

The Authority of Judicial Orders of the Constitutional Court A Study of Legal Construction and Separation of Powers in Indonesia

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ABSTRACT

This study discusses the authority of judicial orders issued by the Constitutional Court in the context of legal construction and the principle of separation of powers in Indonesia. Judicial orders, as a concrete form of the expansion of the role of the judiciary, play an important role in filling legal gaps and ensuring the implementation of the Constitution, especially when the executive and legislative branches fail to fulfill their obligations. This study employs a normative legal approach with three analytical methods: a statutory approach, a case study of Constitutional Court decisions, and a conceptual approach to relevant legal theories. The findings indicate that judicial orders in Indonesia are not supported by a strong implementation framework, unlike practices in other countries such as India, Colombia, South Africa, Austria, and Germany, which are more progressive in regulating and supervising the implementation of judicial orders. The Indonesian Constitutional Court tends to issue declaratory or conditional rulings, but effective follow-up mechanisms do not accompany these. Therefore, this study recommends reformulating rulings to be more operational, establishing an implementation oversight unit, and adopting a continuing mandamus model for strategic issues as part of efforts to strengthen the role of the Constitutional Court in upholding constitutional supremacy and substantive justice in a constitutional democracy.

Keywords: Judicial Orders, Constitutional Court, Legal Construction, Separation, Powers.

1. INTRODUCTION

The judicial authority of the Constitutional Court has undergone a major transformation in the modern legal landscape. Originally intended as a neutral arbiter in legal disputes, the Constitutional Court now plays a much more active role in state governance in many countries, particularly in regions undergoing democratic transition or facing institutional crises. These courts act as guardians of the Constitution, ensuring compliance with the highest legal norms and redefining the limits of political power. This process, known as the judicialization of politics, places constitutional courts on an equal footing with other branches of government in terms of their influence on public policy (Hirschl, 2007; Ginsburg, 2006).

One of the most prominent manifestations of this judicial empowerment is the increasingly widespread use of judicial orders. No longer limited to declaratory rulings, many courts now use coercive legal instruments, such as structural injunctions, ongoing supervisory jurisdiction, and



remedial guidelines, to ensure that decisions are implemented by constitutional mandates (Fiss, 1979; Liebenberg, 2016). In India, for example, the Supreme Court has applied the concept of continuous mandamus in environmental and human rights issues to oversee sustainable policy change (Sathe, 2002). In Latin America and Africa, courts have also adopted a transformative remedial approach, which not only resolves individual violations but also promotes long-term systemic change in the Education, housing, and health sectors.

The active intervention of the Constitutional Court through judicial orders poses challenges to the traditional understanding of the doctrine of separation of powers, which classically emphasizes the strict division of legislative, executive, and judicial functions (Gwyn & Vile, 1970). However, in modern constitutional practice, there is a recognition of the importance of checks and balances, interdependence, and dialogue among branches of government (Barroso, 2011). In the context of countries with fragile democracies or post-authoritarian transitions, judicial intervention is seen as a guardian of democracy and a protector against the abuse of majority power (Sweet, 2000; Butt, 2015).

Therefore, the study of judicial orders is important for understanding institutional legitimacy and shifts in constitutional power dynamics in the modern era. This study also analyzes previous studies that are considered relevant to this research. The authority of the Constitutional Court in issuing judicial orders has become an important object in global constitutional discourse.

Studies such as Sundariwati (2024) and Kishan (2024) highlight how judicial activism strengthens constitutional protection, while Salman et al. (2018) and Awawda (2024) examine the boundaries between judicial activism and restraint as part of institutional design. Siboy et al. (2022) propose reforms to the centralized judicial review model to strengthen the effectiveness of constitutional courts. This concept aligns with Asshiddiqie's (2016) analysis, which positions the Constitutional Court as an instrument of democratization and guardian of the Constitution. Comparatively, Scribner (2010) and Shakti et al. (2023) demonstrate how judicial orders in Latin America, Brazil, Austria, and Germany shape public policy and human rights. Wicaksono and Rahman (2022) emphasize the importance of the relationship between the Constitutional Court and the Supreme Court in realizing implementable decisions. Based on a literature review of Kavanagh (2003), it can be concluded that the authority of judicial order by the Constitutional Court involves a crucial debate regarding the "positive legislator" and its implications for the principle of separation of powers. Sadurski (2005) directly discusses how constitutional courts can go beyond the annulment of laws to order the creation of new norms, which is the essence of judicial orders, and analyzes the legitimacy and limits of this role. Möllers (2011) enriches the discussion by



