POLITICAL LAW APPLICATION OF THE CONSTITUTIONAL QUESTION IN THE STATE SYSTEM REPUBLIC OF INDONESIA PERSPECTIVE THE PROFETICAL LAW PARADIGM

THESIS

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STATEMENT OF THE AUNTENTICITY

In the name of Allah,

With consciousness and responsibility towards the development of science, the author declares that the thesis entitled:

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Is truly the writer's original work which can be legally justified. If this thesis is proven result of duplication or plagiarism from another scientific work, it as precondition of degree will be stated legally invalid.

Malang, 28th April 2020

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MOTTO

اِنَّ اللّٰهَ يَأْمُرُكُمْ اَنْ تُؤَدُّوا الْاَمٰنٰتِ اِلٰٓى اَهْلِهَاۙ وَاِذَا حَكَمْتُمْ بَيْنَ النَّاسِ اَنْ تَحْكُمُوْا بِالْعَدْلِۗ اِنَّ اللّٰهَ نِعِمَّا يَعِظُكُمْ بِهٖۗ اِنَّ اللّٰهَ كَانَ سَمِيْعًاۢ بَصِيْرًا ۔ ٥٨

"Indeed, Allah commands you to render trusts to whom they are due and when you judge between people to judge with justice. Excellent is that which Allah instructs you. Indeed, Allah is ever Hearing and Seeing." (Q.S An-Nisa': 58)

TRANSLITERATION GUIDANCE

A. General

The transliteration guide which is used by the Syariah Faculty of State Islamic University Maulana Malik Ibrahim of Malang is the EYD plus. This is used based on the Consensus Directive from the Religion Ministry, Education and Culture Ministry of The State of Republic Indonesia, dated January 22 1998 No. 158/1987 and 0543.b/U/1987, which is also stated in The Arabic Transliteration Guide Book, INIS Felow 1992.

B. Consonant

Arab	Latin	Arab	Latin
ا	A	ط	Th
ب	B	ظ	Zh
ت	T	ع	‘
ث	Ts	غ	Gh
ج	J	ف	F
ح	H	ق	Q
خ	Kh	ك	K
د	D	ل	L
ذ	Dz	م	M
ر	R	ن	N
ز	Z	و	W
س	S	ه	H
ش	Sy	ء	‘
ص	Sh	ي	Y

ض	Dl		

The Hamzah which is usually represented by and alif, when it is at the beginning of word, henceforth it is transliterated following its vocal pronouncing and not represented in writing. However, when it is in the middle or end of a word, it is represented by a coma facing upwards (‘), as oppose to a comma (‘) whivh replaces the ‘ain “ع”.

C. Vocal, Long Pronounce, and Diftong

In every written Arabic text in the latin form, its vowels fathah is written with “a”, kasrah with “i”, and dlommah with “u, whereas elongated vowels are written such as:

Elongated (a) vowel = â for example قال beomes qâla

Elongated (i) vowel = î for example ڤيل becomes qîla

Elongated (u) vowel = û for example دون becomes dûna

Specially for the pronouncing of *ya' nisbat* (in association), it cannot represented by *"i"*, unless it is written as *"iy"* so as to represent the *ya' nisbat* at the end. The same goes for sound of a diftong, *wawu* and *ya'* after fathah it is written as *"aw"* da *"ay"*. Study the following examples:

Diftong (aw) = و for example قول becomes qawlun Diftong (ay) = ي for example خير becomes khayrun

D. Ta’ Marbûthah (ة)

Ta’ marbûthah is transliterated as “t” if it is in the middle of word, but if it is *Ta’ marbûthah* at the end of word, then it is transliterated as “h”.

For example الرسالة للمدرسة will be *al-risalat li al-mudarrisah*, or if it happens to be in the middle of a phrase which constitutes *mudlaf and mudlaf ilayh*, then the transliteration will be using "t" which is joined with the previous word.

E. Auxiliary Verb and Lafadh Al-Jalalah

Auxiliary verb "al" (ٱل) written with lowercase form, except if it located at the beginning of word, while "al" in lafadh jalâlah which located in the middle of two words or being or become *idhafah*, it removes from writing. Study the following:

1. Al-Imâm al-Bukhâriy said ...
2. Al-Bukhâriy explains, in the prologue of his book ...
3. MasyâAllâhkânawamâ lam yasya" lam yakun.

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Alhamdulillahirabbil'alamin, have given His rahmat and servan, so we can finish this thesis entitled **"Political Law Application of The Constitutional Question in The State System Republic of Indonesia Perspective The Profetical Law Paradigm".** Peace be Upon into The Rasulullah Prophet Muhammad SAW who has taught us guidance (*uswatun hasanah)* to do activity correctly in our life. By allowing Him, may we belong to those who believe and get their intercession on the last day of the end. Amien.

From all the teaching, advice, gudance, and helps of service for us to finish this thesis, then with all humanity the writer will expresses the gratitude which is unequaled to:

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sincere intentions, may all of their charity be part of worship to get the pleasure of Allah SWT.

8. Staff of Syariah Faculty of The State Islamic University Maulana Malik Ibrahim of Malang.

With the completion of this thesis report, the hope that knowledge which we have gained during our studies can provide the benefits of life in the world and the hereafter. As a human who has never escaped fault, the writer is very hopeful for the forgiveness, critism and suggestions from all parties for future improvement efforts.

Malang, 28th April 2020

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ABSTRAK

Mahkamah Konstitusi (MK) sebagai lembaga yang menegakkan supremasi konstitusi dalam kerangka demokrasi konstitusional di Indonesia, pada realitasnya belum melindungi hak-hak konstitusional warga negara secara menyeluruh. Absennya mekanisme *constitutional question* dalam kewenangan pengujian konstitusional membuat MK tidak bisa memberikan keadilan substantif yang berdasarkan Ketuhanan Yang Maha Esa (keadilan transenden). Fokus kajian dalam penelitian ini mencakup 3 hal, yakni: (1) Bagaimana relevansi penerapan *constitutional question* dalam sistem ketatanegaraan RI (2) Bagaimana politik hukum penerapan mekanisme *constitutional question* dalam pengujian konstitusional di MK (3) Bagaimana implementasi *constitutional question* berdasarkan perspektif Paradigma Hukum Profetik.

Jenis penelitian ini merupakan penelitian yuridis normatif dengan menggunakan pendekatan perundang-undangan dan pendekatan konseptual. Bahan hukum yang digunakan dalam penelitian ini terdiri atas: (1) Bahan hukum primer, yakni UUD 1945, UU MK, Putusan Mahkamah Konstitusi, dan *al-Quran al-Karim* (2) Bahan hukum sekunder, meliputi buku-buku, thesis, jurnal, dan dokumen-dokumen yang mengulas tentang *constitutional question*, dan seputar hukum profetik (3) Bahan hukum tersier, yakni Kamus Besar Bahasa Indonesia, Kamus Hukum, dan Kamus Bahasa Inggris. Metode pengumpulan bahan hukum dilakukan mlalui studi kepustakaan. Metode analisis yang dipakai dalam penelitian ini adalah metode analisis yuridis kualitatif.

Hasil dan temuan penelitian menunjukkan bahwa: (1) Penerapan mekanisme *constitutional question* dalam praktik pengujian konstitusional di MK merupakan upaya untuk menegakkan supremasi konstitusi dalam kerangka demokrasi konstitusional sistem ketatanegaraan RI (2) Pelembagaan mekanisme *constitutional question* dapat dilakukan dengan memperluas kewenangan pengujian konstitusional MK melalui perubahan UU MK kedua (3) Paradigma hukum profetik dapat dijadikan alternatif perspektif dalam membangkitkan kembali spirit keadilan yang berdasarkan Ketuhanan Yang Maha Esa (keadilan transenden) dalam praktik pengujian konstitusional di MK, terutama dalam mengimplementasikan mekanisme *constitutional question.*

Beberapa rekomendasi dari penelitian ini antara lain: (1) Reformasi hukum dalam lingkup kekuasaan kehakiman terutama MK, seharusnya segera dilakukan agar setiap orang bisa mendapatkan keadilan, perlindungan dan jaminan kepastian hukum yang merupakan hak-hak konstitusional warga negara (2) MK sebaiknya melakukan pelembagaan mekanisme *constitutional question* dalam kewenangan pengujian konstitusional tanpa mengubah UUD 1945 (3) Keadilan substantif yang sesuai dengan dasar negara dan falsafah bangsa semestinya harus dihidupkan kembali.

Kata Kunci: Mahkamah Konstitusi, Pengujian Konstitusional, *Constitutional Question,* Paradigma Hukum Profetik.

ABSTRACT

The Constitutional Court (MK) as an institution that upholds the supremacy of the constitution within the framework of constitutional democracy in Indonesia, in reality has not protected the constitutional rights of citizens as a whole. The absence of a constitutional question mechanism in the authority of constitutional testing makes the Constitutional Court unable to provide substantive justice based on the Almighty God (transcendent justice). The focus of the study in this study covers 3 things, namely: (1) How is the relevance of the application of constitutional questions in the Indonesian constitutional system (2) How is the political law applying the constitutional question mechanism in constitutional testing at the Constitutional Court (3) How is the implementation of constitutional question based on the perspective of the Prophetic Legal Paradigm .

This type of research is a normative juridical study using the statutory approach and conceptual approach. The legal materials used in this study consist of: (1) Primary legal materials, namely the 1945 Constitution, MK Law, Constitutional Court Decision, and al-Quran al-Karim (2) Secondary legal materials, including books, theses, journals , and documents reviewing constitutional questions, and about prophetic law (3) Tertiary legal materials, namely the Large Indonesian Dictionary, the Law Dictionary, and the English Dictionary. The method of gathering legal material is done through library research. The analytical method used in this study is a qualitative juridical analysis method.

The results and findings of the study show that: (1) The application of constitutional question mechanism in the practice of constitutional testing at the Constitutional Court is an effort to uphold the supremacy of the constitution within the framework of the constitutional democratic system of the Indonesian constitutional system (2) The institutionalization of the constitutional question mechanism can be done by expanding the constitutional testing authority of the Constitutional Court through amendments to the second Constitutional Court Law (3) The prophetic legal paradigm can be used as an alternative perspective in reviving the spirit of justice based on the Almighty God in the practice of constitutional testing at the Constitutional Court, especially in implementing the constitutional question mechanism.

Some recommendations from this research include: (1) Legal reform within the scope of judicial power, especially the Constitutional Court, should be immediately carried out so that everyone can get justice, protection and guarantee of legal certainty which are constitutional rights of citizens. (2) The Constitutional Court should institutionalize the mechanism of constitutional question in the authority of constitutional testing without changing the 1945 Constitution (3) Substantive justice in accordance with the basis of the state and the philosophy of the nation should be revived.

Keywords: Constitutional Court, Constitutional Review, Constitutional Question, Prophetic Legal Paradigm.

الملخص

المحكمة الدستورية (MK) كمؤسسة تدعم سيادة الدستور في إطار الديمقراطية الدستورية في إندونيسيا ، في الواقع لم تحمي الحقوق الدستورية للمواطنين ككل. إن عدم وجود آلية للسؤال الدستوري في سلطة الاختبار الدستوري يجعل المحكمة الدستورية غير قادرة على توفير العدالة الموضوعية القائمة على الإله القدير (العدالة المتعالية). تركز الدراسة في هذه الدراسة على 3 أشياء ، وهي: (1) كيف هي صلة تطبيق الأسئلة الدستورية في النظام الدستوري الإندونيسي (2) كيف يطبق القانون السياسي آلية السؤال الدستوري في الاختبار الدستوري في المحكمة الدستورية (3) كيف يتم تنفيذ السؤال الدستوري على أساس النموذج القانوني النبوي .

هذا النوع من البحث هو دراسة قانونية معيارية باستخدام النهج القانوني والنهج المفاهيمي. تتكون المواد القانونية المستخدمة في هذه الدراسة من: (1) المواد القانونية الأولية ، وهي دستور عام 1945 ، وقانون MK ، وقرار المحكمة الدستورية ، والقرآن الكريم (2) المواد القانونية الثانوية ، بما في ذلك الكتب والرسائل العلمية والمجلات ، والوثائق التي تراجع الأسئلة الدستورية ، وحول القانون النبوي (3) المواد القانونية الثلاثية ، أي القاموس الإندونيسي الكبير ، قاموس القانون ، والقاموس الإنجليزي. تتم طريقة جمع المواد القانونية من خلال البحث في المكتبات.

الطريقة التحليلية المستخدمة في هذه الدراسة هي طريقة تحليل قانوني نوعي. أظهرت النتائج ونتائج البحث ما يلي: (1) إن تطبيق آلية السؤال الدستوري في ممارسة الاختبار الدستوري في المحكمة الدستورية هو محاولة لدعم سيادة الدستور في إطار نظام الديمقراطية الدستورية للنظام الدستوري الإندونيسي (2) يمكن إضفاء الطابع المؤسسي على آلية السؤال المؤسسي من خلال توسيع سلطة المراجعة القضائية للمحكمة الدستورية من خلال تعديل قانون المحكمة الدستورية الثاني (3) يمكن استخدام النموذج القانوني النبوي كمنظور بديل لإحياء روح العدالة المبنية على الله عز وجل في ممارسة الاختبار الدستوري في المحكمة الدستورية ، وخاصة في تطبيق آلية السؤال الدستوري.

تتضمن بعض التوصيات من هذا البحث ما يلي: (1) يجب إجراء الإصلاح القانوني في نطاق السلطة القضائية ، وخاصة المحكمة الدستورية ، على الفور حتى يتمكن كل شخص من الحصول على العدالة والحماية وضمان اليقين القانوني والتي هي حقوق دستورية للمواطنين. (2) ينبغي للمحكمة الدستورية إضفاء الطابع المؤسسي ينبغي إحياء آلية السؤال الدستوري في سلطة الاختبار الدستوري دون تغيير دستور عام 1945 (3) العدالة الموضوعية وفقا لأساس الدولة والفلسفة الوطنية.

الكلمات المفتاحية: المحكمة الدستورية ، الاختبار الدستوري ، السؤال الدستوري ، النموذج القانوني النبوي.

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CHAPTER I

INTRODUCTION

A. Background of Research

The conception of the state of law as an ideal concept in developing national and state life began to be used in a number of countries along with the development of the existing constitutional system.[1] The state of law is that no one is above the law. Management of government power must be based on law. The state and other institutions in any action must be based on law and can be legally accounted for.[2] Jimly Asshiddiqie stated that there are some important characteristics of the state of law, namely;

a. Rule of law
b. Equality
c. Principle of legality
d. Restrictions of power
e. Independent executive organ
f. Independent and netral justice
g. State administrative justice
h. State administration justice
i. Human rights protection
j. Democratic
k. Means to realize the goals of the country
l. Social control and Transparency [3]

[1] Haposan Siallagan, *"Penerapan Prinsip Negara Hukum Di Indonesia"*. Sosiohumaniora, Vol.18 No. 2 Juli 2016, 131.
[2] M. Tahir Azhary, *Negara Hukum: Suatu Studi tentang Prinsip-Prinsipnya, Dilihat dari Segi Hukum Islam, Implementasinya pada Periode Negara Madinah dan Masa Kini*, (Bogor: Kencana, 2003), 30.
[3] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, Jakarta: Konstitusi Press, 2005), 15.

According to Moh. Mahfud MD[4] et al., two of the most important consequences in accordance with the principle of constitutionalism of respect, human rights fulfillment and protection that are important markers of a democratic and law state are:

a. Truly incarnation and impelementation of constitution (UUD 1945) as the highest so that the whole practice of organizing state life.
b. Human rights stated in the constitution and recognized as citizens' constitutional rights, all branches of state power are bound to obey them.

According to MS Armia[5], there are at least five types of state of law concepts:

a. The state of law according to Quran and Sunnah, or what is often referred to as the Islamic nomocracy;
b. The rule of law, according to the Continental European concept, called rechtsstaat, is implemented in the Netherlands, Germany and France. In this case, the state is restricted from being involved in welfare matters;
c. The state of law concept applied in Anglo-Saxon countries, (like UK and the US).
d. The concept of socialist legality previously applied in the Soviet Union;
e. Pancasila state of law.

Indonesia is a country that adheres to the fifth concept, namely Pancasila state of law. It originates from Indonesian social and cultural values which are realized in the form of a state ideology in the form of Pancasila.

The statement about Indonesia as a state of law is mentioned in Article 1 paragraph (3) of the 1945 Constitution, *"The State of Indonesia is*

[4] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional)*, (Malang: UB Press, 2010), 45.
[5] Armia MS, *Perkembangan Pemikiran dalam Ilmu Hukum*, (Jakarta: Pradnya Paramita, 2009), 31.

a state of law".[6] The term "state of law" of that Article does not specifically refer to one of MAin concepts in the western legal tradition, both *Rechtsstaat* and the Rule of Law. It is relatively 'neutral' concept which opens space for new interpretations in accordance with the paradigm and reality of Republic Indonesia.[7]

Indonesia as a state of law has stated that everyone must be recognited, guaranteed, protected, and certainty of law, fair and law's equal treatment.[8] The guarantee of these rights is one embodiment of the form of the democratic law State of Indonesia.

Fulfillment Indonesia's citizens rights is marked by existence of a set judicial powers that are independent as administration justice to uphold law and justice.[9] Ni'matul Huda explained that the affirmation of Indonesia is a rule of law as well as a judicial power is an independent power, containing the spirit to not make law as an instrument of power, uphold the equality before the law, also protect interference both internal and external to judicial power in order to prevent and avoid the failure to achieve justice.[10]

Judicial power in Indonesia is exercised by Supreme Court (MA) and the judiciary below it within the general court, religious court, military

[6] Pasal 1 ayat (3) Undang-undang Dasar Negara Republik Indonesia Tahun 1945.
[7]Aidul Fitriciada Azhar, *"Negara Hukum Indonesia: Dekolonisasi Dan Rekonstruksi Tradisi"*. Jurnal Hukum Ius Quia Iustum No. 4 Vol. 19 Oktober 2012, 490.
[8] Pasal 28D ayat (1) Undang-undang Dasar Negara Republik Indonesia Tahun 1945
[9] Pasal 24 ayat (1) Undang-undang Dasar Negara Republik Indonesia Tahun 1945.
[10] Ni'matul Huda, *Dinamika Ketatanegaraan Indonesia dalam Putusan Mahkamah Konstitusi*, (Yogyakarta: FH UII PRESS, 2011), 18.

court, state administration court.[11] Judicial power in Indonesia also exercised by a Constitutional Court (MK).

Indonesian judicial power can be said to adhere to the bifurcation system, in which judicial power is divided into two branches, namely the ordinary court branch which culminates in MA and the constitutional judicial branch run by MK.[12] According to Jimly Asshiddiqie, in the long run there is a separation between MK as court of law that functions for maintaining constitutionality of all publicly binding legal products, and MA as a court of justice to every citizen and legal entities in Indonesia.[13]

The difference between MK and MA also in function of the both. The test objects of the two institutions are not the same. The Constitutional Court conducted a constitutionality test, while the Court conducted a legality test.

> MA examines the regulations under the law, while MK only examines the laws, not other regulations whose levels are below the law. The gauges are also different. Revewing of statutory regulations under law carried out by MA uses law to assess and carry out testing activities, while MK uses the Basic Law. The trial conducted by MA is the legality testing based on the law, not the constitutionality test according to the 1945 Constitution. The explanation above has concluded that MK tested the constitution of legislative law or legislation, while MA tested the legality of regulation.[14]

[11] Pasal 24 ayat (2) Undang-undang Dasar Negara Republik Indonesia Tahun 1945
[12] Ni'matul Huda, *Dinamika Ketatanegaraan Indonesia dalam Putusan Mahkamah Konstitusi*, (Yogyakarta: FH UII PRESS, 2011), 20.
[13] Jimly Asshiddiqie, *Sengketa Kewenangan Konstitusional Lembaga Negara*, (Jakarta: Sekjen dan Kepaniteraan Mahkamah Konstitusi RI, 2006), 95.
[14] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Sinar Grafika, 2010), 4-5.

MK is a new state institution formed based on the third changes to UUD 1945. MK as a new state institution that stands alone in exercising judicial power is then regulated in Law No. 24 of 2003 concerning the Constitutional Court and was amended by Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court (MK Law).

MK as a constitutional court stands on assumption of supremacy constitution which is the highest law that underlies or underpins state activities and as a parameter to prevent the state from acting unconstitutionally.[15] MK is a new milestone in the development of Indonesian state administration which has an important role in the effort to uphold the constiitution.

MK was formed to guarantee that the 1945 Constitution was truly incarnated and adhered to in its implementation, including ensuring that citizens constitutional rights were truly respected, protected and fulfilled in the practice of state administration.[16] The purpose of establishing MK is in line with the function of MK as The Guardian of Constitution or as constitutional guardian.

The existence of MK was also because a desire to build a democratic government with a checks and balances system between branches of power, realize the state of law and justice and protect the citizens constitutional

[15] Mustafa Lutfi, *Hukum Sengketa Pemilukada di Indonesia (Gagasan Perluasan Kewenangan Konstitusional Mahkamah Konstitusi),* (Yogyakarta: UII Press, 2010), 3.
[16] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 63.

rights.[17] The embodiment of purpose and function of MK's existence was then realized through the authorities granted to MK. MK's authority is stated in Article 24C paragraph (1) of the 1945 Constitution. The article states that:

> "MK has the authority to adjudicate at the first and last level whose decisions are final to review the law against the Basic Law, decide upon disputes over the authority of state institutions whose authority is given by the Constitution, decide upon the dissolution of political parties and decide on disputes over the results of general elections. ".[18]

MK's authority also can be seen in Article 10 paragraph (1) of MK Law. The article states that MK has authority to adjudicate in the first and last level, who has decisions are final to:

a. Test the law against the UUD 1945;
b. Decide on a dispute over the authority of a state institution whose authority is stated by the UUD 1945;
c. Decide upon dissolution of political parties; and
d. Decide upon disputes about general elections result.[19]

MK's authority then expanded and now adds another one, which is to decide the election dispute, which was previously the authority of MA. The transfer of authority from MA to MK is based on the provisions of Article 236 C of Law Number 12 of 2008 concerning the Second Amendment to Law Number 32 of 2004 concerning Regional Government.

MK's constitutional authority in implementing checks and balances principle places state institutions in same position so that can be balance in

[17] Mustafa Lutfi, *Hukum Sengketa Pemilukada di Indonesia (Gagasan Perluasan Kewenangan Konstitusional Mahkamah Konstitusi),* (Yogyakarta: UII Press, 2010), 6.
[18] Pasal 24C ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
[19] Pasal 10 ayat (1) Undang-Undang No. 24 Tahun 2003 Tentang Mahkamah Konstitusi. Lembaran Negara Republik Indonesia Nomor 4316.

the state administration.[20] MK's existence is a concrete step to correct each other's performance state institutions. MK's establishment was also intended as a means of resolving some of the problems that occur in the practice of state administration that were not previously determined by constitution.[21]

MK currently has several authorities that have been mentioned both in the constitution and in the law, but if you look further, MK's authority which is directly concerned with protecting and fulfilling citizens constitutional rights is the authority to test the law against UUD 1945. This authority is exercised if there is a request that is filed regarding the review of laws which are considered to be detrimental to the constitutional rights of citizens.

Jimly Asshiddiqie explained that in the practice of reviewing legal norms, there were some classifications of law norms that could be reviewed for control mechanisms, namely:

a. Normative decisions that contain and are regulatory (regeling)
b. Normative decisions that contain and are administrative in nature (beschikking)
c. Normative decisions that contain and are judgment (judgment).[22]

[20] Bambang Sutiyoso, *Pembentukan Mahkamah Konstitusi Sebagai Pelaku Kekuasaan Kehakiman di Indonesia.* Jurnal Konstitusi, Volume 7, Nomor 6, Desember 2010, 31.
[21] Mustafa Lutfi, *Hukum Sengketa Pemilukada di Indonesia (Gagasan Perluasan Kewenangan Konstitusional Mahkamah Konstitusi),* (Yogyakarta: UII Press, 2010), 6.
[22] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang,* (Jakarta: Sinar Grafika, 2010), 1-2.

That three law norms above can be verified with judicial review and non-judicial mechanisms. The three legal norms above are individual and concrete norms, and some are general and abstract norms.[23]

According to Mauro Cappelleti[24], there are two kinds of constitutional review model in world, the decentralized judicial review and centralized judicial review.

> First, the decentralized judicial review model, which is a model that places the constitutional review authority spread to MA and the lower judicial body. Constitutional review known in countries that adhere to decentralized judicial review only covers concrete norm testing or known as constitutional question. Constitutional review of this model can only be done by judges who are handling their own concrete cases. The first model was created and practiced by the US then followed countries that generally have a common law system. The historical experience of the United States as a country that inherits common law legal traditions makes this country does not need an independent institution outside MA. The power to conduct constitutional review is directly attached MA's authority itself, so MA is referred to as "The Guardian of American Constitution".[25]
>
> Second, the centralized judicial review model, places authority of constitutional review centrally by establishing MK as an organ specifically tasked with carrying out constitutional review. The second model was pioneered by Austria which was then followed by other Continental European countries and civil law countries outside Europe. Some countries that embrace this model include Austria, Germany, Spain, Italy, Russia, Thailand, and so on. MK has authority to conduct constitutional review, especially on abstract norms (abstract review), although testing of concrete norms is also possible.[26]

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[23] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Sinar Grafika, 2010), 1-2.
[24] Arief Ainul Yaqin, *Constitutional Question*, (Jakarta: Sinar Grafika, 2018), 12.
[25] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), 45
[26] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), 50.

Indonesia belongs to the latter group, which places centralized constitutional review authority through the establishment of a MK (centralized judicial review), but there is no explanation that clearly states the scope of norm testing in MK is included in the abstract review or concrete review norm testing variant.

> MK formation history and formulation its authority in process of amending the UUD 1945 shows that there is almost no discussion of the scope of norm testing. The weight of the changes to UUD 1945 carried out in four stages of change (from 1999-2002) may be the cause, so that the framers of the amendment to UUD 1945 do not have time to discuss let alone formulate material on the scope of constitutional testing when discussing and formulating Article 24C of UUD 1945.[27]

Constitutional protection also includes the protection of citizens from the arbitrariness of the application of the law by the court, namely when court applies laws that are not accordance with constitution, thus harming citizens constitutional rights. The constitutional question mechanism is an effort to prevent the loss of citizens' constitutional rights due to laws application that are not accordance with constitution.

> Constitutional question is said to be able to prevent arbitrariness in law enforcement because Constitutional question is a mechanism related to the constitutionality of a law. A judge who is trying a case assesses or doubts the constitutionality of the applicable law, so that the judge can ask his doubts to MK.[28]

The condition of constitutional question mechanism still not been adopted in this MK shows that the constitutional testing system in Indonesia still has inequality because it is only able to reach abstract norm review.

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[27] Jimly Asshiddiqie, *Konstitusi Bernegara,* (Malang: Setara Press, 2015), 168

[28] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 55.

This condition causes the constitutional testing room in Indonesia to be narrow, and doesn't protect citizens constitutional rights.

> Every authority possessed by MK must include comprehensive constitution protection. Restrictions on the authority of constitutional testing only to abstract reviews will prevent violations of the constitution from being maximally processed. The constitutional question then becomes important to be used as MKs authority if it is seen from the interests to carry out constitution comprehensive protection. MK as one of judicial power branches in Indonesia certainly also has a role to realize justice for citizens who submit cases to the Court.[29]

MK has conducted several applications for judicial review that have doubtful constitutionality and are related to cases being tried in general courts. Some of these petitions have even been convicted of and convicted under laws that have doubtful constitutionality. The existence of these requests is one reason that is strong enough to add the authority of the constitutional question in terms of practice.

> Some cases of petition for testing the law include testing the Criminal Code in Case Number 013-022 / PUU-1V / 2006 filed by Eggi Sudjana and Pandopatan Lubis, Case Number 6 / PUU-V / 2007 filed by Panji Utomo, Case Number 14 / PUU-VI / 2008 submitted by Risang Bima Wijaya and Bersihar Lubis, and Case Number 7 / PUU-VII / 2009 submitted by Rizal Ramli. All requests in these cases have been tried and convicted, and have even served a sentence before submitting an application to the Court.[30]

The first application to be discussed is the application in Case Number 013-022 / PUU-IV / 2006. This case was filed by Eddy Sudjana and Pandapotan Lubis.

