# *The Absence of Constitutional Court's Decision Follow Up: Is it A Loss?*

# Ketiadaan Pengaturan Tindak Lanjut Putusan Mahkamah Konstitusi: Sebuah Kerugian?

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**Abstrak**

Dibentuknya Mahkamah Konstitusi (MK) sebagai pengawal konstitusi yang melindungi hak asasi warga negara memberikan harapan pelaksanaan prinsip *rule of law*. MK diharapkan mengambil peran yang besar dalam penegakan dan perlindungan hak konstitusi warga negara dalam setiap putusannya. Harapan ini menjadi kosong tanpa makna sejak Pasal 59 ayat (2) UU No. 8/2011 dinyatakan tidak mempunyai kekuatan hukum mengikat oleh Putusan MK Nomor 49/PUU-IX/2011. Bagaimana dampak penghapusan Pasal 59 ayat (2) yang telah dirumuskan dalam UU No. 7/2020? Jenis penelitian ini merupakan penelitian hukum normatif dengan menggunakan jenis data sekunder yang dikumpulkan dengan teknik pengumpulan data studi kepustakaan. Penghapusan Pasal 59 ayat (2) dalam UU No. 7/2020 berdampak terhadap penyimpangan prinsip *rule of law* dan produk legislasi yang disahkan setelah UU No. 7/2020 berlaku tidak mampu menjamin hak konstitusi warga negara.

**Kata Kunci:** Asas Pembentukan Perundang-Undangan; *Policy-Making Process; Rule of Law.*

**Abstract**

The establishment of the Constitutional Court as the guardian of constitution that protects the citizens' human rights gives hope for the implementation of "rule of law" principle. The Constitutional Court is expected to play a big role in upholding and protecting the citizens' constitutional rights through each of its decisions. This expectation has become meaningless since Article 59 (2) of Law Number 8/2011 is declared to have no binding legal force by the Constitutional Court Decision Number 49/PUU-IX/2011. What are the impacts of the elimination of Article 59 (2) which has been formulated in Law Number 7/2020? This research is socio legal studies that uses secondary data that are collected through literature study. The elimination of Article 59 (2) in Law Number 7/2020 shows violation of the rule of law principles. In addition, the legislation products which are legitimized based on Law Number 7/2020 are unable to guarantee the citizens' constitutional rights.

***Keywords:*** *The Principles of Law-Making; Policy-Making Process; Rule of Law.*

## A. INTRODUCTION

### 1. Background

Indonesia is a constitutional state or a state that is ruled by law according to Article 1 (3) of the Third Amendment of 1945 Constitution of the Republic Indonesia (UUD NRI 1945). Unfortunately, there is no law that gives any specific definition for "the constitutional state" nor "the rule of law". To fill the void of "the state that is ruled by law" definition, many experts gave some concepts of the rule of law[1] which one of them could be quoted as *"The idea of rule by law is that law is a means by which the state operates in the conduct of its affairs; that whatever a government does, it should do through laws".*[2] Based on that definition, I conclude that the rule of law is a principle which law is used as an instrument for a state to run administrative functions that all the government actions in a broad sense must be done based on laws.

Constitutional state could also be interpreted as a state that put constitutions as the bases for the power of a state and all forms of the state administration must be done through laws.[3] Soemarwi explained that laws has a function to limit absolute power of a state that is ruled by law and to guarantee its citizens' human rights.[4] Philipus

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1 Nadirsyah Hosen, "Emergency powers and the rule of law in Indonesia," *Faculty of Business and Law University of Wologong Research Online,* (Januari 2010): 274-276.

2 Nadrisyah Hosen, "Emergency powers," 274.

3 T. Lindsey, *Indonesia: Devaluing Asian Values, Rewriting rule of Law, in R. Peerenboom (ed.), Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian Countries, France, and the U.S*, (London: Routledge Curzon, 2004), 49.

4 Vera Soemarwi, "Melegitimasi Tindakan Negara Berdasarkan Kekuasaan (*Machstaat*): Kajian Putusan Nomor 95/B/2017/PT.TUN.Jkt," *Jurnal Yudisial* Volume 12, Issue 2, (2019): 141, DOI: 10.29123/jy.v12i2.294.

M. Hadjon defined the purpose of the rule of law is basically to give protection to the citizens against the government actions based on the human rights principle and the rule of law.[5] As a constitutional state, Indonesia has adhered to the principle of the supremacy of the constitution[6] since the enactment of the Third Amendment of 1945 Constitution of the Republic Indonesia. The consequence of having the constitutional supremacy is the appearance of the Constitutional Court as the Guardian of Constitution which controls the executive and legislative powers and guarantees the protection of the citizens' constitutional rights in every law enacted.

Hans Kelsen said that the guardian of constitution in its original sense referred to a body whose function was to protect the constitution from violations.[7] Violations of constitution that occurred were facts that were against the constitution, either through an act or omission. Besides that, being the guardian of constitution also meant to protect constitution from threats and dangers (Robert A. Licht, 1993).[8] Carl Schmitt said that the civil, criminal, and administrative courts were not "guardians of the constitution", but they were often mistakenly considered as courts that had the right to conduct judicial review.[9] Carl Schmitt stated that the guardian of constitution was a court that reviewed ordinary law for substantive conformity with the provisions of constitutional state and rejected the application of law if it was against the constitution. Based on these definitions, it can be concluded that the guardian of constitution is a role of judiciary that is devoted to conducting a judicial review of law in order to protect the law from any violation.

