

**URGENCY OF *RECHTSVINDING* AND JURISPRUDENCE IN THE
CONSTITUTIONAL COURT AUTHORITY**

***URGENSI PENEMUAN HUKUM DAN YURISPRUDENSI DALAM
KEWENANGAN MAHKAMAH KONSTITUSI***

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Volume 1, Number 2, September 2022

Received: July 15, 2022 Accepted: August 30, 2022 Online Published: September 30, 2022.

ABSTRACT

Indonesia is a democratic state based on the law (constitutional democratic state), with the understanding that the Constitution has a position as the supreme law because the whole administration of the state should be based on the Constitution. The Constitutional Court was present as the guardian of the constitution to the realization of the ideals of Indonesia as a democratic state based on law. The research entitled *Rechtsvinding* and Jurisprudence Used by the Constitutional Court examines the importance of *rechtsvinding* and the attachment of using jurisprudence in deciding cases according to the authority possessed by the Constitutional Court. This research uses the Socio-Legal method, which is a research method that examines a problem through normative analysis, then uses a non-legal science approach that develops in society. The results of the research that has been done are; 1) *Rechtsvinding* by the Constitutional Court interpreted as an effort to how the Constitutional Court interpreting the Constitution (1945), testing the laws against the 1945 Constitution, to decide the other cases the authority granted by the 1945 Constitution, 2) The Constitutional Court there is no obligation to be bound and is not there is a prohibition to use the jurisprudence of the Supreme Court.

Keywords : ***Rechtsvinding*; Jurisprudence; Constitutional Court**

ABSTRAK

Indonesia adalah negara demokrasi yang berdasar atas hukum (constitutional democratic state), dengan pengertian bahwa konstitusi memiliki kedudukan sebagai hukum tertinggi, karena itu seluruh penyelenggaraan negara harus

berdasar pada Konstitusi. Mahkamah Konstitusi hadir sebagai pengawal konstitusi untuk mewujudkan terjelmanya cita-cita Indonesia sebagai negara demokrasi yang berdasar atas hukum. Penelitian yang berjudul Penemuan Hukum dan Penggunaan Yurisprudensi Oleh Mahkamah Konstitusi mengkaji tentang arti penting penemuan hukum dan keterikatan penggunaan yurisprudensi dalam memutus perkara sesuai kewenangan yang dimiliki oleh Mahkamah Konstitusi. Penelitian ini menggunakan metode socio legal, yaitu metode penelitian yang mengkaji suatu permasalahan melalui analisa normatif, kemudian menggunakan pendekatan ilmu non-hukum yang berkembang di masyarakat. Hasil dari penelitian yang telah dilakukan yaitu; 1) penemuan hukum oleh Mahkamah Konstitusi diartikan sebagai upaya bagaimana Mahkamah Konstitusi menafsirkan Konstitusi (UUD 1945), menguji undang-undang terhadap UUD 1945, memutus perkara lain yang kewenangannya diberikan oleh UUD 1945, 2) Mahkamah Konstitusi tidak ada kewajiban untuk terikat dan tidak ada larangan untuk menggunakan yurisprudensi Mahkamah Agung beserta peradilan lain yang berada di bawahnya lingkungannya maupun yurisprudensi Mahkamah Konstitusi sendiri.

Kata Kunci : Penemuan Hukum; Yurisprudensi; Mahkamah Konstitusi

I. INTRODUCTION

Talking about *rechtsvinding* in this paper context is *rechtsvinding* by judges (*rechterlijke rechtsvinding*) concerning the application or enforcement of the law by judges.¹ Therefore, in this regard, it would be appropriate to first quote a statement by the professor of law from Gadjah Mada University, Sudikno Mertokusumo, who started his discussion of *rechtsvinding* with the statement:

*Because the law is incomplete or unclear, the judge must seek the law, must find the law. He must make a rechtsvinding. Law enforcement and implementation are often legal discoveries and not just the application of the law. Legal discoveries are usually defined as the process of forming the law by judges or other legal officers who are assigned the task of implementing the law on concrete legal events. This is a general process of concretization and individualization of legal regulations by keeping in mind concrete events.*²

From this statement, it is understood that, first, making legal discoveries is an attempt to find answers to the question "what is the law for a particular event or concrete case if the law does not regulate it or does not regulate it?" Second, legal findings by judges are more accurately understood as the legal needs of judges, especially judges in countries that adhere to the tradition of

¹ Suryoutomo, M., & Febriharini, M. P. (2020). PENEMUAN HUKUM (RECHTSVINDING) HAKIM DALAM PERKARA PERDATA SEBAGAI ASPEK MENGISI KEKOSONGAN HUKUM. *Jurnal Ilmiah Hukum Dan Dinamika Masyarakat*, 18(1), 103–116.

² Askarial. (2018). Interpretasi Atau Penafsiran Sebagai Metode Penemuan Hukum. *Menara Ilmu*, 7(79).

civil law,³ as occurred and developed in mainland European countries,⁴ and countries affected by this tradition, including Indonesia. This need arises because, on the one hand, as a remnant of the "legacy" ideology of *Legism*,⁵ Judges in civil law countries generally have become accustomed to or more familiar with rule-based reasoning in dealing with the concrete case that is being tried; Meanwhile, on the other hand, because it turns out that the law is never complete or perfect, it develops the maxim (which is then accepted as the principle)⁶ *Ius curia novit (or iura novit curia)*⁷ namely the judge is considered to know what the law is for a concrete event that is being tried. This is then used as a basis for argumentation that a judge may not refuse to try a case brought to him because there is no law regulating the case in question. Based on this argument, further thought has been developed that for this reason the judge is obliged to explore the laws that live in a society.