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[29] Heru Setiawan, *Rekonseptualisasi Kewenangan Mahkamah Konstitusi Dalam Upaya Memaksimalkan Fungsi Mahkamah Konstitusi Sebagai The Guardian Of Constitution, Thesis MA,* (Semarang: Universitas Diponegoro, 2017), 10.

[30] Jazim Hamidi dan Mustafa Lutfi, *"Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya)".* Jurnal Konstitusi, Vol. 7, No. 1, Februari 2010, 42.

Eddy Sudjana as Petitioner I stated that his constitutional rights were impaired by the enactment of Article 134 and Article 136 bis of the Indonesian Criminal Code (KUHP) when he is currently tried at the Central Jakarta District Court, based on the indictment of deliberately insulting the President. Eddy stated that Article 134 and Article 136 bis of the Criminal Code were seen to be in conflict with Article 28F of UUD 1945. Petitioner II namely Pandapotan Lubis requested a review of Article 134, Article 136 bis and Article 137 of the Criminal Code which the Petitioner deemed to be in conflict with Article 27 paragraph (1), Article 28, Article 28E Paragraph (2) and Paragraph (3), Article 28J Paragraph (1) and Paragraph (2) of UUD 1945. In its decision, MK stated that the Court granted all petitioners' requests and stated that Article 134, Article 136 bis, and Article 137 The Criminal Law Code contradicts UUD 1945, and states that Article 134, Article 136 bis, and Article 137 of the Criminal Code do not have binding legal force. Concerning constitutional question was also discussed in dissenting opinions by Constitutional Justice I Dewa Gede Palguna and Soedarsono. The two Constitutional Justices stated that in this case it was not a matter of constitutionality of norms but rather a matter of application of norms, so to overcome this problem MK in other countries, in addition to being given the authority to adjudicate cases of judicial review, also given the authority to adjudicate cases on constitutional questions and contitutional complaints.[31]

The second decision to be discussed is the decision in Case Number 6 / PUU-V / 2007. Application for testing of this law was submitted by Panji Utomo. The petition in this case examines Article 154, Article 155, Article 160, Article 161, Article 207, Article 208, and Article 107 of the Criminal Code which contradicts Article 28, Article 28D Paragraph (1), and Article 28E Paragraph (2) and Paragraph (3) 1945 Constitution.

Panji Utomo, is an Indonesian citizen who has been tried and sentenced to 3 months imprisonment based on the decision of the Banda Aceh District Court Number 232 / Pid.B / 2006 / PNBNA dated December 18, 2006 because he was considered to have committed a crime as regulated in Articles 154 and 155 Criminal Code. The decision of this petition states that the Petitioner's petition was granted in part, in this case Article 154 and Article 155 of the

[31] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 013-022/PUU-IV/2006

> Indonesian Criminal Code are declared contrary to UUD 1945 and do not have binding legal force.[32]

The next decision is the decision on Case Number 14 / PUU-VI / 2008. This request was submitted by Risang Bima Wijaya and Bersihar Lubis.

> This petition examines the constitutionality of Article 310 paragraph (1), Article 310 paragraph (2), Article 311 paragraph (1) of the Criminal Code which all of the aforementioned Articles are argued against Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F of UUD 1945, whereas, Article 207 and Article 316 of the Criminal Code are argued to be in conflict with Article 27 paragraph (1), Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F of UUD 1945. MK in its legal considerations also states that the case This is related to constitutional complaint, which is questioned by the Petitioners rather constitutional complaints rather than judicial review or constitutional review, while MK only has constitutional review authority, and the authority of constitutional complaint is not mentioned in UUD 1945, so that in its ruling, the Court rejected the petitioners' petition.[33]

Constitutional Complaint is often referred to as Constitutional Complaints. It is a lawsuit filed by citizen to MK, regarding an act or omission committed by public authority that makes person's basic rights violation.[34]

Constitutional complaints question whether an act of a public official has violated a person's basic rights, which can occur partly because the relevant public official erroneously interpreted the norms of the law in its application.[35] Constitutional complaints and constitutinal questions are

[32] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 6/PUU-V/2007
[33] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 14/PUU-VI/2008
[34] I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, (Jakarta: Sinar Grafika, 2013), 36.
[35] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 14/PUU-VI/2008

two mechanisms that have the same goal, namely the realization of the protection and respect for citizens' constitutional rights, but both mechanisms are not included in MK's authority in Indonesia. Researchers in this study will then only discuss the application of the constitutinal question mechanism as an addition or extension of MK's authority.

The last decision to be discussed is the decision in Case Number 7 / PUU-VII / 2009. Request for judicial review of this law was submitted by Rizal Ramli. This petition is also included in the list of cases which are related to the litigation process in the court in his case.

This petition wishes to review of Article 160 of the Criminal Code. The article is considered contrary to Article 28, Article 28C paragraph (2), Article 28E paragraph (2) and paragraph (3), and Article 28G paragraph (1) of UUD 1945.[36]

The court later rejected his petition, but the existence of this petition indicated that many articles which became the legal basis in a case in court were still questioned by his constitutionality. The existence of constitutional question itself is one of the efforts to overcome this.

The hope of constitutional question in MK's authority can better protect every citizen constitutional rights, especially justice seekers who are undergoing litigation in court. The existence of constitutional question can also have an effect on the general judges who are handling cases in order to

[36] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 7/PUU-VII/2009

be able to give the fairest decisions and not violate the constitutional rights of every citizen.

Petitioners who have received court sentences due to laws that violate the constitution indicate that the petitioners have violated their constitutional rights. Prevention of this can be done by applying a constitutional question mechanism be the authority of MK.

> The constitutional question mechanism itself was mentioned in case Number 14 / PUU-VI / 2008, which submitted an examination of Article 310 paragraph (1) and paragraph (2), Article 311 paragraph (1), Article 316, and Article 207. The Court was of the opinion that what is experienced by the applicant is not a matter of norms, but rather the application of the law which can actually be addressed in the mechanism of constitutional question or constitutional complaint that is currently not owned by the Court.[37]

The constitutional question mechanism can be applied in MK if it is added to become MK's authorities. The addition authority could also be an extension for MK's authority. Application of constitutional question mechanism can only be done if there is legal certainty governing it.

The legal certainty principle which is characteristic of state of law has also been conveyed by Allah SWT in His Word. The discussion regarding the necessity of legal certainty in the application of law has been written in the highest Islamic law, al-Qur'an, al-Karim.

> Law originating from Allah SWT as the highest authority in the view of Islam must be conveyed as clearly as possible to the people to be followed and implemented in their lives. That is according to the word of Allah SWT:

[37] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional)*, (Malang: UB Press, 2010), 70.

وَمَا كَانَ رَبُّكَ مُهْلِكَ الْقُرٰى حَتّٰى يَبْعَثَ فِيْٓ اُمِّهَا رَسُوْلًا يَّتْلُوْا عَلَيْهِمْ اٰيٰتِنَاۚ وَمَا كُنَّا مُهْلِكِى الْقُرٰىٓ اِلَّا وَاَهْلُهَا ظٰلِمُوْنَ - ٥٩

Meaning: "And it was not your Lord to destroy cities before He sent in the capital an apostle who read us verses1 to them; and never (also) We destroy cities unless the inhabitants are in a state of wrong doing"(Q.S. al-Qashas: 59).[38]

Apostles who are sent to read the verses of Allah, means to explain clearly to the community so that people know for sure the applicable law which means there is legal certainty. It can also be equated with the provisions of each law that can only be applied after enactment, which in Indonesia is promulgated in the State Gazette of the Republic of Indonesia. The promulgation of a law is intended so everyone can get legal certainty. Mohammad Daud Ali also pointed to legal certainty in the following verse:

مَنِ اهْتَدٰى فَاِنَّمَا يَهْتَدِيْ لِنَفْسِهٖۚ وَمَنْ ضَلَّ فَاِنَّمَا يَضِلُّ عَلَيْهَاۗ وَلَا تَزِرُ وَازِرَةٌ وِّزْرَ اُخْرٰىۗ وَمَا كُنَّا مُعَذِّبِيْنَ حَتّٰى نَبْعَثَ رَسُوْلًا - ١٥

Meaning: "And We will not punish before We send an apostle" (Q.S. al-Isra: 15).[39]

Allah SWT has explained that a law must be determined fairly. The aim is to uphold justice among his servants and so that humans behave fairly among fellow human beings. That is, any means and means that can create justice then it is all in accordance with religion and does not violate it.[40] Al-Qur'an as ultimate source of Islamic law has mentioned word justice more than 1,000 times, occupying the third highest position after the word Allah and science. MAny words of justice mentioned in the Koran show that justice is a very important principle in Islamic law. The principle of justice can be said to be the principle of all the principles of Islamic law.[41]

[38] Muhammad Alim, *"Asas-asas Hukum Modern dalam Hukum Islam".* Jurnal Media Hukum, Vol. 17, No.1, Juni 2010, 157.
[39] Mohammad Daud Ali, *Hukum Islam,* (Jakarta: PT Raja Grafindo Persada, 2000), 117.
[40] Farid Abdul Khalid, *Fikih Politik Islam* (Jakarta: Amzah, 2005), 205
[41] Mohammad Daud Ali, *Hukum Islam,* (Jakarta: PT Raja Grafindo Persada, 2000), 116.

Doing justice is a command of Allah SWT to humans. Some verses of al-Qu'ran which show the necessity to do justice include, Surat an-Nisa verse 58:

اِنَّ اللّٰهَ يَأْمُرُكُمْ اَنْ تُؤَدُّوا الْاَمٰنٰتِ اِلٰٓى اَهْلِهَاۙ وَاِذَا حَكَمْتُمْ بَيْنَ النَّاسِ اَنْ تَحْكُمُوْا بِالْعَدْلِۗ اِنَّ اللّٰهَ نِعِمَّا يَعِظُكُمْ بِهٖۗ اِنَّ اللّٰهَ كَانَ سَمِيْعًاۢ بَصِيْرًا - ٥٨

Meaning: "Verily, Allah has told you to deliver the message to those who are entitled to receive it, and (instructs you) when establishing laws among humans so that you establish fairly. Surely Allah gives you the best teaching. Surely Allah is All-Hearing, All-Seeing (Q. An-Nisa: 58).

The Word of Allah SWT Surat al-Maidah verse 8 also states that:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا كُوْنُوْا قَوّٰمِيْنَ لِلّٰهِ شُهَدَاۤءَ بِالْقِسْطِۖ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلٰٓى اَلَّا تَعْدِلُوْاۗ اِعْدِلُوْاۗ هُوَ اَقْرَبُ لِلتَّقْوٰىۖ وَاتَّقُوا اللّٰهَۗ اِنَّ اللّٰهَ خَبِيْرٌۢ بِمَا تَعْمَلُوْنَ - ٨

Meaning: "O you who believe, you should be those who always uphold (the truth) because of Allah, be a fair witness. And do not ever have your hatred towards a people, pushing you to be unjust. Be fair, because fair is closer to piety. And fear Allah, indeed Allah is All-Knowing what you are doing "(QS. al-Maidah: 8).

The obligation to do justice is also in accordance with the word of Allah SWT Surat al-Hujurat verse 9:

وَاِنْ طَاۤىِٕفَتٰنِ مِنَ الْمُؤْمِنِيْنَ اقْتَتَلُوْا فَاَصْلِحُوْا بَيْنَهُمَاۚ فَاِنْۢ بَغَتْ اِحْدٰىهُمَا عَلَى الْاُخْرٰى فَقَاتِلُوا الَّتِيْ تَبْغِيْ حَتّٰى تَفِيْۤءَ اِلٰٓى اَمْرِ اللّٰهِۚ فَاِنْ فَاۤءَتْ فَاَصْلِحُوْا بَيْنَهُمَا بِالْعَدْلِ وَاَقْسِطُوْاۗ اِنَّ اللّٰهَ يُحِبُّ الْمُقْسِطِيْنَ - ٩

Meaning: "And it is fair. Surely Allah loves those who act justly "(Q.S. al-Hujurat: 9).[42]

The verses above clearly show that God commands us to always uphold justice with the truth in establishing the law. Justice in the application of law can be realized one of them by applying the constitutional question mechanism in MK's authority. The application of this mechanism is an effort to implement justice in the court institution. Constitutional question mechanism application will be a solution to uphold justice in

[42] https://www.tafsirq.com/ Diakses Pada Jumat, 15 November 2019 Pukul 09:25.

general court to make decision. Decisions of general court are expected to all of which do not violate citizens constitutional rights, thus, justice in decisions general court judges that are in accordance with Islamic teachings can be upheld properly.

Based on the description that has been explained above, the researcher feels that the authority of constitutional testing in the concrete review variant or often referred to as constitutional question is the scope of authority that must exist in MK, whether its application as an additional authority or extension of MK's authority. The application of the constitutional question mechanism becomes the authority of MK aimed at ensuring that citizens constitutional rights properly fulfilled. Researcher then felt the urgency to examine this matter, so the researcher then took the title of the study "Political Law Application of The Constitutional Question in The State System Republic of Indonesia Perspective The Profetical Law Paradigm" which would be set in the form of a research thesis.

B. Formulation of Problem

Based on the title and background that have been stated above, a number of problems can be formulated to be investigated. The formulations of the problem include the following:

1. How relevant is the application of constitutional question towards The State System Republic of Indonesia?

2. How is the legal politics for applying the constitutional question mechanism in constitutional review in MK of the Republic of Indonesia?
3. How is the implementation of constitutional question based on the perspective of the Prophetic Legal Paradigm?

C. Goals of Research

Based on a number of problem formulations that have been formulated above, the researcher hopes that some of the research goals will be achieved from the results of this study. This research has several goals that will be achieved, namely:

1. To study and examine the relevance of the application of constitutional question towards The State System Republic of Indonesia
2. To find out and study the legal politics for applying the constitutional question mechanism in constitutional review at MK of the Republic of Indonesia
3. To examine and analyze the implementation of constitutional questions based on the perspective of the Prophetic Law Paradigm

D. Benefits of Research

This research was made in addition to achieve some of the goals mentioned above, it is also expected to provide benefits for researchers and readers in general. The benefits to be provided are:

1. Theoretical Benefits

The researchers hope the results of this study can be utilized to increase the treasury of science, especially in law subject. The results of this study are expected to enrich references and literacy in the world of literature, and can be used as a guide for conducting similar research.

2. Practical Benefits

The researchers hope this research can be a contribution of thought to researchers in the future. The researcher also hopes that this research can provide readers with broad insights, especially related to "Political Law Application of The Constitutional Question in The State System Republic of Indonesia Perspective The Profetical Law Paradigm". This research is also expected to be of practical use for:

a. For the House of Representatives is a reference / reference material to revise the rules regarding the addition or expansion of the authority of MK of the Republic of Indonesia related to the constitutional review of laws in the form of concrete norms, not just abstract norms.
b. For MK of the Republic of Indonesia is as a reference / reference material in terms of the constitutional review practice of the law petitioned by citizens of the Republic of Indonesia.
c. For the Judges of the General Court is to be able to provide the fairest decisions in each case that is being handled, so that the resulting decision does not violate citizens constitutional rights.

d. For the community is to protect the law for people who are undergoing litigation in the general court in order to get a decision as fair as possible and in accordance with the constitutional rights of citizens.

E. Research Methods

1. Research Type

Abdulkadir Muhammad[43] divided legal research into three, based on the focus of his research. The three types of legal research are normative law research, normative-empirical law research, and empirical law research which are divided based on the focus of their research. The following explanation:

a. Normative law research uses normative legal case studies in the form of products of legal behavior, for example reviewing draft laws.
b. Normative-empirical legal research (applied law research) uses normative-empirical legal case studies in the form of legal products, for example, reviewing the implementation of credit agreements.
c. Empirical law research uses empirical law case studies in the form of community legal behavior. The subject of the study is the law which is conceptualized as actual behavior as an unwritten social phenomenon that is experienced by everyone in social relations.

Soerjono Soekanto[44] formulated the division of legal research that contained similar subjects. According to him there are two types of legal research, namely:

a. Normative legal research consisting of:

[43] Abdulkadir Muhammad, *Hukum dan Penelitian Hukum,* (Bandung: PT Citra Aditya Bakti, 2004), 52.
[44] Bambang Sunggono, *Metodologi Penelitian Hukum,* (Bandung: PT Raja Grafindo Persada, 2007), 41.

1) Legal principles research
2) Legal systematics research

b. Extent of law synchronization research
1) Research of history law
2) Legal comparative research

c. Research on sociological or empirical law consisting of:
1) Legal identification research
2) Legal effectiveness research

This thesis is Normative Juridical research. Normative Juridical Research discusses doctrines or principles in the science of law.[45]

In normative law research, law is things that written in the legislation or as a rule or norm which is a benchmark for human behavior that is considered appropriate.[46]

The researcher uses normative juridical research because this thesis is not a empirical research that starts from a case that occurs in the community. This research is a normative juridical study because the researcher sees a legal vacuum in the application of constitutional questions in MK's authority, so the researcher then examines how the legal politics of applying constitutional questions in the Indonesian constitutional system, and will later be analyzed using a prophetic legal paradigm.

2. Research Approach

Johan Nasution[47] suggested several approaches that could be used in normative legal research. These approaches can be used either

[45] Zainuddin Ali, M.A., *Metode Penelitian Hukum*, (Jakarta: Sinar Grafika, 2017), 24.
[46] Amiruddin dan Zainal Asikin, *Pengantar Metode Penelitian Hukum*, (Jakarta: Rajawali Pers, 2006), 118.
[47] Johan Nasution, *Metode Penelitian Hukum*, (Bandung: Mandar Maju, 2008), 81.

independently or individually, in accordance with the issue or problem being discussed. These approaches include:

a. The legal approach, namely research on legal products.
b. Historical approach, namely research or study of the development of legal products based on sequences of historical periods or reality.
c. Conceptual approach, namely research on legal concepts such as legal sources, legal functions, legal institutions, and so on.
d. Comparative approach, namely research on legal comparisons both on comparisons of legal systems between countries, as well as comparisons of legal products and the legal character between time in one country.
e. Political approach, namely research on political policy considerations and community participation in the formation and enforcement of various legal products.
f. Philosophy approach, which is an approach regarding fields related to the object of study of legal philosophy.

Peter Mahmud Marzuki[48] describes the approaches used in legal research. These approaches include:

a. The statue approach is implemented with check out regulations about the legal issues being addressed.
b. The case approach is implemented with check out cases about issues at hand which is have become court decisions have permanent legal force.
c. The historical approach is implemented with check out the background about what is learned and the development of arrangements regarding issues at hand.
d. Comparative approach, carried out by comparing the laws of a country with the laws of one or more other countries regarding the same thing.
e. The conceptual approach moves from doctrines which develop in the science of law.

The researcher then used two approaches in this research. The two approaches used are the statute approach and the conceptual approach,

[48] Peter Mahmud Marzuki, *Penelitian Hukum,* (Jakarta: Kencana, 2010), 94.

this is due to the limitations of the researcher both in mastering the theory and the limitations of the reference.

This study uses a statute approach by examining laws related to the MK, both the UUD 1945, Law No. 24 of 2003 concerning the Constitutional Court which was amended by Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court (MK Law), Constitutional Court Decision, and related regulations. The statute approach is carried out in the context of legal research for both practical and academic purposes, so that the objectives can be of benefit to the general public.

Researchers also use a conceptual approach (conceptual approach). Researchers in obtaining legal doctrines related to constitutional questions and prophetic law by searching literature from related books and journals. The researcher studies the views and doctrines in legal science with the hope that the researcher will find ideas that will give birth to legal understandings, legal concepts, and legal principles that are relevant to legal politics, constitutional question mechanism and prophetic legal paradigms. .

3. Sources of Legal Materials

Normative juridical legal research obtains sources of library legal research, not from the field. The term that is known is the source of legal material. The following are legal sources materials used in this study:

a. Primary Legal Materials

According to Soerjono Soekamto[49], primary law materials are binding law materials. Zainuddin Ali[50] explained that primary law material is law material which has authority (authoritative). Primary law materials consist of:

1) Legislation, for example the Civil Code, the Criminal Code, and so forth.
2) Official records or minutes in making a statutory regulation, for example, academic studies needed in making a draft law and / or regional regulations.
3) Judges' decisions, for example MA's Decision, and the MK's Decision.

The primary law materials used in this study are UUD 1945, MK Law, the Constitutional Court Decision, and al-Quran al-Karim.

b. Secondary Legal Materials

Secondary Law Material namely law material that gives an explanation of the primary law material. Mukti Fajar and Yulianto Ahmad[51] explained that secondary legal materials were got from literature results review or literature relating to the problem or research material. According to Jhony Ibrahim[52], secondary legal material is legal material be composed of books, legal journals, scholars' opinions (doctrines), law cases, jurisprudence, and the latest symposium results, which are related to research problems.

[49] Soerjono Soekamto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat*, (Jakarta: PT Raja Grafindo Persada, 2006), 24.
[50] Zainuddin Ali, *Metode Penelitian Ilmu Hukum*, (Jakarta: Sinar Grafika, 2017), 47.
[51] Mukti Fajar dan Yulianto Achmad, *Dualisme Penelitian Hukum-Normatif dan Empiris*, (Yogyakarta: Pustaka Pelajar, 2015), 156.
[52] Jhony Ibrahim, *Teori dan Penelitian Hukum Normatif*, (Malang: Bayumedia Publishing, 2006), 295.

According to Soerjono Soekamto[53], in normative legal research, literature is a secondary data which has the following characteristics:

1) Secondary data are usually ready-made state.
2) The configuration and content of secondary data has been made and filled in by previous researchers.
3) Secondary data can be found without being attached or restricted by time and place.

Secondary legal materials used in this study include books, theses, journals, and documents that review about constitutional questions, and about prophetic law.

c. Tertiary Legal Materials

Peter Mahmud Marzuki[54] explained that tertiary legal material is material that provides instructions, an explanation of primary and secondary law materials. Tertiary law material can consist of dictionaries, encyclopedias, and others. Jhony Ibrahim[55] further mentioned that tertiary legal materials usually consist of legal dictionaries, encyclopedias, and so forth.

The tertiary legal materials used in this study are the Large Indonesian Dictionary, the Law Dictionary, and the English Dictionary.

4. Methods of collecting legal materials

[53] Soerjono Soekamto dan Sri Mamudji, *Penelitian Hukum Normatif: Suatu Tinjauan Singkat,* (Jakarta: PT Raja Grafindo Persada, 2006), 24.
[54] Peter Mahmud Marzuki, *Penelitian Hukum,* (Jakarta: Kencana, 2010), 95.
[55] Jhony Ibrahim, *Teori dan Penelitian Hukum Normatif,* (Malang: Bayumedia Publishing, 2006), 296.

The legal material collection method used in this thesis is literature study. Literature study is carried out by searching books, journals, theses, and documents related to constitutional questions and prophetic law. Search conducted by researchers conducted by reading, recording, reviewing, and making reviews of existing legal material.

5. Methods of Processing Law Materials

Processing law materials is usually done through stages, namely:

a. Inspection of data (editing), namely re-examination of legal materials obtained mainly from its fullness, explication meaning, congruence, and relation to other groups.[56] Researchers in this case re-examine the legal materials related to constitutional questions and prophetic law that have been found.

b. Classification (classifying), is done by compiling and systematizing the data that has been obtained from a literature study. The data that has been obtained are classified based on questions in the formulation of the problem, so the data got is useful for needs of this research and also makes it easier for readers to understand this research. Researchers in this case after finding and re-examining various legal materials related to the title taken then classifying the data that has been obtained first, and then will be used as material to answer the problem formulation.

[56] Jhonny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, (Malang: Bayumedia Publishing, 2006), 296.

c. Verification (verifying), is done by checking the data that has been obtained from the literature study. The researcher then checks the data that has been obtained, both related to constitutional question, or related to prophetic law, and others related to the researcher's title.

d. Analysis (analysis), carried out by the process of simplification of data in a form that is easy to read and interpret. Data analyzed were in the form of data obtained from library studies. The researcher then begins to analyze the data obtained from the study of literature to answer the formulation of the existing problem.

e. Making conclusions, in this case the author draws conclusions from the results of the analysis that produces answers to the formulation of the problem in this study. At this stage the researcher makes conclusions or important points which then produce a clear and concise picture. These points contain answers to the problem formulation. The answer was obtained from the analysis that has been done. The researcher will then find three answers in accordance with the three problem formulations that have been raised in the problem formulation in Chapter 1.

6. Methods of Analysis of Legal Materials

The steps or analysis activities carried out in normative legal research have specific characteristics because they involve normative conditions that must be fulfilled from the law, namely:

a. Not using statistics (because it is a study that is purely legal)

b. The theory of truth is pragmatic (can be used practically in people's lives)
c. Full value (is a specific trait of legal research)
d. Must be the relevant theory.[57]

Zainuddin Ali[58] explained that what was meant by qualitative legal normative research was research that referred to legal norms contained in various statutory regulations, court decisions.

The analytical method used by researchers in this thesis is a qualitative juridical analysis method. The use of qualitative juridical analysis methods in this research is in the form of in-depth interpretation of legal materials as is the normative legal research in this research.

Bambang Waluyo[59] stated that qualitative data could be analyzed if:

a. The data collected is not in the form of numbers that can be measured.
b. The data is difficult to measure with numbers
c. The relationship between variables is not clear.
d. Samples are more non-probability.
e. Data collection uses interview and observation guidelines.
f. The use of theory is less necessary.

The legal materials that have been obtained are then analyzed using a qualitative analysis approach. This approach is carried out by observing the data obtained, and linking each of the data obtained with the provisions and legal principles related to the problem under study with inductive logic, which is to think from a specific matter towards something more general, using normative tools, namely interpretation and construction of law and then analyzed using qualitative methods so that conclusions can be drawn with deductive

[57] Tim Penyusun, *Pedoman Penelitian Karya Ilmiah Tahun 2015*, (Malang: Fakultas Syariah UIN Maulana Malik Ibrahim Malang, 2015), 23.
[58] Zainuddin Ali, *Metode Penelitian Ilmu Hukum*, (Jakarta: Sinar Grafika, 2017), 105.
[59] Bambang Waluyo, *Penelitian Hukum Dalam Praktek*, (Jakarta: Sinar Gafika, 1996), 76-77.

methods that produce a conclusion that is general to the problems and objectives of the study.[60]

The results of the analysis will be correlated with the research problem in this study to produce an objective assessment to address the problems in the study, namely related to how the legal politics of applying constitutional question becomes the addition of MK's authority. The researcher will then analyze the problem using the prophetic legal paradigm.

F. Previous Research

Previous research conceive information about study has been done by previous authors, in the configuration of books or journal articles have been published, dissertations, theses, or undergraduate theses, both substantially and methods that have links with research problems in order to avoid duplication and subsequently must be explained or demonstrated the originality of this study and the difference with previous studies.

Theories and findings through the results of various previous studies are felt to be very necessary as supporting data. Previous research used as supporting data is research that is relevant to the issues that will be discussed in this study. The results of the study that researchers examined in this previous study came from theses and scientific journals. The following are narratives from some previous studies that are relevant to this research:

[60] Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, (Bandung: PT Citra Aditya Bakti, 2004), 127.

1. Muhammad Ardi Langga in his thesis entitled "Constitutional Complaint in the Political Perspective of National Law and Siyasah" revealed 2 formulations of the problem to be studied, namely: What is meant by constitutional complaint and its urgency for citizens, and what is the political view of national law and siyasah about constitutional complaints. From these two problem formulations, 2 concise research results are also obtained as follows: The application of Constitutional Complaint as an effort to protect the fundamental rights of citizens in the Constitutional Court is very necessary considering that many cases of violations of the constitutional rights of citizens have not been resolved because of the gap the legal vacuum, when viewed from the perspective of Constitutional Complaint National legal politics can be applied to the Constitutional Court's authority without changing the Constitutional Injury doctrine with the efforts of the Legislative Interpretation mechanism through the DPR RI by renewing and expanding explanations related to the Constitutional Court's authority and viewed from the perspective of the Constitutional Complaint concept in accordance with the Law Islam (Siyasah) related to human rights in Islam. This research can then be found several differences with the research to be conducted by researchers, these differences include: The authority of the Constitutional Court which is the object of research is different from the authority of the Constitutional Court to be investigated by researchers. The study uses 2 paradigms in his research,

namely national legal politics and siyasa, while researchers use the Prophetic Law paradigm in analyzing the results of his research. The results of this previous study, when compared with the research of researchers, there are several elements of novelty that will be achieved by researchers, namely: Examining the legal vacuum of the authority of the Constitutional Court in terms of constitutional question, which will then be discussed, studied and analyzed using the prophetic legal paradigm. This study will provide a description of the authority of constitutional question if it is applied in Indonesia, and how the prophetic legal perspective in viewing the urgency of the constitutional question authority.