The constitution mandated the Constitutional Court to be the guardian of constitution that protected the citizens' human rights (The Guardian of Human Rights).[10] This mandate was realized in the form of authorization for conducting judicial review through the Constitutional Court in order to ensure the protection and guarantee the

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[5] Nurul Qamar, et al., *Negara Hukum atau Negara Kekuasaan (Rechtsstaat or Machtstaat)*, (Makassar: CV. Social Politic Genius, 2018), 45-46.

[6] Constitutional Supremacy is a principle which all state institutions and all branches of state power have an equal position before the constitution in a relationship of "checks and balances" between one another. Before the principle of the supremacy of the constitution, Indonesia adhered to the principle of the supremacy of the parliament where the posititon of the People's Consultative Assembly of the Republic of Indonesia as the highest state institution. Martitah, *Sistem Pengujian Konstitusional (Constitutional Review) di Indonesia*, (Jakarta: Konpress, 2015), i.

[7] *"...guardian of the constitution in its original sense, this term refers to an organ whose function it is to protect the constitution against violation."* Lars Vinx, *The Guardian of The Constitution: Hans Kelsen and Carl Schmitt on The Limits of Constitutional Law*, (English: Cambridge University Press, 2015), 174.

[8] Robert A. Licht, *Is The Supreme Court The Guardian of The Constitution?,* (USA: The AEI Press, 1993), 47.

[9] Lars Vinx, *The Guardian of The Constitution*, 79.

[10] Desi Hanara, "Mainstreaming Human Rights in The Asian Judiciary," *Constitutional Review,* Volume 4, Issue 1, (May 2018): 77.

citizens' constitutional rights.[11] Besides that, the possibility of laws to be contradicted with the 1945 Constitution of the Republic Indonesia could be prevented.

In the New Order era, the law-making process in Indonesia was less democratic and tended to be repressive.[12] This was caused by the political configurations that tended to be authoritarian, which gave the executives more dominant roles and made the legal products became conservative or orthodox.[13] Conservative or othodox legislation products reflected the political vision of authorities hence in their law-making process the executives did not involve community participations and aspirations seriously, even if they did it was usually just a mere formality.[14] Those legal products were used as instruments for implementing government's visions and wills that could oppress citizens' and make their human rights not fulfilled.

In the post-reform era, political life gradually changed to be more democratic, it was because the legislation products in the New Order era had been reformed. In the current period, the spirit of reformation is corrupted by the oligarchs. Legislation products that are passed in the current period tend to be contradicted with the spirit of democracy and the law-making process tends to be authoritarian rather than responsive.[15] This can be seen from the lack of public participation in the law-making process.

The law-making method during the New Order era seems to be re-applied in the formulation of Law Number 7 of 2020 onthe Third Amendment of Law Number 24 of 2003 on the Constitutional Court (hereinafter it will be referred as Law 7/2020 or Constitutional Court Law). This can be seen from the lack of transparency and public participation in the law-making process. In this Third Amendment of the Constitutional Court Law, the Article 59 Paragraph (2) has been removed which causes legal uncertainty.

Before the amendment, Article 59 Paragraph (2) in Law Number 8 of 2011 on Amendment of Law Number 24 of 2003 on the Constitutional Court was written "If it is necessary to amend a law that has been reviewed, the People's Representative Council of the Republic of Indonesia (DPR RI) or the President will immediately take action on the Constitutional Court decision as referred to in Paragraph (1) in

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11 Simon Butt, "Traditional Land Rights Before The Indonesian Constitutional Court," *LEAD Journal*, Volume 10, Issue 1, (2014): 60.
12 Heriyono Tardjono, "Reorientasi Politik Hukum Pembentukan Undang-Undang di Indonesia," *Jurnal Renaissance*, Volume 1, Issue 02, (Agustus 2016): 66.
13 Solikhul Hadi, "Pengaruh Konfigurasi Politik Pemerintah Terhadap Produk Hukum," *ADDIN*, Volume 9, Issue 2, (Agustus 2015): 383.
14 Solikhul Hadi, "Pengaruh Konfigurasi Politik," 386.
15 Heriyono Tardjono, "Reorientasi Politik Hukum," 73.

accordance with the laws and regulations." Article 59 Paragraph (2) does not have binding legal force through Constitutional Court Decision Number 49/PUU-IX/2011.

The Constitutional Judges considered the content of Article 59 Paragraph (2) was ambiguous and created legal uncertainty because the legislators (People's Representative Council and President) would take action on the Constitutional Court Decision only if it was necessary and that was contradicted with Article 24C Paragraph (1) of 1945 Constitution of the Republic Indonesia which stated that the Constitutional Court Decision is final and binding (*erga omnes*) and self-executing. Besides that, Constitutional Court Judges considered there was some errors in Article 59 Paragraph (2), 'The People's Representative Council or the President'. It was because the People's Representative Council or the President should not stand alone in the law-making process as regulated in Article 20 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia that firmly used the phrase 'the People's Representative Council and the President'.