II. METHOD

The research method is a scientific way of obtaining certain data with specific purposes and uses. Or a set of rules, activities, and procedures used by researchers. Many societal problems are very complex, and cannot be answered textually and in a monodisciplinary manner, and situations like this a more basic and enlightening explanation can be found in an interdisciplinary manner. Therefore, we need a legal approach that can explain the relationship between law and society. And the socio-legal approach is an alternative.⁸ The socio-legal research method is a research method that approaches a problem by combining normative analysis with non-legal science approaches to seeing the law. Socio-legal research is research that examines the science of law by incorporating social factors while remaining within the boundaries of legal writing. Research Socio-Legal is an alternative approach to the legal test of doctrinal studies. The word "social" in socio-legal studies represents the relationship between the contexts in which the law exists (an interface with a context within which law exists).⁹

Socio-legal research still prioritizes the discussion of legal norms, then examines them comprehensively from the study of non-legal science / non-

³ Brouwer, R. (2020). On the meaning of "system" in the common and civil law traditions: Two approaches to legal unity. *Utrecht Journal of International and European Law*, 34(1). <https://doi.org/10.5334/UJIEL.451>

⁴ Introduction: Comparative Criminal Law. (2020). In *The Handbook of Comparative Criminal Law*. <https://doi.org/10.1515/9780804777292-001>

⁵ Huang, Y. S., & Asghar, A. (2021). The political initiative of Taiwan's education for sustainable development: Looking through the lens of Chinese legalism. *Policy Futures in Education*, 19(7). <https://doi.org/10.1177/1478210321995650>

⁶ Scott, I. K. (2021). Learning to "Think like a Lawyer": Developing a Metacognitive Model for Legal Reasoning. *College Teaching*, 69(1), 34-42. <https://doi.org/10.1080/87567555.2020.1803190>

⁷ Lailam, T. (2016). Pro-Kontra Kewenangan Mahkamah Konstitusi dalam Menguji Undang-Undang yang Mengatur Eksistensinya. *Jurnal Konstitusi*, 12(4). <https://doi.org/10.31078/jk1247>

⁸ Hakim, M. H. (2017). PERGESERAN ORIENTASI PENELITIAN HUKUM: DARI DOKTRINAL KE SOSIO-LEGAL. *Syariah Jurnal Hukum Dan Pemikiran*, 16(2), 105. <https://doi.org/10.18592/sy.v16i2.1031>

⁹ Klink, B. (2020). Towards a Speculative Sociology of Law: Utopia as Method. *Recht Der Werkelijkheid*, 40(3). <https://doi.org/10.5553/rdw/138064242019040003004>

legal factors, such as history, economy, society, politics, culture, and others. Socio-legal is an umbrella concept, which is an umbrella for all the approaches to the law, legal proceedings, or legal system. Socio-legal research is not in the dichotomy of legal researchers' conflict, between juridical normative/doctrinal research or empirical juridical research. Socio-legal research does not separate itself from juridical normative/doctrinal studies, instead, it thoroughly examines normative studies and legal doctrines, then "uncovered" through studies from non-legal aspects.

III. ANALYSIS AND DISCUSSION

a. *Rechtsvinding* by the Constitutional Court

If you follow Bruggink's opinion, there are two models of *rechtsvinding*, namely the interpretation method (interpretative method) and the reasoning model (*redeneerwijzen*) or legal construction.¹⁰(Hadjon & Djatmiati, 2016) For interpretation, there are four models, namely;

- 1) Language interpretation (de taalkundige interpretation);
- 2) Historical statutes (de wethistorische interpretations);
- 3) Systematic (die systematische interpretation);
- 4) Social (de maatshappelijke interpretation).

Meanwhile, for reasoning or legal construction, there are three forms, namely:

- 1) Analogy;
- 2) Rechtsverfijning (legal refinement or legal narrowing) and (3) *argumentum a contrario*.

Similar to Bruggink's opinion above, Scholler states that in civil law countries, there are four groups of interpretation methods whose principles are developed based on statutory interpretation, namely (1) literal, (2) intentional, (3) systematic, and (4) teleological.¹¹ However, Scholler notes that before applying these methods of interpretation, it is necessary to first understand the existence and application of the "rules traditionally applied cannons of interpretation, namely verbal meaning, grammatical construction (building or grammatical construction); statutory context (statutory context), and teleological or social aspects (teleological aspects) of the provisions of the law to be interpreted. Meanwhile, in countries adhering to the common law tradition, the principles of interpretation are developed through court decisions.¹² This situation can be understood because it is closely related to the application of the doctrine of *stare decisis* or precedent (which has been accepted as a principle) which is held firmly by judges or courts in these countries. This doctrine or principle implies that the opinion of a judge or the decisions of a previous court or a higher court in certain concrete cases binds

¹⁰ Hadjon, P. M., & Djatmiati, T. S. (2016). *Argumen Hukum* (7th ed.). Gadjah Mada University Press, Cetakan Ke.