2. Ahmad Zulal Abu Main in his thesis entitled "The Perspective of Siyasah Dusturiyyah Against the Constitutional Complaint Concept in the Constitutional Court Authority" revealed several formulations of the problems taken, namely: How is the concept of constitutional complaint in the authority of the constitutional court, and how is the perspective of the constitutional complaint on the concept of constitutional complaint? within the authority of the constitutional court. The two formulations of the problem can then be obtained by two research results, namely: First, in view of the doctrine of legal science, the constitutional court is an institution authorized to hear constitutional complaint cases. Second, the concept of constitutional complaint is also relevant to siyasah dusturiyyah, including the definition and scope of siyasah dusturiyyah,

protection of human rights in Islam, and the area of al-mazalim as a court of arbitrary authority towards the people. Some differences found by researchers between previous research and research that will be conducted by researchers include: The authority of the Constitutional Court to be examined in the research of researchers is different from those in previous studies, where researchers will examine the subject of constitutional questions, while those that have been examined in previous studies are related constitutional complaint. Researchers also use a prophetic legal perspective in their research, while previous research uses the perspective of siyasah dusturiyyah, so that the paradigm used to analyze is clearly different. The results of the research that will be achieved by researchers in accordance with several elements of novelty from previous studies include the following: related to the application of the authority of constitutional question if added to become the authority of the Constitutional Court in testing the Act against the 1945 Constitution, as well as how the prophetic legal paradigm views the application of constitutional question to be wrong one authority of the Constitutional Court.

3. Dhiana Oktaviani Putri in her script entitled "Urgency in the Arrangement of Constitutional Rights of Citizens Through Constitutional Complaint in the Constitutional Court" revealed several problem formulations, namely: What is the urgency of regulating the constitutional rights of citizens through constitutional complaints in the

Constitutional Court, and how the practice of protecting constitutional rights citizens in the Constitutional Court in 2015-2016 through constitutional complaint. The results obtained from this study are that the Constitutional Complaint's authority has not been fully implemented so it has not protected the constitutional rights of citizens. The addition of Constitutional Complaint authority can be done through constitutional interpretation so that there is no need to change the 1945 Constitution but only interpret the provisions governing the authority of the Constitutional Court. The difference between this previous research and the research that will be conducted by researchers, among others: The authority of the Constitutional Court discussed in this study is different from that which will be discussed in the research of the writer. This study discusses the expansion of the Constitutional Court's authority in the form of constitutional complaint authority, while the researcher will discuss the expansion of the Constitutional Court's authority, namely the constitutional question authority. This research also does not use a certain paradigm, but rather addresses the protection of the constitutional rights of citizens, while researchers will use the prophetic legal paradigm in their research. Researchers also have several elements of novelty that will be achieved in this study. The novelty element that will be achieved is related to the legal vacuum in the authority of the Constitutional Court in examining the constitutionality of the Law through the mechanism of constitutional question. This

research will also discuss how mechanisms and arrangements related to the addition or expansion of constitutional question authority in becoming part of the authority of the Constitutional Court. The results of the study will also be analyzed using the prophetic legal paradigm, how prophetic law sees the need to extend the authority of the Constitutional Court in the form of constitutional question.

4. The scientific journal by Pan Mohamad Faiz entitled "Addition of Constitutional Question Authority in the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights", has the following problem formulation: What is the possibility of constitutional question mechanism in Indonesia with alternative implementation. The formulation of the problem can then be obtained from the research that, there is an urgency to add constitutional question authority to the Court. akaan. The results of this study indicate that there is an urgency to add constitutional question authority to the Constitutional Court, and if the constitutional question will be applied in Indonesia, then the basis for constitutional question authority should be regulated through constitutional changes, or by revising the Constitutional Court Law, constitutional interpretation as outlined in the Constitutional Court decision, or the expansion of legal standing for court institutions as one of the constitutional review petitioners. It is also necessary to regulate the qualifications of constitutional question applicants and the time limit for handling cases by MK. The difference between the previous research

and the research that will be conducted by researchers is that this study together examines the application of constitutional questions when applied in Indonesia, the following mechanisms and their implementation, but the difference is the perspective in research that researchers use prophetic legal paradigms in analyzing the application of constitutional questions in Indonesia . The novelty element of the research conducted by researchers is how the prophetic legal paradigm views the existence of constitutional questions in the Indonesian constitutional system.

5. Hamid Chalid & Arief Ainul Yaqin in a scientific journal entitled "Initiating the Institutional Question Institution through the Extension of the Authority of the Constitutional Court in Testing the Law", provides a formulation of the problem to be examined, namely: How the idea of institutionalizing constitutional questions in Indonesia through the expansion of the authority of the Constitutional Court in examining laws against the Constitution. The results of this research are: The constitutional question institution can be placed as part of the constitutional testing authority possessed by the Constitutional Court based on Article 24C paragraph (1) of the 1945 Constitution. The results of this study also indicate that there is a need or urgency, both in terms of theory and practice to institutionalize the constitutional question mechanism in the Constitutional Court. The difference between previous research and research to be conducted by researchers is that

this study discusses the idea of institutionalizing constitutional question as one of the authorities of the Constitutional Court in testing the constitutionality of a law without mentioning the paradigm used, so the difference lies in the paradigm used by researchers in discussing expansion of the Constitutional Court's authority in this case constitutional question. The novelty element that will be achieved by researchers is not only about how the authority of cosititutional question can be applied to become the authority of the Constitutional Court that has legal certainty, but also how the prophetic legal paradigm views the application of constitutional question authority to become one of the Constitutional Authorities.

Some of the previous studies presented above show that there have been several previous studies related to the research to be carried out by researchers. The following is a complete description of previous research in tabular form which is expected to facilitate understanding related to previous research which has been explained in detail in the points above.

TABLE 1.1

PREVIOUS RESEARCH

No.	Researcher's Name and Title	Problem Formulation	Findings	Difference	Newness
1.	Muhammad Ardi Langga, Thesis of the Department of State Administration, Faculty of Sharia, Raden Intan State Islamic University in 2018 entitled, "Constitutional	1. What is meant by constitutional complaint and its urgency for citizens? 2. What is the political view of national law and siyasa about constitutional complaints?	1. The application of Constitutional Complaint as an effort to protect the fundamental rights of citizens in the MK is very necessary considering that many cases of violations of citizens' constitutional rights have not been resolved because of the	The MK'S authority which is the object of research is different from the authority of the MK to be examined by researchers. The study uses 2 paradigms in his research, namely national legal politics and siyasa, while researchers use the Prophetic Law paradigm in analyzing the results of his research.	Examining the legal vacuum of the authority of the MK in terms of constitutional questions, which will then be discussed, studied and analyzed using the prophetic legal paradigm. This study will provide a description of the authority of constitutional questions if applied in Indonesia, and how a prophetic legal perspective views the

	Complaint in Political Perspective of National Law and Siyasah"		gap in the legal vacuum. 2. When viewed from the perspective of Constitutional Complaint National legal politics, it can be applied to the MK's authority without changing the Constitutional Injury doctrine with the efforts of the Legislative Interpretation mechanism through the Indonesian Parliament to renew and expand explanations related to the MK's authority and		urgency of the constitutional question authority.

			viewed from the perspective of the Constitutional Complaint concept in accordance with Islamic Law (Siyasah) related to human rights in Islam.		
2.	Ahmad Zulal Abu Main, Thesis of the Department of Islamic Public Law Study Program on Constitutional Law, Faculty of Sharia and Law at the State	1. What is the concept of constitutional complaint in the authority of the MK? 2. What is the perspective of siyasah dusturiyyah on the concept of	First, in the view of legal science doctrine, the MK is an institution authorized to adjudicate constitutional complaints cases. Second, the concept of constitutional complaint is also relevant to siyasah dusturiyyah, including the definition and scope of siyasah dusturiyyah,	The MK's authority to be examined in the research of researchers is different from that of previous studies, where researchers will examine the subject of constitutional questions, while what has been examined in previous studies is related to constitutional complaints.	The novelty element that will be achieved is related to the application of the authority of constitutional question if it is added to become one of MK's authorities in testing Law against UUD 1945. And how the prophetic legal paradigm views the application of constitutional

	Islamic University of Surabaya in 2018 entitled, "Siyasah Dusturiyyah's Perspective on the Concept of Constitutional Complaint in the Authority of the MK"	constitutional complaint in authority of the MK?	protection of human rights in Islam, and the area of al-mazalim as a court of arbitrary authority towards the people.	Researchers also use a prophetic legal perspective in their research, while previous research uses the perspective of siyasah dusturiyyah, so that the paradigm used to analyze is clearly different.	question to be one of the authorities of the MK.
3.	Dhiana Oktaviani Putri, Thesis of the Law Study Program at the Faculty of Law, Islamic	1. What is the urgency of regulating the constitutional rights of citizens through constitutional	The Constitutional Complaint's authority cannot be fully exercised so that it has not protected the constitutional rights of citizens.	This research discusses the expansion of MK's authority in the form of constitutional complaint authority, while the researcher will discuss the expansion of the MK's authority, namely the	Novelty element that will be achieved is related to the legal vacuum in the authority of the MK in examining the constitutionality of the Law through the mechanism of

	University of Yogyakarta in 2018 entitled, "Urgency of the Arrangement of Citizens' Constitutional Rights through Constitutional Complaint in the MK"	complaints in the MK? 2. How is the practice of protecting the constitutional rights of citizens in the MK in 2015-2016 through constitutional complaint?	The addition of Constitutional Complaint authority can be done through constitutional interpretation so that there is no need to change the 1945 Constitution but only interpret the provisions governing the authority of the MK.	constitutional question authority. This research also does not use a certain paradigm, but rather addresses the protection of citizens' constitutional rights, while researchers will use the prophetic legal paradigm in their research.	constitutional question, and will be analyzed using a prophetic legal paradigm, namely how the prophetic law sees the need to expand the MK's authority in the form of constitutional question.
4.	Pan Mohamad Faiz and Josua Satria Collins in the Constitutional Journal Vol. 15	What are the possible constitutional question mechanisms in Indonesia with	There is an urgency to add constitutional question authority to the Court. and if the constitutional question will be applied in Indonesia, then the basis	This research together examines the application of constitutional question when applied in Indonesia, along with its mechanism and implementation. But the	The novelty element of the research conducted by researchers is how the prophetic legal paradigm views the existence of constitutional questions in

	No. 4, December 2018 entitled, "Addition to the Authority of Constitutional Questions in the MK as an Effort to Protect the Constitutional Rights of Citizens"	alternative implementations	for the authority of the constitutional question should be regulated through constitutional changes, or by revising the MK Law, interpretation of the constitution as outlined in the MK's decision, or expanding the legal standing for court institutions as one of the applicants for constitutional review . In addition, it is also necessary to regulate the qualifications of constitutional question applicants and the time	difference is the perspective in research researchers use a prophetic legal paradigm in analyzing the application of constitutional questions in Indonesia.	the Indonesian constitutional system.

			limit for handling cases by MK.		
5.	Hamid Chalid & Arief Ainul Yaqin "Initiating the Institutional Question Institutionalization through Expanding the Authority of the MK in Testing the Laws"	How is the idea of institutionalizing constitutional question in Indonesia through the expansion of the authority of the MK in examining laws against the Constitution?	The constitutional question institution can be placed as part of the constitutional testing authority possessed by the Court based on the provisions of Article 24C paragraph (1) of the 1945 Constitution. In addition, the results of this study also indicate that there is a need or urgency, both in terms of theory and practice to institutionalize constitutional mechanisms question at MK.	This study discusses the idea of institutionalizing constitutional question as one of the MK's authorities in testing the constitutionality of a law without mentioning the paradigm used, so the difference lies in the paradigm used by researchers in discussing the expansion of the MK's authority in this case constitutional question.	The novelty element that will be achieved by researchers is not only about how the authority of cosititutional question can be applied to become the authority of the MK which has legal certainty, but also how the prophetic legal paradigm views the application of constitutional question authority to one of the MK's authorities.

Based on some of the previous researches described above, it can be concluded that there are some previous studies that are relevant to the research to be conducted by researchers. The previous researches described above also show differences with the research to be conducted by researchers, but it can also be seen that there are elements of novelty in research to be conducted by researchers, which will differentiate from previous research.

G. Structure of Discussion

Researchers use the systematic writing of a thesis proposal as follows in order to facilitate completing research, systematize the discussion, so that this thesis proposal is more easily understood. The following systematic writing is used:

CHAPTER I INTRODUCTION

CHAPTER I includes background, formulation of problem, goals of research, benefits of research, research methods, previous research, and structure of discussion. In this chapter the researcher explains the reasons of the problems to be studied, as well as the aims and benefits of conducting this research. Meanwhile, previous research includes research information has been done by previous researchers, in the form of theses and scientific journals.

In this chapter the researcher describes the related types of research, research approaches, sources of legal materials, methods of collecting legal

materials, methods of processing legal materials, and methods of analysis of legal materials.

CHAPTER II LITERATURE REVIEW

This chapter contains three theories related to the title taken by the researcher. Theoretical studies used by researchers in this study are, Prophetic Law, Constitutional Testing Theory, and Legal Certainty Theory.

CHAPTER III RESEARCH RESULTS AND DISCUSSION

This chapter is the core of research because it contains results of research has been done by authors. This chapter the researcher will describe the legal material that has been obtained. The researcher will then analyze the legal material that has been obtained using a predetermined method so that it can answer the entire problem statement.

CHAPTER IV CLOSING

This chapter is the last chapter that includes conclusions and suggestions. The conclusions contain brief answers to the formulation of the problem at hand. Suggestions presented in this chapter are recommendations to parties who have more authority in relation to research title. Suggestions are submitted to make improvements for the benefit of the community and to be useful for further research.

CHAPTER II

LITERATURE REVIEW

A. Prophetic Law

Etymologically the term prophetic comes from English prophetic, which means:

a. of or pertaining to aprophet: prophetic inspiration (from or relating to a prophet (prophetic inspiration)
b. of the nature of or containing prophecy: prophetic writings (from the nature or containing prophecy / prophecy: prophetic writing)
c. having the function or powers of a prophet, as a person (having the function or power of a prophet, as a person)
d. predictive ominous: propheticsigns: prophetic warnings (predictive, pleasant: prophetic signs, prophetic warnings).[61]

So, the prophetic meaning is to have the traits or characteristics like a prophet, or are predictive, estimating. We can translate prophetic here into 'prophethood'.

The prophetic paradigm in legal science that seeks to integrate between religion and science, will be centered on humans, as prosecutors of knowledge. The prophetic paradigm has 3 stages, namely the transcendental process, the humanization process, and the liberalization process.

First, the transcendental process, will put more emphasis on efforts to internalize values and build theoretical constructs derived from

[61] Heddy Shri Ahimsa Putra, *Paradigma Profetik Islam (Epistemologi, Etos, dan Model)*, (Yogyakarta: Gadjah Mada University Press, 2016), 2.

revelation. The results will be MAin basis for studying, developing, and interpreting the science of law.[62]

> Transcendental stage is in the religious, spiritual, ethical, and moral values that are full of dynamics and fights born in a long span of history. Modern science which has been in the corridor of positivistic modernist hegemony with empirical, objectivist and rational doctrine began to be sued by transcendental thinkers who prioritize the values and meanings behind it, so that the building of science becomes more open and intact in responding to the problems of life and life. Transcendental thinking attracts the attention of the initiators of science, because it is considered as an alternative thinking of the future amid the dialectics of positivistic rational understanding which is considered unable to overcome various problems of life and life.[63]

The second stage is the humanization process. In the second stage, it is expected that there will be a change in the prophetic intellectual self.

> This stage emphasizes more on efforts to understand social reality and internal problems that are actually faced and must be overcome. This stage provides hope for a new meaning to be gained from internalization with social context, so that it will enrich factual and actual perspectives in studying and developing legal science, or in reading, interpreting and implementing law.[64]

> Humanization which is a constructive interpretation of the lafadl *"amar ma'ruf"* whose original meaning advocates or upholds virtue. *Amar Ma'ruf's* command is designated to raise dimension, positive potential (*ma'ruf*) of every human being, that an encouragement of emancipation to the light (*nur*) of divine guidance for achieving state of fitrah. Whereas in the language of Islamic science the meaning is to humanize humanity, eliminate material, dependence, violence and hatred from humans.[65]

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[62] Kelik Wardiono. *Paradigma profetik : Pembaruan basis epitemologis ilmu hukum*, (Yogyakarta: Genta Publishing, 2014), 41.
[63] Absori, *Pemikiran Hukum Transendental dalam Konteks Pengembangan Ilmu Hukum Indonesia*, (Yogyakarta: Genta Publishing, 2017), 15.
[64] Kelik Wardiono. *Paradigma profetik : Pembaruan basis epitemologis ilmu hukum*, (Yogyakarta: Genta Publishing, 2014), 41.
[65] Kuntowijoyo, *Muslim Tanpa Masjid : Esai-Esai Agama, Budaya dan Politik dalam Bingkai Strukturalisme Transedental*, (Bandung: Mizan, 2001), 364-365

The third stage is the process of liberalization. In the third stage, various deposits of knowledge and experience gained in the first and second stages will be applied, so that the science of law and law will be formed with a prophetic face. This process is then expected to form prophetic intellectuals who can carry out social transformation based on prophetic ethical ideals in developing legal science, reading, interpreting and implementing law.

Keywords that can be used as a guide to understanding the prophetic paradigm in legal science are:

a. Norms in the relative normative world that are dialectic simultaneously with the world of ideas and the empirical world, as keywords in understanding aspects of ontology
b. Integration between science and religion (the process of the existence of demistification) as a key word in understanding aspects of epistemology
c. Justice, as a key word in understanding aspects of axiology.[66]

Liberation that a constructive interpretation lafadl "*nahi mungkar*" whose original meaning to prohibit any destructive crime. Liberalization in the definition of Islamic scholarship means liberation from nescience, poorness, and suppression.

> Kuntowijoyo interpreted liberalization in Islamic scholarship context based on the grades of transcendence then led to emergence of prophetic responsibility to independent humans from severity, poverty, ruthlessness, dominance of suppressive fabrics and life of false awareness. Ideology of Marx of liberation regards religion as opium, while Kuntowijoyo places religion as tool of his liberation after going through the process of objectifying knowledge.[67]

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[66] Kelik Wardiono. *Paradigma profetik : Pembaruan basis epitemologis ilmu hukum*, (Yogyakarta: Genta Publishing, 2014), 41.

[67] Husnul Muttaqien, *Menuju Sosiologi Profetik : Telaah Gagasan Kuntowijoyo Tentang Ilmu Sosial Profetik dan Relevansinya Bagi Pengembangan Sosiologi*, Skripsi. (Yogyakarta: Fakultas Ilmu Sosial dan Ilmu Politik Universitas Gadjah Mada, 2003), 125.

The prophetic paradigm sees no separation between God and other realities. Humans become something important in understanding reality of God, because humans are the reality of the immanence of God's presence.

> The view of the absence of separation between God and other realities creates a holistic concept of justice. Holistic justice means that true justice is not only outward in nature but also encompasses other, more transcendental aspects. This justice must be in accordance with the justice ordered by God. Not justice in human eyes. Justice based on prophetic law is more fundamental, that is, physical and mental.[68]

Prophetic Law is a legal concept that prioritizes humans as noble beings, where the glory is measured in how far humans have been submitting and obeying God's will.

> Prophetic philosophy which consists of humanist, emancipatory, transcendental and teleological principles. Prophetic spirit consisting of the spirit of humanity, science, servitude and universality, the concept of law which is usually materially oriented and positive then directed to the spiritual. Prophetic law views the basis of science as intuitive (faith) or a priori guidance, because of its intuitive nature, knowledge stems from man's receptive ability to what is bestowed from revelation or guidance, therefore the prophetic paradigm rejects the views of Descrates' doubts or Derida's uncertainties .[69]

> Law and justice have a real prophetic paradigm that we can see in law enforcement in justice. The real law is the norm (prohibited acts) both in regulations and in religion. In accordance with the opinion of the scholars of Jurisprudence, the law is the word of God or the words of the Prophet (PBUH) which contains demands (orders, prohibitions, acquisition) for the actions of believers or that makes one particular thing as a cause or condition or a barrier from these demands.[70]

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[68] Bobby Briando, *"Prophetical Law: Membangun Hukum Berkeadilan Dengan Kedamaian"*, Jurnal Legislasi Indonesia Vol. 14 No. 3, September 2017, 327.
[69] Absori, *Pemikiran Hukum Transendental dalam Konteks Pengembangan Ilmu Hukum Indonesia*, (Yogyakarta: Genta Publishing, 2017), 45.
[70] M. Syamsudin, *Ilmu Hukum Profetik : Gagasan awal landasan Kefilsafatan Dan Kemungkinan pengembangannya Di Era Postmodern*, (Yogyakarta. Pusat Studi Hukum UII, 2013), 283.

The paradigm of prophetic orientation in legal implementation is actually "similar" to progressive law idea stated by Satjipto Rahardjo. Progressive law places human beings and people as the goal of the existence of law.[71]

Human rights law enforcement officials should be realistic, not residing in ivory towers. They must hone their intuition by going down to saturate aspirations that develop in community.

> Legal enforcers must be agents of change and not staff in law system. They must have the courage to wreck down barriers constructed by ideologies that oppress social justice. They have to leave monolithic interpretation because the law text only offers restricted interpretation space. Legal progressive implementation emphasizes context rather than mere regulatory texts.[72]

B. Constitutional Review Theory

The constitutional review actually originated from phenomenal decision of American MA in the "Marbury versus Madison" case in 1803.[73] That decision was the basis / beginning of the development of the theory and practice of constitutional review as we know it today. The practice of judicial review from America then spread throughout the world and influenced the state administration system in several countries.

> The case was the first time in history, MA made a judicial review of the Judiciary Act 1789. The provisions of case that gave MA authority to issue writ of mandamus in Article 13 Judiciary Act were considered to exceed the authority granted by the constitution, so that MA declared that it was against the constitution as supreme of

[71] Suparman Marzuki, *Robohnya Keadilan : Politik Hukum HAM Era Reformasi*, (Yogyakarta: Pusham UII, 2011), 269-270.
[72] Suparman Marzuki, *Robohnya Keadilan : Politik Hukum HAM Era Reformasi*, (Yogyakarta: Pusham UII, 2011), 269-270.
[73] Eni Purwaningsih, *Judicial review: Sejarah Kelahiran, Wewenang dan Fungsinya dalam Negara Demokrasi*, (Bandung: Nusamedia, 2005), 10.

land, however, on other hand also stated that William Marbury according to the law entitled to the letters of appointment. John Marshall's courage in the "Marbury Vs Madison" case for jihad became a new precedent in American history and its influence was widespread in legal thinking and practice in many countries. Since then many federal and state laws have been declared contrary to the constitution by MA.[74]

According to Mauro Cappelleti[75], there are two constitutional review types of in the world, the decentralized judicial review model and the centralized judicial review model.

First, the decentralized judicial review model, which is a model that places the constitutional review authority spread to MA and the lower judicial body. Constitutional review known in countries that adhere to decentralized judicial review only covers concrete norm testing or what is known as constitutional question. Constitutional review of this model can only be done by judges who are handling their own concrete cases. The first model was found and practiced by the US and followed by countries that generally have a common law system. The historical experience of the United States as a country that inherits common law legal traditions makes this country does not need an independent institution outside MA. The power to conduct constitutional review is directly attached to the authority of MA itself, so that MA is referred to as "The Guardian of American Constitution".[76]

Second, the centralized judicial review model, that places constitutional examination authority centrally by establishing the Constitutional Court as an organ specifically tasked with carrying out constitutional review. The second model was pioneered by Austria which was then followed by other Continental European countries and countries outside Europe which usually adhered to civil law system. Some countries that embrace this model include Austria, Germany, Spain, Italy, Russia, Thailand, and so on. The Constitutional Court in carrying out its authority to conduct

[74] https://MKri.id/berita/perintisandanpembentukanmahkamahkonstitusi, diakses pada 21 Oktober 2019.
[75] Arief Ainul Yaqin, *Constitutional Question*, (Jakarta: Sinar Grafika, 2018), 12.
[76] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), 45.

constitutional review, especially on abstract norms (abstract review), although testing of concrete norms is also possible.[77]

Both theoretically and empirically, it can be concluded that the constitutional review of various countries consists of two test variants, namely abstract review of norms (abtract review) and concrete review of norms (concrete review).

Judicial review mechanisms are accepted as a way for modern rule of law to control and compensate for the inclination of government officials to be arbitrary. This principle is called check and balance.[78]

Jimly Asshiddiqie explained that in the practice of judicial review, there were some types of legal norms that could be tested to as norm control mechanisms, namely:

a. Normative decisions that contain and are regulatory (regeling)
b. Normative decisions that contain and are administrative in nature (beschikking)
c. Normative decisions that contain and are judgment (judgment) namely a verdict.[79]

The three forms of legal norms above ould be tested for truth with judicial and non-judicial mechanisms. The three legal norms above are individual and concrete norms, and some are general and abstract norms.[80]

[77] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), 50.
[78] Ni'matul Huda, *Dinamika Ketatanegaraan Indonesia dalam Putusan Mahkamah Konstitusi*, (Yogyakarta: FH UII PRESS, 2011), 26.
[79] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Sinar Grafika, 2010), 1-2.
[80] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Sinar Grafika, 2010), 1-2.

There are differences in terms used between constitutional review and judicial review. The term distinction is made for at least two reasons, namely:

a. Constitutional review in addition to being conducted by a judge can also be done by an institution other than a judge or a court, depending on which institution the constitution provides the authority to do so.
b. The concept of judicial review is also related to a broader understanding of the object, for example, covering the legality of regulations under the law against laws, whereas constitutional review only concerns the testing of constitutionality, namely the constitution.[81]

The first explanation is linked to the constitutional review system. The constitutional review system includes two main duties, namely:

a. To make sure the functioning of democratic system in relation to balance of roles or interplay between the branches of legislative, executive and judiciary powers. Constitutional review is designated to avoid the use of power by one branch of power in such a way that the other branches of power
b. To protect every individual citizen from power misuse by state institutions which harm their basic rights guaranteed in constitution.[82]

Constitutional review itself outlines two review mechanisms. abstract review of norms and concrete review of norms. The following explanation relates to two testing mechanisms:

a. Examination of abstract norms (abstract review), is an examination of the law in the abstract, in the sense that the law being reviewed is not related to any concrete case in court.
b. Concrete norm review (concrete review) which is then termed the constitutional question. Concrete norm review is a reviewing of a law in relation to a real case which is currently processing in a court of law. Concrete review of norms (concrete review) always

[81] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), 8-9.
[82] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), 2-3.

starts from the existence of a litigation process in court, where in the process found the problem of constitutionality of a legal norm that is the basis of the concrete case in question.[83]

C. Legal Certainty Theory

The realistic legal goals are legal certainty and legal usefulness. The positivism places more emphasis on legal certainty, while functionalists prioritize the usefulness of the law.[84]

Certainty is a matter (condition) that is certain, provisions or provisions.[85] According to Hans Kelsen, law is a norm system. Norms are statements that underline the "should" or das sollen aspects by including some rules about what should be done.[86] The law must be correctly certain and fair. It must be a code of establish and fair because the code of conduct have to support an offer which is respected reasonable.[87]

The law can be defined by choosing one of the 5 possibilities below:

a. In accordance with its basic, logical, religious, or ethical characteristics
b. According to the source, namely the Law
c. According to its effect on people's lives.
d. According to the method of his formal statement or the exercise of his authority
e. According to the objectives to be achieved.[88]

[83] Arief Ainul Yaqin, *Constitutional Question*, (Jakarta: Sinar Grafika, 2018), 39.
[84] Dosminikus Rato, *Filasafat Hukum Mencari dan Memahami Hukum*, (Yogyakarta: PT Presindo, 2010), 59.
[85] https://kbbi.web.id/pasti Diakses pada 25 November 2019 Pukul 10:38.
[86] Peter Mahmud Marzuki, *Pengantar Ilmu Hukum*, (Jakarta: Kencana, 2008), 58.
[87] Dominikus Rato, *Filsafat Hukum Mencari: Memahami dan Memahami Hukum*, (Yogyakarta: Laksbang Pressindo, 2010), 59.
[88] Riduan Syahrani, *Rangkuman Intisari Ilmu Hukum*, (Bandung: Citra Aditya Bakti, 2009), 18.

