

# THE LEGAL LOGIC OF THE COLLAPSE ON NON- RETROACTIVE DOCTRINE IN THE CONSTITUTIONAL COURT DECISION

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## Abstract

The non-retroactive doctrine as a legal principle did not apply retroactively. In legal system of Indonesian; Article 28I paragraph (1) of 1945 Constitution determines that a human right can not be prosecuted based on retroactive law as well as rights that can not be reduced under any circumstances. Similarly Article 58 of Law No. 24 Year 2003 concerning Constitutional Court determines that a Law is being reviewed by the Constitutional Court is still applied, before there is decision stated that the law is contrary to the 1945 Constitution. However, with the use of “legal logic of implication relationships” in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, the decision was made retroactive and it become the jurisprudence for the Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-XI/2013.

**Keywords:** The Collapse of the of Non-Retroactive Doctrine, Constitutional Court Decision

## I. INTRODUCTION

### A. Background

John Marshall, the Chief Justice of the United States Supreme Court (1801-1835) had said that: “Law is said to be unconstitutional means that it isn’t contrary to the constitution, but because it is contrary to the doctrine which is made by a judge to interpret the constitution.”<sup>1</sup> Talking to the doctrine,<sup>2</sup> in Indonesia at

<sup>1</sup> Craig R. Ducat, *Constitutional Interpretation*, Ninth Edition, Boston: Wadsworth Cengage Learning, 2009, p. 81.

<sup>2</sup> The doctrine which is interpreted in this paper can be understood in two meanings, those are: (i) the establishment of a class of

least there are three Constitutional Court Decisions regarding Constitutional Review<sup>3</sup> of law that make collapse of the non-retroactive doctrine. Those three decisions are Constitutional Court Decision No. 110-111-112-113/ PUU-VII/2009, Decision No. 5/ PUU-IX/2011,<sup>4</sup> and Decision No. 13/PUU-X/2013.<sup>5</sup>

Principal petition of the applicant in the Case No. 110-111-112-113/PUU-VII/2009 is the provision Article 205 paragraph (4), Article 211 paragraph (3) and Article 212 paragraph (3) of Law No. 10 Year 2008 concerning General Elections The People's Representative Council, The Regional Representative Council, and The Regional People's Representative Council<sup>6</sup> (Law No. 10 Year 2008). More details of the substance of the petitions described as follows:<sup>7</sup>

1. Whereas the Petitioner I argued that Article 205 paragraph (4) and Elucidation Article 205 paragraph (4) of Law No. 10 Year 2008 opens the potential for double counting and lead to uncertainty in the law. While the Article 212 paragraph (3) and Article 211 paragraph (3) of Law No. 10 Year 2008, Petitioner I argued that it's contrary to the open Proportional electoral system.
2. Whereas the Petitioner II argued that if the phrase "vote" in Article 205 paragraph (4) of Law No. 10 Year 2008 interpreted as the only remaining vote of Political Parties that meet the Splitter Voter Numbers (BPP, *Bilangan Pembagi Pemilih*), thus it makes disproportionality of the acquisition vote is to the seats a political party, and there will be double counting.
3. Whereas the Petitioner III argued that if the phrase "vote" in Article 205 paragraph (4) of Law No. 10 Year 2008 interpreted as the only remaining vote of Political Parties which meet the BPP, there will be double counting. While the Article 211 paragraph (3) and Article 212 paragraph (3) of Law No. 10 Year 2008 *mutatis-mutandis* to the argument of the Petitioner I.

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expert statecraft, consistently, particularly in the country's policy and (ii) as a principle, such a legal principle in many cases. In this case the Constitutional Court's Decision could be interpreted as the founding class of the expert of matters pertaining to the form of constitution studies, consistently, particularly in the country's policy, while the doctrine of non-retroactive is defined as a legal principle. For clearer understanding look at to the Discussion with part of theme about The Doctrine and the Non-Retroactive Doctrine.

<sup>3</sup> Why does this paper use a term of "Constitutional Review.?" In legal system of Indonesian, based on Article 24 paragraph (2) of 1945 Constitution stated that the doer or judicial power is done by Supreme Court and Constitutional Court. One of the authority of Supreme Court is to review statutory rules and regulations below the laws against the laws, while Constitutional Court has authority to review laws against the Constitution. In this case, thus; "Judicial Review" is as the authority of The Supreme Court and it is not discussed in this paper. While "Constitutional Review" is as the authority of The Constitutional Court.

<sup>4</sup> Constitutional Court Decision No. 5/PUU-IX/2011 regarding Constitutional Review of Article 34 of Law No. 30 Year 2002 concerning Commission of Corruption Eradication, stated on the Plenary Constitutional Court was open for public on Monday, 20th of June 2011.

<sup>5</sup> Constitutional Court Decision No. 13/PUU-XI/2013 regarding Constitutional Review of Article 22 paragraph (1) and paragraph (4) of Law No. 15 Year 2006 concerning The Financial Audit Board, stated on the Plenary Constitutional Court was open for public on Tuesday, 10th of September 2013.

<sup>6</sup> The meaning of The Regional People's Representative Council in this case there are three region these are: (i) provinces, (ii) regencies and (iii) municipalities.