## 2. Research Questions

the issue that will be discussed in this paper is "how is the impact of the revocation of Article 59 Paragraph (2) in Law Number 7 of 2020 in order to guarantee the protection of the Indonesian citizens' constitutional rights in the law-making process?"

## 3. Methods

This research is socio legal studies, which uses a social science methodological approach in a broad sense[16]. The research is conducted by reviewing secondary data and library materials[17]. This research uses primary legal materials such as laws on the Constitutional Court and the Constitutional Court Decision Number 49/PUU-IX/2011, and secondary legal materials such as legal literature, academic research, and publication. The technique that is used to collect the data is library research and interviews.

This research also uses statute approach.[18] The statute approach includes the 1945 Constitution of the Republic of Indonesia and the Law Number 7 of 2020 onon the Third Amendment of Law Number 24 of 2003 on the Constitutional Court. The

[16] Sulistyowati Irianto, Memperkenalkan Kajian Socio-Legal dan Implikasi Metodologisnya, dalam bukunya Adrian W. Bedner, Sulistowati Irianto, Jan Michiel Otto, Theresia Dyah Wirastri, *Kajian Socio-Legal, Seri Unsur-Unsur Penyusun Bangunan Negara Hukum* (Bali: Pustaka Larasan, 2012), 3.
[17] Soerjono Soekanto dan Sri Mamudji, Penelitian Hukum Normatif: Suatu Tinjauan Singkat, (Jakarta: Raja Grafindo Persada, 2012), 12.
[18] Peter Mahmud Marzuki, *Penelitian Hukum Edisi Revisi,* (Jakarta: Kencana Prenada Media Grup, 2013), 136 dan 158.

research analysis technique is descriptive analysis, which is a technique that aims to provide an analysis of the secondary data that relevant to the research.

## B. DISCUSSION

### 1. The revocation of Article 59 Paragraph (2) causes a threat of legal void that can lead to legal uncertainty

The consequence for Indonesia as a *rechtsstaat* is that "the joints in the life of a nation and a state in Indonesia must be based and implemented in accordance with laws".[19] It also applies in making the laws or policies that must be in accordance with laws.

The history of Indonesia shows that absolute power needs to come to an end. The way to end it is by creating a constitutional system and the rule of law concept *(rechtsstaat)*.[20] When a law regulate a matter, it will give a legal certainty for the implementation for that matter. The legal certainty aspect has an important role in the rule of law. Legal certainty contains three principles, such as (1) legal guarantees are carried out in accordance with the norms or laws; (2) parties who have entitled according to law can obtain their rights; and (3) court decisions can be enforced.[21] On the other hand, if there is no law or norm that regulate a matter, it will give a definite impact, viz. a void of law.

A void of law (*recht vacuum* or *wet vacuum*) is a condition where the rules in a state are considered inadequate and unable to guarantee legal certainty for its citizens.[22] The void of law is the impact of the law which is left behind from the society development that always dynamic and fast.[23] It occurs because the legislature, both legislative and executive, are slow or take so much time in making and promulgating a law. In addition, the inconsistency of legislators to fill a legal void and guarantee legal certainty can be seen from many implementing regulations that are mandated by a higher law do not exist or have never been made.[24]

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[19] Heriyono Tardjono, "Reorientasi Politik Hukum," 61.

[20] Retno Kusniati, "Sejarah Perlindungan Hak Hak Asasi Manusia dalam Kaitannya dengan Konsepsi Negara Hukum," *Jurnal Ilmu Hukum*, Volume 4, Issue 5, (Juli 2011): 79.

[21] R. Tony Prayogo, "Penerapan Asas Kepastian Hukum dalam Peraturan Mahkamah Agung Nomor 1 Tahun 2011 tentang Hak Uji Materiil dan dalam Peraturan Mahkamah Konstitusi Nomor 06/PMK/2005 tentang Pedoman Beracara dalam Pengujian Undang-Undang," *Jurnal Legislasi Indonesia*, Volume 13, Issue 02, (Juni 2016): 194.

[22] Hario Mahar Mitendra, "Fenomena dalam Kekosongan Hukum," *Jurnal RechtsVinding Online*, (April 2018): 1.

[23] Gamal Abdul Nasir, "Kekosongan Hukum & Percepatan Perkembangan Masyarakat," *Jurnal Hukum Replik*, Volume 5, Issue 2, (September 2017): 177.

[24] Hario Mahar Mitendra, "Fenomena dalam Kekosongan Hukum," 2.