Legal certainty is a ensure that a law must be brought out in a good or proper way. Certainty is essentially one of the aims of the law.[89] Legal certainty is a question that can only be answered normatively, not sociology.

> Normative legal certainty is when certain regulations are conducted and promulgated because they regulate clearly and logically. Clearly in the sense of not causing doubt (multi-interpretation) and logical. Clearly in sense that it becomes a norm system with other norms so which they don't quarrel or cause norm conflicts. Legal certainty refers to enforcement of clear, and consistent laws that implementation cannot be influenced by subjective conditions.[90]

> The teaching of legal certainty comes from the Juridical-Dogmatic teachings which are based on the positivistic school of thought in the world of law which tends to see law as something autonomous, independent. For adherents of this thought, law is nothing but a collection of rules. The purpose of the law is nothing but guaranteeing the realization of legal certainty. Legal certainty is realized by the law by its nature which only makes a general state of law. The general nature of state of law proves that the law does not aim to bring about justice or expediency, but merely for certainty. Legal certainty is a guarantee regarding the law that contains justice. The norms that promote justice must truly function as rules are obeyed.[91]

The country of Indonesia is a follower of the continental European legal system which was derived from the colonial state in the colonial era. Written law is typical of continental Europe with a groundnorm.[92] Continental Europe is very thick with elements of legal certainty, so Indonesia which adheres to the Continental European legal system certainly

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[89] Awaludin Marwan, *Teori Hukum Kontemporer Suatu Pengantar Posmoderenisme Hukum*, (Yogyakarta: Rangkang Education, 2010), 24.
[90] Christine S.T Kansil, dkk, *Kamus Istilah Hukum*, (Jakarta, 2009), 385.
[91] Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*, (Jakarta: Penerbit Toko Gunung Agung, 2002), 82-83.
[92] Suwardi Sagama, *"Analisis Konsep Keadilan, Kepastian Hukum Dan Kemanfaatan Dalam Pengelolaan Lingkungan",* Mazahib,Vol Xv, No. 1 Juni 2016, 28.

adheres to the principle of legal certainty in the administration of the constitutional system of the Republic of Indonesia.

The implementation of Indonesian constitutional system that is in accordance with principle of legal certainty must of course cover all aspects, including the aspects of judicial power. The aspects of judicial power which include MA and MK must of course be in accordance with legal certainty in bringing out their tasks and authority, so all arrangements related to judicial power should be regulated both in the constitution, laws, and other related regulations.

The Court as one of the organizers of judicial power has the authority to examine the constitutionality of a law. Based on a theoretical study related to constitutional testing, MK placed authority of constitutional testing centrally (centralized judicial review), but there was no explanation that clearly stated the scope of norm testing in the Constitutional Court was included in the variant testing of abstract review or concrete review (constitutional question) norms, even though in practice, the Constitutional Court has tested abstract norm or concrete review (constitutional question) norms.

Prophetic Law as a new legal paradigm sourced from revelation is then used by researchers as material for analysis. Prophetic law, which is the highest law that comes from revelation, will become a knife for analysis related to how testing of norms in the Constitutional Court can cover carrying out abstract review or concrete review (constitutional question)

norms, so that its implementation is in accordance with true justice and does not abuse the rights of constitutional rights of citizens.

The three theories explained above will then be used as material to analyze how constitutional questions can become an authority that should be held by MK in Indonesia. The application of constitutional question authority can then be an addition or extension of the MK's authority. The authority of the MK to conduct a constitutional question with the concrete review testing model related to litigation in the court is expected to fulfill the principle of legal certainty and provide true justice, and not abuse the constitutional rights of Indonesian citizens.

CHAPTER III

RESEARCH RESULTS AND DISCUSSION

A. The Relevance of The Application of Constitutional Question in The State System Republic of Indonesia

Every state based on law generally has a state institution[93] whose duty is to maintain the upholding of the state and law. State institutions that are specifically tasked with enforcing this law are commonly called judicial authorities. The court in Indonesia is a body or institution that carries out its duties as a judicial authority.[94]

> Forming the Constitutional Court (MK) as one of executors of judicial power after third changed to the 1945 Constitution of the Republic of Indonesia (UUD 1945) characterizes that Indonesia is a state that adopts a constitutional system with separation powers concept, *checks and balances* mechanism through judicial review against UUD 1945.[95]

The establishment of the Constitutional Court was also an effort to protect human rights. The enforcement of human rights in Indonesia is listed

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[93] State Institution is a government institution or "Civilizated Organization" in which the institution is created by the state, from the state, and for a country where it aims to develop the country itself. (Lihat di https://id.wikipedia.org/wiki/Lembaga_Negara Diakses Pada Kamis, 28 Mei 2020 Pukul 12:33). State institutions in Dutch are called staatsorgaan. There are State Institutions that are formed based on or are given power by the Basic Laws, Laws, and some are even formed based on Presidential Decrees. (Lihat di Jimly Asshiddiqie, *Perkembangan & Konsolidasi Lembaga Negara Pasca Amandemen*, (Jakarta: Sinar Grafika, 2010), 37).

[94] Judicial power is exercised by a Supreme Court and the judiciary below it in the general court, religious court, military court, state administrative court, and by a Constitutional Court. (See Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia). Judicial Power in Indonesia is regulated in Law No. 14 of 1970 concerning Judicial Power, then amended by Law No. 35 concerning Judicial Power. In 2004, Law No. 35 of 1999 revoked and replaced with Law No. 4 of 2004 concerning Judicial Power, then changed to Law No. 48 of 2009 concerning Judicial Power. (Look at Umar Said Sugiarto, *Pengantar Hukum Indonesia*, (Jakarta: Sinar Grafika, 2017), 90).

[95] https://id.scribd.com/doc/216275672/Sistem-Ketatanegaraan-Indonesia Diakses pada Sabtu, 18 April 2020 pukul 17:03.

in the state constitution, the 1945 Constitution.[96] The collection of human rights guaranteed in the constitution is then called constitutional rights. Guarantee of human rights in the constitution (constitutional rights) is one element of the rule of law, namely constitution based individual rights, or if interpreted that is a constitution based on human rights.[97]

Constitutional rights which must not be violated in the rule of law cannot be realized properly in Indonesia. Many people are disappointed with some of the decisions of the Constitutional Court which are still considered as insulting the sense of justice in society.[98]

> Some MK decisions that are considered disappointing are Decision Number 45 / PHPU.DVIII / 2010 related to KPU Kobar PHPU case. Many regretted the decision and accused the Constitutional Court of not having consistency in making decisions on the substance of the same case. The decision was also considered to be out of the grip of the Court's rules and authority.[99] The next ruling namely Case Decision Number 96 / PUU-XIV / 2016 which rejected the request of victims of forced evictions to cancel Article 2, Article 3, Article 4, and Article 6 of the Government Regulation in Lieu of Law No. 51 of 1960 concerning the Prohibition of Use of Land without a Right Permit or Power of Attorney is also considered to be disappointing and preserving human rights violations. The decision was considered to have the potential to increase the rate of criminalization of traditional communities or indigenous peoples who have traditionally occupied their residential land for a long time.[100]
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> The next controversial decision is Decision Number 21 / PUU-XII / 2014 concerning Judicial Review of Law No. 8 of 1981 concerning

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[96] BAB XA tentang Hak Asasi Manusia Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

[97] Sirajuddin dan Winardi, *Dasar-Dasar Hukum Tata Negara Indonesia,* (Malang: Setara Press, 2016), 27.

[98] Sirajuddin dan Winardi, *Dasar-Dasar Hukum Tata Negara Indonesia,* (Malang: Setara Press, 2016), 34.

[99] Fajar Laksono Soeroso, *"Pembangkangan Terhadap Putusan Mahkamah Konstitusi Kajian Putusan Nomor 153/G/2011/PTUN-JKT".* Jurnal Yudisial Vol. 6 No. 3 Desember 2013, 229.

[100] https://www.bantuanhukum.or.id/web/putusan-mahkamah-konstitusi-lestarikan-pelanggaran-ham/ Diakses Pada Kamis, 28 Mei 2020 Pukul 16:58.

the Criminal Procedure Code (KUHAP). This ruling is considered to have the potential to undermine the authority of law enforcement and cause a rise in lawsuits.[101] There is also the Constitutional Court Decision Number 2 / PUU-V / 2007.[102] The Constitutional Court's ruling stated that the death sentence was constitutional, but the ruling was later ignored by the Panel of Judges who were hearing the case of Judicial Review of Hilary K. Chimezia and Hengki Gunawan. The Supreme Court PK Judge Panel in its decision stated that the death penalty is very contrary to the provisions in Article 28A of the 1945 Constitution.[103]

Protection of the constitutional rights of citizens is also still not comprehensive, especially related to concrete cases in court (constitutional question). The authority of the Constitutional Court which is still limited to testing the constitutionality of abstract norms and does not reach the testing of concrete norms or constitutional questions has caused the constitutional rights of citizens to not be fully protected.

The absence of a constitutional question mechanism in the constitutional testing authority of the Constitutional Court was then felt necessary to be reviewed, considering that Indonesia as a country that adheres to constitutional democracy must uphold the protection and respect for the constitutional rights of citizens. The review is then expected to be followed up with legal reform within the Constitutional Court's authority regarding the application of the constitutional question mechanism. This

[101] https://mkri.id/index.php?page=web.Berita&id=10827 Diakses Pada Kamis, 28 Mei 2020 Pukul 15:30.
[102] Novendri M. Nggilu, *"Menggagas Sanksi atas Tindakan Constitution Disobedience terhadap Putusan Mahkamah Konstitusi".* Jurnal Konstitusi, Volume 16, Nomor 1, Maret 2019, 53.
[103] Pasal 28A Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 menyatakan bahwa: *"Setiap orang berhak untuk hidup serta berhak mempertahankan hidup dan kehidupannya".*

legal reform is deemed necessary in order to create impartial judicial power which is a prerequisite for the establishment of democratic government.[104]

This chapter will then discuss how the relevance of the constitutional question mechanism will be applied in the Indonesian constitutional system. The application of constitutional question mechanism can be an effort to uphold constitutional democracy in Indonesia, so that the rights of citizens can be guaranteed and government power can be legally limited so that it is not arbitrary. The existence of a constitutional question mechanism in the practice of constitutional testing is also an effort to uphold the supremacy of the constitution by putting the constitution (1945 Constitution) as the highest law. Upholding the constitutional supremacy in the concept of constitutional democracy becomes very important, considering that after the changes to the 1945 Constitution, Indonesia adopted the doctrine of constitutional supremacy[105] and abandoned the doctrine of parliamentary supremacy.

Further discussion regarding the relevance of the application of the constitutional question mechanism in the Indonesian constitutional system will be explained later in this chapter. Before discussing the relevance, we should first review how the dynamics of the Indonesian constitutional system before and after the amendment to the 1945 Constitution, which will then be more focused on the discussion of an independent judicial power in

[104] Abdul Latif dan Hasbi Ali, *Politik Hukum*, (Jakarta: Sinar Grafika, 2014), 93.
[105] A. Ahsin Thohari, *"Mahkamah Konstitusi dan Pengokohan Demokrasi Konstitusional di Indonesia"*. Jurnal Legislasi Indonesia, Vol. 6 No. 3, September 2009, 97.

an effort to uphold constitutional supremacy in accordance with the concept of constitutional democracy in Indonesia.

1. The Dynamics of the Indonesian State Administration System Before and After Changes to the 1945 Constitution

Basic constitutional system of the Republic of Indonesia stated clearly in Chapter I of Form and Sovereignty Article 1 (1), (2) , and (3) 1945. The basic constitutional system is as follows:

Article 1 (1) of the 1945 Constitution states that : *"The State of Indonesia is a unitary state in the form of a republic*".[106] Then in Article 1 (2) states that: *"Sovereignty belongs to the people and implemented by constitution"*[107]. A description of the form and the sovereignty of Indonesia was further stated in Article 1 (3) which reads that: "*Indonesia is a state of law".*[108]

The term rule of law in that article does not specifically refer to one of MAin concepts in the western legal tradition, both *Rechsstaat* and the *Rule of Law.* The term constitutional state in the 1945 Constitution is a relatively neutral concept that opens up interpretation space for new understanding in accordance with the paradigm and reality of the Unitary State of the Republic of Indonesia. [109]

[106] Pasal 1 ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
[107] Pasal 1 ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
[108] Pasal 1 ayat (3) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
[109] Specifically in the Western tradition there are two types of rule of law, namely Rechtsstaat which develops in the Continental European legal tradition and the Rule of Law that develops in the Anglo Saxon legal tradition. In general, Rechtsstaat developed from the concept of Liberaal Rechtsstaat (Liberal State of Law) in the 19th century that saw the role of the state must be reduced to protect and advance personal freedom and private property rights (grondrechten) which were structurally carried out by separation of power (scheiding van machten). Meanwhile, in the Anglo-Saxon

The 1945 Constitution as the constitution of the State in its expansion has experienced a many kind shades and changes which have an effect on the Republic of Indonesia's constitutional system. The changes both formal and non-formal has brought changes to the constitution and hierarchy regulations in Indonesia. The Indonesian State Administration System has passed a shift that has resulted in fundamental changes to structure and authority of state institutions. a.[110] Amendments to UUD 1945 reinforce principle of state based on law and constitutional system based on balance power.[111] The Indonesian constitutional system is based on two things, namely before the changes to the 1945 Constitution, and after the changes to the 1945 Constitution.

UUD 1945 before change did not provide strict provisions regarding the distribution of power. The 1945 Constitution before the change only knew the division of power and not the separation of power.[112] The construction of constitutional system, sovereignty of the people based on 1945 before changes are considered fully materialized in the container of the People's Consultative Assembly (MPR), which is interpreted as highest institution or

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tradition the concept of the Rule of Law developed which developed along with the growth of British constitutionalism - since the birth of MAgna Charta in the 13th century - which emphasized the supremacy of general law (the absolute supremacy or predominance of regular law), equality in before the law (equality before the law), as well as individual rights that are not guaranteed by the rules in a formal document but as a consequence of the rights established and upheld by the court. (Look at Aidul Fitriciada Azhar, *"Negara Hukum Indonesia: Dekolonisasi Dan Rekonstruksi Tradisi".* Jurnal Hukum Ius Quia Iustum No. 4 Vol. 19 Oktober 2012, 490).

[110] Chairul Anwar, *Konstitusi dan Kelembagaan Negara,* (Jakarta: CV. Novindo Pustaka Mandiri, 1999), 71

[111] https://www.google.com/panmohamadfaiz.com/ Diakses pada Kamis, 16 April 2020 pukul 13:24

[112] Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara Indonesia Pasca Amandemen UUD 1945*, (Jakarta: Prenada Media, 2010), 14

highest forum. The functions shared as the duties and authority institutions of higher state underneath it, namely the president, House of Representatives (DPR) , Supreme Court (MA) , and so on.

UUD 1945 before the change in principle did not adhere to the principle of Trias Politica which regulates the separation of powers as taught by Montesqueau. The Indonesian constitutional system actually follows to the principle of power distribution.

> The highest state power is united instead of being separated in the highest state institution that is incarnation of all Indonesian people (MPR). Legislative power is delegated to the DPR together with the president. Executive power is in hands of president, judicial power is in hands of MA and judicial bodies, but partly also in the hands of the president. There is also the DPA (the Supreme Advisory Council) and BPK (Financial Supervisory Agency) that each - each as higher institutions of State that serves to ensure the effective running of the government.[113]

The second phase in the Indonesian constitutional system is after the changes to the 1945 Constitution which were carried out after the reform. One of important agendas of reform movement is a change to the 1945 Constitution which was then successfully implemented for four consecutive years through the Annual Meeting of the MPR namely 1999, 2000, 2001 and 2002.[114] If the original manuscript of the 1945 Constitution contains 71 provisions, then after four changes, the total contents of the 1945 Constitution now include 199 provisions.[115] Background of implementing the amendments to the 1945 Constitution:

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[113] Oesman Oetojo, *Pancasila Sebagai Ideologi Negara*, (Jakarta: BP7 Pusat, 1991), 295.

[114] Tri Karyanti, *"Sistem Ketatanegaraan Indonesia Sebelum dan Sesudah Amandemen UUD 1945".* Majalah teknik, Vol. 3 No. 1, Januari, 2012, 209.

[115] Jimly Asshiddiqie, *"Struktur Ketatanegaraan Indonesia Setelah Perubahan Keempat UUD Tahun 1945*", *Makalah,* disampaikan Pada: Seminar Pembangunan Hukum Nasional VIII Tema Penegakan Hukum Dalam Era Pembangunan Berkelanjutan 14-18 Juli, (Denpasar: Badan

1) The 1945 Constitution forms a constitutional structure which rests on the highest authority in the hands of the MPR which fully implements the sovereignty of the people, so that it does not result in *checks and balances* on the constitutional institutions.
2) The 1945 Constitution gives a very large amount of power to the holders of executive power (the President). The system adopted by UUD 1945 is *executive heavy*, which is, dominant power in the hands of the President is equipped with various constitutional rights commonly called prerogative rights (among others: granting clemency, amnesty, abolition and rehabilitation) and legislative power because they have the power to form laws.
3) The 1945 Constitution contains articles that are too "flexible" and "flexible" so that it can lead to more than one interpretation (multiple interpretations), for example Article 7 of the 1945 Constitution (before being amended).
4) The 1945 Constitution brings too much authority to power of the President to regulate important matters with the law. The President also holds legislative power so that the President can formulate important matters according to his wishes in the law.[116]

Amendments to the 1945 Constitution have several focuses of change. First, the application of *separation power* principle with *distribution of power* principle that applies in systematics in the 1945 Constitution. Second, the broadest regional autonomy. Third, the idea of direct presidential election, and Fourth, the idea of forming additional institutions namely the Regional Representative Council (DPD) which will complement existence of the DPR as a legislative body.[117] Following are the differences in the Indonesian constitutional system before and after the changes in UD 1945:

Pembinaan Hukum Nasional Departemen Kehakiman Dan Hak Asasi Manusia RI Denpasar, 2003), 1.

[116] Tri Karyanti, *"Sistem Ketatanegaraan Indonesia Sebelum dan Sesudah Amandemen UUD 1945".* Majalah teknik, Vol. 3 No. 1, Januari, 2012, 206.

[117] Jimly Asshiddiqie, *Hukum Tata Negara dan Pilar-Pilar Demokrasi; Serpihan Pemikiran Hukum, Media dan HAM,* (Jakarta: Konstitusi Press, 2005), 19-20.

Tabel 1.2. THE DIFFERENCES OF THE STATE SYSTEM REPUBLIC INDONESIA BEFORE AND AFTER AMANDEMENTS OF 1945 CONSTITUTION

No.	Before the Amendment to the 1945 Constitution	After the Amendment of the 1945 Constitution
1.	The executive has more power than the legislature and the judiciary	The Executive, Legislative and Judiciary have the same power in administering the state
2.	The president and vice president are appointed and dismissed by the MPR. The president and vice president have no time limit in their term of office.	The president and vice president are directly elected by the people through elections, and their term of office has a time limit.[118]
3.	Supremacy and *super power* MPR (People's Consultative Assembly as the highest state institution that has to k uasaan infinite).	The existence of constitutional supremacy (the 1945 Constitution has the highest position in the country)
4.	MPR as the holder of people's sovereignty	MPR as a high state institution and equal in position with other presidential institutions.
5.	Absence of *checks and balances*	The principle of *checks and balances* [119]
6	There are no DPD, MK and KY institutions.	New state institutions were formed in legislative and judicial powers, namely the DPD, MK, and KY.[120]

The table above shows that the changes in the 1945 Constitution made a change to the constitutional system in Indonesia, both in terms of state institutions and the limits of power of state institutions. This research will

[118] Pasal 6A ayat (1) dan Pasal 7 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
[119] Frits Marannu Dapu, *"Sistem Ketatanegaraan Indonesia Sebelum Dan Sesudah Amandemen UUD 1945"*. Lex Administratum, Vol. II No. 3, Juli-Oktober 2014, 123.
[120] https://www.google.com/panmohamadfaiz.com/ Diakses pada Kamis 16 April 2020 pukul 13:49

then focus more on judicial power, especially MK in terms of its authority to examine the Law on UUD 1945.

a. The Political Configuration of Judicial Power Before Changes to the 1945 Constitution

Every country has a branch of judicial authority or in English it is often referred to as *'the judiciary'*.[121] Main and first function of judicial branch of power is to *resolve* disputes *(resolving disputes)* between individuals and individuals, individuals and communities, even individuals or communities and states. The second function is to form or make a policy.

Judicial authorities according to the 1945 Constitution before the changes is done by MA and the judiciary another. Judicial power only consists of court bodies culminating in MA. Judicial power at this time is independent.[122].

Before the amendment to the 1945 Constitution, judicial authority was regulated by very limited provisions in the 1945 Constitution. Before the change to UUD 1945, independence principle was not found in provisions of Constitution, but was explained in the Elucidation of Article 24 and Article 25 of the 1945 Constitution, which

[121] Walter F. Murphy, et., al, *Courts, Judges & Politics, An Introduction to the Judicial Process*, (Boston: McGraw Hill, 2005), 45. Lihat juga dalam Susi Dwi Harijanti, *Politik Hukum Kekuasaan Kehakiman: Meluruskan Arah Manajemen Kekuasaan Kehakiman*, (Jakarta: Sekretariat Jenderal Komisi Yudisial Republik Indonesia, 2018), 62.

[122] The Supreme Court Institute, in accordance with the principle of independent of judiciary, is recognized to be independent in the sense that it cannot be intervened or influenced by other branches of power, especially the government. (Look at Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2005), 187).

stated: *"Judicial power is an independent power which means that it is independent from the influence of the Government's power. In connection with that, guarantees must be made in the law regarding the position of the judges".*

Before any amendments to the 1945 Constitution, Article 24 states:

" (1) Judicial power is exercised by a MA and other judicial bodies according to the law.

(2) The composition and power of the judicial bodies are regulated by law. "

The provisions of Article are not explicitly stated that the power of the judiciary is an independent power. Weak legal protection against independence of judiciary power before the 1945 changes led to the institution of judicial power is easily interfered by institutions outside the judiciary.[123] The history of judicial power in Indonesia has provided an illustration and understanding that judicial power has always been under the auspices of the executive in this case the President. In the era of President Soekarno, the Chief Justice was once used as one of the cabinet members who was directly responsible to the president, so conceptually there was no judicial power, because it had become executive power. [124]

Purifying the Implementation of the 1945 Constitution was an important milestone in the development of judicial power before

[123] Achmad Edy Subiyanto, *"Rekonstruksi Kewenangan Konstitusional Komisi Yudisial".* Jurnal Media Hukum Vol. 22 No.1 Juni 2015, 141.
[124] Bagir Manan, *Kekuasaan Kehakiman Republik Indonesia,* (Bandung: LPPM Universitas Islam Bandung, 1995), 7.

reform. The issuance of Law No. 14 of 1970 concerning the Basic Provisions of Judicial Power was formed to replace Law No. 19 of 1964 concerning the Basic Provisions of Judicial Power which are considered to have deviated from the provisions of the 1945 Constitution. The most important deviation is the provision that allows the President's intervention in the judicial affairs contained in Article 19 of Law No. 19 of 1964, which gave the authority to the President namely *"Some things can come down or interfere in Court matters"*. The article is constitutionally incompatible with the provisions of Article 24 and Article 25 of the 1945 Constitution.[125]

The paradigm of UUD 1945 before the change that gave the executive and legislative powers to the President showed the President's dominant position as the handler of government power. The existence of a dominant presidential power is also an explanation of the formation of the 1945 Constitution which does not explicitly mention the separation of judicial powers from the Government.

b. A Portrait of Analysis of Judicial Power after the Amendment of the 1945 Constitution

Judicial power in Indonesia experiences development and change with the changes in the 1945 Constitution. Judicial power after the change of UUD 1945 becomes a very fundamental power and as part of axis of power that has the function of upholding justice.[126]

[125] The presence of Law Number 14 of 1970 is to restore the independence of judicial power which has been lost since the enactment of Law Number 19 of 1964. In the provisions of Articles 24 and 25 of the 1945 Constitution itself it is not explicitly stated that there is independence of judicial power. (Look at Komisi Yudisial Indonesia, Aidul Fitriciada Azhar, *Paradigma Kekuasaan Kehakiman Sebelum dan Sesudah Reformasi: Meluruskan Arah Manajemen Kekuasaan Kehakiman*, (Jakarta: Sekretariat Jenderal Komisi Yudisial Republik Indonesia, 2018), 37)

[126] Achmad Edi Subiyanto, *"Mendesain Kewenangan Kekuasaan Kehakiman Setelah Perubahan UUD 1945"*. Jurnal Konstitusi Vol. 9 No. 4, Desember 2012, 666.

According to Moh. Mahfud MD, there are at least three things which at the beginning of the reforms surfaced related to the discourse to improve law enforcement through judicial reforms in particular, judicial power:

1) The rise of judicial mafia (precisely *judicial corruption*) involving judges and other law enforcers (chess of law enforcers).
2) There's so many legislation, which is substantively considered contrary to the laws and regulations are higher, including the 1945 Constitution, but there is no mechanism effective testing through judiciary *(judicial review)*, which existed at the time just testing by legislative *review (legislative review)* and testing by the executive agency *(executive review)* which is certainly very dependent on the will of the President in accordance with the underlying *executive heavy* political system .
3) The weakness judges of the powers of government intervention because of the placement of judges under the guidance of government (for personnel administration and finances ial) and below MA (for technical justicial).[127]

Based on these three reasons, the arrangement of the judicial world became one of MAin concerns at the time of the reformation wave. Reforms in the world of justice and law enforcement are carried out with changes in laws and regulations in the field of justice and judicial authority both changes in various laws and changes or amendments to the 1945 Constitution.

The change to UUD 1945 changes state administration system in the field of judiciary or judicial power. Initially, the Chapter on Judicial Power in UUD 1945 only had two articles namely Article 24 and Article

[127] Moh. Mahfud MD, *"Rambu Pembatas Dan Perluasan Kewenangan Mahkamah Konstitusi"*. Jurnal Hukum No. 4 Vol. 16 Oktober 2009, 442.

25.[128] Amendments are made by changing and adding articles and paragraphs, so that as contained in Chapter IX concerning Judicial Power, there are 5 (five) articles in that chapter, namely Article 24, Article 24A, Article 24B, Article 24C, and Article 25 .

Based on these articles, judicial power is exercised by an MA and its subordinate judiciary within the General Courts, Religious Courts, Military Courts, State Administrative Courts, and by a new judicial authority called MK.[129] There is an institution specifically held for the recruitment of prospective justices, namely the Judicial Commission (KY) to recruit professional judges who are professional and have integrity towards their profession as law enforcement and justice.[130]

A firm guarantee in the constitution is necessary for the establishment an independent judicial power. One of major steps resulting from the amendment to the 1945 Constitution is to explicitly mention the independence of the judiciary.

The statement of independent power and independent judiciary is one of the results of the Amendment to UUD 1945 contained in Article 24 paragraph (1) of the 1945 Constitution in full reads:

(1) " *Judicial power is an independent power to administer justice to uphold law and justice."*[131]

[128] Achmad Edy Subiyanto, *"Rekonstruksi Kewenangan Konstitusional Komisi Yudisial"*. Jurnal Media Hukum Vol. 22 No.1 Juni 2015, 143.
[129] Pasal 24 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
[130] Pasal 24B Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
[131] Pasal 24 ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

The article is the basis for an independent and independent judicial power. Judicial power in the composition of state power according to the 1945 Constitution after the change remains placed in power that is independent, independent, and free from interference from other powers.

> Freedom in the sense that a set of judicial authorities in carrying out their functions is independent of the influence of other power holders. Independent in this context has the meaning that the power to regulate its own domestic affairs. This is a consequence of the separation of state power contained in the 1945 Constitution.[132]

Bagir Manan said that there were a number of goals to be achieved with an independent judicial authority. These goals include:

1) As part of a system of separation or division of power between state governing bodies, judicial power is needed to guarantee and protect individual freedom.
2) An Independent judicial power is needed to prevent government officials from acting arbitrarily and oppressively.
3) An independent judicial power is needed to assess the validity of a statutory regulation so that the legal system can be properly implemented and enforced.[133]

Not only that, Article 24 a (2) and (3) of the 1945 Constitution mandates that judicial power is not only exercised by an MA but also by a MK. Following is the editorial of Article 24 paragraphs (2) and (3) of the 1945 Constitution:

(1) "Judicial power shall be exercised by a MA and the judiciary below it in the general court, religious court environment, military court environment, state administrative court environment, and by a MK."
(2) "Other agencies whose functions related to the judicial authority stipulated in laws - laws."