<sup>7</sup> Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, p. 81-82.

4. Whereas the Petitioner IV argued that Article 205 paragraph (4) of Law No. 10 Year 2008 in the implementation lead to multiple interpretations, especially in defining the phrase “vote” when it is interpreted as the rest of the vote from the political parties only which meet the BPP, thus it will be an injustice, because the major parties will be over representation, and to the smaller parties will be under representation conversely.

On Friday, 7<sup>th</sup> of August 2009, the Court finally decided the Case No. 110-111-112-113/PUU-VII/2009, which was stated in the Plenary session of the Constitutional Court are open to the public by stating “To grant the petition for some applicant,” which describes as follows:<sup>8</sup>

- Stating that Article 205 paragraph (4) of Law No. 10 Year 2008 is conditionally constitutional. It means the constitutional has mening as long as be understood that the calculations for establishing the second phase of The People’s Representative Council (DPR, *Dewan Perwakilan Rakyat*) seats acquisition for political parties members which is conducted in the following methods:
  1. Determining the equivalence of 50% (fifty percent) of the number of valid votes BPP, that is 50% (fifty percent) of the BPP numbers in every constituency of DPR Member;
  2. Distribute the remaining seats in each constituency of Parliament Member to Political Party of general election participant of DPR Member, with the following provisions:
    - a. If the valid votes or remaining votes of political parties participating in General Election of DPR reaches at least 50% (fifty percent) of the BPP, thus the Political Parties acquire one (1) seat.
    - b. If the valid votes or remaining votes of political parties participating in General Election of DPR does not reach at least 50% (fifty percent) of the BPP and there are remaining seats, therefore :
      - 1) The valid vote of political party is categorized as the remaining vote which consider in the calculating of seat in the third phase; and
      - 2) The remaining votes of the political party are taken in the calculation of seats in the third phase.
- Stating that Article 211 paragraph (3) of Law No. 10 Year 2008 is conditionally constitutional. That is, the constitutional is as far as implemented in the following methods:

<sup>8</sup> Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, p. 109-111.

1. Determine the number of remaining seats which is not divided yet, that is by reducing the amount of seats allocation in the constituency of The Provinces Regional People's Representative Council (DPRD, *Dewan Perwakilan Rakyat Daerah*) Member with the number of seats that have been divided by the calculation of the first phase.
  2. Determine the number of remaining valid votes of political parties participating in the general election of the Provinces DPRD Members, by the methods:
    - a. For political parties gaining seats in the first phase of the calculation, the number of valid votes of the political party is minus with the result of multiplying the number of seats obtained by political parties in the first phase with a number of BPP.
    - b. For those political parties do not gain seats in the calculation of the first phase, the valid votes obtained by the Political Parties categorized as the remaining votes.
  3. Establish seat acquisition of political parties participating in general election of The Regencies/Municipalities DPRD Members, by distributing the remaining seats to Political Party participating in the general election of The Regencies/Municipalities DPRD Members that is one by one as ordinary system all remaining seats are divided by depleted based on the largest remaining votes of Political Parties.
- Ordering to the Election Commission to implement the calculation of the DPR seats, Provinces DPRD, and Regencies/Municipalities DPRD in the second phase of general election results in 2009 based on this Court's Decision;
  - Ordering to the publication of this decision in the Official Gazette of the Republic of Indonesia;
  - Rejecting to the petition for besides and beyond.

Regardless of the articles declared conditionally constitutional by the Court in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 as mentioned above, there are interesting things in the Constitutional Court in the Command of Constitutional Court Decision to be discussed in further discussion. That is there is a clause "Ordering to Election Commission carry out the calculation of the DPR seats, Provinces DPRD, and Regencies/Municipalities DPRD in the second phase of general election results in 2009 based on this Court's decision." It means that the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 has retroactive. And finally, the decision is also made by the jurisprudence of the two Constitutional Court Decisions.

First, the Constitutional Court Decision No. 5/PUU-IX/2011 regarding Constitutional Review of Article 34 of Law No. 30 Year 2002 concerning Commission of Corruption Eradication (Law No. 30 Year 2002), in the terms of jurisprudence (examine the bold sentence) can be seen on the *ratio decidendi* on the page 76 that is:

“Considering that despite according to Article 47 of Law No. 24 Year 2003 concerning Constitutional Court, the Constitutional Court Decision in effect since established (prospective), but for the sake of expediency principle which is the universal principles and purposes of the law to specific cases the Court may enforce its decision retroactively (retroactive). It has become jurisprudence indicated in the Decision of the Court Number 110-111-112-113/PUU-VII/2009 .... Therefore, in order to avoid legal uncertainty in transition as a result of this decision, relating to the post of Chairman Commission of Corruption Eradication (KPK, *Komisi Pemberantasan Korupsi*) replacement (newly elected), then this decision applies to the KPK that have been selected and occupied the KPK is now elected for four years since he was elected. “

The second, as well as the Constitutional Court Decision No. 13/PUU-XI/2013<sup>9</sup> regarding Constitutional Review of Article 22 paragraph (1) and paragraph (4) of Law No. 15 Year 2006 concerning The Financial Audit Board (Law No. 15 Year 2006), in terms of jurisprudence (examine the bold sentence) can be seen also on the *ratio decidendi* on pages 78-79, described as follows:

“Considering that despite according to Article 47 of Law No. 24 Year 2003 concerning Constitutional Court, the Court’s decision in effect since established (prospective), but for the sake of the principle of expediency which is the principle of the universal destiny of law, for certain cases the Court’s decision may be applied retroactively (retroactive) as set forth in the Decision of the Court No. 110-111-112-113 / PUU-VII / 2009 .... Therefore, to avoid legal uncertainty as a result of this decision, relating to the replacement of The Financial Audit Board (BPK, *Badan Pemeriksa Keuangan*) Member position, thus this decision applies to the replacement of BPK Member position has been appointed and has current positions as BPK Member, so has the right to occupy the full term which is 5 (five) years since it was his appointment as a BPK Member with the President’s decision.”

Constitutional Court Decision No. 110-111-112-113/ PUU-VII/2009, Decision No. 5/ PUU-IX/2011, and Decision No. 13/PUU-X/2013 as mentioned above

<sup>9</sup> Even The Constitutional Court Decision No. 13/PUU-XI/2013 eliminate the article which is not asked to be reviewed by Petitioner too, that is Article 22 paragraph (5) of Law No. 15 Year 2006 concerning The Financial Audit Board.

has had retroactive. While textually, it doesn't matter by implementing a law retroactively (retroactive) is the thing that is not according to the constitution, as Article 28I paragraph (1) of 1945 Constitution: ".... and the right not to be prosecuted under a retroactive law are human rights that cannot be reduced under any circumstance whatever." Similarly, under Article 58 of Law No. 24 Year 2003 concerning Constitutional Court (Law No. 24 Year 2003) which determined that a law was constitutional reviewed by the Constitutional Court was still applied, before there was decision states that the law was contrary to the 1945 Constitution. Based on this understanding accurately, it can be interpreted, both based on Article 28I paragraph (1) of 1945 Constitution and Article 58 of Law No. 24 Year 2003 that the Constitutional Court Decision applies in non-retroactive. It means that it can be understood accurately that the three Constitutional Court Decisions are contrary to the Article 28I paragraph (1) of 1945 Constitution and also Article 58 of Law No. 24 Year 2003.

## **B. Questions**

Based on the background as described above, the principal issues raised in this paper is what the legal logic used by the Court when the Court Decision No. 110-111-112-113/PUU-VII/2009 make the collapse of non-retroactive doctrine.<sup>10</sup>

## **II. DISCUSSION**

### **A. The Doctrine and the Non-Retroactive Doctrine**

The doctrine (*doktrin*), according to Indonesian Dictionary<sup>11</sup> there are at least two meanings, those are: (i) the doctrine (on the principle of political main stream, religious), and (ii) the establishment of a class of religious sciences expert, constitutional, consistently, particularly in the country's policy. While according to Black's Law Dictionary,<sup>12</sup> doctrine is as a principle, such a legal principle, that is widely adhered to.

<sup>10</sup> In this paper is focused to discuss about *ratio decidendi* specifically is used by Court in Constitutional Court Decision No. 110-111-112-113/ PUU-VII/2009, because this decision is the beginning of the collapse of non-retroactive doctrine.

<sup>11</sup> Departemen Pendidikan Nasional, *Kamus Besar Bahasa Indonesia*, edisi keempat, Jakarta: PT. Gramedia Pustaka Utama, 2008, p. 338.

<sup>12</sup> Bryan A. Garner (editor in chief), *Black's Law Dictionary*, Eighth Edition, Boston: West Publishing Company, 2004, p. 1457.

Furthermore, in the Alphabetical Thesaurus (*tesaurus*)<sup>13</sup> of Indonesian Language Center, which is defined as the doctrine is dogma, creed, stream, principles, dogma, ideology, canon, understanding, and theories.<sup>14</sup> Meanwhile, according to the Oxford Paperback Dictionary & Thesaurus,<sup>15</sup> is a doctrine is a set of beliefs or principles held by religious or political group.

Based on the meaning of the doctrine referred (based on dictionary or thesaurus), thus it is a doctrine in this article can be understood in two meanings those are: (i) the establishment of a class of expert statecraft, consistently, particularly in the country's policy and (ii) as a principle, such a legal principle in many cases. In this case the Constitutional Court's Decision could be interpreted as the founding class of the expert of matters pertaining to the form of constitution studies,<sup>16</sup> consistently, particularly in the country's policy, while the doctrine of non-retroactive is defined as a legal principle.

Finally, it can be concluded wisely, that the Constitutional Court Decision and the principle of non-retroactive equally be called a "doctrine." Therefore, for more details, it can be understood that the word "doctrine" in the beginning of paragraph of this paper is: "Law is said to be unconstitutional means that it isn't contrary to the constitution, but because it is contrary to the doctrine which is made by a judge to interpret the constitution."