To fill a legal void, not only laws that are made by legislature are considered as laws, but also jurisprudence created by judiciary can be considered as a law to fill the emptiness of law *(judge made law)*. Jurisprudence has a very important function to fill the legal void and give legal certainty.[25] Subekti said jurisprudence means court decisions that have permanent legal force and justified by the Supreme Court as a court of cassation, or the Supreme Court decisions itself which are permanent.[26]

Based on the National Legal Development Institution's (BPHN) research in 1995, a judge decision could be called as a jurisprudence if it met the five elements, such as a.) a decision on a legal case that has no law regulates it yet; b.) a decision that has permanent legal force; c.) has repeatedly been used as a legal basis for deciding the same or similar cases; d.) to fulfill a sense of justice; e.) the decision is justified by the Supreme Court.[27] Thus, it can be understood that not all court decisions at the trial court nor high court can be considered as jurisprudence. The Constitutional Court as the guardian of constitution has a very large opportunity to make legal breakthroughs through jurisprudence compared to other courts that are restricted by laws.

The Constitutional Court has obligations to guard constitution and guarantee legal certainty through its every decision. Based on Article 64 of Law Number 24 of 2003 on the Constitutional Court, there are three types of the Constitutional Court decision: (1) the application is unacceptable, in terms of the applicant and/or the application does not meet the requirements; (2) the application is granted, in terms of the application is reasonable; and (3) the application is rejected, in terms of the application is unreasonable.[28] All of those decisions are final as written in Article 24C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia jo. Article 10 Paragraph (1) of Law Number 24 of 2003 on the Constitutional Court. Final means the Constitutional Court decision has permanent legal force *(inkracht van gewijsde)* since it was announced and no legal remedies can be taken.[29] In the Elucidation of Article 10 Paragraph (1) of Law 8/2011, it is explained that the final characteristic in a Constitutional Court decision includes binding legal force (final and binding). The binding characteristic in Constitutional Court decision means that the Constitutional

[25] Enrico Simanjuntak, "Peran Yurisprudensi dalam Sistem Hukum di Indonesia," *Jurnal Konstitusi*, Volume 16, Issue 1, (Maret 2019): 100.
[26] Hario Mahar Mitendra, "Fenomena dalam Kekosongan Hukum," 3.
[27] Hario Mahar Mitendra, "Fenomena dalam Kekosongan Hukum," 4.
[28] Achmad Rubaie, "Dilematis Hukum Mahkamah Konstitusi dalam Perspektif Putusan," *AJUDIKASI: Jurnal Ilmu Hukum*, Volume 2, Issue 2, (Desember 2018): 121.
[29] Indonesia, Law of the Constitutional Court, Law Number 24 of 2003, The Elucidation Article 10 Paragraph (1).

Court decision does not solely apply to the applicants or parties in the decision, but it also applies to everyone *(erga omnes)*.

In theory, the Constitutional Court decision which is final and binding means that it automatically applies to the general public and must be followed up, however in practice (law in action) there are still some Constitutional Court decisions that are not implemented accordingly.[30] The fact shows that the Constitutional Court decisions often do not get positive responses from other state institutions. Jaelani in his research said that the Constitutional Court decision will be implemented effectively if there is a deadline for legislators to execute the decision, whereas if there is no deadline, the Constitutional Court decision will not be implemented properly.[31] For example, the Constitutional Court Decision Number 36/PUUX/2012 on request for judicial review of Law Number 22 of 2001 on Oil and Gas. In the decision, there was a command for legislators to make Amendment to Law 22/2011, but in fact the law has not been amended until now. Instead, they made Presidential and Ministerial Regulations.[32]

This kind of act towards the Constitutional Court decision can occur because the Constitutional Court does not have an instrument or executor who is in charge to ensure the execution of its decision.[33] Unlike other judicial institutions or courts, the Constitutional Court does not have an executive unit to force other parties to comply and execute its decision as soon as possible, thus the execution of the Constitutional Court decision highly depends on other parties to execute and take action on the decision that has been made.[34] Besides that, the absence of implementing regulations or laws to force the execution of the Constitutional Court decision is also the main cause why the decision cannot be enforced.

The 1945 Constitution of the Republic of Indonesia and the Constitutional Court Law do not regulate about how the implementation or execution of the Constitutional Court decision should be done. However, in those laws contain statements that the Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final and have legal force since they were announced in the

[30] M. Agus Maulidi, "Menyoal Kekuatan Eksekutorial Putusan Final dan Mengikat Mahkamah Konstitusi," *Jurnal Konstitusi*, Volume 16, Issue 2, (Juni 2019): 342.

[31] Abdul Kadir Jaelani, *et al*., "Executability of The Constitutional Court Decision regarding Grace Period in The Formulation of Legislation," *International Journal of Advanced Science and Technology*, Volume 28, Issue 15, (2019): 816-823.

[32] Abdul Kadir Jaelani, *et al*., "Executability of The Constitutional Court Decision," 818.

[33] Widayati, "Problem Ketidakpatuhan terhadap Putusan Mahkamah Konstitusi tentang Pengujian Undang-Undang," *Jurnal Pembaharuan Hukum*, Volume 4, Issue 1, (April 2017): 10.

[34] Mohammad Agus Maulidi, "Problematika Hukum Implementasi Putusan Final dan Mengikat Mahkamah Konstitusi Perspektif Negara Hukum," *Jurnal Hukum IUS QUIA IUSTUM*, Volume 24, Issue 4, (Oktober 2017): 550.

court open to public also Article 59 Paragraph (2) of Law Number 8 of 2011 on the Constitutional Court which states that the People's Representative Council or the President will take action on the Constitutional Court decision only if it is necessary.[35] But then, Article 59 Paragraph (2) of the Constitutional Court Law is revoked in the Third Amendment of the Constitutional Court Law, namely Law Number 7 of 2020. This surely has an impact on the occurrence of legal void. Regulations or laws that regulate the implementation of the Constitutional Court decision are very important in order to ensure legal certainty.