considering how active roles such as judicial orders can influence the "constitutional identity" of the Constitutional Court in the eyes of the public and the constitutional system. Popelier (2010) provides a comparative case study from Belgium, showing how constitutional courts in other countries navigate the boundaries of the separation of powers when operating actively. Finally, Kavanagh (2003) proposes the concept of a "living constitution" that can justify a more proactive role for courts, including through judicial orders, but emphasizes the need to maintain a balance with the principle of separation of powers to prevent judicial overreach.

This study aims to comprehensively analyze the legal construction of the Constitutional Court's authority in issuing judicial orders and its implications for the principle of separation of powers in a constitutional democracy. The main issues examined include how the legitimacy and legal boundaries of judicial orders are constructed in the Indonesian legal system, the extent to which such judicial intervention affects the balance of power between branches of government, and how these practices compare with the constitutional experiences of other countries. The objective of this study is to provide a normative analysis of the role of judicial orders as an effective instrument for constitutional enforcement and as a response to institutional failure. This research is expected to provide theoretical benefits in enriching the constitutional law literature on the dynamics of judicial power and democracy, practical benefits in formulating the direction of reform of the Constitutional Court's authority, and academic benefits as a reference in comparative law studies highlighting the relationship between judicial power and constitutionalism.

2. RESEARCH METHOD

This study adopts a normative legal approach, seeking to discover legal truth through the analysis of legislation, legal Theory, and legal doctrine. To achieve this objective, the researcher uses three main approaches: the legal regulation approach (examining regulations related to the authority of the Constitutional Court), the case approach (analyzing relevant Constitutional Court decisions related to the issue under discussion), and the conceptual approach (studying legal perspectives and doctrines to identify relevant ideas, concepts, and legal principles). The legal materials used include primary legal materials (the Constitution and the Law on the Constitutional Court), secondary legal materials (other laws and regulations, Constitutional Court decisions, books, journals, theses, and news articles), and tertiary legal materials (legal dictionaries, encyclopedias, and websites) as supplementary materials. Legal materials are searched through legal documentation centers and university libraries. Next, legal analysis is conducted through systematic interpretation, which involves relating laws to the legal system as a whole, and



grammatical interpretation, which focuses on the meaning of language, word order, or the wording of legal provisions.

3. RESULTS AND DISCUSSION

Judicial Orders and Their Implications for the Principle of Separation of Powers

In classical political Theory, the doctrine of separation of powers proposed by Montesquieu in "De l'Esprit des Lois" (1748) emphasizes the importance of a clear separation between the three branches of government: legislative, executive, and judicial, in order to prevent the concentration of power and protect the freedom of citizens. However, the development of modern constitutional states shows that this separation cannot be understood rigidly. Instead, the concept of "checks and balances" has emerged as a more relevant approach, whereby the branches of government must monitor and balance each other rather than simply being separate. Within this framework, the judiciary, particularly the Constitutional Court, has a crucial function in controlling the legality of the actions of the executive and legislative branches and ensuring that every action of the state is in accordance with the Constitution.

Judicial order is the concrete manifestation of the courts' role in addressing institutional failures, especially when the legislature fails to enact regulations that are in line with the Constitution or the executive fails to carry out its constitutional obligations. In many cases, it is not enough for the Constitutional Court to invalidate a norm or declare an action unconstitutional; the court must issue an order to ensure that appropriate follow-up action is taken. This is where judicial orders become a corrective response to the inaction or neglect of the other two branches of government. This also occurs in the context of countries undergoing democratic transition, where constitutional courts are relatively more independent institutions with the legitimacy to act as a counterweight to political power.

However, tensions arise between the approaches of judicial activism and judicial restraint. Judicial activism refers to the courts' active role in interpreting and shaping the law to uphold substantive justice and address legal gaps, including through proactive judicial orders. Conversely, judicial restraint encourages courts to exercise caution and limit themselves to textual interpretations of the law without interfering in the realm of public policy, which should be the domain of the legislature or executive.