¹¹ Atrey, S. (2021). Beyond discrimination: Mahlangu and the use of intersectionality as a general theory of constitutional interpretation. In *International Journal of Discrimination and the Law* (Vol. 21, Issue 2). <https://doi.org/10.1177/13582291211015637>

¹² Konyakhin, V. P., Batyutina, T. Y., Aslanyan, R. G., & Intykbaev, M. K. (2021). Acts of the Russian Federation Constitutional Court in the context of criminal law linkages. *SHS Web of Conferences*, 118. <https://doi.org/10.1051/shsconf/202111803003>

the next judge or court (or a lower court) in hearing similar cases.¹³ In this regard, for judges in common law countries who also accept the principles of statutory interpretation, such as in the United States, there is no difference in how they work in deciding cases based on *stare decisis* (precedent) and based on law, as stated. By Benjamin Cardozo, “*Stare decisis* is at least the everyday working rule of our law. I shall have something to say later about the propriety of relaxing the rule in exceptional conditions. But unless those conditions are present, the work of deciding cases in accordance with precedent that plainly fit them is a process similar in its nature to that of deciding cases in accordance with a statute.”¹⁴

Since this paper is not intended to give a lecture on Introduction to Legal Studies, the initial notes on legal findings will be sufficient here. The essence of the whole note The introduction above is only to emphasize that *rechtsvinding* is a necessity for a judge or court in deciding a concrete case that is being tried in case there are circumstances in which the law does not regulate it or does not regulate it or there could be contradictions in the rules that apply to it. The matter. In such a situation, the judge must determine what or how the law applies to the case and then pour it into a decision. In determining what or how the law is, judges can use legal interpretations and legal constructs. Seen from this point of view, it is not appropriate for legal findings to be linked to the Constitutional Court if the legal findings are interpreted solely as “what is the law enforced by the Constitutional Court on a case if the law does not regulate or do not regulate it?” This is because the main function of the Constitutional Court (and the constitutional court or what is referred to by other names in all countries) is constitutional review.¹⁵

Particularly in this case testing the constitutionality of statutory norms. In other words, from the perspective of its main function, the main task of the Constitutional Court is not to apply the norms of the law, but rather to “adjudicate” the norms of the law so that ordinary courts do not apply statutory norms that are contrary to the Constitution. . Therefore, in this paper, legal findings by the Constitutional Court will be interpreted as an effort to find answers to the question “how the Constitutional Court interprets the Constitution (*in casu* UUD 1945), especially in exercising its authority to test the constitutionality of laws.” With this limitation, it does not mean that the Constitutional Court only performs interpretation of the Constitution when exercising its authority to test the constitutionality of laws. Following the authority granted by the 1945 Constitution, the Constitutional Court has the authority to examine laws against the 1945 Constitution, to decide disputes over the authority of state institutions its authority is granted by the 1945 Constitution, to decide the dissolution of political parties; decide disputes over the results of general elections, as well as decide the opinion of the DPR that the President and/or Vice President committed violations or no longer fulfill the requirements as President and/or Vice President as

¹³ Black’s Law Dictionary. (2019). *Black’s Law Dictionary - Free Online Legal Dictionary*. Black’s Law Disctionary.

¹⁴ Singh, R. (2022). Epilogue: The Nature of the Judicial Process 100 Years on. In *The Unity of Law*. <https://doi.org/10.5040/9781509949458.0030>

¹⁵ Palguna, D. G. (2018). *Mahkamah Konstitusi: dasar pemikiran, kewenangan, dan perbandingan dengan negara lain*. Konstitusi Press (Konpress).

stipulated in the 1945 Constitution so that every exercise of its powers the Constitutional Court will interpret the constitution.¹⁶

In other words, it can be said that basically the decisions of the Constitutional Court are a form of constitutional judges' interpretation of binding judges in the cases they decide.¹⁷ The exercise of the authority of the Constitutional Court in examining the constitutionality of laws is the focus of the discussion of constitutional interpretation in this paper, apart from reasons of limited space, is that judicial review of the constitutionality of laws can be said to be the core business of the Constitutional Court, as is the case with the constitutional courts in various countries. If it departs from the United States Court Decision in the *Marbury v. Madison* (1803)¹⁸ as well as the establishment of the world's first constitutional court, in this case, the Austrian Constitutional Court (*Bundesverfassungsgerichtshof*). It can be said that the history of the birth of the constitutional court (or what is called by other names) is the history of the birth of the idea of reviewing the constitutionality of laws.¹⁹

Talking about the interpretation of the constitution is talking about how elaborate the meanings contained in the constitution, which results are then recognized and treated as (part) of constitutional law.²⁰ Or, as said by Anthony Mason, interpreting the constitution is an attempt to find answers to questions relating to how to view the constitution and the objectives that the constitution aims to achieve. Methodologically, according to Scholler, the methods of interpreting laws also apply to the interpretation of the constitution, but their enactment is only limited to being a starting point. This is because, in the interpretation of the constitution, three additional important aspects must be considered, namely the unity of the constitution, the practical coherence of the constitution, and the appropriate working of the constitution.²¹

Thus, for example, in a certain concrete case in examining the constitutionality of a law, it is not wrong if the judge interprets the constitutionality of a statutory norm (or a certain part of a statutory norm) by rejecting the historical interpretation method. However, when the use of such methods as a point of departure results in conclusions or legal opinions that

¹⁶ Simanjuntak, S., Alfaiz, R., & Ambarita, M. (2021). Urgensi Perluasan Kewenangan Mk Terhadap Constitutional Question Dan Constitutional Complaint Sebagai Wujud Perlindungan Hak Konstitusional Warga Negara. *Legislatif: Lembaran Gagasan Mahasiswa Yang Solutif Dan Inovatif*, 4(2).