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[132] Achmad Edy Subiyanto, *"Rekonstruksi Kewenangan Konstitusional Komisi Yudisial"*. Jurnal Media Hukum Vol. 22 No.1 Juni 2015, 144.
[133] Bagir Manan, *Kekuasaan Kehakiman Republik Indonesia*, (Bandung: LPPM Universitas Islam Bandung, 1995), 45.

MK is an institution of judicial power other than MA which specifically handles constitutional or political justice.[134] MK in carrying out its authority[135], has asserted itself as *the guardian of democracy's* state institution that hold up justice principles that enforce substantive justice in each of its decisions. Court within the framework of substantive justice through implementation of the authority is not only be based on spirit of the Act merely formal legality, but also consistent for the sole responsibility of realizing the goal of legal norms itself, namely the substantive value.[136]

After the change to UUD 1945, there are also determinations governing judges. B agi judge, Article 24A verse (2) of the 1945 Constitution explicitly specify that, *"Jugdes grand must have integrity and a personality that is not dishonorable, fair, professional, and experienced in the field of law".*[137]

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[134] Moh. Mahfud MD, *"Rambu Pembatas Dan Perluasan Kewenangan Mahkamah Konstitusi".* Jurnal Hukum No. 4 Vol. 16 Oktober 2009, 447.

[135] The Court has the authority to adjudicate at the first and last level whose decisions are final to examine the law against the Constitution, decide upon disputes over the authority of state institutions whose authority is granted by the Constitution, decide upon the dissolution of political parties, and decide on disputes about the results of general elections. The Court also has the obligation to give decisions on the opinion of the DPR regarding alleged violations by the President and / or Vice President according to the Constitution. (See Article 24C Paragraphs (1) and (2) of the 1945 Constitution of the Republic of Indonesia). Since the issuance of Law No. 12 of 2008 which is a change to Law No. 32 of 2004 the authority of the Constitutional Court was added one more, namely to examine and decide upon disputes over the results of regional head elections (pilkada) which were previously the competence of the Supreme Court. The transfer of judicial authority over the election results is a consequence of the provisions of Law No. 22 of 2007 concerning the Election Organizer which places the elections into the general election regime. (Look at Moh. Mahfud Md, *"Rambu Pembatas Dan Perluasan Kewenangan Mahkamah Konstitusi".* Jurnal Hukum No. 4 Vol. 16 Oktober 2009, 448).

[136] Martitah, *Mahkamah Konstitusi dari Negative Legislature ke Positive Legislature,* (Jakarta: Konstitusi Press, 2016), 101.

[137] Pasal 24A Ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

Specifically to maintain the independence and integrity of judges, the amendment to the 1945 Constitution also gave rise to a new institutions, namely KY.[138] KY's authority is mentioned in Article 24B paragraph (1) of the 1945 Constitution which states that: *"The Judicial Commission is independent in having the authority to propose the appointment of MA Justices and has other powers in order to maintain and uphold the honor, dignity, and behavior of judges".*[139]

The Judicial Commission was formed to recruit professional and professional judges who have integrity towards their profession as law implementation and justice.[140] The existence of KY as a state institution in the branch of judicial power marks a new paradigm in the implementation of the independence of judicial power.

The explanations above can be concluded that the Indonesian state is a unitary state in the form of a republic, and is a state of law. The dynamics of Indonesian constitutional system can be divided into 2 phases, before and after changes to UUD 1945.

The Republic of Indonesia's constitutional system before the amendment to UUD 1945 did not adhere to the separation of powers, the supremacy of MPR, and the absence of *checks and balances* between state institutions. After the change to UUD 1945, the supremacy of MPR

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[138] Siti Fatimah, *Proliferasi Kekuasaan Kehakiman Setelah Perubahan UUD 1945*. Disertasi, (Yogyakarta: Fakultas Hukum Universitas Islam Indonesia, 2014), 29.
[139] Pasal 24B Ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
[140] Achmad Edi Subiyanto, "Mendesain Kewenangan Kekuasaan Kehakiman Setelah Perubahan UUD 1945". Jurnal Konstitusi Vol. 9 No. 4, Desember 2012, 671.

was abolished and replaced with supremacy of the constitution, the principle of *checks and balances was* applied in relations between state institutions, and new institutions such as the DPD, KY, and MK as constitutional justice institutions were born to realize the supremacy of the constitution.

The amendment to the 1945 Constitution also brought several changes in the judicial authority . The independence of judicial power that was not previously stated in the constitution is then strengthened by guarantees in constitution, precisely in Article 24 paragraph (1) of the 1945 Constitution. Judicial power which is a judiciary then also applies *checks and balances* principle in relation to other institutions, this will be explained in the next chapter.

2. Juridical Analysis of Judicial Power Based on Principles *Checks and balances*

The application of concept of power sharing and power separation in modern times has become a combination with *checks and balances* concept. *Checks and balances* concept itself originated from *The Founding Fathers*[141] United States, which separates strictly from one another but supervises each other without the existence of a power above, so that each

[141] The Founding Fathers of the United States, were a group of American leaders who united the Thirteen Colonies, led the war for independence from Great Britain, and built a governance framework for the new United States during the last decade of the 18th century. This group comes from various social, economic and ethnic backgrounds and occupations, some of which have no prior political experience.
(Lihat di https://en.wikipedia.org/wiki/Founding_Fathers_of_the_United_States Diakses pada Senin, 24 Februari pukul 23:08)

power can function well, while also avoiding arbitrariness and overlapping [142]

According to Robert Weissberg, the principle linked to the separation of powers is the principle of checks and balances. The separation of powers divides government power between different officials, meanwhile, the existence of the principle of checks and balances makes each official have power / authority over other officials..[143]

The principle of *checks and balances*, namely a system of rules that emphasizes the existence of a mechanism of mutual control and balance between state institutions, so as to prevent the concentration of power in one institution.[144]

According to Miriam Budiardjo, the doctrine of *checks and balances system* among state institutions presupposes equality and supervises each other. This system does not require there its institutions more power ful than others.[145]

> According to Jimly Asshiddiqie, the principle of checks and balances is a principle in the constitutional system that wants every branch of power, both legislative, executive and judicial powers to have the same degree, so that each can control each other. State power can be regulated, restricted, and even controlled as well as possible, so that abuse of power by the state apparatuses who are occupying positions in each branch of power can be prevented and overcome.[146]

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[142] Faharudin, *"Prinsip Checks and Balances Ditinjau dari Sisi dan Praktik"*. Jurnal Hukum Volkgeist Vol. 1 No. 2 April 2017, 122.
[143] Robert Weissberg, *Understanding American Government*, (New York: Holt Rinehart and Winston, 1979), 35.
[144] Denny Indrayana, *Amandemen UUD 1945 Antara Mitos dan Pembongkaran*, (Bandung: PT. Mizan Pustaka Anggota IKAPI, 2007), 77.
[145] Miriam Budiardjo, *Demokrasi di Indonesia Demokrasi Parlementer dan Demokrasi Pancasila: Kumpulan Karangan Prof. Miriam Budiardjo,* (Jakarta: PT Gramedia Pustaka Utama, 1994), 227.
[146] Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia*, Jakarta, Sinar Grafika, 2010), 61.

The above explanations can then be concluded that what is meant by the principle of *checks and balances* is the principle in the system of separation of powers that halts the mutual control of each authority of a state institution . This effort of mutual control is carried out both by the legislative, executive and judicial branches in the state administration system.

The principle of *checks and balances* has the function of preventing branches of power from abuse of power. Abuse of power can be in the form of abuse for certain purposes or for a political compromise.[147]

The Indonesian constitutional system after the changes in the 1945 Constitution adheres to the principle of checks and balances. This principle is one of the objectives of the amendment to the 1945 Constitution, which is to refine the basic rules of state administration in a democratic and modern, more stringent and transparent manner.[148]

Indonesia is a democracy that adheres to the principle of popular sovereignty. The principle of popular sovereignty itself as an institution can be organized through two options, namely through a power-sharing system (*division of power*) and the separation of powers (*separation of power*).[149]

[147] Bagir Manan, *Membedah UUD 1945*, (Malang: Tim UB Press, 2012), 88.
[148] Hamdan Zoelva, *Pemakzulan Presiden di Indonesia,* (Jakarta: Sinar Grafika, 2011), 64.
[149] The separation of powers is horizontal in the sense that power is divided into functions that are reflected in equal and mutually equitable state institutions (checks and balances). Whereas the distribution of power is vertical in the sense that MAnifestation of power is distributed vertically down to high state institutions under institutions that hold the power of a vertical nature, not horizontal power separation. (Look at Titik Triwulan Tutik, *Konstruksi Hukum Tata Negara Indonesia Pasca Amandemen UUD 1945*, (Jakarta: Prenada Media, 2010), 13.)

> According to Jimly Asshiddiqie[150], if previously the 1945 Constitution did indeed embrace the concept of power sharing, but after the fourth amendment, the principle of vertical distribution of power was no longer adhered to by the 1945 Constitution. country. The relationship between one institution and another is bound by the principle of checks and balances, where the institutions are recognized as equal but controlling each other.

Indonesia's constitutional system after the fourth amendment of the 1945 Constitution divides governmental power into 3 branches of power. Legislative power is exercised by the DPR and DPD. The MPR, which previously held the highest authority, became equal with other high institutions. Executive power is exercised by the President. Judicial power is exercised by MK.[151] There is also the formation of Judicial Commission which is often called an extra-judicial institution because its existence is not listed in Article 24 paragraph (2) of the 1945 Constitution, but it is also listed in Chapter IX of Judicial Power.[152]

The three branches of power, both legislative, executive and judiciary, in carrying out their functions control one another according to the principle of checks and balances system.[153] A system of checks and balances in the administration of power enables mutual control between existing branches of power and avoids hegemonic, tyranic, and centralized actions. [154] The

[150] Jimly Asshiddiqie, *Sengketa Kewenangan Antarlembaga Negara*, (Jakarta: Konpress, 2005), 2.
[151] Jimly Asshiddiqie, *Konstitusi dan Konstitualisme* (Jakarta: Konstitusi Press, 2006), 184
[152] Pasal 24 Ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
[153] Faharudin, *"Prinsip Checks and Balances Ditinjau dari Sisi dan Praktik".* Jurnal Hukum Volkgeist Vol. 1 No. 2 April 2017, 124-125.
[154] Fickar Hadjar dkk, *Pokok-pokok Pikiran dan Rancangan Undang-Undang Mahkamah Konstitusi*, (Jakarta: KRHN dan Kemitraan, 2003), 4.

purpose of checks and balances is to maximize the functions of each state institution and limit the arbitrariness of state institutions.[155]

The principle of checks and balances can be operationalized in the following ways:

a) Granting authority to take action to more than one institution. For example, the authority to legislate is given to the government and parliament
b) Granting authority to appoint certain officials to more than one institution, for example the executive and legislative branches
c) Legal remedies of one institution's impeachment against other institutions
d) Direct supervision of one institution over other state institutions, such as the executive overseen by the legislature
e) Granting authority to the court as an institution for resolving cases of authority disputes between the executive and legislative institutions.[156]

Further discussion will then focus on the implementation of the principle of checks and balances on judicial power, which in this case is judicial power. Explanations related to judicial authority after the amendment to the 1945 Constitution can be seen in Article 24 paragraph (1) and (2) of the 1945 Constitution which states that:

(1)"Judicial power is an independent power to administer justice to uphold law and justice."
(2)"Judicial power shall be exercised by a MA and the judiciary below it within the general court, religious court, military court, state administrative court, and by a MK."

Specifically to maintain the independence and integrity of judges, the amendment to the 1945 Constitution also gave rise to a new institution,

[155] Indra Rahmatullah, *"Rejuvinasi Sistem Checks and Balances Dalam Sistem Ketatanegaraan di Indonesia"*. Jurnal Cita Hukum Vol. I No. 2 Desember 2013, 216.
[156] Munir Fuady, *Teori Negara Hukum Modern*, (Bandung: Refika Aditama, 2009), 124.

namely KY. KY's authority is regulated in Article 24B paragraph (1) of the 1945 Constitution.[157]

The principle of checks and balances in judicial or judicial power is also applied. Implementation of the principle of checks and balances in judicial power can be classified into two types, namely the implementation of internal checks and balances in the branch of judicial power, and the implementation of checks and balances between judicial authorities and other branches of power.

The implementation of internal checks and balances in the judicial branch of power can be seen from the authority of MA to propose the names of three prospective MK judges.[158] There is also KY which has the authority to conduct supervision in the field of judicial ethics.[159]

The second principle of checks and balances is between judicial and other powers. The application of the principle of checks and balances can be in the form of a judicial relationship with the executive, and a judicial relationship with the legislature.

> The meeting point in the relationship between the executive and the judiciary lies in the authority of the President to take action in the judicial field, such as granting clemency, amnesty, abolition, and rehabilitation. The President in granting pardon and rehabilitation must

[157] Article 24B paragraph (1) of the 1945 Constitution of the Republic of Indonesia states that*: "The Judicial Commission is independent and has the authority to propose the appointment of Supreme Court Justices and has other powers in order to maintain and uphold the honor, dignity, and behavior of judges"*.

[158] Montisa Mariana, *"Checks and balances antar Lembaga Negara di dalam Sistem Politik Indonesia"*. Jurnal Logika Vo. 21 No.1, Desember 2017, 25.

[159] The authority of the Judicial Commission is exercised through external supervision in the administration of justice in the field of judicial ethics by the Judicial Commission. Look at https://www.komisiyudisial.go.id/frontend/news_detail/96/ky-lahir-sebagai-check-and-balances-kekuasaan-kehakiman Diakses pada Selasa 25 Februari 2020 pukul 13:16.

also pay attention to MA's considerations, and to provide amnesty and abolition must take into consideration the DPR's consideration.[160]

The relationship between the legislature and the judiciary lies in the law as a product of the legislative body that can be tested for constitutionality by MK. This means that MK also has the authority in the legislative field in the negative sense (negative legislation). The existence of such authority makes in the process of forming and formulating MAterial or substance of the law, the Parliament and the President must be aware of the possibility of a judicial review from MK.[161]

The balance of power between the judiciary, legislative and executive institutions is also built on the procedure of filling judges, both MA judges and MK judges. The filling of the justices of the justices is done through a selection conducted by KY. The results of the KY selection are submitted to the DPR for discussion and approval. Candidates who have been approved by the Parliament are appointed as justices through a Presidential Decree. Relations between judicial, legislative and executive institutions are also seen in the appointment of judges of MK. MK Justices consisting of 9 (nine) people consisting of 3 (three) judges were submitted by the DPR, 3 (three) people were nominated by the President, and 3 (three) people were nominated by MA. This kind of composition illustrates the balance of legislative, executive and judicial institutions in developing the role of MK.[162]

The application of the principle of checks and balances relating to judicial, legislative and executive relations can also be seen in the authority of MK in resolving disputes over the authority of state institutions. MK also has the obligation to provide decisions on the opinion of the DPR regarding alleged violations by the President and / or Vice President. MK's authorities and obligations are in accordance with Article 24C paragraphs (1) and (2):

(1) MK has the authority to adjudicate at the first and last level, the decision of which is final to examine the law against the Basic Law,

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[160] Sunarto, *"Prinsip Checks And Balances dalam Sistem Ketatanegaraan Indonesia".* Masalah-Masalah Hukum, Jilid 45 No. 2, April 2016, 161.

[161] Saldi Isra, *Pergeseran Fungsi Legislasi: Menguatnya Model Legislasi Parlementer dalam Sistem Presidensial Indonesia,* (Jakarta: PT. Raja Grafindo Persada, 2010), 10.

[162] Sunarto, *"Prinsip Checks And Balances dalam Sistem Ketatanegaraan Indonesia".* Masalah-Masalah Hukum, Jilid 45 No. 2, April 2016, 162.

decide upon disputes over the authority of state institutions whose authority is granted by the Basic Law, decide upon the dissolution of political parties and decide on disputes concerning the results general election.

(2) MK must render a decision on the opinion of the People's Representative Council regarding alleged violations by the President and / or Vice President according to the Basic Law.[163]

The explanations above show that Indonesia applies the principle of checks and balances in its constitutional system. The application of the principle of checks and balances is carried out for the balance and control of the three branches of power, both legislative, executive and judicial. The principle of checks and balances especially in judicial or judicial power is carried out with good relations in the form of the linkage of authority and oversight between judicial, legislative and executive powers.

3. Independence of Judicial Power in Realizing the Supremacy of the Constitution

Implementation of law in Indonesia began since Indonesia proclaimed itself as an independent country.[164] Indonesia as an independent country applies the concept of the rule of law in developing the life of the nation and state.[165]

[163] Pasal 24C ayat (1) dan (2) Undang-Undang Dasar Negara Republik Indonesia.

[164] As an independent nation, Indonesia forms a national state and regulates the state structure in the constitution and the Grond Wet / Fundamental Law. In every independent country, the constitution has an important meaning and key role because the nature of the constitution is a reflection of the soul, spirit, moral values, cultural and ideological values and the philosophy of the struggle of a nation. Therefore, a country's constitution is a historical product of the nation's struggle. (Look at Yosaphat Bambang Suhendarto, *Kekuasaan Kehakiman Pasca Amandemen UUD 1945*. Thesis, (Semarang: Universitas Diponegoro, 2008), 59).

[165] Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia, which states*: "The State of Indonesia is a State of Law"*.

The conception of the rule of law is in line with Plato's view that good governance is governed by law. According to Aristotle, a good country is a country governed by the constitution and rule of law.[166]

Indonesia as a state of law, put the 1945 Constitution as the constitution and the basis of state administration. The peak of legal power is placed in the constitution which is essentially a document of agreement on the highest state system. Constitutional provisions constitute the most important constitutional foundations, which underlie the legal system, political system, economic system, social system and culture of a country. The constitution has a role to maintain the essence of the existence of a country from the influence of various developments that move dynamically.[167]

The 1945 Constitution as a constitution, established by the founders of the Republic of Indonesia, on 18 August 1945.[168] Indonesia as a state of law that places the 1945 Constitution as a constitution and basic law has stated that everyone has the right to recognition, guarantees, protection, and certainty of law that is fair and equal treatment before the law.[169] Fulfillment of the rights of citizens in Indonesia is marked by the existence of a set of judicial powers that are independent in carrying out their duties as administrators of justice to uphold law and justice.[170]

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[166] Ni'matul Huda, *Negara Hukum, Demokrasi, dan Judicial Review*, (Yogyakarta: UII Press, 2005), 1.

[167] https://www.bphn.go.id/data/documents/struktur_ketatanegaraan_pasca_amandemen.pdf Diakses Pada Rabu 26 Februari 2020 Pukul 13:36

[168] https://id.wikipedia.org/wiki/UndangUndang_Dasar_Negara_Republik_Indonesia_Tahun_1945 Diakses pada Rabu, 26 Februari 2020 Pukul 13:47

[169] Pasal 28D ayat (1) Undang-undang Dasar Negara Republik Indonesia Tahun 1945

[170] Pasal 24 ayat (1) Undang-undang Dasar Negara Republik Indonesia Tahun 1945.

Explanations related to judicial power that is independent in Indonesia are also contained in Article 1 paragraph (1) of the Law of the Republic of Indonesia Number 48 of 2009 concerning Judicial Power. The article states:

> (1) *"Judicial Power is the power of an independent state to administer justice in order to enforce law and justice based on the Pancasila and the 1945 Constitution of the Republic of Indonesia, for the sake of the implementation of the Republic of Indonesia."*[171]

Article 3 paragraph (2) then states that,

> (2) *"All interference in judicial affairs by other parties outside the jurisdiction of the judiciary is prohibited, except in matters referred to in the 1945 Constitution of the Republic of Indonesia."*[172]

Judicial power in Indonesia is exercised by an MA and a judicial body which is subordinate to it in the General Courts, the Religious Courts, the Military Courts, the State Administrative Courts.[173] Judicial power in Indonesia, apart from being carried out by MA, is also exercised by a MK.

Judicial power in Indonesia is exercised in an independent and independent manner. The statement then provides an understanding that MA and MK as executors of judicial power carry out their duties and authority independently and independently.

Independent in the sense that MA and MK as the actors of judicial power in carrying out their functions are independent of the influence of other

[171] Pasal 1 Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman. Lembaran Negara Republik Indonesia Nomor 5076

[172] Pasal 3 ayat (2) Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman. Lembaran Negara Republik Indonesia Nomor 5076

[173] Pasal 24 ayat (2) Undang-undang Dasar Negara Republik Indonesia Tahun 1945

power holders. Independent in this case means having the power to manage his own household affairs.[174]

Judicial power is an independent body, free from interference from other powers. The relationship of judicial power with other state equipment, better reflects the principle of separation of powers which is "checks and balances".[175]

> Ni'matul Huda explained that the affirmation of Indonesia is a rule of law as well as a statement that judicial power is an independent power, containing the spirit to not make law as an instrument of power, upholding the principle of equality before the law and protecting interference both internal and external to judicial power in order to prevent and avoid the failure to achieve justice.[176]

The exercise of an independent judicial power is also a reflection or implementation of the values in the Universal Declaration of Human Rights. These values can be seen in *Article 10 Universal Declaration of Human Rights*[177] states: *"Every one is entitled in full equality to a fair and public hearing by in independent and impartial tribunal in the determination of his rights and obligations and of any criminal charge against him".*

An independent judicial power is an implementation of the provisions of the 1945 Constitution which aims to guarantee individual freedom, and the prevention of arbitrary governmental actions based on the rule of law.[178]

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[174] Achmad Edi Subiyanto, "Mendesain Kewenangan Kekuasaan Kehakiman Setelah Perubahan UUD 1945". Jurnal Konstitusi Vol. 9 No. 4, Desember 2012, 666.
[175] Yosaphat Bambang Suhendarto, *Kekuasaan Kehakiman Pasca Amandemen UUD 1945*. Thesis. (Semarang: Universitas Diponegoro, 2008), 54.
[176] Ni'matul Huda, *Dinamika Ketatanegaraan Indonesia dalam Putusan Mahkamah Konstitusi*, (Yogyakarta: FH UII PRESS, 2011), 18.
[177] https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf Diakses pada Rabu, 26 Februari 2020, pukul 14:21.
[178] Achmad Edy Subiyanto, *"Rekonstruksi Kewenangan Konstitusional Komisi Yudisial".* Jurnal Media Hukum Vol. 22 No.1 Juni 2015, 144.

The operational dimension of judicial power includes the power of an independent state to administer justice to enforce law and justice based on Pancasila and the 1945 Constitution.[179]

The explanations above can then be concluded that Indonesia as a constitutional state laid the constitution (1945 Constitution) as the highest foundation of state administration. The 1945 Constitution as the source of the highest state system states that everyone has the right to protection, guarantee, legal certainty, and equal treatment before the law.

The realization of these rights is carried out with the existence of a set of judicial powers (MA and MK) that are independent in enforcing law and justice. Explanations related to independent judicial power are regulated explicitly in the 1945 Constitution, so that the implementation of independent judicial power in Indonesia is actually a form of supremacy of the constitution that makes the constitution as the basic law and the highest law in a country.

4. Reconceptualization of *Constitutional Question* in Constitutional Democracy Perspective

Democracy without a legal basis will make a country without order, while a rule of law without a democracy rests on authoritarian rules.[180] The absence of strict, consistent and transparent law enforcement will cause the

[179] Rimdan, *Kekuasaan Kehakiman Pasca-Amandemen Konstitusi*, (Jakarta: Kencana, 2013), 2.
[180] A.A. Gadjong, *Pemerintahan Daerah : Kajian Politik dan Hukum*, (Bogor: Penerbit Ghalia Indonesia, 2007), 35.

democratic system to lead to anarchy [181], and do not uphold the rights of citizens.

The existence of the constitution as the highest law and basic law is essential in order to provide guarantees and the public can defend each of its rights.[182] The concept of constitutional democracy then emerged as an idea of democracy based on the constitution as the highest law.

The idea of the concept of constitutional democracy emerged as a form of development of the paradigm of the modern state which made the constitution the guardian of the democratic system. Restrictions of democratic mechanisms through the constitution are carried out to protect the rights of citizens.[183] Constitutional democracy places constitutionalism within its constituent framework. Citizens' rights can only be guaranteed if government power can be legally restricted so that they cannot act arbitrarily.[184]

> Jimly Asshiddiqie believes that constitutional democracy is a system in which the implementation of people's sovereignty is carried out according to the constitutional procedures stipulated in law and the constitution. Constitutional democracy places how there is an effort in realizing a consensus between popular sovereignty (democracy) and legal sovereignty (nomocracy), as two things that are considered disharmony but are inherent between one and the other in achieving the goals of the state that protect plural society.[185]

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[181] Wasistiono dan Wiyoso, *Meningkatkan Kinerja Dewan Perwakilan Rakyat Daerah*¸ (Bandung: PT Fokusmedia, 2009), 2.
[182] A. Ahsin Thohari, *"Mahkamah Konstitusi dan Pengokohan Demokrasi Konstitusional di Indonesia".* Jurnal Legislasi Indonesia, Vol. 6 No. 3, September 2009, 97.
[183] Janedjri M. Gaffar, *Demokrasi Konstitusional (Praktik Ketatanegaraan Indonesia Setelah Perubahan UUD NRI 1945),* (Jakarta: Konstitusi Press, 2012), 184-185.
[184] A. Ahsin Thohari, *"Mahkamah Konstitusi dan Pengokohan Demokrasi Konstitusional di Indonesia".* Jurnal Legislasi Indonesia, Vol. 6 No. 3, September 2009, 97.
[185] Jimly Asshiddiqie, *Konstitusi & Konstitusionalisme Indonesia,* (Jakarta: Sinar Grafika, 2010), 58.

Janedjri M. Gaffar classifies concretely the three forms of implementing constitutional democracy, namely:

a) The arrangement of relations between state institutions; related to the aspect of achieving the objectives of democratic countries and the law and concerning the limitation of power by avoiding the accumulation of power that can cause abuse of power (through separation of powers and checks and balances)
b) There is a legislation process; related to democratic lawmaking that takes into account the aspirations of the community, as well as the embodiment of the state ideals, democratic ideals, and the ideals of the law in the constitution
c) There is a judicial review; related to guaranteeing the realization of democracy and nomocracy in order to uphold the supremacy of the constitution through constitutionality testing of laws and regulations.[186]

Jimly Asshiddiqie put forward the principles of the idea of democracy based on the law (constitutional democracy), viz:[187]

a) the guarantee of equality and equality in shared life;
b) recognition and respect for differences or plurality;
c) the existence of rules that bind and serve as a source of mutual reference;
d) there is a dispute resolution mechanism based on the mutually agreed rules mechanism;
e) recognition and respect for human rights;
f) restrictions on power accompanied by mechanisms for resolution of state disputes between state institutions, both vertically and horizontally;
g) the existence of an independent and impartial court with the highest decision authority on the basis of justice and truth;
h) the formation of a special judicial institution to guarantee justice for citizens who have been harmed by the decision or policy of the government (state administration official);
i) the existence of a "judicial review" mechanism by the judiciary regarding the norms of legislative provisions, both those stipulated by the legislative and executive bodies;
j) the constitution and laws and regulations governing guarantees for the implementation of the above mentioned principles;

[186] Janedjri M. Gaffar, *Demokrasi Konstitusional (Praktik Ketatanegaraan Indonesia Setelah Perubahan UUD NRI 1945)*, (Jakarta: Konstitusi Press, 2012), 13-14.
[187] Jimly Asshiddiqie, *Menuju Negara Hukum Yang Demokratis*, (Jakarta: Bhuana Ilmu Populer, 2009), 245-246.

k) there is recognition of the principle of legality (due process of law) in the whole system of state administration.

Indonesia is a country that adheres to constitutional democracy.[188] The affirmation of Indonesia as a state that adheres to constitutional democracy is stated in Article 1 paragraph 2 of the 1945 Constitution, namely: *"Sovereignty is in the hands of the people and implemented according to the Constitution".*[189] The meaning is that Indonesia's democratic government in its implementation is limited by the constitution, namely the 1945 Constitution.