The implementation of the Constitutional Court decision cannot solely rely on the parties' moral or legal awareness, but it requires rules which can force the execution of the Constitutional Court decision. The regulation which is contained in Article 59 Paragraph (2) of Law 8/2011 is indeed a statement of rule, not an implementing mechanism rules, however the revocation of Article 59 Paragraph (2) weakened the guarantee of legal certainty for implementation of Constitutional Court decision regardless of the juridical characteristics of the decision are final and binding.

The missing rule of the execution of the Constitutional Court decision as regulated in Article 59 Paragraph (2) of the Constitutional Court Law causes a loss of legal guarantee and increases the occurrence of legal void related to the mechanism for implementing the Constitutional Court decision. *Erga omnes* principle cannot be the only foundation for implementing the Constitutional Court decision due to the weak legal protection for that matter. The absence of rule that forces legislators to implement the Constitutional Court decision makes them act slowly to implement the decision or worse they do not do it at all.

## 2. Weakness of rule of law's enforcement as an impact or error in Article 59 Paragraph (2)

The phrase "if necessary" creates legal uncertainty because it give ambiguous meaning that the People's Representative Council and the President will take action on the Constitutional Court decision only if it is necessary, even though the Constitutional Court decision is final and binding (*erga omnes*) and must be implemented immediately by the People's Representative Council and the President to embody the constitutional system based on the 1945 Constitution of the Republic of Indonesia and as a consequence of understanding the democratic rule of law. The phrase "if necessary" is considered contrary to Article 24C Paragraph (1) of the 1945 Constitution of the

[35] Abdul Kadir Jaelani, *et al.*, "Executability of The Constitutional Court Decision."

Republic of Indonesia which regulates about the characteristic of the Constitutional Court decision that is *erga omnes*.

Besides that, the phrase "the People's Representative Council or the President" is not suitable with Article 20 Paragraph (2) of the 1945 Constitution of the Republic Indonesia which states that every bill or draft law is discussed by the People's Representative Council and the President for mutual consent. The People's Representative Council or the President does not stand alone to discuss a bill, thus it should not use the conjunction "or"[36] which indicates a choice between two subjects, but "and"[37] which indicates the equality of function between two subjects that in this case are the People's Representative Council and the President.

In the Constitutional Court Decision Number 49/PUU-IX/2011 on the judicial review application of Law 8/2011, the applicant stated that the content of Article 59 Paragraph (2) created a blur on legal certainty. The applicant emphasized the ambiguous meaning in Article 59 Paragraph (2) in the phrase "if necessary". It was considered that the People's Representative Council and the President would follow up on the Constitutional Court decisions only if it was necessary. The applicant also stated that the impact of the enactment of Article 59 Paragraph (2) was contrary to Article 28 D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia which guarantees that everyone has the right to get legal certainty. Adhere to the principle of *erga omnes*, the applicant considered that the phrase "if necessary" could be misinterpreted that the mandate for legislators to implement the Constitutional Court decision was not mandatory and the decision that should be follow up or not.

The word "if" is a conjunction to introduce possible or impossible situations or conditions and the results[38], while the word "necessary" means needed in order to achieve a particular result[39], thus the word "if necessary" also means "if needed". The word "if" in a sentence implies there is a condition, not absolute, and not forcing so the use of the word "if" in Article 59 Paragraph (2) causes ambiguous meaning that as if not all the Constitutional Court decisions are final and binding. This is certainly

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36 Based on Merriam-Webster Dictionary, "or" as a conjuction used as a function word to indicate an alternative, the equivalent or substitutive character of two words or phrases, or approximation or uncertainty: https://www.merriam-webster.com/dictionary/or, accessed on 14 August 2022.

37 Based on Merriam-Webster Dictionary, "and" as a conjuction used as a function word to indicate connection or addition especially of items within the same class or type: https://www.merriam-webster.com/dictionary/and, accessed on 14 August 2022.

38 Cambridge University Press, https://dictionary.cambridge.org/grammar/british-grammar/if, accessed on 14 August 2022.

39 Cambridge University Press, https://dictionary.cambridge.org/dictionary/english/necessary, accessed on 14 August 2022.

contrary to the necessity of implementing the Constitutional Court decision which should be implemented because all of the Constitutional Court decisions are final and binding *(erga omnes)*.

The Constitutional Court judges in their consideration of judicial review of Law 8/2011 stated that the meaning of word "if necessary" was considered contrary to Article 24 C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia which regulates the characteristic of the Constitutional Court decision is final and Article 28 D Paragraph (1) of the 1945 Constitution of the Republic of Indonesia that is related to the applicants' rights of legal certainty. The Constitutional Court considered the application is legally reasonable therefore the application was accepted by stating that Article 59 Paragraph (2) did not have binding legal force through the Constitutional Court Decision Number 49/PUU-IX/2011.