¹⁷ Tamrin, A. (2015). Perubahan Konstitusi dan Reformasi Ketatanegaraan Indonesia. *JURNAL CITA HUKUM*, 3(1). <https://doi.org/10.15408/jch.v2i1.1843>

¹⁸ Nelson, W. E. (2018). *Marbury v. Madison: The Origins and Legacy of Judicial Review, Revised and Expanded*. University Press of Kansas.

¹⁹ Molier, G., & Rijpkema, B. (2018). Germany's New Militant Democracy Regime: National Democratic Party II and the German Federal Constitutional Court's 'Potentiality' Criterion for Party Bans: Bundesverfassungsgericht, Judgment of 17 January 2017, 2 BvB 1/13, National Democratic Party II. *European Constitutional Law Review*, 14(2), 394–409.

²⁰ Celis Vela, D. A. (2021). The specificity thesis of constitutional interpretation. *International Journal of Constitutional Law*, 19(4). <https://doi.org/10.1093/icon/moab104>

²¹ Saunders, B. B., & Kennedy, S. P. (2020). History and constitutional interpretation: Applying the "Cambridge school" approach to interpreting constitutions. *Oxford Journal of Legal Studies*, 40(3). <https://doi.org/10.1093/ojls/gqaa013>

are incompatible, let alone contradict, with the need to understand the constitution as a unit, or (can) give rise to illogical practices, or make the constitution impossible to work or be implemented. Precisely, the interpretation of history must be abandoned. The same applies to the use of other methods of interpretation as a starting point for interpreting the constitution. Therefore, it is not easy (if you do not want to say that it is impossible) to state a certain method of interpretation as the most appropriate method of interpreting the constitution, in this case, the interpretation of the constitution which is applied in examining the constitutionality of a law.

What has become a constant debate on the interpretation of the constitution is not the question of which method of interpretation is considered to be the most appropriate, but the issue of the tendency of the judges' stance or attitude in interpreting the constitution. If we reflect on the practice in the United States as a country which according to the records of experts is the first country to enact a written constitution, there are two tendencies for the judges to stand in interpreting the constitution, namely those who adhere to the principle of *originalism* (so-called originalist) and those who adhere to the principle of *non-originalism* (so-called non-originalist). Until now, the positions of these two groups cannot be reconciled so the interpretations that have been born from the two groups are different. Those who are called *originalists* are further grouped into two, namely those who adhere to the "original meaning" or original intent (so it is called original intention *originalism*) and those who adhere to the "original meaning" or original meaning (so it is called original meaning *originalism*). In the opinion of followers of original intention *originalism*, the constitution must be interpreted according to the original intentions of the drafters of the constitution. The judges from the group of original intention *originalists* criticized the stance of *non-originalists* - considered to be using a liberal approach - as an illegitimate approach.²²

One of the famous original intention originalist figures is Robert H. Bork. In one article published in the Indiana Law Journal, Bork stated that the decisions of judges (in the case of the Supreme Court of the United States) must always be based on or controlled by neutral principles.²³ Such requirements, according to Bork, derive from the existence of anomalous conditions that arise from the application of the principle of court supremacy in a democratic society. It is said to be an anomaly because, according to Bork, if the court is truly supreme and can rule according to such supreme principles, then such a society is not a democratic society. However, this anomaly is nullified by the model of government as outlined in the structure of the Constitution (United States), a model on which the principle of people's consent is limited by the Supreme Court. These neutral principles, said Bork, can be found in the Constitution, namely in the values chosen by the Founding Fathers, not in the Supreme Court. On another occasion, Bork reiterated his argument as an original intention originalist by saying that the

²² Ryan, J. E., & Ryant, J. E. (2011). LAYING CLAIM TO THE CONSTITUTION: THE PROMISE OF NEW TEXTUALISM. *Virginia Law Review*, 97(7).

²³ Ugland, E. (2020). Bork, Robert H. Neutral Principles and Some First Amendment Problems, 47 Ind. L. J. 1 (1971). *Communication Law and Policy*, 25(3). <https://doi.org/10.1080/10811680.2020.1766877>

Constitution is "Law." Therefore, if the constitution is true "Law" then - as is the case with all laws - the meaning as intended by the lawmaker is what binds the judge, just as it binds the branch of power. Legislative and executive. Therefore, in interpreting the Constitution, judges (at any level) are bound by the intention of drafting the Constitution.²⁴

However, this original intention of the originalist view has drawn sharp criticism. There are two names according to Lawrence B. Solum are considered to be the founders of the critics of the original intention, namely Paul Brest and Jefferson Powell. Brest questioned how to know the meaning of an institution whose membership is plural if only based on text.²⁵ Although the text can indeed give clues to the intentions of the drafters of the Constitution, the text itself does not have a more important position than other sources in trying to find this point. Moreover, says Brest further, intentionalists often treat the writings or statements of the drafters of the Constitution as if they are evidence that shows their point.