The non-retroactive doctrine as a legal principle which states that the law is not retroactive. In the American legal system, retroactive legal principles known as: *ex post facto law*, that Congress is forbidden to enact retroactive legislation. In America at least *ex post facto law* includes three kinds of restrictions. First, it bars government from punishing as a crime an act which was innocent at the time it was committed. Second, it prohibits government from retroactively increasing the seriousness of the punishment for an act already defined as a crime. Finally,

<sup>13</sup> Thesaurus (*tesaurus*) is different from dictionary. In the dictionary can be found out about the information of word meaning, while in the thesaurus can be found out the words are used to express the ideas of the author. Therefore, thesaurus can help the author to depict or express about the ideas based on the author means. See Departemen Pendidikan Nasional, *Tesaurus Alfabetis Bahasa Indonesia Pusat Bahasa*, Cet. I, Jakarta: PT Mizan Pustaka, 2009, p. Xi.

<sup>14</sup> *Ibid.*, p. 161.

<sup>15</sup> Maurice Waite & Sara Hawker (Edited), *Oxford Paperback Dictionary & Thesaurus*, Third Edition, New York: Oxford University Press, 2009, p. 274.

<sup>16</sup> Based on Article 24C paragraph (5) of 1945 Constitution states that : "A constitutional court justice shall have integrity and impeccable personality, be just, be a statesman/stateswoman mastering the constitution and constitutionalism, and does not concurrently hold a public office."



it restrains federal and state governments from eliminating criminal defenses that existed at the time the allegedly criminal act was performed.<sup>17</sup>

The legal system in Indonesia related to the non-retroactive doctrine/*ex post facto law* stipulated in Article 28I paragraph (1) of 1945 Constitution which determines that it is a human right not to be prosecuted based on retroactive law as rights that can not be reduced under any circumstances. There are two opinion groups with regard to the provisions of this Article. The first group believes that the rights contained in Article 28I paragraph (1) of 1945 Constitution should be follow to restrictions under the provisions of Article 28J paragraph (2) of 1945 Constitution.<sup>18</sup> The second group believes that the rights contained a human rights non-deregable rights, can not be reduced under any circumstances without exception.<sup>19</sup>

## **B. Legal Logic and It's Various Relationship**

Irving M. Copi stated; "Logic is the study of methods and laws used to distinguish correct reasoning from the incorrect ones."<sup>19</sup> In short term it can be said that logic is a science and an ability to think straight (accurate).<sup>20</sup>

Furthermore, when it comes to the relationship between law and logic; Hans Kelsen stated that:<sup>21</sup>

"That a view which has a lot of adherents among jurists is that there is a quite special relationship between law and logic (in the traditional meaning, from two values, true or false), that "logical character" has the nature of law specifically, it means that in their reciprocities relationships, the norms of law in accordance with the principles of logic."

The resolution of the issues is necessary to know all kinds of relations and its laws. If there are two statements displayed simultaneously will cause

<sup>17</sup> Timothy L. Hall (Edited), *The U.S. Legal System: Volume 1, First Printing,*, California: Salem Press, 2004, p. 286-287.

<sup>18</sup> Based on Article 28J paragraph (2) of 1945 Constitution states that: "In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society."

<sup>19</sup> Jimly Asshiddiqie, *Komentar Atas Undang-Undang Dasar Negara Republik Indonesia Tahun 1945*, Cet. Pertama, Jakarta: Sinar Grafika, 2009, p. 124.

<sup>20</sup> Alex Lanur OFM, *Logika Selayang Pandang*, Cetakan ke-27, Yogyakarta: Kanisius, 1983, p. 7.

<sup>21</sup> Hans Kelsen, "Essay in Legal and Moral Philosophy," alih bahasa, B. Arif Sidharta, *Hukum Dan Logika*, Cetakan ke-4, Bandung: Alumnus, 2011, p. 27.



what the logic calls “logical relationship.” There are at least six kinds of logical relationships:<sup>22</sup>

1. Independent relationship (non interlocked) that is: two statements have an independent relationship when both feature entirely separate issues, it's similar to the following statement:

Sumbawa horse is vigorous.  
Tamarind tree is rooted riding.  
All rabbits are weak.  
All rabbits eat leaves.  
Arabic is difficult.  
The logic is difficult.

Independent relationship has character: truth or falsity of the first statement can not be used to find the truth or falsity to the other statements. The truth of the statement “Sumbawa horses are vigorous” can not be used to determine the truth or falsity of the statement whereas “The Tamarin tree is rooted riding,”

2. Equivalent relationship that is: two statements have the equivalent relationship when the both have the same meaning such as:  
All materials are metal.

Most of the metal are iron.

Some scholars become minister.  
Most scholars don't become a minister.

Equivalent relationship has the nature of truth or falsity of another statement which determine the truth or falsity of the statements of the others. With the other words, if the one statement is true so another statement is true too, if the one statement is false so another statement is false too.

3. Contradictory relationship is that two contradictory statements have a relationship when both composed of subject and predicate terms are similar but different in quality and quantity. There are contradictory relationship between A and B statements or on the pairs of E and I, such as:

A: All the successful ones are diligent.  
B: Some successful ones are not diligent.  
E: All the righteous ones are not spiteful.  
I: Some righteous ones are spiteful.

A pair of contradictory problems have character when the another is false so the another one must be true, and if the one is true so the another must be true, it is impossible the both are true or false.

