral orientations must be put forward as the fulfillment of moral obligations: a normative orientation that emphasizes obedience to standard rules; honesty orientation that emphasizes fairness with a focus on agreements; a utilitarian orientation that emphasizes the consequences of the well-being and happiness of one's moral actions on others; and the perfectionism orientation emphasizes achieving harmony with others.

Conclusion

Regarding the authority of the Constitutional Court in reviewing laws and the nature of their decisions which are final and binding, legislators cannot simply ignore them by forming new laws that ignore the decisions of the Constitutional Court (in the last case forming PERPPU Job Creation). In the end, ignoring the Constitutional Court's decision is equivalent to violating the constitution. Disobedience to the Constitutional Court's decision is a form of disloyalty and defiance of the constitution itself, or what is referred to as constitutional disobedience.

Concerning compliance with the decisions of the Constitutional Court with the consideration that the Constitutional Court is a Negative Legislature, there are no special enforcement agencies. There are no juridical consequences for ignoring the decisions of the Constitutional Court; the application of Lawrence Kohlberg's 4 moral orientations must be put forward as the fulfillment of moral obligations: a normative orientation that emphasizes



obedience to standard rules, honesty orientation that emphasizes fairness with a focus on agreements; a *utilitarian* orientation that emphasizes the consequences of the well-being and happiness of one's moral actions on others; and the perfectionism orientation emphasizes achieving harmony with others.

Thus, this research concluded that obedience to the Constitutional Court decisions is not only a constitutional obligation for legislators but also a moral obligation for legislators. This research is limited to discussing obedience to the Constitutional Court decisions, which is a constitutional and moral obligation to legislators. Differences with previous research can be seen in the study from the point of view of moral obligations, so there are novelty and scientific contributions to this research, especially concerning constitutional law.

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