Sanusi[190] in his study mentioned there are The Ten Pilars of Indonesian Constitutional Democracy according to the philosophy of Pancasila and the 1945 Constitution:

a) A Divinity of Godhead
b) Democracy with Intelligence
c) Democratic People's Sovereignty
d) Democracy with "Rule of Law"
e) Democracy with the Division of State Power
f) Democracy with Human Rights
g) Democracy with an Free Court
h) Democracy with Autonomy
i) Democracy with Prosperity
j) Socially Democratic Democracy

The upholding the supremacy of the constitution in the concept of constitutional democracy becomes very important. After the Amendment of the 1945 Constitution, Indonesia adopted the doctrine of "supremacy of the

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[188] Bambang Yuniarto, *Pendidikan Demokrasi Dan Budaya Demokrasi Konstitusional*. (Yogyakarta: Penerbit Deepublish, 2018), 85.
[189] Pasal 1 ayat (2) Undang-Undang Dasar Negara Republik Indonesia.
[190] Sanusi, A., *"Memberdayakan Masyarakat dalam Pelaksanaan 10 Pilar Demokrasi", dalam Pendidikan Nilai Moral dalam Dimensi Pendidikan Kewarganegaraan*, (Bandung: Lab. PMPKn FPIPS UPI, 2007), 193-205.

constitution" and abandoned the doctrine of "supremacy of the parliament".[191] Efforts to uphold the supremacy of the constitution can then be realized by the existence of legal means to test the legislation against the constitution (constitution).

> Hans Kelsen, an Austrian legal thinker, gave an idea that from the beginning believed that the implementation of constitutional rules could be effectively guaranteed only if an organ other than the legislative body was given the task of testing whether a law was constitutional or not, and did not apply it if it was in accordance with this organ's opinion is unconstitutional. Special organs can be formed for this purpose, such as a special court called the MK.[192]

The idea was later realized by the establishment of the MK as the guardian of constitution in the third amendment to the 1945 Constitution. The MK is often also referred to as a constitutional judiciary in which this state organ has the authority to settle legal disputes (legal dispute) based on constitution.[193] The establishment of the MK was intended to provide a guarantee for the strengthening of democratic reforms as well as constitutional democracy to ensure checks and balances between branches of state power.[194]

Conceptually, the MK as a MK has 2 (two) strategic functions, namely: protecting the fundamental rights of the community, and overseeing legislative activities. If this is done continuously, it will reach the

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[191] A. Ahsin Thohari, *"Mahkamah Konstitusi dan Pengokohan Demokrasi Konstitusional di Indonesia".* Jurnal Legislasi Indonesia, Vol. 6 No. 3, September 2009, 97.
[192] Jimly Asshiddiqie dan M. Ali Safaat, *Teori Hans Kelsen tentang Hukum*, (Jakarta: Setjen & Kepaniteraan MK-RI, 2006), 13.
[193] Ahmad Syahrizal, *Peradilan Konstitusi,Suatu Studi tentang Adjudikasi Konstitusional sebagai Mekanisme Penyelesaian Sengketa Normatif*, (Jakarta: Pradnya Paramita, 2006), 75.
[194] A. Ahsin Thohari, *"Mahkamah Konstitusi dan Pengokohan Demokrasi Konstitusional di Indonesia".* Jurnal Legislasi Indonesia, Vol. 6 No. 3, September 2009, 102.

culmination of what is called "constitutional justice".[195] The role of the MK is certainly very crucial in guarding the journey of constitutional democracy.

The MK as an institution established or formed to assume the role of guardian and protector of the 1945 Constitution as the highest constitution and law in a country that embraces constitutional democracy.[196] The MK was formed to ensure that the 1945 Constitution was truly incarnated and adhered to in its implementation, including ensuring that the constitutional rights of citizens were truly respected, protected and fulfilled in the practice of state administration.[197]

According to Mauro Cappelleti,[198] Broadly speaking, there are two models of constitutional testing in the world, a decentralized judicial review model and a centralized judicial review model.

> First, the decentralized judicial review model, which is a model that places the constitutional review authority spread to MA and the judiciary under it. Constitutional review known in countries that adhere to decentralized judicial review only covers concrete norm testing or known as constitutional question. Constitutional review of this model can only be done by judges who are handling their own concrete cases. The first model was pioneered and practiced by the United States and followed by countries that generally have a common law system. The historical experience of the United States as a country that inherits common law traditions makes this country does not need an independent institution outside MA. The power to conduct constitutional review is directly attached to the authority of MA itself,

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[195] Ahmad Syahrizal, *Peradilan Konstitusi,Suatu Studi tentang Adjudikasi Konstitusional sebagai Mekanisme Penyelesaian Sengketa Normatif,* (Jakarta: Pradnya Paramita, 2006), 75.

[196] Christo Sumurung Tua Sagala, *"Konseptualisasi Pengaduan Konstitusional (Constitutional Complaint) Sebagai Salah Satu Upaya Perlindungan Hak Konstitusional Warga Negara".* USU Law Journal, Vol.7. No.6, Desember 2019, 142.

[197] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 63.

[198] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 12.

so that MA is referred to as "The Guardian of the American Constitution".[199]

Second, the centralized judicial review model, which places the authority of the constitutional review centrally by establishing the MK as an organ specifically tasked with conducting constitutional review. The second model was pioneered by Austria which was then followed by other Continental European countries and countries outside Europe which generally adopted a civil law system. Some countries that embrace this model include Austria, Germany, Spain, Italy, Russia, Thailand, and so on. The MK in carrying out its authority to conduct constitutional review, especially on abstract norms (abstract review), although reviewing of concrete norms is also possible.[200]

Indonesia belongs to the latter group, which places the authority of constitutional testing centrally through the formation of MK (centralized judicial review), but there is no explanation that clearly states the scope of norm testing in MK is included in the variant testing of abstract review norms or concrete review (constitutional question).

Constitutional protection also includes the protection of citizens from the arbitrariness of the application of the law carried out by the court, namely when the court applies laws that are contrary to the constitution, thus harming the constitutional rights of citizens. The constitutional question mechanism is one of the efforts to prevent the loss of citizens' constitutional rights due to the application of law in court that is contrary to the constitution.

Constitutional question is said to be able to prevent arbitrariness in law enforcement because constitutional question is a mechanism related to the constitutionality of a law. A judge who is trying a case assesses or

[199] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), 45

[200] Jimly Asshiddiqie, *Model-Model Pengujian Konstitusional di Berbagai Negara*, (Jakarta: Sinar Grafika, 2010), 50.

doubts the constitutionality of the applicable law, so the judge can submit his constitutional question to the Court.[201]

The constitutional question mechanism can be realized through the authority of the MK in examining laws against the constitution. However, the authority of the MK related to this constitutional examination, both in the 1945 Constitution and in Law No. 24 of 2003 concerning the MK and was amended by Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the MK (MK Law), did not explicitly mention the authority to test concrete norms related to cases in court, which in this case is called constitutional question.

The 1945 Constitution and the MK Law only state that the MK has the authority to adjudicate at the first and last level whose decisions are final to test the law against the 1945 Constitution.[202] The authority of constitutional testing at the MK which did not mention provisions for testing concrete norms related to cases in court (constitutional question) was then interpreted that constitutional testing at the MK was only limited to testing abstract norms.

The condition that the constitutional question mechanism has not yet been adopted in this MK shows that the constitutional testing system in Indonesia still has inequality because it is only able to reach abstract norm

[201] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 55.
[202] Lihat di Pasal 24C ayat (1) Undang-Undang Dasar Negara Republik Indonesia dan Pasal 10 ayat (1) Undang-Undang No. 24 Tahun 2003 Tentang Mahkamah Konstitusi. Lembaran Negara Republik Indonesia Nomor 4316.

review. This condition causes the constitutional testing room in Indonesia to be narrow, and does not protect the constitutional rights of citizens.

> In fact, every authority possessed by the MK must include comprehensive protection of the constitution. Restrictions on the authority of constitutional review only to abstract reviews will prevent violations of the constitution from being processed maximally. The constitutional question then becomes important to be used as the authority of the MK if it is seen from the interests to carry out comprehensive protection of the constitution. The MK as one of the branches of judicial power in Indonesia certainly also has a role to bring justice to the citizens who submit cases to the Court.[203]

There is an imbalance in the constitutionality review at the MK which makes the constitutional rights of citizens not protected as a whole causing the implementation of constitutional democracy in Indonesia is also imperfect, so it is necessary to hold a reconceptualization related to the authority of reviewing the constitutionality of the MK, so that supremacy of the constitution can be upheld and constitutional rights more secure citizens. The reconciliation can be realized by adding the authority to examine concrete norms (constitutional question) both by changing the 1945 Constitution and by making it an extension of the authority for reviewing constitutionality in the MK through amendments to the MK Law, which in this case will be further discussed in the next discussion.

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[203] Heru Setiawan, *Rekonseptualisasi Kewenangan Mahkamah Konstitusi Dalam Upaya Memaksimalkan Fungsi Mahkamah Konstitusi Sebagai The Guardian Of Constitution, Thesis,* (Semarang: Universitas Diponegoro, 2017), 10.

B. The Legal Politics for Applying The Constitutional Question Mechanism in Constitutional Review at The MK of the Republic of Indonesia

1. Description of Constitutional Question and Constitutional Complaints

a. *Constitutional Question*

The lexical understanding of constitutional question can be interpreted as a constitutional issue or constitutional question. The birth of constitutional question is inseparable from the history of the birth of the MK.[204]

> The constitutional question is raised by a judge of a general court, that is, when a general court judge must give a decision on a case, if he believes that the applicable law is unconstitutional, or doubts its validity, he can refer the question to the MK. The general court judge can postpone the examination and question it in a MK. The MK will not give a verdict on the case, but it does set limitations regarding the constitutionality of the law. General court judges will then determine the case based on the MK's decision.[205]

The term constitutional question contains two meanings, namely understanding in general and specifically. The following explanation

> Constitutional question in a general sense is a term that refers to any issues or questions related to the constitution, while in its specific / specific definition, what is meant by constitutional question is an attempt at constitutional review submitted by a judge from an ordinary court to the Court on a law on a law in which he doubts his constitutionality in relation to the concrete case he is handling.[206]

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[204] Asmaeny Aziz dan Izlindawati, *Constitutional Complaint dan Constitutional Question dalam Negara Hukum,* (Jakarta: Kencana, 2018), 98.
[205] Victor Ferreres Comella, *"The European Model of Constitutional Review of Legislation: Toward decentralization?",* International Journal of Constitutional Law, Volume 2, Issue 3, July 2004, 465.
[206] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 18.

Constitutional question meaningfully refers to every issue related to constitution which is very broad in nature, and is within the realm of the authority of the MK to decide on it.[207] The MK in the decision of the constitutional question only resolves the constitutionality of the law, not the case itself. As long as the Court has not stated its decision, the examination of the case is stopped.[208] The submission of constitutional question will result in the postponement of the entire litigation process in the general court until the issuance of the final and binding decision of the MK, then there is time to further estimate the truth of the case.[209]

The term constitutional question is often referred to as "preliminary question*".*[210] This constitutional question was submitted by the general court judge to the Court before the judge applied the legal norms that were questioned by his constitutionality in a concrete case that was being handled by him.

The constitutional question is also termed "The Constitutionality of Law Upon the Request of the Court*".*[211] The mention of constitutional question in that term is when the constitutional question is submitted by a judge from the general court when the judge concerned doubts the

[207]Jazim Hamidi dan Mustafa Lutfi, *"Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya)".* Jurnal Konstitusi, Vol. 7, No. 1, Februari 2010, 33.
[208] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 27.
[209] Josua Satria Collins dan Pan Mohamad Faiz, *"Penambahan Kewenangan Constitutional Question di Mahakamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara".* Jurnal Konstitusi, Vol. 15, No. 4, Desember 2018, 693.
[210] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 17.
[211] Josua Satria Collins dan Pan Mohamad Faiz, *"Penambahan Kewenangan Constitutional Question di Mahakamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara".* Jurnal Konstitusi, Vol. 15, No. 4, Desember 2018, 692.

constitutionality of a law that will be applied in the concrete case that is being handled..

> The Court in Decision Number 013-022 / PUU-IV / 2006 provided an explanation related to the constitutional question. The MK stated that what is meant by constitutional question is that if a judge (outside the constitutional judge) doubts the constitutionality of a legal norm to be applied in a concrete case, so before deciding on the case in question the judge in question submits an application (question) first to the MK regarding constitutionality legal norms earlier.[212]

Constitutional question is one alternative to uphold the constitutional rights of citizens if it can later be applied as one of the authorities of the MK. The application of constitutional question can be done by making it the addition of the MK's authority, or just its extension.

> Constitutional question is intended so that if there is a law which forms the basis of a case handled by a judge, then the judge doubts or questions the constitutionality of the law, then before deciding the case the judge asks the MK for an opinion first, whether the law is constitutional or not. Based on the MK's decision or answer to the constitutional question, the judge can then decide on the case he is handling.[213]

Constitutional question is a procedure to protect legislators from neglect of the enforcement of laws and regulations on the part of the judiciary. The constitutional question mechanism also aims to ensure legal uniformity and legal reliability by focusing on constitutional adjudication within a single institution[214]

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[212] Putusan Mahkamah Konstitusi Republin Indonesia Nomor 013-022/PUU-IV/2006

[213] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 25.

[214] Herbert Hausmaninger, "*Judicial Referral of Constitutional Questions in Austria, Germany, and Russia",* Tulane European & Civil Law Forum, Vol. 12, winter 1997, 31.

The explanations above can be concluded that the constitutional question is an attempt submitted by a general court judge who is in doubt about the law which is the basis for the application of the case he is handling in court, this effort is in the form of a constitutional question submitted to the Court. Constitutional question is an authority that should be in the MK in Indonesia, so that the enforcement of justice in the litigation process also does not violate the constitutional rights of citizens.

b. *Constitutional Complaint*

Constitutional Complaint in Indonesian is defined as "pengaduan konstitusional". Constitutional Complaint is a right that is owned by every person or group to make a statement of disagreement about the government's treatment of it, because their constitutional rights are violated.[215]

This mechanism allows individuals to submit to the MK if they consider that their basic rights have been violated.[216] The intended right is a special instrument of protection of constitutional rights and freedoms against decisions that violate the law from public authorities.[217]

[215] Asmaeny Aziz dan Izlindawati, *Constitutional Complaint dan Constitutional Question dalam Negara Hukum*, (Jakarta: Kencana, 2018), 98-99.
[216] Victor Ferreres Comella, *"The European Model of Constitutional Review of Legislation: Toward decentralization?",* International Journal of Constitutional Law, Volume 2, Issue 3, July 2004, 465.
[217] Aušra Kargaudienė, "*Individual Constitutional Complaint In Lithuania: Conception And The Legal Issues"*, Baltic Journal Of Law & Politics Volume 4, Number 1, 2011, 163.

Constitutional Complaint is the filing of a case to the MK for violations of constitutional rights for which there is no legal instrument to bring it on, or there is no longer available legal settlement (judicial).[218]

> The MK in Decision Number 013-022 / PUU-IV / 2006 explained that what was meant by constitutional complaint was when a citizen complained to the MK that the action or omission of a state official or public official had violated his constitutional rights temporarily all available legal remedies are no longer available (exhausted).[219]

Dannemann states that constitutional complaints have several characteristics that are determined by four factors, viz:

1) Availability of legal remedies against violations of constitutional rights
2) There is a separate process that only examines the constitutional problem of an action, not other legal issues
3) Can be submitted by individuals who are directly affected by the action
4) The court that decides constitutional complaints has the power to restore the rights of victims.[220]

In practice, constitutional complaints with constitutionality testing of legal norms (judicial review) are both means of protecting the constitutional rights of citizens who have been violated.[221] Constitutional complaint is a legal effort to legally maintain human dignity that must not be contested in order to be safe from acts of state

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[218] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 23.
[219] Putusan Mahkamah Konstitusi Republin Indonesia Nomor 013-022/PUU-IV/2006
[220] Gerhard Dannemann, *"Constitutional Complaints: The European Perspective",* The International and Comparative Law Quarterly, Volume 43, Issue 1, January 1994, 142.
[221] Heru Setiawan, *Rekonseptualisasi Kewenangan Mahkamah Konstitusi Dalam Upaya Memaksimalkan Fungsi Mahkamah Konstitusi Sebagai The Guardian Of Constitution, Thesis,* (Semarang: Universitas Diponegoro, 2017), 87.

power. Constitutional complaint is a constitutional lawsuit mechanism as a tool for the protection of human rights.[222]

The following table will then be presented to facilitate the explanation of the mechanism of constitutional question and constitutional complaint. The table will review the differences and similarities in the mechanism of constitutional question and constitutional complaint.

Tabel 1.3 THE DIFFERENCES AND EQUATIONS OF CONSTITUTIONAL QUESTION AND CONSTITUTIONAL COMPLAINT MECHANISM

DIFFERENCE		EQUATION
Constitutional Question	***Constitutional Complaint***	
Constitutional issues or constitutional questions [223]	Constitutional complaints	Submitted to the MK
Submitted by an individual or general court judge who is doubtful about the constitutionality of the law in relation to the case he is handling. [224]	Submitted by certain individuals or groups	It is an effort to protect the constitutional rights of citizens
Caused because there are laws related to concrete cases in the court that are not constitutional	Caused because of government treatment or decisions from public authorities that violate the law and the	Equally related to violations of the constitutional rights of citizens

[222] Jazim Hamidi dan Mustafa Lutfi, *"Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya)"*. Jurnal Konstitusi, Vol. 7, No. 1, Februari 2010, 36.
[223] Jazim Hamidi dan Mustafa Lutfi, *"Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya)"*. Jurnal Konstitusi, Vol. 7, No. 1, Februari 2010, 37.
[224] Victor Ferreres Comella, *"The European Model of Constitutional Review of Legislation: Toward decentralization?",* International Journal of Constitutional Law, Volume 2, Issue 3, July 2004, 465.

	constitutional rights of citizens [225]	

In some countries, the authority of constitutional question and constitutional complaint is MAin authority of the MK. Indonesia as a country that adopts the MK as the guardian of constitution does not have these two authorities.

Indonesia is a constitutional state which adheres to constitutional democracy[226] and crave the supremacy of the constitution.[227] Fulfillment of the constitutional rights of citizens then becomes urgent in the framework of a constitutional democracy that upholds the supremacy of the constitution. The fulfillment of these constitutional rights can be marked by the creation of justice for all its citizens.

Adopting the idea of a constitutional question mechanism and constitutional complaint into the constitutional testing authority of the MK is one way to achieve justice for citizens. The application of constitutional question and constitutional complaint mechanisms in Indonesia is a manifestation in respecting and protecting the constitutional rights of citizens.

The next discussion will discuss the practice of constitutional testing in several countries. Further discussion will also be more focused on

[225] Aušra Kargaudienė, "*Individual Constitutional Complaint In Lithuania: Conception And The Legal Issues"*, Baltic Journal Of Law & Politics Volume 4, Number 1, 2011, 163
[226] Bambang Yuniarto, *Pendidikan Demokrasi Dan Budaya Demokrasi Konstitusional*. (Yogyakarta: Penerbit Deepublish, 2018), 85.
[227] Asmaeny Aziz dan Izlindawati, *Constitutional Complaint dan Constitutional Question dalam Negara Hukum,* (Jakarta: Kencana, 2018), 97.

the application of constitutional question mechanisms in these countries, so that later it can be used as a reference if Indonesia will apply the constitutional question mechanism in constitutional testing at the MK.

2. Constitutional Review Practices in Austria and Germany

The constitutional review mechanism has evolved from certain historical and political conditions which differ from country to country. In general, if viewed from the history of constitutional testing in the world, this constitutional review system can be divided into two systems, namely the American system and the Austrian system.

The first constitutional testing system is the American system that developed first, in which all courts participate in the practice of constitutional testing. The second system is the Austrian system, which has a special MK system that is centralized and separate from general courts.[228]

Most countries in Europe have formed a special MK like Austria which was then uniquely empowered to rule out legislation that is contrary to the constitution.[229] This centralized MK model was born in Europe after World War I. Hans Kelsen is the most developed, popularized, and defended scholar of this model, in addition to alternatives to the American model..[230]

[228] Herbert Hausmaninger, "*Judicial Referral of Constitutional Questions in Austria, Germany, and Russia"*, Tulane European & Civil Law Forum, Vol. 12, winter 1997, 25.
[229] Victor Ferreres Comella, *"The European Model of Constitutional Review of Legislation: Toward decentralization?",* International Journal of Constitutional Law, Volume 2, Issue 3, July 2004, 461.
[230] Victor Ferreres Comella, *"The European Model of Constitutional Review of Legislation: Toward decentralization?",* International Journal of Constitutional Law, Volume 2, Issue 3, July 2004, 461.

Germany and Italy later also began using this model after World War II. Other countries that have adopted this model also make MK judges who have the authority to examine constitutional laws, not judges from general courts.[231]

> Post-World War II, this centralized special MK model has more influence than the American model. In the years that followed, the Austrian model was often modified by contemporary German theory and experience, and adopted by most of Western Europe and also by several Central American and Latin American countries. Recently, almost all democracies that have arisen in Eastern Europe have formed MKs based on Austrian and / German experience.[232]

Indonesia itself also adopted a special and centralized MK system like Austria and Germany. This model was realized with the establishment of the MK as a MK which has the function of the guardian of constitution.

The establishment of the MK is certainly not free from the influence of the existing MK model in Austria and Germany, bearing in mind that these two countries are the initial milestones in the establishment of a MK, and have played a role in the development of the presence of the MK model. This discussion will then review how the practice of constitutional testing in Austria and Germany, so that later can be made comparisons and examples in the practice of constitutional testing in Indonesia, especially in terms of the authority of testing concrete norms related to court cases (constitutional question).

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[231] John E. Ferejohn, *"Constitutional Review in The Global Context",* New York University Journal Legislation and Public Policy, Vol. 6, 2002, 49.
[232] Herbert Hausmaninger, "*Judicial Referral of Constitutional Questions in Austria, Germany, and Russia"*, Tulane European & Civil Law Forum, Vol. 12, winter 1997, 26.

a. Constitutional Review in Austrian Constitutional Court

Constitutional review in Austria began to be developed seriously by Hans Kelsen in the Austrian Constitution of 1920.[233] Hans Kelsen, an Austrian legal theorist, found a model of constitutional adjudication that has become popular over the past few decades. Kelsen expressed the need for an institution with the power to control or regulate laws.[234]

The institution in question is the MK or MK of Austria. The Austrian MK (Bundesverfassungsgerichtshof) is recorded in history as the first MK in the world, and adopted by many other countries.[235] The Austrian MK was formed together with a constitution that has broad authority provisions, including constitutional review to protect constitutional rights.[236]

The Austrian MK consists of the President of the Court, the Vice-President of the Court, and 12 member judges, totaling 14 judges. There are also 7 substitute judges who are ready to fill or replace judges who are unable to attend.[237] Some of the powers of the Austrian MK are:

1) Determine the constitutionality of Federal, State and statutory laws that are located under the Act
2) Test international agreements in general

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[233] Tom Glinsburg, "*The global spread of constitutional review* (Edited by Keith Whittington and Daniel Keleman)", Oxford Handbook of Law and Politics chapter 6, Oxford University Press, 2008, 85.

[234] John E. Ferejohn, *"Constitutional Review in The Global Context",* New York University Journal Legislation and Public Policy, Vol. 6, 2002, 51-52.

[235] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia,* (Jakarta: Sinar Grafika, 2011), 3.

[236] M. Cappeletti, *The judicial process in comparative perspective,* (Oxford: clarendon press, 1989), 85.

[237] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 54-55.

3) Resolve disputes over Presidential Elections and Parliamentary Elections
4) Authority to decide competency disputes that occur between the General Courts and Administrative Courts or Administrative Courts for all other types of justice
5) Deciding the case of Impeachment against high state officials suspected of violating the law.[238]

Austria is a federal state. The Austrian MK examines the constitutionality of federal or state laws both ex officio, when they are prejudiced against a case before the court itself, or at the request of certain organs or persons.[239]

The Austrian MK allows the examination of all norms, both laws, administrative regulations and international treaties, regarding their constitutionality or legality. The Austrian MK holds full powers of judicial review, both within the legality testing framework and in the constitutional testing framework.[240] All lower norms that violate higher norms generally apply until they are canceled by the Austrian MK.[241]

Constitutional review in Austria includes abstract reviews as well as concrete reviews. Abstract review (a posteriori abstract review) in Austria can only be accessed by certain state organs[242]. Concerning the

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[238] Jimly Asshiddiqie dan Ahmad Syahrizal, *Peradilan Konstitusi di Sepuluh Negara,* (Jakarta: Konstitusi Press, 2006), 15.

[239] Herbert Hausmaninger, "*Judicial Referral of Constitutional Questions in Austria, Germany, and Russia",* Tulane European & Civil Law Forum, Vol. 12, winter 1997, 28.

[240] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 57.

[241] Herbert Hausmaninger, "*Judicial Referral of Constitutional Questions in Austria, Germany, and Russia",* Tulane European & Civil Law Forum, Vol. 12, winter 1997, 28.

[242] The parties / organs of the state that can apply for abstract review in Austria are: a) Federal Government (in order to sue State Law, b) State Government (in order to sue Federal Law), c) 1/3 members of the National Council (DPR) or 1/3 members of the Federation Council (senate) in order to sue the Federal Law, d) 1/3 member of the Federal Parliament or 1/3 member of the State Parliament (diet) to sue the State Law. (Look atArief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 17.)

authority of concrete review or constitutional question stated in Articles 139 and 140 of the Austrian Constitution. After the amendment to the Austrian Constitution in 1975, subjectum litis or subjects who were given the right to submit constitutional questions was expanded to include all judicial bodies that carry out the functions of judicial power, even for individuals / individuals who are involved in litigation in the courts to directly submit constitutional questions without through a court judge.

b. Constitutional Review in Germany Constitutional Court

The Bundesverfassungsgericht or the German MK is a judicial institution designed to handle constitutional cases. The establishment of the German MK was outlined in the Basic Law of 1949 *(Grundgesetz).*[243]

The German MK has very broad constitutional authority as the guardian of the constitution in the country (*grundgesetz).*[244] The extent of authority possessed by Germany originates from the constitution and laws governing the German MK. The breadth and flexibility of the German MK's authority because the German Constitution precisely Article 93 paragraph (2), permits the addition of the MK's authority through the law.[245]

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[243] Jimly Asshiddiqie dan Ahmad Syahrizal, *Peradilan Konstitusi di Sepuluh Negara*, (Jakarta: Konstitusi Press, 2006), 36.
[244] Nur Hidayat Sardini dan Gunawan Suswantoro, *60 Tahun Jimly Asshiddiqie Menurut Para Sahabat*, (Jakarta: Yayasan Pustaka Obor Indonesia, 2016), 370.
[245] I Dewa Gede Palguna, *Constitutional Complaint (Pengaduan Konstitutional) Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, (Jakarta: Sinar Grafika, 2013), 6.

Germany, which is a federal state, besides having a MK at the central level, also has a MK in each of the 16 states.[246] The jurisdiction of the Federal Court is to deal with constitutional cases at the federal level using the federal constitution as the basis, while the state MK handles constitutional cases at the regional / state level by using the State Constitution as the basis.

> The constitutional review system or judicial review that applies in Germany includes abstract reviews as well as concrete reviews. Abstract reviews can only be submitted by certain state organs, such as the Federal Government, State Governments, and *Bundestag* members. The constitutional review mechanism that can be accessed by individuals / individuals is a concrete review mechanism, and it must go through a judicial referral of constitutional question. There is also a constitutional complaint mechanism *(verfassungsbescwerde)* that can be accessed directly by individuals / individuals who feel their constitutional rights have been violated by the actions of officials or public bodies. Germany also holds full authority over the testing of laws and regulations, both in the framework of legality reviewing, and in the framework of reviewing constitutionality.[247]

Laws that violate the constitution are null and void *ab initio*. General court judges may not use unconstitutional law as the basis for a case. The general court judge can then delay the process and refer constitutional questions to the Court.[248]

Austria and Germany, as well as Indonesia, are countries with a centralized judicial review model, which puts the constitutional review authority centrally by establishing the MK as an organ specifically

[246] https://id.wikipedia.org/wiki/Jerman Diakses pada Senin, 02 Februari 2020 Pukul 23:24.
[247] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 76-77.
[248] Herbert Hausmaninger, "*Judicial Referral of Constitutional Questions in Austria, Germany, and Russia"*, Tulane European & Civil Law Forum, Vol. 12, winter 1997, 30.

tasked with carrying out constitutional review. However, there are differences regarding the authority of constitutional review in Austria and Germany, with the authority of constitutional review in Indonesia. The following table will be presented to facilitate understanding of constitutional review in Austria, Germany and Indonesia:

TABLE 1.4 CONSTITUTIONAL REVIEW IN AUSTRIA, GERMANY, AND INDONESIA

No.	Austria	Germany	Indonesia
1.	*Bundesverfassungsgerichtshof*[249]	*Bundesverfassungsgericht*[250]	Mahkamah Konstitusi Republik Indonesia (MK RI)
2.	14 Judges and 7 Substitute Judges [251]	16 Federal Court judges [252]	9 Constitutional Judges
3.	Determine the constitutionality of all norms / legislation (Testing of constitutionality and testing of legality)	Testing of legislation is carried out both within the framework of testing legality and constitutionality testing [253]	To the extent of testing the constitutionality of laws against the 1945 Constitution, the legality testing is carried out by MA [254]
4.	Having a MK located in the national capital.	Having a central (federal) and state (regional) MK	Having one MK located in the national capital
5.	Includes abstract review and concrete review	Includes abstract review and concrete review	Only limited to abstract reviews

[249] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia,* (Jakarta: Sinar Grafika, 2011), 3.
[250] Jimly Asshiddiqie dan Ahmad Syahrizal, *Peradilan Konstitusi di Sepuluh Negara,* (Jakarta: Konstitusi Press, 2006), 36.
[251] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 54-55.
[252] https://MKri.id/index.php?page=web.Berita&id=11763 Diakses pada Kamis 24 April 2020 pukul 13:24.
[253] http://equityjusticia.blogspot.com/2014/03/mahkamah-konstitusi-republik-federal.html?m=1 Diakses pada Kamis, 24 April 2020 pukul 13:26.
[254] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang,* (Jakarta: Sinar Grafika, 2010), 4-5.