<sup>22</sup> H. Mundiri, *Logika*, Cetakan ke-14, Jakarta: RajaGrafindo Persada, 2011, p. 73-79.

4. Contrary relationship is that the two statements have contrary relationship when the term of subject and predicate both of them are equal in quantity universally but they are different in quality. On these statements of A and E have contrary relations, such as:

A: All politicians are unfair.

B: All politicians are not unfair.

E: All tigers are not grumpy.

A: All the grumpy tiger.

Contrary relationship has character: one statement must be false and could be wrong and the the both could be false too. And now is investigated the nature of contrary relationship by taking a pair of propositions A and E on a few examples. When in the fact: all politicians are unfair, thus A statement is true and E statement is false. When in the facty: all politicians are not unfair ones so A is false and E is true. When in the fact: there are unfair ones and the others are fair, so both A and E are wrong.

5. Sub-contrary relationship (a half contrary): two statements have sub-contrary relationship when the term of subject and predicate of the statements are equal, has equally quantity and the particular is different in quality. There are sub-contrary relationships in these statements I and O, such as described bellow:

I: Some traders are stingy.

O: Some traders are not stingy.

.....

O: Some students are not lazy.

I: Some students are lazy .

The sub-contrary relationship has a nature that: one of the statements must be true and the both can be true. Let's test the nature of sub-contrary relationship by taking a pair I and O above as an example. When in the fact: all traders are stingy, thus I is true (remember about a half meaning) and O is false. When all the traders are not stingy, thus O is true and I is false. When in fact some traders are stingy and the the others are are not so I and O are true.

6. Implication relationship that is: two statements have implication relationship when the term of subject and predicate of the statements are equal in quality but both are different in quantity. On the statement of A and I and a pair E and O there are implication relationships, such as:

A: All students from block C are diligent.

I: Some students from block C are diligent.

E: All patriots are not lazy.

O: Some patriots are not lazy.

The implications relationship has the nature: the both can be true, the both can be false, or the one can be true and another can be false. And now, the nature of implication relationship is tested by taking a pair of A and I above as an example. When in the fact: if all student from block C are diligent, so A is true, and I is too. Therefore the both are true. When in fact: all students from block C are diligent, so A and I are false. In this case there is a possibility for the both are false. When in the fact: students from block C are diligent and last students so I is true and A is false. In this case there is a possibility the one is true and another is false. That condition can appear on the statement of E and O if they are tested.

Then, singular statement is investigated. A and E statement with the same subject and predicate as known the both have a contrary relationship. But the A and E statement are singular with the same subject and predicate which have a contrary relationship, such as:

A (singular): Hasan dresses in black.

E (singular): Hasan does not dress in black.

A pair of A problems (singular) with the same subject but different predicates is able to have a contrary relationship too, such as:

A (singular): Nurdin goes to Yogyakarta.

A (singular): Nurdin goes to Solo.

A pair of A problems (singular) with the same subject but different predicate is able to have an independent relationship such as:

A (singular): Nurdin goes to Yogyakarta.

A (singular): Nurdin is smart kids.

By many kinds of logical relationships like on the statements above thus in this research will be found out the understanding to what legal logic used by the Court in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 that make the collapse of non-retroactive doctrine. Finally, the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 which make collapse of non-retroactive doctrine is applied as jurisprudence by the other two decisions, they are Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-X/2013.

### **C. The Legal Logic of the Collapse on Non-Retroactive Doctrine in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009**

What the legal logic used on Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 thus make collapse the non-retroactive doctrine

is able to be started by looking at the part of *ratio decidendi* specifically revealed by the Court to include five things (especially; look at to the bold one), that is:<sup>23</sup>

1. The setting to the power to legal binding of the Court decision explicitly is not found in either the 1945 Constitution or the Constitutional Court Law, but on the Article 24C paragraph (1) of 1945 Constitution, Article 10 paragraph (1), Article 47, and Article 58 of Law No. 24 Year 2003 specifies that the decision of the Court is a the court decision at the first and final level, which should be final and has permanent legal power since completed pronounced in the open plenary session to the public. If the decision of the Court declared the Act is contrary to the 1945 Constitution, the law is still applicable to the declaration that the Act is contrary to the 1945 Constitution and does not have legally binding since the announcement of the decision on open court to the public. From the three arrangements above can be concluded that the Court's decision doesn't have binding legal force on non-retroactive. As a result, that decision, thus the article or the Constitution which is stated not have binding legal force applied since the day of announcement of the judgment in a open plenary session to the public (*ex nunc*). It means that the statement does not have the legal binding force of an Act, it does not significantly affect to the legal relations have occurred prior to the announcement of the Court's decision.
2. The non-retroactive doctrine is ruled in Law No. 24 Year 2003 generally as principle that apply without mentions the possibility of an exception and does not set on the discretion of judges to determine the behavior that actually receded in certain circumstances be required to be able to achieve the goals decided by an Act of a quo. The principle of non-retroactive in the enforcement of a law at first regarding the application of the rules of criminal law retroactively is a principle accepted universally. The ban has correlation with protection of human rights, to prevent victims of injustice as a result of the arbitrariness of the authorities to create a law to prohibit and penalize an act which was not a criminal act, known as the principle of *nullum delictum nulla poena sine praevia lege poenali*. In particular, the setting of the American Constitution specifies that Congress is forbidden to enact legislation that retroactively (*ex post facto law*) meanwhile the Article 28I paragraph (1) of 1945 Constitution, determines that it is a human right not to be prosecuted on the basis of the law retroactive as rights that can not be reduced under any circumstances. Although a ban on the application of the Act in retroactive, that in the field of criminal law is a universal

<sup>23</sup> Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009, p. 105-108.