When summarized, Brest's criticism of original intention *originalism* includes the following reasons:

- 1) Difficulty in ascertaining the general institutional intentions of a multi-member (multiple) institutions;
- 2) certain matters relating to identifying the intent of the members of the Philadelphia Convention and the intent of the states ratifying the conventions (which preceded the Philadelphia Convention - Author) in terms of the original Constitution and the intentions of members of Congress and the intent of the institution's state legislatures on various amendments to the (original) Constitution;
- 3) Problems in determining the generality or specificity of the intentions of Designers or ratifiers;
- 4) The problem of concluding the existence of intentions based on the constitutional structure;
- 5) Difficulty translating the beliefs and values of Designers and ratifiers given the changes that occur over time;
- 6) The problem of democratic legitimacy - namely that the Constitution of 1789 was drafted and ratified without the participation of women and slaves;
- 7) Instability problems, in the sense that orders an inflexible constitutional order is incapable of adapting to constantly changing circumstances.

Meanwhile, Powell based his critique on questioning the intentionalists' view that the drafters of the Constitution wanted or intended their draft Constitution to be interpreted according to their intent. While it is true that there are references to phrases regarding the "original intent" and "the intent of the designers" in the debate in the drafting process of the Constitution, these phrases do not represent an earlier version of original intentions

²⁴ Bobić, A. (2017). Constitutional Pluralism Is Not Dead: An Analysis of Interactions Between Constitutional Courts of Member States and the European Court of Justice. *German Law Journal*, 18(6). <https://doi.org/10.1017/s2071832200022380>

²⁵ Solum, L. B. (2012). What is Originalism? The Evolution of Contemporary Originalist Theory. *SSRN Electronic Journal*. <https://doi.org/10.2139/ssrn.1825543>

originalism. Brest further emphasized that the main hope of the drafters of the Constitution in Philadelphia with the interpretation of the constitution was that the Constitution, like any other legal document, be interpreted by the explicit or clear language of the Constitution. This hope, says Powell, is evident from the many attempts by designers to clarify text formulations, both to remove obscurity or ambiguity and to dispel concerns that excess language will be taken literally and therefore the purpose of a particular provision is defeated. Moreover, according to Powell, although the material for the debate regarding the language used in the Constitution was very abundant, none of the debates indicated the existence of a delegation that suggested that to avoid misunderstanding the text of the Constitution, interpreters of the Constitution at that time The front can overcome this by considering the points articulated during the Constitutional Convention in Philadelphia.²⁶

Starting at the end of the 20th century, original intention *originalism* began to be abandoned, and then shifted to original meaning *originalism*.²⁷ The central figure who played an important role in this shift was Supreme Court Justice Antonin Scalia. In his speech at a seminar organized by the Department of Justice, Scalia suggested stopping the search for the original intentions of the drafters and replacing them by finding “common meanings that the original public meaning contained in the text of the Constitution.”²⁸ The reason is, that because the Constitution is a text, it must be interpreted according to its original meaning, namely the general meaning that was in effect when the text was ratified.

Part of the reason above, according to Ralph Rossum, another reason that encourages Scalia to leave her original intention is that she disagreed with the use of the legislative history of the court in interpreting the law. He is worried that the same "logic" is imposed by judges in interpreting the constitution. According to Scalia, “The use of legislative history can 'mask the underlying choices made by the judge in construing a statute' and can confer 'a false impression that elected representatives considered and intended the result reached by the judge'. It can also upset delicate legislative compromises that 'are best found' in the actual language of the statute. "Scalia believes, that adhering to the original public meaning - which means adhering to the text and tradition - will prevent or curb judicial discretion. Preventing judicial discretion is very important to prevent judges from using their preferences or preferences in interpreting the Constitution. Adherence to the text of the constitution or (in the case of ambiguity) to the traditional meaning of those who adopt the constitution will reduce the danger that the judge replaces the people's beliefs with his own beliefs. For Scalia, the text formed the rules so that the judge just had to apply the rule as law. Therefore, when the text or tradition does not provide rules, there are no rules, which means that there

²⁶ Harvelian, A., Safa'at, M. A., Widiarto, A. E., & Qurbani, I. D. (2020). CONSTITUTIONAL INTERPRETATION OF ORIGINAL INTENT ON FINDING THE MEANING OF SOCIAL JUSTICE IN THE CONSTITUTIONAL REVIEW. *Yustisia Jurnal Hukum*, 9(3). <https://doi.org/10.20961/yustisia.v9i3.42003>

²⁷ Brink, D. O. (2016). Originalism and Constructive Interpretation. In *The Legacy of Ronald Dworkin*. <https://doi.org/10.1093/acprof:oso/9780190466411.003.0012>

²⁸ Barnett, R. E., & Bernick, E. D. (2018). The letter and the spirit: A unified theory of originalism. In *Georgetown Law Journal* (Vol. 107, Issue 1, pp. 1–55). Georgetown Law Journal Association. <https://doi.org/10.2139/ssrn.3049056>

is no law for the judge to apply the rules that are contrary to the actions of the branch of power that represent the will of the people (i.e. Formulate the rules) so that there is no justification for interfering. Judge's hand.²⁹