6.	*Ex officio* constitutionality testing (prejudice of a case in court), and at the request of a particular individual or organ [255]	Can only be submitted by certain organs such as the federal government, state government, and ¼ Bundestag (abstract review), and can be accessed by individuals and through court judges (concrete review)	Abstract reviews can be submitted by individuals, customary law community units, public and private legal entities, state institutions [256]
7.	Testing the new law can be done after the law was officially passed	The legislation being tested is the one that has been officially passed (*posteriori review*)	Test the laws that have been passed, not the RUU.

The explanation from the table above then provides an understanding that there are some differences and similarities between the MK of Austria, Germany, and Indonesia. A striking difference and makes MK of the Republic of Indonesia has disadvantages compared to the Austrian and German MK is the lack of authority to conduct concrete norm review or concrete review. The absence of this authority is certainly influenced by legal politics in making laws and regulations related to the MK of the Republic of Indonesia, then the next discussion will discuss related to legal politics in the mechanism of testing concrete norms, in this case specific to the constitutional question in the MK based on the Risalah Sidang.

[255] Herbert Hausmaninger, "*Judicial Referral of Constitutional Questions in Austria, Germany, and Russia"*, Tulane European & Civil Law Forum, Vol. 12, winter 1997, 28.
[256] Pasal 51 ayat (1) Undang-Undang Dasar Negara Republik Indonesia dan Pasal 10 ayat (1) Undang-Undang No. 24 Tahun 2003 Tentang Mahkamah Konstitusi. Lembaran Negara Republik Indonesia Nomor 4316.

3. The Political Law of the Constitutional Question Mechanism in the Risalah Sidang

The socio-political dynamics that occurred in the 1990s marked by the resignation of President Soeharto from the presidency in 1998, there was a message that the administration of the state was more democratic and based on law, or constitutional democracy. That is what later became MAin legal objective of the amendment to the 1945 Constitution.[257]

The amendment to the 1945 Constitution then became a milestone which had a very significant influence on the politics of national law. One of the directions of national legal politics launched by Indonesia after the agenda for constitutional change is to continue the agenda for the formation and change of law (legal reform).[258]

After the Amendment of the 1945 Constitution, Indonesia adopted the doctrine of "supremacy of the constitution" and abandoned the doctrine of "supremacy of the parliament".[259] Efforts to uphold the supremacy of the constitution can then be realized by the existence of legal means to test the legislation against the constitution (constitution). The said legal means are then realized by the establishment of the MK as the guardian of the constitution in the third amendment to the 1945 Constitution.

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[257] Anna Triningsih, *"Politik Hukum Pengujian Peraturan Perundang-Undangan dalam Penyelenggaraan Negara".* Jurnal Konstitusi, Vol. 13, No. 1, Maret 2016, 128.
[258] Kartono, *"Politik Hukum Judicial Review di Indonesia".* Jurnal Dinamika Hukum Vol. 11 Edisi Khusus Februari 2011, 17.
[259] A. Ahsin Thohari, *"Mahkamah Konstitusi dan Pengokohan Demokrasi Konstitusional di Indonesia".* Jurnal Legislasi Indonesia, Vol. 6 No. 3, September 2009, 97.

MK was formed due to the implementation of constitutionalism. The existence of this understanding has an impact on the no longer the position of the highest state institutions. All state institutions are equal and equal and the relationship is checks and balances.[260]

> The MK, which has the authority to examine laws against the 1945 Constitution, has shifted the paradigm of parliamentary supremacy, to the paradigm of constitutional supremacy. The hereditary principle of legal herarchy associated with this test is that higher regulations are a measure of validity for lower regulations. This has justified reasons because historically the constitution constructed was an agreement of the whole nation when forming a country based on the principle of pacta sunt servanda, the constitution is also the law of origin, the highest law for the nation that is in charge.[261]

The constitutional review authority of the MK is only formulated briefly in Article 24C paragraph (1) of the 1945 Constitution, which reads: "The MK has the authority to adjudicate at the first and last level whose decisions are final to test the law against the Basic Laws... "[262] The formulation of the constitutional testing authority at the MK is still very general and cannot be immediately understood because the article does not provide any description regarding the direction of its implementation.[263]

Jimly Asshiddiqie explained that in the practice of testing legal norms, there were three types of legal norms that could be tested or commonly referred to as norm control mechanisms, namely:

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[260] Jimly Asshiddiqie, *Perkembangan dan Konsolidasi Lembaga Negara Pasca Reformasi*, (Jakarta: Sekretariat Jendral dan Kepaniteraan MK RI, 2006), 26.

[261] Anna Triningsih, *"Politik Hukum Pengujian Peraturan Perundang-Undangan dalam Penyelenggaraan Negara".* Jurnal Konstitusi, Vol. 13, No. 1, Maret 2016, 134.

[262] Pasal 24C ayat (1) Undang-Undang Dasar Negara Republik Indonesia

[263] Mohammad Fajrul Falaakh, *Pertumbuhan dan Model Konstitusi serta Perubahan UUD 1945 oleh Presiden, DPR, Mahkamah Konstitusi*, (Yogyakarta: Gadjah Mada University Press, 2014), 103.

a. Normative decisions that contain and are regulatory (regeling)
b. Normative decisions that contain administrative nature (beschikking)
c. Normative decisions that contain and are judgment (judgment) commonly called a verdict.[264]

The three legal norms above are individual and concrete norms (constitutional question), and some are general and abstract norms.[265] All three of them can be tested for truth through a judicial mechanism (judicial review), both abstract review and concrete review.

The scope of norm testing adopted by the MK was not clearly formulated, whether it would include abstract review or concrete review (constitutional question), or both, even though it was an important element in the application of constitutionality testing authority to the Court.

> The history of the formation of the MK and the formulation of its authority in the process of amending the 1945 Constitution shows that there is almost no discussion of the scope of norm testing. MAgnitude of the weight of changes to the 1945 Constitution carried out in four stages of change (from 1999-2002) may be the cause, so that the formulator of the changes to the 1945 Constitution do not have time to discuss let alone formulate material about the scope of constitutional review when discussing and formulating Article 24C of the 1945 Constitution.[266]

The MK as an institution established or formed to assume the role of Guardian and Protector of the 1945 Constitution as the highest constitution and law,[267] guarantee that the 1945 Constitution is truly incarnated and

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[264] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Sinar Grafika, 2010), 1-2.
[265] Jimly Asshiddiqie, *Hukum Acara Pengujian Undang-Undang*, (Jakarta: Sinar Grafika, 2010), 1-2.
[266] Jimly Asshiddiqie, *Konstitusi Bernegara,* (Malang: Setara Press, 2015), 168
[267] Christo Sumurung Tua Sagala, *"Konseptualisasi Pengaduan Konstitusional (Constitutional Complaint) Sebagai Salah Satu Upaya Perlindungan Hak Konstitusional Warga Negara".* USU Law Journal, Vol.7. No.6, Desember 2019, 142.

adhered to in its implementation, including ensuring that the constitutional rights of citizens are truly respected, protected and fulfilled in the practice of state administration.[268]

Constitutional protection also includes the protection of citizens from the arbitrariness of the application of the law carried out by the court, namely when the court applies laws that are contrary to the constitution, thus harming the constitutional rights of citizens. Concrete review mechanism or what is called constitutional question is one of the efforts to prevent the loss of constitutional rights of citizens due to the application of law in court that is contrary to the constitution.

The discussion of concrete review or constitutional question if viewed from the history of the formation of the MK in the amendment to the 1945 Constitution through the minutes of the trial is almost not found. The proposal regarding the granting of concrete review authority or constitutional question to the MK was raised by Soetjipto from the Group of Faction. The proposal was made at the PAH I BP MPR 41st session on June 8, 2008 which proposed the amendment to the Article in the amendment as follows.

> Then the next Article which might be Article 25 paragraph (1):
> "The MK has the following authorities*:*
> 1) examine the law at the court's request;
> 2) adjudicate the dissolution of political parties;
> 3) adjudicate disputes between local government agencies and between regional governments and the central government;

[268] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 63.

4) adjudicate a conflict of laws".[269]

Pada poin (1) yang menyebutkan bahwa MK harusnya memiliki kewenangan menguji undang-undang atas permintaan pengadilan. Rumusan poin tersebut merupakan usulan terkait adanya mekanisme pengujian norma konkret yang terkait dengan kasus pengadilan atau yang disebut dengan *constitutional question.*

In point (1) which states that the Court should have the authority to examine the law at the request of the court. The formulation of these points is a proposal related to the existence of a mechanism for testing concrete norms related to court cases or what is called constitutional question.

Unfortunately the proposal / idea for the formulation of the article for the amendment to the 1945 Constitution did not get a response and adequate attention from the formulator of the amendment to the 1945 Constitution. The proposal / idea just evaporated without ever being discussed and further formulated.[270]

The fact that there is no article formulation relating to the authority to examine concrete norms (constitutional question) in the constitutionality testing authority of the MK is a weakness. In practice it is very possible that violations of constitutional rights occur in the litigation process in court.

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[269] Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Latar Belakang, Proses, dan Hasil Pembahasan 1999-2002 Buku VI Kekuasaan Kehakiman*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), 134.

[270] Arief Ainul Yaqin, *Constitutional Question*, (Jakarta: Sinar Grafika, 2018), 174.

Even though the MK was only given the authority of a judicial review of the law, in practice many cases were submitted formally to the MK in the form of judicial review,[271] but substantially including constitutional question, on the grounds of constitutional impairment suffered by the applicant because he has been tried and even convicted based on the provisions of the law whose constitutionality is doubtful.

The MK's Constitutional Review authority which is only limited to abstract reviews from the legal side can cause problems because it can be considered to limit the rights of justice seekers. Legal political analysis plays an important role. Through this approach, the law formed will at least consider the overall interests of citizens as justice seekers.[272]

The explanations above indicate the need for a political law that regulates the existence of constitutional testing authority within the scope of concrete norms (constitutional question). The existence of these rules is also expected so that everyone will get a guarantee of legal certainty that is in line with efforts to protect the constitutional rights of citizens as a whole.

[271] Hamdan Zoelva, "*Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara"*. Jurnal Media Hukum, Vol. 19 No.1 Juni 2012, 153.
[272] Kartono, *"Politik Hukum Judicial Review di Indonesia".* Jurnal Dinamika Hukum Vol. 11 Edisi Khusus Februari 2011, 17.

4. Vacum of Norm Mechanism of Constitutional Question in the Authority of Constitutional Review in Indonesian Constitutional Court

Constitution[273] as the highest law has one function namely as an arrangement in protecting human rights which then becomes the constitutional rights of citizens.[274] The idea of establishing a MK which has judicial review authority at least gives a role to strengthen the constitutional rights of citizens.[275]

According to Jimly Asshiddiqie, one of the MK's authorities determined by the 1945 Constitution is the constitutional review of the law with the 1945 Constitution (judicial review or also often called constitutional review) which is basically a practice of constitutionalism.[276]

The establishment of the MK also functions as the guardian of democracy, the protector of citizens' constitutional rights and the protector of human rights.[277] The fulfillment of citizens 'constitutional rights is not enough only through the existing constitutional review mechanism, because violations of citizens' constitutional rights not only occur due to laws that contradict the 1945 Constitution, but can also occur due to a court decision

[273] The constitution is a normative crystallization of the duty of the state in providing protection for human rights and carrying out governance based on the sovereignty of the people accompanied by legal power limits directed at the interests and benefit of the people as a whole. (Look at Mahfud MD, *Demokrasi dan Konstitusi di Indonesia,* (Jakarta: Rineka Cipta, 2003), 142.)
[274] Ni'matul Huda, *Hukum Tata Negara Indonesia* (Yogyakarta: PT Raja Grafindo Persada, 2005), 216.
[275] Kartono, *"Politik Hukum Judicial Review di Indonesia".* Jurnal Dinamika Hukum Vol. 11 Edisi Khusus Februari 2011, 19.
[276] Jimly Asshiddiqie, *Menuju Negara Hukum yang Demokratis*, (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2008), 12.
[277] Mahfud MD, *Demokrasi dan Konstitusi di Indonesia,* (Jakarta: Rineka Cipta, 2003), 142.

/ sentence. on the basis of laws that are against the constitution.[278] These problems can be overcome by the mechanism of constitutional question in the authority of constitutional testing in the MK.

The authority of the constitutional question is not owned by the MK at least until now.[279] The constitutional review authority of the MK was determined limitatively in the 1945 Constitution without mentioning the authority of the constitutional question, so that many of the requests for constitutional questions were declared "unacceptable" (*niet ontvankelijk verklaard*) on the grounds the MK was not authorized to try them.[280]

The authority of the MK to decide on constitutional question cases is still constrained, because the authority has not been explicitly contained in the 1945 Constitution or the MK Law. The constitutional testing authority of the MK is only formulated briefly in Article 24C paragraph (1) of the 1945 Constitution, which reads: "The MK has the authority to adjudicate at the first and last level whose decisions are final to test the law against the Basic Laws... "[281] Article 10 Paragraph (1) of the MK Law also only states that the MK has the authority to adjudicate at the first and last level whose decision is final to test the law against the 1945 Constitution.[282]

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[278] Bachtiar, *Problematika Implementasi Putusan Mahkamah Konstitusi pada Pengujian UU Terhadap UUD,* (Jakarta: Raih Asa Sukses, 2015), 61.
[279] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 013-022/PUU-IV/2006
[280] Hamdan Zoelva, "Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara". Jurnal Media Hukum, Vol. 19 No.1 Juni 2012, 160.
[281] Pasal 24C ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
[282] Pasal 10 ayat (1) Undang-Undang No. 24 Tahun 2003 Tentang Mahkamah Konstitusi. Lembaran Negara Republik Indonesia Nomor 4316.

Seeing the actual condition and development of cases submitted and examined at the MK, as discussed in the previous sub-chapter, many legal experts recommend that the MK also be given the authority to hear constitutional question.[283] Seeing the actual condition and development of cases submitted and examined at the MK, as discussed in the previous sub-chapter, many legal experts recommend that the MK also be given the authority to hear constitutional question.

According Moh. Mahfud MD dkk[284], there are at least three important advantages that can be taken from the application of the constitutional question mechanism if it is to be adopted in Indonesia:

a) Maximizing the respect, protection and fulfillment of citizens' constitutional rights
b) Judges are not forced to apply laws that apply to a case which according to their belief the law is against the constitution (1945 Constitution)
c) For Indonesia which formally or legal tradition does not adhere to the principle of stare dicisis or precedent principle, that right will help form a unified view or understanding among judges outside the constitutional judge regarding the importance of upholding the principle of legal constitutionality not only in the process of its formation but also in its application.

The urgency of applying constitutional questions can also be seen from a comparative perspective. Countries that have MK such as Germany, Material on constitutional testing is clearly and adequately regulated in the constitution.

The constitutional review system or judicial review that applies in Germany includes abstract reviews as well as concrete reviews.

[283] Hamdan Zoelva, *"Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara".* Jurnal Media Hukum, Vol. 19 No.1 Juni 2012, 162.
[284] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 50.

> Abstract reviews can only be submitted by certain state organs, such as the Federal Government, State Governments, and Bundestag members. The constitutional review mechanism that can be accessed by individuals / individuals is a concrete review mechanism, and it must go through a judicial referral of constitutional question. There is also a constitutional complaint mechanism (*verfassungsbescwerde*) that can be accessed directly by individuals/individuals who feel their constitutional rights have been violated by the actions of officials or public bodies. Regarding the testing time, that is, after the laws and regulations were officially passed and enacted (posteriori review). Germany also holds full authority over the testing of laws and regulations, both in the framework of legality testing, and in the framework of testing constitutionality.[285]

Such formulation shows that the German constitution has built its constitutional review system on a strong and clear regulatory foundation. Formulations such as the German constitution are not found in the 1945 Constitution. Article 24C paragraph (1) of the 1945 Constitution does not give any instructions regarding the mechanism or procedure for its implementation. Whereas constitutional review has components and elements that are very diverse which should have been determined in the constitution.

As Hamid Chalid stated,[286] This institutionalization of constitutional question in global constitutionality has been widely accepted and adopted as part of the authority of the MK in the realm of constitutional review. Constitutional review itself consists of two testing mechanisms, namely abstract norms review and concrete norms review (also called constitutional questions).

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[285] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 76-77.
[286] Nur Hidayat Sardini dan Gunawan Suswantoro, *60 Tahun Jimly Asshiddiqie Menurut Para Sahabat,* (Jakarta: Yayasan Pustaka Obor Indonesia, 2016), 362-363.

The omission of the constitutional question mechanism is clearly a loss, both in terms of society and for the judge. Here are the disadvantages:

a) In terms of citizens or the community, it is a disadvantage because it can limit people's access to constitutional protection and justice.
b) From the judge's point of view, with the institutionalization of constitutional question, the judge is not forced to apply legal norms or laws which in his judgment are contrary to the constitution.[287]

The steps of legal reform should not only begin with reforming legal substances, such as improving the quality of legislation and other legal regulations, but must also be followed by improvements to the institution of judicial power as a legal structures.[288] One form of improvement of the institution of judicial power is the idea of adopting a constitutional question mechanism into the constitutional justice system.

> The non-adoption of the constitutional question mechanism in the MK's authority makes the room for constitutionality testing of laws in Indonesia still very narrow, that is, it only reaches the testing of abstract norms and does not yet accommodate the testing of concrete norms. In fact, it is very possible that the issue of constitutionality from the application of a law arises from the litigation process in the general court.[289]

The absence of regulation related to the constitutional question mechanism, (while in reality constitutional testing in the MK there is a request for testing the constitutional question mechanism) raises the existence of a legal vacuum (vacum of norm) in constitutive testing related to the constitutional question mechanism. Since the amendment of the 1945

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[287] Arief Ainul Yaqin, *Constitutional Question*, (Jakarta: Sinar Grafika, 2018), 164.
[288] Jazim Hamidi dan Mustafa Lutfi, *"Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya)".* Jurnal Konstitusi, Vol. 7, No. 1, Februari 2010, 39.
[289] Josua Satria Collins dan Pan Mohamad Faiz, *"Penambahan Kewenangan Constitutional Question di Mahakamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara"*. Jurnal Konstitusi, Vol. 15, No. 4, Desember 2018, 691.

Constitution, affirmation of law enforcement and protection of citizens' constitutional rights is needed clear regulations governing this so that there is no legal vacuum that can lead to conflict and endanger state life.[290]

The existence of a legal vacuum[291] shows that the law cannot yet accommodate and is far behind by the development of society. This legal vacuum is also not in accordance with the essence of the rule of law, given that the establishment of legal norms through laws is carried out to provide legal certainty as an effort to protect human rights. Based on the above thinking, then legal certainty must be upheld, and the state in formulating legislation must always pay attention to aspects of legal certainty and protection of citizens' rights.

> Main task of law is to create order. Legal certainty must be sought, in order to achieve order in society. Certainty here must be interpreted as legal certainty and legal certainty. The interest in seeking justice is represented in terms of preventing restrictions on citizens' rights. Saving citizens' rights in seeking justice is a universal state obligation. This obligation is permanent in the guidelines permitted by the constitution. The constitution itself has the function of guarding democracy (the guardian of democracy by protecting minority rights), protecting the constitutional rights of citizens and protecting the human rights.[292]

Certainty is essentially one of the aims of the law.[293] Legal certainty is a question that can only be answered normatively, not sociology. Normative

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[290] Asmaeny Aziz dan Izlindawati, *Constitutional Complaint dan Constitutional Question dalam Negara Hukum,* (Jakarta: Kencana, 2018), 230.

[291] The legal vacuum itself can be interpreted as an empty condition or the absence of statutory regulations (laws) governing certain rules in society, the legal vacuum is also often referred to as the legal vacuum. (Lihat di https://tiarramon.wordpress.com/2009/12/13/dilema-hukuman-mati/ Diakses pada Jumat, 29 Mei 2020 Pukul 10:36).

[292] Kartono, *"Politik Hukum Judicial Review di Indonesia".* Jurnal Dinamika Hukum Vol. 11 Edisi Khusus Februari 2011, 21.

[293] Awaludin Marwan, *Teori Hukum Kontemporer Suatu Pengantar Posmoderenisme Hukum*, (Yogyakarta: Rangkang Education, 2010), 24.

legal certainty is when certain regulations are made and promulgated because they regulate clearly and logically.[294]

Indonesia as a country that adheres to the supremacy of the constitution has an obligation to guarantee legal certainty against its citizens, because guaranteeing legal certainty is one of the constitutional rights of citizens.[295] The implementation of the Indonesian constitutional system that is in accordance with the principle of legal certainty must of course cover all aspects, including the aspects of judicial power.

MK as one of the executors of judicial power requires definite arrangements related to its authority as a form of legal legitimacy. MK which has a role in upholding the supremacy of the constitution as a form of constitutional democracy adopted by Indonesia must be able to protect the constitutional rights of citizens as a whole.

The existence of a legal vacuum (vacum of norm)[296] in the constitutional question mechanism that should be in the authority of constitutional review in the MK causes guarantee of legal certainty for citizens in accordance with Article 28D paragraph (1) is not implemented. The absence of guarantee of legal certainty causes one of the constitutional

[294] Christine S.T Kansil, dkk, *Kamus Istilah Hukum*, (Jakarta, 2009), 385.

[295] Pasal 28D ayat (1) Undang-undang Dasar Negara Republik Indonesia menyatakan bahwa, "*Setiap orang berhak atas pengakuan, jaminan, perlindungan, dan kepastian hukum yang adil serta perlakuan yang sama dihadapan hukum."*

[296] The legal vacuum can be interpreted as "an empty state or the absence of statutory regulations (the law governing (certain) order in society," so that the legal vacuum in positive law is more accurately described as "legal vacuum or statutory regulation." (Look at Gamal Abdul Nasir, "*Kekosongan Hukum & Percepatan Perkembangan Masyarakat*". Jurnal Hukum Replik, Vol. 5 No. 2, September 2017, 173.)

rights of citizens to be violated and the implementation of constitutional supremacy is not optimal.

There is a need for clear and binding regulations related to constitutional questions on the constitutional review authority of the MK, so that everyone can get guaranteed legal certainty in accordance with the constitutional rights in the 1945 Constitution. The existence of legal certainty so that the implementation of constitutional democracy that upholds supremacy of the constitution can be carried out properly.

5. Application of Constitutional Question as an Extension of the Authority of Constitutional Review in Indonesian Constitutional Court

The discourse on the application of constitutional question in the constitutional review authority of the MK still has pros and cons among academics to date. The pros and cons are because the constitutional question mechanism is not found explicitly in the 1945 Constitution.[297]

Some have argued that including the authority to adjudicate constitutional questions must be done through amendments to the 1945 Constitution, while others argue that this can be done by revising the MK Law, some are of the opinion that it is sufficient to do so through the jurisprudence of the MK decision.

Hamdan Zoelfa[298] said that the MK could only adjudicate petition for constitutional question through explicit regulation in the 1945 Constitution.

[297] Hamdan Zoelva, *"Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara".* Jurnal Media Hukum, Vol. 19 No.1 Juni 2012, 162.
[298] Hamdan Zoelva, *"Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara".* Jurnal Media Hukum, Vol. 19 No.1 Juni 2012, 162.

This opinion has implications that the application of the constitutional question mechanism can only be done through changes to the 1945 Constitution.

The placement of the constitutional question mechanism as an additional authority in the constitution certainly provides a strong constitutional basis for the MK to handle the constitutional question case. The amendment to the 1945 Constitution was then made urgent in order to strengthen the legal legitimacy of the MK's authority to test petition for constitutional question.

The ideal concept to add the authority of the MK to constitutional question through the amendment of the 1945 Constitution is not easy either politically or procedurally. [299] Procedurally, changes to the 1945 Constitution are explained in Article 37 of the 1945 Constitution concerning changes to the Constitution:

a) Proposed amendments to the articles of the Constitution can be scheduled in the MPR session if submitted by at least 1/3 of the members of the MPR.
b) Every proposal for amendments to the articles of the Constitution is submitted in writing and clearly indicated the proposed part to be changed along with the reasons.
c) To amend the articles of the Constitution, the MPR session was attended by at least 2/3 members of the MPR.
d) The decision to amend the articles of the Constitution is made with the approval of at least fifty percent plus one member from all members of the MPR.
e) Specifically, no change regarding the Unitary State of the Republic of Indonesia can be made.[300]

[299] Asmaeny Aziz dan Izlindawati, *Constitutional Complaint dan Constitutional Question dalam Negara Hukum*, (Jakarta: Kencana, 2018), 233.
[300] Pasal 37 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

The existence of procedural rules related to changes in the 1945 Constitution also implies a number of political things that must be taken to implement changes in the 1945 Constitution. The existence of these rules also causes obstacles in implementing changes to the 1945 Constitution, so that the addition of authority in the 1945 Constitution to test the constitutional question when viewed from in terms of political and procedural will be very difficult. These obstacles include:

a) Required equality of interests of MPR members, MPR sessions must be attended by 2/3 MPR members, and the proposed amendment must be approved by at least fifty percent plus one member from all MPR members.
b) It takes a long time, considering that Indonesia uses a multiparty system, so that to find common ground and consistency of opinions among MPR members who come from is very difficult, because of the changing configurations of political interests.[301]

As for the empirical reality of the existence of petition related to constitutional question, it is impossible to leave it alone. Other alternatives are needed besides making changes to the 1945 Constitution.

Alternatives that can be done include expanding the authority of the MK. The expansion of authority itself can be interpreted as the addition of authority caused by the expansion or change of concept boundaries.[302]

[301] Asmaeny Aziz dan Izlindawati, *Constitutional Complaint dan Constitutional Question dalam Negara Hukum,* (Jakarta: Kencana, 2018), 234-235.
[302] M. Guntur Hamzah, *Paradigma Baru Penyelenggaraan Pemerintahan Berdasarkan Undang-Undang Administrasi Pemerintahan (Kaitannya dengan Perkembangan Hukum Acara Peratun), Makalah,* disampaikan pada Seminar Sehari dalam rangka HUT Peradilan Tata Usaha Negara ke-26 dengan tema: Paradigma Baru Penyelenggaraan Pemerintahan Berdasarkan Undang-Undang Administrasi Pemerintahan, kaitannya dengan Perkembangan Hukum Acara Peratun 26 Januari, (Jakarta: Hotel Mercure, 2016), 13.

This expansion of authority can be done through changes to the MK Law. Although the form is in the form of questions, the construction of thought and the substance contained in the constitutional question is the examination of the law against the 1945 Constitution, so that this mechanism can be protected by the authority of constitutional review and does not violate the authority stipulated in the 1945 Constitution.