- principle and becomes a human right that can not be reduced under any circumstances, these principles recognize the exceptions as set out in Article 1 paragraph (2) Criminal Code (KUHP, *Kitab Undang-Undang Hukum Pidana*) that applies universally, where if there is a change of legislation, the defendant treated is the most favorable to the accused.
3. The prohibition for the Court's decision to apply retroactively is not clearly regulated and found as common in ordinary court decision. In the State Administrative Court, Criminal, and Civil widely known decision of the court which has the power behavior retroactive (*ex tunc*) because in general sentencing or acquittal of the defendant, the granting of a lawsuit in unlawful acts, or defaults, the decision relating to the status or position of a civil servant, debts and legal violation, has retroactive since a default or a criminal offense committed, and it is not after the date of the announcement in the open plenary court to the public. A decision is not applied retroactive, in some circumstances could cause the purposes of protection provided by the legal mechanism is not reached.
  4. The objective is given to the Constitution enforcement through constitutional review as the authority of the Court is not to allow an Act is contrary to the 1945 Constitution, so that if the decision applies only prospectively and there is not possible discretion for judges enforce them retroactive, be issues that must always be answered whether the constitutional protection objectives can be achieved or not. In the constitutional law, by the content and the various of law, it can be sure there is any particular legal interest protected by the 1945 Constitution, related to the status or position which apply through the electoral process, both decided by the Court through testing of Law which has correlation with the election of candidates through the method of the counting and determination of the seat, or through dispute or dispute about the results of elections. The consequences of the legal decision should be binding retroactively on the desirability and the vote, either by a decision that confirms or cancels the determination of votes and number of seats determined by the Election Commission. Without the enforceability retroactive, thus the purpose of constitutional protections put on dispute resolution related to results of the general election law and the testing of laws that impact on a person's status or legal position will not be reached, as become the purpose of the constitution and law.
  5. Article 58 of Law No. 24 Year 2003 determines that the principle of the presumption of constitutionality in the validity of the Law is applied on the decision declaring that the Law is contrary to the 1945 Constitution therefore it does not have legally binding, it is implied the prohibition

to retroactively enforce the decision of the Court. The practice of the Court in several decisions have stated that a law applied constitutionally with certain requirements (conditionally constitutional), either by a particular interpretation, fulfillment of certain minimum funding allocations, and after passing a certain period or the decision declaring the law is unconstitutional but it still applied until in a certain time limit. The practice is not regulated in the Law No. 24 Year 2003, both on the discretion of judges as well as special arrangements in the Law No. 24 Year 2003 determining the legal consequences of a decision on a limited basis or to declare that the decision has a legal effect in the future. Therefore, the principle of non-retroactive of the law as a result of the Court's decision is not an absolute thing, as applied on Constitutional Court Law expressly like in the several countries which have Constitutional Court. In a certain field of law, the exceptions and discretion recognized universally is required because there is an objective of specific legal protection to be achieved which has public order characters. Moreover, in a decision which give a certain interpretation as a condition of the constitutionality of the norm (interpretative decisions), the decision should be applied retroactive naturally since the creation of legislation which is interpreted, because it is for the meaning given and attached to the norm interpreted. Therefore, although the Law No. 24 Year 2003 determines that the Court's decision is prospective but for the case of *a quo*, because it is special, thus the decision of *a quo* should be implemented retroactive to the distribution of The People's Representative Council (DPR, *Dewan Perwakilan Rakyat*) seat, Provinces The Regional People's Representative Council (DPRD *Provinsi, Dewan Perwakilan Rakyat Daerah Provinsi*) seat and Regencies/Municipalities The Regional People's Representative Council (DPRD *Kabupaten/Kota, Dewan Perwakilan Rakyat Daerah Kabupaten/Kota*) seat of the result in legislative elections in 2009 without any compensation or indemnity for the consequences which already exist on the rules that existed before.

Furthermore, based on the special *ratio decidendi* by the Court as explained above, thus the legal logic used by the Court in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 thus make the collapse of non-retroactive doctrine is the implication relationship, that is: two statements have implication relationship when the term of subject and predicate of the statements are equal, the both are equal in quality but different in quantity. Legal logic of implication

relationship is as defined on the statement of pair A<sup>24</sup> and I<sup>25</sup> and to the pair of E<sup>26</sup> and O<sup>27</sup> as described follows:

- A: Article 24C paragraph (1) of 1945 Constitution, Article 10 paragraph (1), Article 47, and Article 58 of Law No. 24 Year 2003 specifies that the decision of the Court is a the court decision at the first and final level, which should be final and has permanent legal power since completed pronounced in the open plenary session to the public
- I: The objective is given to the Constitution enforcement through constitutional review as the authority of the Court is not to allow an Act is contrary to the 1945 Constitution, so that if the decision applies only prospectively and there is not possible discretion for judges enforce them retroactive, be issues that must always be answered whether the constitutional protection objectives can be achieved or not.
- E: Article 28I paragraph (1) of 1945 Constitution, determines that it is a human right not to be prosecuted on the basis of the law retroactive as rights that can not be reduced under any circumstances.
- O: Therefore, the principle of non-retroactive of the law as a result of the Court's decision is not an absolute thing, as applied on Constitutional Court Law expressly like in the several countries which have Constitutional Court.