In theory, the shift from original intentions *originalism* to original meaning *originalism* is a significant change. However, according to Ryan, in practice, it hardly brings any meaningful changes. This happened not only because conservative groups Intentionalists often refuse to accept this "new version" of *originalism* if it brings outcomes that they value liberal but also because the methodology used is relatively unchanged. Therefore, according to Ryan, there is no difference between original intention originals and original meaning *originalism*. Different from those in the *originalists* group, those in the non-*originalists* view the constitution as a living organism. That's why these non-*originalists* are often called living constitutionalists because they treat the constitution as a living constitution. The view of the living constitutionalists is based on the idea that the (United States) Constitution was made to be able to last for centuries, so that, as a consequence, in facing various crises it must be able to adapt. Therefore, the meaning of the Constitution must always change as an expression of changing the fundamental values of each generation. Constitution must also develop (evolving) so that its meaning must develop, because only with the development of meaning can the Constitution be able to survive.³⁰

Erwin Chemerinsky, a proponent of a living constitution, strongly opposes the position of *originalists* because there are serious methodological problems in the *originalists'* thinking. Reading the history of the Constitution to find "original intent," said Chemerinsky, is not value-neutral because of the subjective process of deciding whose intentions to vote (the designer's intent or the intent of those who ratify) to ensure that it is their view that holds meaning and to determine the meaning of so many people who often have different goals or purposes.³¹ Says Chemerinsky further, even if the methodological problem can be resolved, certain purposes of *originalism* lead us to absurd conclusions. For example, if following the line of thinking of the *originalists*, electing a woman as president or vice president is against the Constitution because Article II refers to this office holder as "he" and there is no doubt that The drafters of the Constitution intended only men to fill the positions of President and Vice President. Meanwhile, in support of his view as a living constitutionalist, he said that the basis for the concept of a living constitution lies in the fact that modern society can't be governed based on certain views of individuals who lived centuries ago. On another occasion, Chemerinsky argued that it is utterly absurd to develop a definition of the Constitution for the 21st century to do so from the meaning of the 18th

²⁹ Rossum, R. A. (2016). Antonin scalia's jurisprudence: Text and tradition. In *Antonin Scalia's Jurisprudence: Text and Tradition*. University Press of Kansas. <https://doi.org/10.5860/choice.43-6846>

³⁰ Gordon-Reed, A. (2020). The Second Creation: Fixing the American Constitution in the Founding Era by Jonathan Gienapp. *Journal of the Early Republic*, 40(3). <https://doi.org/10.1353/jer.2020.0075>

³¹ Colby, T. B. (2019). Originalism and structural argument. *Northwestern University Law Review*, 113(6). <https://doi.org/10.2139/ssrn.3376150>

Fajarwati, M. (2016). Upaya Hukum Untuk Melindungi Hak Konstitusional Warga Negara Melalui Mahkamah Konstitusi. *Jurnal Legislasi Indonesia*, 13(03).

century. Throughout recent history, the Supreme Court has made careful decisions about the meaning of the Constitution by looking at its text, its purpose, its structure, existing precedents, historical practice, and current needs and values.³²

In the Indonesian context, based on the decisions of the Constitutional Court throughout its history, there has not been any difference in views among constitutional judges in such a way that it can be dichotomous that there is a "division" between originalist constitutional judges and non-originalist constitutional judges. In this regard, I think that the fundamental problem lies not in the answer to the question of whether it is more appropriate to be *originalists* or to be non-*originalists* (living constitutionalists) but on the question of how to understand the definitions contained in the Constitution and how to make them happen. So, one-day *originalism* might be more appropriate to use while on other occasions it would be strange if *originalism* was enforced. Furthermore, the explanation regarding the *rechtsvinding* by the Constitutional Court with the condition of Indonesia's current legislation and the goal state law, there are two fundamental problems which must be presented beforehand. First, exposure to the current state of Indonesian legislation this - a topic that demands not just qualitative statements, but also, or even above all, data that is the result of field research. Second, the explanation of the rule of law - because it is impossible to know the objectives of the rule of law without first reviewing developments in the history of rule of law thinking.³³

Therefore, on this occasion, I will only explain in general terms. About the current state of Indonesian legislation, I will only underline two things. First, the high number of requests for judicial review of the constitutionality of laws submitted to the Constitutional Court does not always indicate serious matters relating to the interpretation of the constitution. It says "not always" because often the things filed do not even relate to the constitutionality of the norms of the law petitioned for review, but rather the application of the norms of the law by judges in courts within the judiciary under the Supreme Court or by law enforcement officials. This means that the statutory norms themselves do not contradict the 1945 Constitution. It is not uncommon for them to have nothing to do with testing the constitutionality of laws. Because what the Petitioner brought was a concrete case that had been decided by the court. Regarding such problems, the cause is largely due to the absence of the authority of the Constitutional Court to adjudicate cases of constitutional complaints.³⁴ Second, the separation of judicial review (which is in the hands of the Constitutional Court) and judicial review of statutory regulations under the law against laws (which are in the hands of the Supreme Court) can encourage the development of a lack of unified interpretation of the issue.