Problems arose when Article 59 Paragraph (2) was revoked in Law Number 7 of 2020 on the Third Amendment of the Constitutional Court Law because there are no more provision that regulates the implementation of the Constitutional Court decision or it could be called as a legal void. It is because the only written provision that regulates the implementation of the Constitutional Court decision is in Article 59 Paragraph (2). The revocation of the article was a rash decision because it could not only make the legal certainty became blur, but also the occurrence of legal void.

The phrase "if necessary" in Article 59 Paragraph (2) also left impression that the Constitutional Court decision did not have the power to order or command the legislators to revise the laws that had been reviewed. If it is deemed necessary, the legislators will finally respond to the result of judicial review that has been in the Constitutional Court decision, otherwise if it is deemed unnecessary the legislators will not take any action on the Constitutional Court decision. Thus, the implementation of the Constitutional Court decision in terms of judicial review became subjective. This subjectivity caused the obscure of legal certainty.

Based on the Constitutional Court's review in its decision number 49/PUU-IX/2011, the phrase "if necessary" was intended to show that not all the Constitutional Court decisions must be follow up by amending the laws. As time goes by, the Constitutional Court decision has various type of decisions besides 3 (three) types of decision, such as the decision that the application is unacceptable, the decision that the application is granted, and the decision that the application is rejected as stated in Article 64 of Law Number 24 of 2003, there are also conditionally constitutional decision, conditionally unconstitutional decision, limited constitutional decision, and judicial

review decision.[40] Any types of the Constitutional Court decisions are final and binding after being announced, even though they have not been implemented yet. This is included for judicial review decision that even though it has not been implemented by the legislators yet, it is still final and have legal force.

The Constitutional Court judges considered that the word "if" in Article 59 Paragraph (2) was deleted or removed, it would cause another misinterpretation that the Constitutional Court decisions would have legal force after there was an implementation from the legislators. Therefore, the Constitutional Court judges concluded that Article 59 Paragraph (2) will still have legal certainty with or without the word "if" or "if necessary".

Then, the reason for revoking the Article 59 Paragraph (2) was that there were a language or phrase errors in writing the article. Language errors could occur not because they had not mastered a language rule system, but because they failed to realize the language rule system that have actually been mastered and wanted to be conveyed.[41] The factor that cause it can be memory limitation or forgetfulness.[42] Language or phrase errors in Article 59 Paragraph (2) can still be corrected considering the errors happened due to the negligence of the legislators in word choice. They were minor errors because there were only a few wrong words, not the entire paragraph. We also need to consider the essence of Article 59 Paragraph (2) as the only written provision that regulates the implementation of the Constitutional Court decision.

The revocation of Article 59 Paragraph (2) caused a legal void *(recht vacuum)* on the rule about implementation of the Constitutional Court judicial review decision. Meanwhile, the consequence for a constitutional state is that every aspect of life as a nation and a state must be based and done in accordance with constitution or law.[43] Law has a function to control or limit power that one has so their actions can be legally and ethically accountable.[44] Thus, if there is a legal basis or a law that regulates about an implementation of an authority, the practice of using the authority must be done in accordance with the law. To prevent arbitrariness by the governments, legal certainty is needed. Legal certainty can be obtained by having legal products

[40] Mohammad Mahrus Ali, dkk., "Tindak Lanjut Putusan Mahkamah Konstitusi yang Bersifat Konstitusional Bersyarat Serta Memuat Norma Baru," *Jurnal Konstitusi* Volume 12, Issue 3, (September 2015): 633.
[41] Reni Supriani dan Ida Rahmadani Siregar, "Penelitian Analisis Kesalahan Berbahasa," *Jurnal Edukasi Kultura*, Volume 3, Issue 2, (2016): 70.
[42] Reni Supriani dan Ida Rahmadani Siregar, "Penelitian Analisis."
[43] Heriyono Tardjono, "Reorientasi Politik Hukum," 61.
[44] Dachran Busthami, "Kekuasaan Kehakiman Dalam Perspektif Negara Hukum Di Indonesia," *Masalah-Masalah Hukum*, Volume 46, Issue 4, (2017): 336-337.

and legal basis which is clear and concrete that regulates about the implementation of an authority and becomes the standard on how to use the authority.

Judicial review is one of the Constitutional Court's authorities as stated in Article 24 C Paragraph (1) of the 1945 Constitution of the Republic of Indonesia. Asshiddiqqie, said that the concept of judicial review, particularly about the judicial review by the judiciary, it is necessary to distinguish between judicial review and judicial preview, review means viewing, assessing, or re-examining, which consists of the words "re" and "view", meanwhile preview that consists of the words "pre" and "view" means an activity of viewing the pre-event of something or an object that is already fine in the present.[45]

The Constitutional Court decision does not end when the decision being announced in the court, it requires an implementation.[46] Judicial review decision, whether it is a complete revocation of a law or just amending some parts of a law that is being reviewed, needs to be implemented. For example, if the result of a judicial review decision make the law should be changed in the certain parts, the authorities or the legislator must implement the decision by changing the certain parts that have been determined in the decision.