The implication relationship has characteristics such as: both can be true, the both can be false, or the one can be true and another can be false. Let's test the nature of the implication relationship by taking the statements of pair of A and I above can have three possibilities, those are: (i) if in fact: All the Constitutional Court Decisions are non-retroactive, thus A<sup>28</sup> is true, so does I.<sup>29</sup> Therefore, both are true, (ii) if in fact: All the Constitutional Court Decisions are retroactive, thus A and I<sup>30</sup> are false. In this case, it has the both are possibility false, and (iii) if in fact: All the Constitutional Court Decisions are "non-retroactive" and there are "retroactive" too, thus I is true but A<sup>31</sup> is false. In this case there is possibility the one is true and another is false. The fact also occurs when the

<sup>24</sup> The statement of A is taken from special *ratio decidendi* by Court as described on point No. 1 above which is bold.

<sup>25</sup> The statement of I is taken from special *ratio decidendi* by Court as described on point No. 4 above which is bold.

<sup>26</sup> The statement of E is taken from special *ratio decidendi* by Court as described on point No. 2 above which is bold.

<sup>27</sup> The statement of O is taken from special *ratio decidendi* by Court as described on point No. 5 above which is bold.

<sup>28</sup> See the statement of A which is bold; the Constitutional Court Decision about non-retroactive.

<sup>29</sup> See the statement of I which is bold Constitutional Court Decision above is non-retroactive but in certain/special condition could be retroactive too.

<sup>30</sup> Could be remember that the statement of I which is bold that perhaps the Constitutional Court Decision is retroactive (in certain/special condition) by less quantity than the other Constitutional Court Decisions which are non-retroactive (generally).

<sup>31</sup> Could be remember that the statement of A which is bold it must be understood that Constitutional Court Decision is non-retroactive.



statements of E and O are tested. Of course, in this case, “if in the fact” referred to those of the three implication relationships [(i), (ii), and (iii)] are based on what statements are written in the “special *ratio decidendi*” in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009.

Finally, it can be concluded that, based on the fact in the “specifically *ratio decidendi*” revealed in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 which make the collapse of the non-retroactive doctrine using legal logic of implication relationship with the 3<sup>rd</sup> possibility (iii) above, that is, in fact: all the Constitutional Court Decisions there are “non-retroactive and some of them are “retroactive”. Obviously, “retroactive” is rare happen as the decision, if in retroactive should be in under specific circumstances.

Next there is a question, whether the legal logic of implication relationship which is used by the Court in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 which make the collapse of non-retroactive doctrine as described above meets with the limits of constitutionalism too.

Constitutionalism is as a doctrine puts the constitution in the supreme position, or as the highest law applied in a country (the supreme law of the land). Therefore, the constitution does not have a positivistic legal significance only, but it has a philosophical meaning too and values which become the source of inspirations for all the policies in the life of the state.<sup>32</sup> The Constitution also is not like recipes which make a definite taste if it follows properly. However, the constitution is the words of the law are written on sheets of paper. Its application in practice is in another case. The Constitution is an important document and perhaps it is the most important, but there are seven main reasons why the constitution does not need to be understood correctly, those are:<sup>33</sup>

1. The Constitution may not be very important if it is not obeyed. Dictatorial regime has a democratic constitution generally, and politicians in the countries which have advanced democracies are known attempt to violate or avoid it.

<sup>32</sup> Hamdan Zoelva, *Mengawal Konstitusionalisme*, Cetakan Pertama, Jakarta: Konstitusi Press, 2016, p. 304.

<sup>33</sup> Kenneth Newton & Jan W. Van Deth, “Foundation of Comparatif Politics,” diterjemahkan Imam Muttaqin, *Perbandingan Sistem Politik: Teori dan Fakta*, Cetakan I, Bandung: Nusamedia, 2016, p. 101-102.

2. The Constitution may be incomplete. It is a public document which may not explain to some of the aspects of the constitution which is more important; *eg*: electoral rules, political parties, or even the prime minister's tenure.
3. To understand the constitution fully sometimes needs the references to another document-consideration of the Supreme Court, historical documents, or the United Nation Declaration on Human Rights.
4. The written Constitution is supported by the convention rapidly.
5. The Constitution may evolve and change, even the document is not changed. The American Constitution in 1787 did not give the United States Supreme Court review of constitutional rights. The Supreme Courts took this authority by themselves in 1803 when deciding the case *Marbury vs. Madison*.
6. The Constitution may be unclear or does not address to the specific circumstances.
7. The Constitution can be fail. History is full of constitutional democracy were fails and took place by the revolution, autocrats and military dictatorial regime. The lesson can be learnt is that a successful democracy can't be dictated by the law of the constitution, however the constitution was drafted well; that political democracy must be accepted and practiced by the political elite and the citizens too. The constitution is like a fortress it must have solid structures and strict protection of the armed forces.