³² Qerimi, Q. (2019). The contents and contours of contemporary cosmopolitan constitution-making: Immanuel Kant in the twenty-first century. In *Global Constitutionalism* (Vol. 8, Issue 2). <https://doi.org/10.1017/S2045381719000078>

³³ Møller, J., & Skaaning, S. E. (2012). Systematizing thin and thick conceptions of the rule of law. *Justice System Journal*, 33(2). <https://doi.org/10.1080/0098261X.2012.10768008>

³⁴ Purnamasari, G. C. (2017). Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara Melalui Pengaduan Konstitusional (Constitutional Complaint). *Veritas et Justitia*, 3(2). <https://doi.org/10.25123/vej.2668>

Certain laws give rise to legal uncertainty. Therefore, in the future, this constitutional issue must be resolved.³⁵

Meanwhile, concerning the relationship between legal findings by the Constitutional Court (which has been limited in meaning in the context of constitutional interpretation, as described above) and the objectives of a rule of law, I will only explain in general terms. Changes made to the 1945 Constitution, have fundamentally changed the Indonesian constitutional system, from a system that applies the principle of parliamentary supremacy to a system that applies the principle of constitutional supremacy. The 1945 Constitution of the Republic of Indonesia was amended four times between 1999 and 2002 in the reformation era. These constitutional changes have altered the principles and the structure of the Indonesian primary state's institutions. Broadly speaking, all of the power branches - ie legislative, executive, and judicial organs- are now interrelated horizontally in running the country and none of them is superior to the others. Such a constitutional system is generally found in countries that employ a presidential system. However, by reviewing the authority held by the legislatures, it is found that some characteristics of a parliamentary system are also applied in Indonesia.³⁶

The current presidential system in Indonesia is the result of the amendments to the 1945 Constitution. Before Indonesian reform, the presidential system was influenced by a strong parliamentary pattern in which the president was responsible for the People's Consultative Assembly. Today, this provision no longer exists. However, the consistency of the presidential system is still problematic because of the dominant power of the president over the House of Representatives. These problematic points are not in line with the presidential system principle because it reduces the authority of the president. The Parliament may only establish any law as long as it is according to the 1945 Constitution.³⁷

Such changes were made because they departed from the mandate of the Preamble of the 1945 Constitution, which in principle required that Indonesia, which would be founded on the 1945 Constitution, is a constitutional democratic state. The first and foremost requirement of a democratic state based on law is constitutionalism - which includes the meaning, of which, that the Constitution has the position of a supreme law and therefore all state administration must be based on and must not conflict with the Constitution. The question then is, how can the requirements of the Constitution as the highest law be truly obeyed and manifested in practice, this is what explains the importance of the presence of the Constitutional Court. That is, as reflected in the authority given to him by the 1945 Constitution, the Constitutional Court is present with the premise of being

³⁵ Lule, A. (2021). DUALISME PENGUJIAN PERATURAN DAERAH: LEGITIMASI KONSTITUSIONAL DAN MENGAKHIRI AMBIVALENSI PENYELESAIAN HUKUM. *CREPIDO*, 3(2). <https://doi.org/10.14710/crepido.3.2.110-119>

³⁶ Zen Zanibar, Z. (2018). The Indonesian Constitutional System in the Post Amendment of the 1945 Constitution. *Sriwijaya Law Review*, 2(1), 45. <https://doi.org/10.28946/slrev.vol2.iss1.109.pp45-55>

³⁷ Kuswanto, K. (2018). Consistency of the Presidential System in Indonesia. *Sriwijaya Law Review*, 2(2). <https://doi.org/10.28946/slrev.vol2.iss2.67.pp170-182>

the guardian of the Constitution to realize the aspirations of Indonesia as a democracy based on law.

b. Jurisprudence Used by the Constitutional Court

Mahkamah Constitution (MK) in a judicial use procedural law, general and special procedural law by the characteristics of each case the authorities. Based on Law Number 24 of 2003 concerning the Constitutional Court as amended by Law Number 8 of 2011 concerning Amendments to Law Number 24 of 2003 concerning the Constitutional Court (MK Law), for the smooth implementation of its duties and powers, the Constitutional Court (The Court) was given the authority to complement the procedural law of the Constitutional Court in the form of a Constitutional Court Regulation. In addition, the Court's procedural law was also born from the practice of the Court's decisions. These decisions have become jurisprudence and are used as the basis of society when proceeding in the Constitutional Court. In legal practice, jurisprudence is one of the sources of law. Jurisprudence was born from decisions that have permanent legal force (*inkracht van gewijsde*).³⁸

The rapid development of state institutions, especially state institutions whose authorities are regulated by law, has changed the constitutional order of Indonesia. This has an impact also on the procedural law of the Constitutional Court in resolving disputes over the authority of state institutions, which are regulated in the Constitutional Court Regulation No. 08/PMK/2006. The number of disputes over state institutions that have been resolved by the Constitutional Court through its decisions makes this decision jurisprudence and this is used by the Constitutional Court to expand its authority in interpreting the concept of state institutions. The results achieved in this paper are that the jurisprudence of the Constitutional Court decisions regarding disputes over the authority of state institutions has expanded the Constitutional Court's authority in understanding the position of state institutions so that this makes the Constitutional Court Regulation No. 08/PMK/2006 need to be revised to renew procedural law.³⁹