This tension has sparked a normative debate about how far courts can go without violating the principle of separation of powers while still effectively exercising their constitutional control function. The results of the discussion show that judicial orders are an important manifestation of



the expansion of the role of the Constitutional Court in maintaining constitutional supremacy and the integrity of state governance.

Amidst a crisis of trust in political institutions and the often slow or opportunistic performance of the legislature or executive, judicial orders serve as both a corrective and preventive mechanism. The Constitutional Court can compel state institutions to act or cease constitutional violations, ultimately strengthening the principle of checks and balances. Although it has sparked debates about the limits of judicial authority, in practice, judicial order has become a vital tool in maintaining the functions of a democratic and accountable rule of law. It has proven that the separation of powers is not merely about the division of tasks but also constitutional responsibilities among branches of government.

The Construction of Judicial Order in the Indonesian Constitutional System

In modern constitutional systems, judicial order refers to legal orders issued by courts to instruct or prohibit certain actions that state institutions or officials must carry out. Judicial orders have several important types, including declaratory judgments (declaratory decisions that state rights or obligations without enforcing action), mandamus (orders to public officials to perform legal duties), structural injunctions (systemic orders to remedy structural violations comprehensively), and continuing mandamus (ongoing orders supervised by the Court to ensure progressive implementation of decisions). The existence of judicial orders is an important instrument in upholding constitutional supremacy, especially when other branches of government fail to carry out their constitutional mandates.

In the Indonesian context, the Constitutional Court has evolved from its original role as a negative legislator, which was limited to invalidating legal norms that conflicted with the 1945 Constitution, to a more active and proactive actor in shaping the constitutional order. This shift is evident in several rulings that not only invalidate legal norms but also contain instructional elements directed at state institutions or lawmakers. The Constitutional Court no longer merely declares the unconstitutionality of a norm but also sets a timeframe for improvement, provides normative technical guidelines, and regulates the transition of the implementation of the invalidated provisions. This demonstrates an expansion of authority toward judicial orders with executive functions.

The legal basis supporting the practice of judicial orders by the Constitutional Court in Indonesia stems from the Constitution and Law No. 24 of 2003 on the Constitutional Court (as amended), which grants the authority to review laws, resolve disputes over the authority of state institutions, dissolve political parties, and resolve election disputes. However, despite not explicitly

using the term "judicial order," such practices can be found in the form of instructive rulings. For example, the use of phrases such as "establishing new legal norms" or "making improvements within a certain timeframe" in the Court's rulings reflects a more proactive judicial approach. This progressive interpretation expands the meaning of judicial review to include a tool for regulating the direction of legislative policy and public administration.

Case studies illustrating elements of judicial orders in Constitutional Court rulings can be seen, for example, in Constitutional Court Decision No. 135/PUU-VII/2009 regarding the review of the Oil and Gas Law, which contained an order for the lawmaker to amend legal norms within a certain timeframe. Another example is Constitutional Court Decision No. 46/PUU-VIII/2010 on the status of children born out of wedlock, which has direct implications for civil law regulations and the administrative obligations of the state. In the case of elections, such as Constitutional Court Decision No. 22-24/PUU-VI/2008, the Court not only invalidated a norm but also ordered the election authorities to adjust their technical procedures. The findings of this discussion confirm that the Indonesian Constitutional Court has developed the legal construct of judicial order as part of its more active constitutional role, particularly in bridging the gap between constitutional norms and state practices. Judicial order, in this context, serves as a corrective and preventive mechanism to ensure that the law is not merely declarative but also operational in realizing constitutional justice.

Comparative Perspectives and Their Relevance to the Indonesian Constitutional Court

In understanding the role of the Constitutional Court in modern constitutional systems, it is important to examine how judicial orders are practiced comparatively in various countries. Each country develops its forms and strategies for implementing judicial order in its unique social, political, and legal context. From the continuing mandamus model in India to remedial interpretation in Germany, these variations in approach demonstrate how constitutional courts can play an active role in ensuring the implementation of constitutional rights and strengthening democratic governance. The table below presents a comparison of judicial order practices in six countries, including Indonesia, highlighting the instruments used, their distinctive features, policy focus, and implementation levels, which can serve as a basis for reflection and learning for national constitutional system reforms.