Based on the seven main reasons why that the constitution is not necessary to be understood accurately as stated above and this is the limitation of the constitutionalism. In this case, at least by the use of legal logic of implication relationship which is used by the Court in Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 thus make collapse the non-retroactive doctrine certainly, and it is also in accordance with the two of the seven main reasons as limit of constitutionalism above. They are, the first, as stated on the point 2 above, that is the Constitution may be incomplete. It is a public document which may not explain to some of the aspects of the constitution which is more important; *eg*: electoral rules, political parties, or even the prime minister's tenure. In this case its relevant that it is proven that the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 related to the case about the unclear of the legislative elections rules and the Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-XI/2013 related to the case about the unclear of the tenure state official rules.

Second, as stated on the point 6 above, that is the Constitution may be unclear or does not address to the specific circumstances. In this case, its relevant can be reviewed from historical aspect. Historically, when look at on the book of *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945* (The Comprehensive Text of Amendment of 1945 Constitution) published by *Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi* (The Secretariat General and the Office of the Registrar of the Constitutional Court of the Republic of Indonesia), if it is investigated the use of “retroactive” phrase at least there was thirteen (13) pages, those are page 22, 63, 66, 169, 227, 242, 243, 281, 293, 299, 336, 361, and 601.

The use of the “retroactive” phrase on the thirteenth page, there are two things should be understood, those are on the pages 22 and 242. On the page 22 described about the enforcement of the “retroactive” rule of law that is in the Indonesian Constitution in 1950 period (UUDS 1950, *Undang-Undang Dasar Sementara 1950*) it was made Law No. 62 Year 1958 concerning Citizenship of the Republic of Indonesia on 1<sup>st</sup> of August, 1958. On the Article VIII Closing Regulation of this Law mentioned that “This Law attend into force on the day ruled by the considerations stating that the article 1 letters b to j, Article 2, Article 17 letter a , c, and h are retroactive to 27<sup>th</sup> of December, 1949”. It is known that on 27<sup>th</sup> of December, 1949 the recognition of sovereignty by the Netherlands with the founding of the Republic of Indonesia States as the result of the Round Table Conference (KMB, *Konferensi Meja Bundar*).<sup>34</sup>

While on page 242 the use of “retroactive” phrase as Muhammad Ali’s opinion who expressed that he disagreed related to the court which could be retroactive. According to him it is not compatible with the principle of legality which is already known throughout around the world that was *nullum delictum nulla poena sine praevia lege poenali*.<sup>35</sup>

The “retroactive” phrase as stated on pages 22 and 242 in the book of The Comprehensive text of Amendment of 1945 Constitution stated that on the page

<sup>34</sup> Mahkamah Konstitusi Republik Indonesia, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002 (Buku VIII, Warga Negara dan Peunduduk, Hak Asasi Manusia dan Agama)*, Edisi Revisi, Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010, p. 22.

<sup>35</sup> *Ibid.*, p. 241-242.

22 related to the implementation of a law that applied retroactive, while on the pages 242 relate to the disagreement of the application of laws that could be applied retroactive.

### III. CONCLUSION

Solving problem of the issue of constitutionality is also necessary to know the various relationships with their logical relationship and their laws. If the two statements are applied simultaneously will cause what the logic stated “legal logic of implication relationships.” The legal logic used in the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 thus make collapse the non-retroactive doctrine is the implication relationships, those are: two statements have implication relationships when the term of subject and predicate of the statements are same, both are in quality but they are different in quantity. The quality deal with the Constitutional Court Decision is final and binding, while the quantity has many implications related to the Constitutional Court Decision, whether the non-retroactive or retroactive. Finally, legal logic used based on the fact “specifically *ratio decidendi*” revealed on the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 concluded that all The Constitutional Court Decision applied “non-retroactive” and some of them are “retroactive.” Obviously, “retroactive” is rare happen as the decision, if in retroactive should be in under specific circumstances.

The conclusions from the use of legal logic has complied at least with the limits of constitutionalism, it means there are two main reasons why the non-retroactive doctrine as set in Article 28I paragraph (1) of 1945 Constitution does not need to be understood correctly, those are: (i) the Constitution may be incomplete. It is a public document which may not explain to some of the aspects of the constitution which is more important; *eg*: electoral rules, political parties, or even the prime minister’s tenure. and (ii) the Constitution may be unclear or does not address to the specific circumstances. Furthermore, in this case, there are also two things become relevant: (i) it is proven that the Constitutional Court Decision No. 110-111-112-113/PUU-VII/2009 related to the case about the unclear

of the legislative elections rules and the Constitutional Court Decision No. 5/PUU-IX/2011 and Decision No. 13/PUU-XI/2013 related to the case about the unclear of the tenure state official rules and (ii) historically is not known about the restrictions related to the application of the non-retroactive doctrine certainly.

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