Indonesia uses civil law in the law system that does not bind to jurisprudence. Nevertheless, if there is a decision that is contradictory to the previous one, that will be a debate over how the enforceability of the existing jurisprudence. The Constitutional Court as one of the judicial authorities has the authority to examine the law against the Constitution 1945 of the State of the Republic of Indonesia. In its authority, the Constitutional Court is bumped by a previous decision that has become a landmark but was not followed. In other words, there is a contradiction between the previous decision and the present decision. This research will see how the enforceability of jurisprudence on the judicial review of the decision of the Constitutional Court. The analysis method used is a literature study using a case study approach. The conclusion available in this study is that jurisprudence is a source of law that can be a reference in a union of judicial

³⁸ Subiyanto, A. E. (2015). *Yurisprudensi dalam Putusan MK*. Mahkamah Konstitusi Republik Indonesia. <https://www.mkri.id/index.php?page=web.Berita&id=10837>

³⁹ Yunus, M., Astuti, I. F., Khairina, D. M., Freeman, & Teguh Martono, K. (2011). KEDUDUKAN YURISPRUDENSI PUTUSAN MAHKAMAH KONSTITUSI DALAM MEREKONSTRUKSI HUKUM ACARA. *Jurnal Sistem Komputer*, 10(2), 49–54.

review cases, but is not bound by judges to deviate based on logical reasons in the judicial independence and judicial accountability as well as the conception of the living constitution.⁴⁰

Concerning the use of jurisprudence of the Constitutional Court, in the context of reviewing the constitutionality of laws, there are two main questions. First, is the Constitutional Court bound by jurisprudence or other court decisions in interpreting the constitutionality of the law? Second, does the Constitutional Court always have to be bound by its own decisions or can it change its position in interpreting the constitutionality of laws? Regarding the first question, it can be said that there is no obligation for the Constitutional Court to be bound by jurisprudence or other court decisions, say the decisions of the Supreme Court - along with the courts in the four jurisdictions that are under the Supreme Court. However, there is no prohibition against using or referring to jurisprudence or other court decisions, even including the decision of the courts of the international judiciary, if it is intended to strengthen the legal considerations of the decision of the Constitutional Court. This is part of the accountability of the Constitutional Court decisions in the sense that the judges are obliged to elaborate on their reasons or arguments in the legal considerations of the decision to arrive at a certain verdict.⁴¹

Meanwhile, regarding the second issue, in principle, of course, the Constitutional Court is bound by its own decisions. However, in line with the view of a living constitution, if there is a fundamental change in society, the Constitutional Court is not prohibited - under certain circumstances - even has to - leaving its position. However, in such circumstances, he is obliged to explain his legal judgment as to why he left his previous position. In this connection, it is important to note that the existence of such a change of position is something commonplace as long as the reasons or arguments for change are clearly explained not only by its relevance but also its coherence with the Constitution. This practice is prevalent in common law countries where the principle of precedent or *stare decisis* is highly adhered to. Just to point to an example, the United States Supreme Court changed its stance on the principle of separate but equal in the *Plessy v. Ferguson* (1896) where at that time the Supreme Court of the United States argued that the separation of schools based on skin color was constitutional as long as the facilities were the same. However, the *Brown v. The Board of Education* (1954) of the Supreme Court of the United States renounced that stand and declared that separation of schools based on color was against the Constitution.⁴²

IV. CONCLUSION

That *Rechtsvinding* is a necessity for a judge or court in deciding a concrete case that is being tried if there are circumstances in which the law

⁴⁰ Agustine, O. V. (2018). Keberlakuan Yurisprudensi pada Kewenangan Pengujian Undang-Undang dalam Putusan Mahkamah Konstitusi. *Jurnal Konstitusi*, 15(3). <https://doi.org/10.31078/jk1539>

⁴¹ Palguna, I. D. G. (2016). *PENEMUAN HUKUM DAN PENGGUNAAN YURISPRUDENSI OLEH MAHKAMAH KONSTITUSI*.

⁴² Fajarwati, M. (2016). Upaya Hukum Untuk Melindungi Hak Konstitusional Warga Negara Melalui Mahkamah Konstitusi. *Jurnal Legislasi Indonesia*, 13(03).

does not regulate it or does not regulate it or there could be conflicts of rules that apply to the case. In such a situation, the judge must determine what or how the law applies to the case and then pour it into a decision. In determining what or how the law is, judges can use legal interpretations and legal constructs. *Rechtsvinding* of by Mahkamah Constitution be interpreted as an effort to how the Constitutional Court interpreting the Constitution (UUD 1945), testing the laws against the 1945 Constitution, rule on the dispute the authority of state institutions whose authorities are granted by the 1945 Constitution, dissolution of political parties; decide disputes over the results of general elections, as well as decide the opinion of the DPR that the President and/or Vice President committed a violation or no longer fulfills the requirements as President and/or Vice President as regulated in the 1945 Constitution.

That there is no obligation for the Constitutional Court to be bound by jurisprudence or other court decisions, say the decisions of the Supreme Court - along with the courts in the four jurisdictions that are under the Supreme Court. However, there is no prohibition against using or referring to jurisprudence or other court decisions, even including the decisions of courts of international judicial institutions, if it is intended to strengthen the legal considerations of the Constitutional Court decisions. P No principle is certainly the Constitutional Court is bound by the decisions themselves. However, in line with the view of a living constitution, if there is a fundamental change in society, the Constitutional Court is not prohibited - under certain circumstances - even has to - leaving its position. However, in such circumstances, he is obliged to explain his legal judgment as to why he left his previous position.

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