Table 1. Comparison of Judicial Order Practices

Country	Judicial Order Instrument	Main Characteristic	Policy Focus	Implementation
India	Continuing Mandamus	Continuous mandates, long-term oversight	Environment, minority rights	Courts actively monitor implementation
South Africa	Constitutional Remedial Orders	Guaranteeing constitutional social policies	Housing, education, health	Orders with clear obligations for the state

Colombia	Tutela Orders	Rapid protection of fundamental rights	Social rights and public services	Direct orders to the executive
Austria	Suspended Annulment	Dialogue, legislative deadlines for improvements	Legislation and civil rights	Does not directly repeal laws
Germany	Remedial Interpretation	Encouraging institutional policy corrections	Privacy, human rights, employment	Legislature given time for revision
Indonesia	Constitutional ruling + ruling (conditional unconstitutionality, postponement, normative order)	Does not always include clear implementation mechanisms; depends on interpretation by other institutions	Right to vote, lawmaking, constitutional protection	Weak, often ignored by the executive/legislature; no mechanism for monitoring implementation

(Source: Author, 2025)

The comparison table above shows that judicial orders in various countries have developed into effective judicial instruments in guaranteeing the implementation of constitutional rights and promoting policy reform. Countries such as India and Colombia stand out for their active interventionist approach by the courts, where instruments such as Continuing Mandamus and Tutela Orders not only establish legal obligations but also directly regulate the mechanisms for their implementation. On the other hand, the Austrian and German models demonstrate a more dialogic approach, granting the legislature a deadline to amend laws or norms deemed unconstitutional, reflecting high trust in the political process while remaining within the framework of constitutional supremacy.

In contrast, Indonesia appears to lag in the effectiveness of judicial order enforcement. The Constitutional Court often issues declaratory or conditional rulings (such as conditional unconstitutionality or postponement), but strong enforcement instruments do not accompany these and rely entirely on the good faith of the executive or legislative bodies. The absence of oversight or follow-up mechanisms means that many of the Constitutional Court's decisions are not followed up in concrete terms, blurring the judicial control function over the exercise of other branches of government.

To strengthen the effectiveness of judicial orders, the Indonesian Constitutional Court needs to reformulate its rulings to be more operational by including deadlines for implementation and constitutional consequences if they are not carried out. Additionally, the adoption of the continuing mandamus model, as in India, could be considered for handling strategic cases, particularly human rights violations and environmental issues, to enable the court to continue monitoring policy implementation. Strengthening oversight institutions is also crucial through the establishment of a special unit within the Constitutional Court or an independent institution to evaluate the follow-up of decisions, such as compliance units in several countries. Furthermore, the practice of inter-branch dialogue, as applied in Austria and Germany, can create a space for constructive

cooperation between state institutions to improve unconstitutional laws in a deliberative manner. Finally, the consolidation of constitutional culture must be achieved through legal Education and increased public awareness so that the public understands that the judicial order is not merely a legal product but an important instrument in ensuring the protection of constitutional rights and strengthening democracy.

4. CONCLUSIONS

This study concludes that judicial orders are a concrete expression of the transformation of the role of the Constitutional Court as the guardian of the Constitution in the Indonesian constitutional system. This authority reflects the expansion of its function from merely a negative legislator to an institution that actively provides normative instructions to ensure the effective implementation of the Constitution. In the context of separation of powers, judicial orders play a role as a necessary checks and balances instrument to overcome legislative and executive failures in carrying out their constitutional responsibilities. However, the implementation of judicial orders in Indonesia still faces serious challenges, such as weak oversight, unclear implementation mechanisms, and dependence on the goodwill of other institutions. Compared to practices in countries such as India, Colombia, South Africa, Austria, and Germany, the Indonesian Constitutional Court has not fully utilized judicial orders as an effective constitutional control tool. Therefore, it is necessary to reformulate court rulings to make them more operational, strengthen the oversight unit for the implementation of rulings, adopt a continuing mandamus model for strategic issues, and build a constitutional culture that encourages collaboration between state institutions. Judicial orders, if applied systematically and supported by adequate institutional design, can serve as an important bridge between constitutional supremacy and substantive justice in Indonesian democracy.

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