Judicial review is one of a way to ensure that a law does not contradict with the 1945 Constitution of the Republic of Indonesia, that is why the implementation of the judicial review decision is important because it is a continuation of the judicial review. This means that legal products or law which regulates the implementation of judicial review decision is needed. That is because it will be a legal basis to implement the judicial review decision so there is a legal certainty to implement the Constitutional Court decision especially the judicial review decision. It will also give legal certainty on who has the authorities and obligations as stated in the laws, what kind of authorities and obligations that are given by the laws, and deadline considering the urgency to implement the Constitutional Court decision on judicial review.

The Constitutional Court decision is final and binding once it is announced in the plenary session which is open to public. In fact, it cannot be implemented immediately.[47] Therefore, it is important to have a provision or law that regulates the implementation of the Constitutional Court decision on judicial review because it functions as a standard of legal obligations and coercion for them who authorized by law to implement the decision. Coercion through provisions in a law is an effort to achieve legal certainty. If

45 Jimly Asshiddiqqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Konstitusi Press, 2006), 4.
46 Mohammad Agus Maulidi, "Problematika Hukum," 550.
47 Mohammad Agus Maulidi, "Problematika Hukum," 548.

there is a coercion through legal obligation, it will guarantee the implementation of the Constitutional Court decision, in this case is judicial review decision, then the function of the Constitutional Court as the guardian of constitution and the guardian of human rights can be more optimal. Implementation of Constitutional Court decision that is done efficiently is a main factor to uphold the constitution supremacy, and if we look further, it can be a reflection of the establishment of the rule of law *(rechtsstaat)*.[48]

**3. Non-participation in the making of Law Number 7 of 2020**

There is a criticism from some people towards the making of Law Number 7 of 2020 because there is no community participation despite of the requirement for transparency (Indrawan, 2017)[49] in the law-making or policy-making process (Rosser, 2004)[50].

As reported by Tribunnews.com on Wednesday, August 26, 2020, the Vice Chairman of Commission III of the People's Representative Council of the Republic of Indonesia stated that the work committee meeting (*Panja*) of the Constitutional Court Bill was declared closed to the public.[51] He also said as reported by Kompas.com on August 27, 2020 that "the committee meeting for Constitutional Court Bill must indeed be closed because we are still discussing the articles in that law, it is to prevent misunderstandings or misperceptions if the articles that have not been approved are published to the public".[52]

[48] Mohammad Agus Maulidi, "Problematika Hukum," 539.

[49] Transparency is a "Closed door decision making". It can be the enemy both of justice and of sustainability, because it offers opportunities for corruption, collusion and nepotism and prevents the growth of public understanding and potential support for decisions. Mochamad Indrawan, et al., "Mitigating Tensions over Land Conversion in Papua, Indonesia," *Asia & The Pacific Policy Studies*, Volume 4, Issue 1 (January 2017):147-157, https://doi.org/10.1002/app5.157.

[50] "*...**the policy-making process** in Indonesia was dominated by five main sets of actors: the "politico-bureaucrats," the major domestic conglomerates, controllers of mobile capital, major international financial institutions (IFIs) such as the World Bank and the International Monetary Fund; **The politico-bureaucrats**: As Robison has pointed out, New Order officials were not mere bureaucratic functionaries but "politico-bureaucrats" in the sense that they exercised both political and bureaucratic authority* (Robison 1986: 107); ***The mobility of their capital:** meant that they could effectively threaten the Indonesian state with investment strikes unless it adopted policies that they desired. In essence, this meant that there was strong pressure on the state to adopt conservative macroeconomic and fiscal policies, liberalize the trade and investment sectors, deregulate the financial sector, and privatize state enterprises.* Rosser, A., et al., *Indonesia: The politics of inclusion,* (Brighton: IDS, 2004), 3.

[51] Chaerul Umam, "Pembahasan RUU Mahkamah Konstitusi Digelar Tertutup," https://www.tribunnews.com/nasional/2020/08/26/pembahasan-ruu-mahkamah-konstitusi-digelar-tertutup, is downloaded on 20 November 2020.

[52] Haryanti Puspa Sari, "Pembahasan Revisi UU Mahkamah Konstitusi Digelar Tertutup," https://nasional.kompas.com/read/2020/08/27/13541091/pembahasan-revisi-uu-mahkamah-konstitusi-digelar-tertutup, is downloaded on 20 November 2020.

The People's Representative Council's choice to make the committee meeting closed to public caused public disapproval. For example, a community group who were the members of the Save the Constitutional Court Coalition applied judicial review application for formal and material review of Law 7/2020, the Coalition thought that there were six formal problems in the law that one of them was that the discussion of the law-making process was done secretly, without involving the public participation, was rushed, and did not indicate the sense of crisis of the Covid-19 pandemic.[53]

By connecting two dots between the existence of the transparency principle in law-making process and the fact that the discussion of the latest Constitutional Court Bill was held behind closed doors, we can find a point that the transparency in the process of making the Constitutional Court Bill has not been done optimally yet. The work committee meeting which was held closed for public also means that the community participation in the law-making process is considered less significant.

Regarding this, it should be remembered that the Constitutional Court is a state institution that in charge of the judiciary, has an important role in the life of a nation and a state, and has at least five functions as the Constitutional Court viz. *the guardian of the constitution, the final interpreter of the constitution, the protector of human rights, the protector of the citizen's constitutional rights,* and *the protector of democracy.*[54] In making laws or regulations, it is necessary to have some foundations or principles in order to create legal products that have consistency of values.

Maria Farida Indrati in her book "*Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan*" or "Science of Legislation: Types, Functions, and Content Materials" defines the principles of making laws as guidelines or standards in making good laws.[55] In every process of making laws or regulations, the transparency principle is necessary. It needs opinions and aspirations from many people in the community as a form of community involvement in the making laws. It is because the laws that are made will have impacts on people who are lived under the law or ruled by law after all.

Provisions of law-making is stipulated in Law Number 12 of 2011 on the Establishment of Legislations. The transparency principle is one of the principles

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[53] Fachri Audhia Hafiez, "Ramai-ramai Gugat Revisi UU MK," https://mediaindonesia.com/politik-dan-hukum/358140/ramai-ramai-gugat-revisi-uu-mk, accessed on 10 Februari 2021.

[54] Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, *Hukum Acara Mahkamah Konstitusi,* Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 10.

[55] Maria Farida Indrati S., *Ilmu Perundang-undangan 1: Jenis, Fungsi, dan Materi Muatan*, (Daerah Istimewa Yogyakarta: PT. Kanisius, 2007), 252.

for making good laws as written in Article 5 letter G of Law 12/2011.[56] Then, it can be concluded that getting involved in a law-making process from the preparation, drafting, and discussion process is community right that should be fulfilled in a law-making process.[57] In addition, Article 96 Paragraph (1) Chapter XI of Law 12/2011, regulates on public rights to give opinions in a law-making process.[58] Then, in Article 96 Paragraph (4) of Law 12/2011, it is stated that to make it easier for the public to give opinions or suggestions, every draft of law or bill must be accessible to the public.[59] The Paragraph (4) contains provision about the application of transparency principle by having community involvement in a law-making process.

Therefore, it can be concluded that to realize the transparency principle in law-making process, it is necessary to have a concrete implementation of transparency in every step of the law-making process. The transparency principle can be implemented concretely by having "Policy Community". It consists of individuals or groups, such as civil society actors, companies, government agencies or officials, and donor organizations, who share social or political goals that are oriented towards a policy goal.[60]

"Policy Community" makes its members, whether in formation of government institutions, companies, or other community groups, are united in a common community. For individuals or organizations that collaborated in "Policy Community", the ones that guide their activities are the common goals which is one of it is about a law-making or law formulation.[61] In conclusion, this "Policy Community" is a way to implement the transparency in the law-making process. "Policy Community" becomes a means or forum for people in the community to try expressing their opinions and their aspirations in a law-making process. Thus, the transparency principle in a law-making process can be realized through "Policy Community" participation.

## C. CONCLUSION

In conclusion, Indonesia as a constitutional state should have legal basis in every aspect of s as a nation and a state, including the implementation of the Constitutional

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[56] Indonesia, Law of the Establishment of Legislations, Law Number 12 of 2011, LN.2011/No. 82, TLN No. 5234, Article 5 letter g.

[57] Indonesia, Law Number 12 of 2011, The Elucidation Article 5 letter g.

[58] Indonesia, Law Number 12 of 2011, Article 96 Paragraph (4).

[59] Indonesia, Law Number 12 of 2011.

[60] Jacqueline VEL et al., "Law-Making as a Strategy for Change: Indonesia's New Village Law," *Asian Journal of Law and Society*, Volume 4, Issue 2, (September 2017): 9.(halaman 9 yang dimaksudkan ada di halaman berapa diantara halaman 447-471)

[61] Jacqueline VEL, *et.al.,* "Law-Making as a Strategy for Change."

Court decision. The revocation of Article 59 Paragraph (2) of Law 8/2011 caused the loss of the only provision that regulated about the implementation of the Constitutional Court's judicial review decision by the legislators and led to a legal void and legal uncertainty. The revocation of the article was done because there were phrase errors which made the article was in contrary to the 1945 Constitution of the Republic of Indonesia as a supreme law in Indonesia. However, the phrase errors should not be the reason to revoke the whole paragraph and create a legal void especially about the implementation of the Constitutional Court's judicial review decision. Even though the Constitutional Court decision is final and binding (*erga omnes*), the implementation of the decision still needs a provision to guarantee the implementation and to prevent legal void that has been there since the Constitutional Court was established. The phrase errors in the Article 59 Paragraph (2) should be corrected or revised so it will not contradict with the supreme law. This is because the substance of Article 49 of Paragraph (2) is very important to prevent legal void and problem of the implementation of the Constitutional Court decision which has been considered less effective. In addition, the establishment of Law Number 7 of 2020 should fulfill the transparency aspect as stipulated in Article 5 of Law Number 12/2011. The transparency provides a chance for public to give opinions in a law-making process. One of many ways for implementing the transparency principle in law-making process is through "Policy Community" which can be means for community to give their aspirations for legislations that fulfill a sense of justice.

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