The extension of the MK's authority in testing the law against the 1945 Constitution can be done by adding provisions to the MK Law regarding the legal standing of the general court judge to ask questions to the MK, about the constitutionality of the law which will be used in deciding the case being tried if doubt arises. Article 51 Paragraph (1) of the MK Law states that:

> (1)"Petitioners are parties who consider their constitutional rights and / or authorities impaired by the coming into effect of the law, namely:
> a. individual Indonesian citizens;
> b. customary law community unit as long as it is still alive and in accordance with community development and the principles of the Unitary State of the Republic of Indonesia as stipulated in the law;
> c. public or private legal entity; or
> d. state institutions."[303]
>
> There are two things that can be concluded from these provisions. First, the legislators seem to assume that violations of constitutional rights only occur because of legal norms. Second, those who have a legal standing (persona standi in judicio) to submit applications for testing are only those whose constitutional rights are directly impaired by the enactment of the law..[304]

The explanation above shows that there is no legal standing for general court judges who wish to submit constitutional question petitions. There is

[303] Pasal 51 ayat (1) Undang-Undang No. 24 Tahun 2003 Tentang Mahkamah Konstitusi. Lembaran Negara Republik Indonesia Nomor 4316.
[304] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 56.

no regulation related to this because the judge who is the petitioner in the case of constitutional question is in essence not harmed by the enactment of the law..[305]

> The limitation of legal standing in the mechanism of constitutional review can have implications for the optimization of the MK's functions. The legal standing limitation that can submit an application as explained above certainly raises the possibility for many laws that conflict with the constitutional rights of citizens as individuals, both to civil and political rights relating to freedom and democratization.[306]

These legal standing restrictions cause judges to be forced to apply the norms of the law that are not in accordance with the constitution. John Marshall who said that judges should not be forced to apply laws that are against the constitution, because the judge had sworn that he would enforce the constitution.[307]

The legal standing of the applicant (legal standing) in constitutional question can also be regulated by establishing MA as the applicant who can submit constitutional questions to the MK. Judges of the general court must first submit a request for constitutional question to MA, which will then be collected and selected by MA, and forwarded to the MK.

> In the constitutional justice system in France, constitutional questions that can be submitted to the MK are determined by the highest level, both from the general court and administrative court. The climax of general justice in France is the *Cour de Cassation* as the French MA for civil and criminal justice, whereas, the peak of administrative justice is the *Conseil d'atat* as the French MA for administrative justice. When lower judges want to submit constitutional questions, they must first

[305] The question of the constitution arises when the general court judge is doubtful about the constitutionality of the law which forms the basis of the law to try cases in court. (Look at Asmaeny Aziz dan Izlindawati, *Constitutional Complaint dan Constitutional Question dalam Negara Hukum,* (Jakarta: Kencana, 2018), 238.)
[306] Hamdan Zoelva, *Mengawal Konstitusionalisme*, (Jakarta: Konstitusi Press, 2016), 262.
[307] Erwin Chemerinsky, *Constitutional law an policies,* (New york: Aspen law & Bussiness, 2006), 37-44.

submit to the *Cour de Cassation* or the *Conseil D'Etat*. Meanwhile, the constitutional justice system in Russia, the request for constitutional question can only be accepted by the Russian MK if the litigants doubt the constitutionality of the law being applied to their case..[308]

The constitutional question mechanism can also be carried out by changing the MK Law, for example by adding provisions in the eighth section ("Testing of the Law against the Basic Law"), that court judges from the General Courts, Religious Courts, Military Courts, or Administrative Courts The state, if in deciding the case being tried, is doubtful about the constitutionality of the law applicable to the case, it can raise questions to the MK about the constitutionality of the relevant law before the decision on the case is handed down..[309]

If the MK states that the law is constitutional, the examination of the case will proceed. Conversely, if the MK declares that the relevant law is unconstitutional, the case is declared null and void.[310]

The explanations above provide the conclusion that in terms of the place for regulating authority to break the constitutional question, there are two models that can be applied, namely:

a) Puts the authority to examine constitutional questions in the constitution. The countries that give authority referred to in their constitutions include Angola, Austria, Bosnia, South Korea, Russia, Malta and Spain. From the provisions of the 7 state constitutions, there are also those that determine constitutional question as an authority separate from judicial review.
b) Placing the authority for constitutional question testing in the MK Law which is a derivation of the 1945 Constitution. Countries that determine the constitutional question mechanism in the MK Law and are a derivation of the authority to break the constitutionality of the rule of law granted by the constitution. These countries

[308] Jimly Asshiddiqie dan Ahmad Syahrizal, *Peradilan Konstitusi di Sepuluh Negara*, (Jakarta: Konstitusi Press, 2006), 226-227.
[309] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional)*, (Malang: UB Press, 2010), 47.
[310] I Dewa Gede Palguna, *Constitutional Complaint (Pengaduan Konstitutional) Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, (Jakarta: Sinar Grafika, 2013), 14-15.

include, Belarus, Croatia, Georgia, Germany, Latvia, Lithuania and Slovenia.[311]

The explanations above also conclude that the submission of constitutional question can be submitted directly by the court at all levels that are examining a case or determined can only be done through MA which will then be forwarded to the Court.[312] The submission policy depends on each country. There are at least two types of constitutional question submission mechanism based on the level of the court that submitted:

a) Can be submitted directly by courts at all levels that are examining a case, namely Angola, Austria, Germany, South Korea, Latvia, Lithuania, Malta, Slovenia and Spain.
b) It was determined that constitutional question testing was conducted through MA, namely Belarus, Croatia, Georgia, and Russia.[313]

The expansion of the MK's constitutional testing authority over the constitutional question mechanism can also be done through the jurisprudence of the MK's decisions, before it is too far adopted and regulated in the constitution and the law. Although the form of a decision, but its validity remains in general..

The MK's decision on constitutional question will be disseminated to all ordinary judges. The decision will be used as an anchor or handle in completing other concrete cases that are being handled by the judges.[314]

The adoption and application of the constitutional question through both jurisprudence and individuals and/legal entities in the MK is one

[311] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional)*, (Malang: UB Press, 2010), 68-69.
[312] Hamdan Zoelva, "Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara". Jurnal Media Hukum, Vol. 19 No.1 Juni 2012, 159.
[313] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional)*, (Malang: UB Press, 2010), 69.
[314] Firmansyah Arifin dkk, *Hukum dan Kuasa Konstitusi*, (Jakarta: Konsorsium Reformasi Hukum Nasional, 2004), 100.

> of the tangible proofs that it is time for the face of law enforcement in this country to stand up. The implementation of the five precepts of the values of Pancasila which is the basis of the state is then not only a symbol but can be incarnated in every line of national life.[315]

Referring to the results of a comparative study of several countries that have applied constitutional questions, the constitutional question procedure which will later be adopted in the constitutional testing authority of the MK in general can be constructed through the following mechanisms:

a) An application for constitutional question is submitted by a general court judge to the Court when in hearing a concrete case the judge finds the alleged unconstitutionality of a norm of law which he will apply in the concrete case in question.
b) The request was submitted by the judge, either on his own initiative or the initiative of the parties
c) To be able to accept an application, the judge submitting the a quo petition must be able to explain and convince at least two things to the Court:
    1) The decision really depends on the norm of the law petitioned for review
    2) Clarity regarding the provisions of the constitution that are violated by the norm of the law petitioned for review
d) Since the constitutional question is submitted to the Court, the trial of a concrete case must be stopped temporarily by the court concerned until the Court's decision
e) If the Court decides that the law tested by it is not contrary to the constitution, the court can apply the intended law
f) If the Court decides that the law being tested is contrary to the constitution, the court cannot apply the norms of the said law
g) Although the petition for constitutional question is derived from a concrete case that is currently ongoing in court, the MK's decision in this case remains binding (*erga omnes*).[316]

Another crucial issue that also needs to be considered in institutionalizing the constitutional question mechanism in the MK is the issue of the consequences of the procedure for adjourning trials on concrete

[315] Jazim Hamidi dan Mustafa Lutfi, *"Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya)".* Jurnal Konstitusi, Vol. 7, No. 1, Februari 2010, 45.
[316] Arief Ainul Yaqin, *Constitutional Question,* (Jakarta: Sinar Grafika, 2018), 210

cases whose legal basis is being tested by the MK. The existence of this constitutional question will result in the postponement of the entire litigation process in the general court (pending review by ordinary court) until the publication of the final and binding decision of the MK.

> The existence of postponement of the trial is very contrary to the principle of speedy justice in the general court environment. The legal process must of course be made as quickly as possible, because every justice seeker needs legal certainty and also justice. Slowing down or delaying the legal process will in fact deny justice itself, as the law adage states "justice delayed, justice denied".[317]

The existence of the adjournment procedure is also not in line with the rules and the fact that the cases in the court have a time limit for settlement, both specifically stipulated by law or determined in general through SEMA No. 2 of 2014.[318] This problem can be overcome with two alternatives that can be applied:

a) During the postponement of the trial due to the submission of the Constitutional Question to the Court, the provisions regarding the time limit for the settlement of the case in the court must not be taken into account, but rather be suspended (suspend), until the completion of the testing process at the Court. The time or days passed in court must not be taken into account and must be exempted from the limitation provisions of the case settlement time in court. This can be confirmed in the MK Law.
b) Establish the time limit for Constitutional Question testing in the MK which is adjusted to the time limit for the completion of the concrete case in court.[319]

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[317] Josua Satria Collins dan Pan Mohamad Faiz, *"Penambahan Kewenangan Constitutional Question di Mahakamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara"*. Jurnal Konstitusi, Vol. 15, No. 4, Desember 2018, 702.

[318] SEMA Number 2 of 2014 can be one of the references regarding setting the case settlement deadline. Based on these rules, the Supreme Court must decide at the latest 3 (three) months after the case is received by the Chairperson of the Cassation / Reconsideration Panel. Meanwhile, the settlement of the appeal and first instance cases must be done no later than 3 months and 5 months, respectively.

[319] Arief Ainul Yaqin, *Constitutional Question*, (Jakarta: Sinar Grafika, 2018), 216.

> Regarding the time of settlement of constitutional question cases, there are variations in the settlement of constitutional questions in various countries. For example in Luxembourg, constitutional question cases can be resolved in a matter of months. Meanwhile, in Austria and Belgium it can take up to one year. The MK in Italy decided on constitutional question cases within one to two years. In fact, the settlement of constitutional question cases in Germany and Spain took five to eight years.[320]

Regarding the time for completing the constitutional question request, it must consider the time limit for the case handling process in the MK and the general court. This deadline for settlement must also consider the condition of the area, transportation access and communication in Indonesia.

> Submission of constitutional question to the MK, both by the litigant and the general court judge, should be processed through the court clerk. The Registrar will then proceed to the Chief Justice to process and inventory the list of constitutional questions raised by the judges. The Chairman of the Court then submitted a constitutional question to the MK in the form of a submission like the existing constitutional review. The MK, after being ready with its decision based on the results of the Consultative Consultative Meeting (RPH), the Registrar's Office then set the time of the hearing so that the reading of the decision was not long after the RPH. After being read out in a hearing that is open to the public, the results of the decision will be notified to the court clerk who handles the petitioner's case for later use in deciding the concrete case. During the submission process until the MK's decision is issued, cases currently being handled by judges in the general court will be temporarily stopped.[321]

The existence of arrangements related to the processing of constitutional question requests through the court clerk is done to

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[320] Josua Satria Collins dan Pan Mohamad Faiz, *"Penambahan Kewenangan Constitutional Question di Mahakamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara"*. Jurnal Konstitusi, Vol. 15, No. 4, Desember 2018, 702.

[321] Josua Satria Collins dan Pan Mohamad Faiz, *"Penambahan Kewenangan Constitutional Question di Mahakamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara"*. Jurnal Konstitusi, Vol. 15, No. 4, Desember 2018, 702-703.

facilitate the technical submission of constitutional questions. Arrangements like this are also expected to be able to shorten the time for handling concrete cases in the court or request for constitutional question in the MK.

> To complete the basis of the constitutitonal question authority, the MK can also stipulate MK Regulations (PMK) related to the implementation of proceedings to handle constitutional question cases. MA also needs to establish a MA Regulation (PERMA) to regulate the constitutional question mechanism in the general court environment.[322]

MAximum institutionalization of constitutional question mechanisms must also be supported by institutional structures, human resources capable of accommodating the addition of constitutional question authority. MAximum planning is carried out in order to get the fairest decisions that guarantee the fulfillment of the constitutional rights of citizens.

The explanations above then made the writer agree with several ideas related to the institutionalization of constitutional question put forward by experts. According to the author, the constitutional question mechanism should be an extension of the constitutional review authority, not an additional authority of the MK.

This expansion of authority can be done by changing the MK Law, without making changes to the 1945 Constitution. This is on the basis that the constitutional question mechanism does not violate the 1945

[322] Josua Satria Collins dan Pan Mohamad Faiz, *"Penambahan Kewenangan Constitutional Question di Mahakamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara"*. Jurnal Konstitusi, Vol. 15, No. 4, Desember 2018, 701.

Constitution, but its implementation is a practice of constitutional review, so that it can be accommodated with the authority of the MK in testing the laws against the Constitution contained in Article 24C paragraph (1) of the 1945 Constitution.

Changes to the MK Law can then be made by adding legal standing provisions in Article 51 paragraph (1) of the MK Law. The addition of the legal standing is for the general court judge who doubts the constitutionality of the norms that form the basis of the concrete case law being handled, can submit a constitutional question request to the Court. Submission of constitutional question requests can be made by all judges of the general court without having to go through MA.

The existence of a constitutional question mechanism will cause a postponement of the trial during the completion of the constitutional question petition in the MK. Regarding the time of completion of the petition for constitutional question and case in court must also be considered, so that it is in accordance with the principle of speedy trial.

Some technical applications for constitutional question submission can then be explained further with the existence of PMK and PERMA, so there are regulations that clearly regulate, in order to realize legal certainty in every society seeking justice and for citizens in general.

C. The Implementation of Constitutional Question Based on The Perspective of The Prophetic Law Paradigm

Indonesia is a country with a Muslim majority population.[323] Indonesia as a Muslim country, in the decade of the seventies and eighties awareness of the crisis in the field of modern science that was considered free of values and free of other interests.[324]

The phenomenon of scientific crisis was then responded with the idea of the need for an ethical dimension in the development of science. The one paradigm that has an ethical dimension in it is the prophetic paradigm. Related to jurisprudence, this paradigm is also often called the prophetic legal paradigm.

The discussion in this section will then try to elaborate values in the prophetic legal paradigm as an alternative perspective that can be used to review how the need to implement the constitutional question mechanism in the constitutional testing authority of the MK, so that later the MK can carry out its functions optimally as the guardian of constitution .

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[323] According to the results of the 2010 Indonesian Population Census, 87.18% of the 237,641,326 Indonesians were Muslims (the archipelago is the country with the most Muslim population in the world), 6.96% Christian, 2.9% Catholic, 1.69% Hindu, 0.72% Buddhism, 0.05% Confucianism, 0.13% other religions, and 0.38% missed or not asked. (Look at https://id.wikipedia.org/wiki/Agama_di_Indonesia, Diakses pada Sabtu, 14 Maret 2020 pukul 15:07).

[324] The good or bad of science does not depend on the product of science, but rather depends on the use of knowledge by humans, whether used for good or bad. (Look at M. Syamsudin, *Ilmu Hukum Profetik : Gagasan awal landasan Kefilsafatan Dan Kemungkinan pengembangannya Di Era Postmodern*, (Yogyakarta. Pusat Studi Hukum UII, 2013), 6).

1. The Reality of Application of Constitutional Question in the Petition for Constitutional Review in Indonesian Constitutional Court

The MK has conducted several applications for judicial review which have doubtful constitutionality and are related to concrete cases which were tried in general courts. This petition was filed on the pretext that their constitutional rights had been impaired by a court ruling handed down to them. The petition has been tried and convicted based on a law that is doubtful of its constitutionality.

> Some cases of petition for testing the law include testing the Criminal Code in Case Number 013-022 / PUU-1V / 2006 filed by Eggi Sudjana and Pandopatan Lubis, Case Number 6 / PUU-V / 2007 filed by Panji Utomo, Case Number 14 / PUU-VI / 2008 submitted by Risang Bima Wijaya and Bersihar Lubis, and Case Number 7 / PUU-VII / 2009 submitted by Rizal Ramli. All applications in these cases have been tried and convicted, and have even served a sentence before submitting an application to the Court.[325]

The first application to be discussed is the application in Case Number 013-022 / PUU-IV / 2006. This case was filed by Eddy Sudjana and Pandapotan Lubis.

> Eddy Sudjana as Petitioner I stated that his constitutional rights had been impaired by the enactment of Article 134 and Article 136 bis of the Criminal Code (KUHP) when he was now tried at the Central Jakarta District Court, based on the indictment of deliberately insulting the President. Eddy stated that Article 134 and Article 136 bis of the Criminal Code were seen to be in conflict with Article 28F of the 1945 Constitution. Petitioner II namely Pandapotan Lubis requested a review of Article 134, Article 136 bis and Article 137 of the Criminal Code which was seen by the Petitioner to be in conflict with Article 27 paragraph (1), Article 28, Article 28E Paragraph (2) and Paragraph (3), Article 28J Paragraph (1) and Paragraph (2) of the 1945 Constitution. In its decision, the MK stated that the Court granted all petitioners'

[325] Jazim Hamidi dan Mustafa Lutfi, *"Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya)"*. Jurnal Konstitusi, Vol. 7, No. 1, Februari 2010, 42.

requests and stated that Article 134, Article 136 bis, and Article 137 The Criminal Law Code contradicts the 1945 Constitution, and states that Article 134, Article 136 bis, and Article 137 of the Criminal Code do not have binding legal force. Concerning constitutional question was also discussed in dissenting opinions by Constitutional Justice I Dewa Gede Palguna and Soedarsono. The two Constitutional Justices stated that in this case it was not a matter of constitutionality of norms but rather a matter of application of norms, so to overcome this problem the MK in other countries, in addition to being given the authority to adjudicate cases of judicial review, also given the authority to adjudicate cases on constitutional questions and contitutional complaints.[326]

The second decision to be discussed is the decision in Case Number 6 / PUU-V / 2007. Application for testing of this law was submitted by Panji Utomo. The petition in this case examines Article 154, Article 155, Article 160, Article 161, Article 207, Article 208, and Article 107 of the Criminal Code which contradicts Article 28, Article 28D Paragraph (1), and Article 28E Paragraph (2) and Paragraph (3) 1945 Constitution.

Panji Utomo, is an Indonesian citizen who has been tried and sentenced to 3 months imprisonment based on the decision of the Banda Aceh District Court No. 232 / Pid.B / 2006 / PNBNA dated December 18, 2006 because he was considered to have committed a crime as regulated in Articles 154 and 155 Criminal Code. The decision of the petition states that the Petitioner's petition was granted in part, in this case Article 154 and Article 155 of the Indonesian Criminal Code are declared contrary to the 1945 Constitution and do not have binding legal force.[327]

The next decision is the decision on Case Number 14 / PUU-VI / 2008. This request was submitted by Risang Bima Wijaya and Bersihar Lubis.

This petition examines the constitutionality of Article 310 paragraph (1), Article 310 paragraph (2), Article 311 paragraph (1) of the Criminal Code for which all of the aforementioned Articles are argued contrary to Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F

[326] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 013-022/PUU-IV/2006
[327] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 6/PUU-V/2007

> of the 1945 Constitution, whereas, Article 207 and Article 316 of the Criminal Code are argued to be in conflict with Article 27 paragraph (1), Article 28E paragraph (2), Article 28E paragraph (3), and Article 28F of the 1945 Constitution. MK in its legal considerations also states that the case This is related to constitutional complaint, which is questioned by the Petitioners rather constitutional complaint rather than judicial review or constitutional review, while the MK only has constitutional review authority, and constitutional complaint authority is not mentioned in the 1945 Constitution, so that in its ruling, the Court rejects the petition of the petitioners.[328]

The final decision to be discussed is the decision in Case Number 7 / PUU-VII / 2009. The application for testing this law was submitted by Rizal Ramli. This petition is also included in the list of cases which are related to the litigation process in the court in his case.

This petition wishes to test the constitutionality of Article 160 of the Criminal Code. The article is considered contrary to Article 28, Article 28C paragraph (2), Article 28E paragraph (2) and paragraph (3), and Article 28G paragraph (1) of the 1945 Constitution.[329]

The court then rejected his petition, but the existence of this petition indicated that many articles which became the legal basis in a case in court were still questioned by their constitutionality. The existence of constitutional question itself is one of the efforts to overcome this.

> The constitutional question mechanism itself was mentioned in case Number 14 / PUU-VI / 2008, which submitted an examination of Article 310 paragraph (1) and paragraph (2), Article 311 paragraph (1), Article 316, and Article 207. The Court was of the opinion that what is experienced by the applicant is not a matter of norms, but rather the application of law which can actually be addressed in the mechanism

[328] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 14/PUU-VI/2008
[329] Putusan Mahkamah Konstitusi Republik Indonesia Nomor 7/PUU-VII/2009

of constitutional question or constitutional complaint that is currently not owned by the MK.[330]

Another example of the application of constitutional question is when a citizen can question the MK regarding Article 28E paragraphs (1) and (2) which states that:

> "(1) Another example of the application of constitutional question is when a person has the right to embrace religion and worship according to his religion, choose education and teaching, choose work, choose citizenship, choose a place to live in the territory of the country and leave it, and the right to return. "
> "(2) Everyone has the right to freedom to believe in beliefs, express thoughts and attitudes, in accordance with his conscience. Citizens can question the MK regarding Article 28E paragraphs (1) and (2) which state that"[331]

The article collides with the value and scope of meaning with Article 29 paragraph (2) of the 1945 Constitution. Article 29 paragraph (2) states that:

"The state guarantees the independence of each population to embrace their respective religions and to worship according to their religion and belief.."[332]

> Conflict of values between the Articles in the 1945 Constitution can be questioned because the effect can cause misinterpretation of each individual community. That every individual only believes in the existence of God, but they can also deny the formal Shari'a / rituals of each religion that are not carried out properly, or vice versa each citizen is possible within one period of embracing two religions at once for certain interests (committing apostasy to change religion as they wish). This differs greatly from the state's obligation to protect the implementation of religious life in accordance with its beliefs and

[330] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional)*, (Malang: UB Press, 2010), 70.
[331] Pasal 28E ayat (1) dan (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
[332] Pasal 29 ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945

beliefs (Article 29 of the 1945 Constitution).[333]

Other constitutional question issues as stipulated in Article 18 paragraph (4)[334] with Article 22E of the 1945 Constitution which debatebel. Provisions regarding general elections are regulated further in Article 22E paragraph (1-6) of the 1945 Constitution[335], while the provisions regarding the election of regional heads are regulated in Article 18 paragraph 4 of the 1945 Constitution.

> Regulations on regional head elections (regimes) of general elections are only regulated in Article 1 point 4 of Law No. 22 of 2007. Regarding the authority of the MK in deciding regional head election disputes which are only regulated through Law No. 32 of 2004 in conjunction with Law No. 12 of 2008 concerning Regional Government, especially Article 236C, also needs to be questioned about its constitutionality. The whole sample is a case study of the constitutional question, where each individual community or legal entity can submit its constitutional questions to the MK as a competent institution to interpret this matter..[336]
>
> Another reality of the application of constitusioanal questions that have actually been carried out, for example, is someone who was convicted through a decision of the PK, but the decision was wrong in the application of the law and if the convict has novum (new evidence), the case can be questioned or re-submitted through the constitusioanal question and constitusioanal complaint; playback of records or wiretapping of the KPK in the trial of the MK, the case of Amrozi et al. examined the law governing the procedure for capital

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[333] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 64.

[334] Article 18 paragraph (4) of the 1945 Constitution states that: "Governors, Regents and Mayors respectively as provincial, regency and city regional government heads are democratically elected."

[335] Article 22E of the 1945 Constitution consists of 6 paragraphs, along with its editors: (2) General elections are held to elect members of the People's Legislative Assembly, the Regional Representative Council, the President and vice-president and the Regional People's Representative Council. (3) Participants in the general election to elect members of the People's Legislative Assembly and members of the Regional People's Legislative Assembly are political parties. (4) Participants in the general election to elect members of the Regional Representative Council are individuals. (5) General elections are held by a national, permanent and independent election commission. (6) Further provisions regarding general elections are regulated by law."

[336] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 65.

> punishment which was considered constitutional, the judge who tried the case first asked the Court before proceeding with his case investigation..[337]

The requests related to constitutional question as mentioned above show that many citizens have been impaired by their constitutional rights due to the application of norms that are contrary to the constitution. The applicants have even been tried and sentenced based on unconstitutional laws.

The absence of a constitutional question mechanism within the MK's authority, makes the petitioners submit their petition through the judicial review of the constitution, even though when viewed from the substance, the requests are constitutional question requests. This can be one of the reasons that is strong enough to expand the authority of constitutional question in the MK when viewed from the practical side

2. God, Humanity, and Justice Principles in the Perspective of Prophetic Paradigms

The word prophetic, which means prophethood, places revelation *(al-Qur'an*) and hadith (*as-sunnah*) as MAin source in law. Al-Qur'an and as-Sunnah then become the foundation for the whole building of prophetic law.[338]

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[337] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 65.

[338] Prophetic law is a science of law whose paradigms, basic assumptions, principles, teachings or theories, methodology, structure of norms, are built on the basis of the epistemology of Islamic teachings sourced from the Qur'an and hadith. (Look at M. Syamsudin, *Ilmu Hukum Profetik : Gagasan awal landasan Kefilsafatan Dan Kemungkinan pengembangannya Di Era Postmodern*, (Yogyakarta. Pusat Studi Hukum UII, 2013), 101.)

The prophetic paradigm has 3 stages or processes, namely the transcendental process (transformed into *tukminuna billah*), the process of humanization (transformed into *amar ma'ruf*), and the process of liberalization (transformed into *nahi mungkar*). This is in accordance with the word of God in Surat al-Imran (3): 110[339] which means:

كُنْتُمْ خَيْرَ اُمَّةٍ اُخْرِجَتْ لِلنَّاسِ تَأْمُرُوْنَ بِالْمَعْرُوْفِ وَتَنْهَوْنَ عَنِ الْمُنْكَرِ وَتُؤْمِنُوْنَ بِاللّٰهِ ۗ وَلَوْ اٰمَنَ اَهْلُ الْكِتٰبِ لَكَانَ خَيْرًا لَّهُمْ ۗ مِنْهُمُ الْمُؤْمِنُوْنَ وَاَكْثَرُهُمُ الْفٰسِقُوْنَ - ١١٠

Meaning: "You are the best people who are born for humans, command the forgiving, and prevent from evil, and believe in Allah. If the People of the Book of faith, surely it is better for them, among them there are believers, and most of them are people who are wicked."

Transcendental thinking can be seen in the values of religion, spiritual, ethics, and morality that are full of dynamics and struggles born in a long span of history.[340] The next process, which is Humanization, is a constructive interpretation of the lafadl "*amar ma'ruf*", the original meaning of which is advocating or upholding virtue.[341] The final process is Liberation which is a constructive interpretation of the lafadl *"nahi mungkar"*, whose original meaning means to prohibit or oppose any destructive crime.

These three processes, both transcendental, humanization, and liberalization in the context of Indonesianism are in accordance with the national philosophy contained in the five pillars of Pancasila. Transcendental centered on spiritual values can be elaborated in the first

[339] Al-Qur'an Al-Karim
[340] Absori, *Pemikiran Hukum Transendental dalam Konteks Pengembangan Ilmu Hukum Indonesia,* (Yogyakarta: Genta Publishing, 2017), 15.
[341] Kuntowijoyo, *Muslim Tanpa Masjid : Esai-Esai Agama, Budaya dan Politik dalam Bingkai Strukturalisme Transedental,* (Bandung: Mizan, 2001), 364-365

principle of "Godhead". Humanization which means humanity can then be matched with the second principle of "Fair and Civilized Humanity", while liberation will then be linked to the principle of justice so that humans are free from misery and receive guaranteed legal certainty, this is in accordance with the fifth precepts "Social Justice for All People Indonesia". The author will then describe how prophetic law based on the Qur'an as a source of law views the values of God, Humanity, and Justice in this discussion.

a. God (transcendental)

God if interpreted in language means "the nature of the condition of God", "everything related to God", "things related to God", "knowledge about the state of God and religion", "the basis of belief in God Almighty".[342]

Godhead in the prophetic legal paradigm is included in the transcendental process. This transcendental process is a process that emphasizes more on efforts to internalize values and build theoretical constructs that originate from *wahyu Ilahi*.[343] *Wahyu Ilahi* what is meant here is the *al-Qur'an* as a source of law.

The dimension of transcendence assumes that nature and human life are realities that do not arise by themselves, but rather have a creator. Kuntowijoyo tries to put back the objective reality that is researched or

[342] https://kbbi.kemdikbud.go.id/entri/ketuhanan Diakses pada Minggu, 15 Maret 2020 pukul 11:08.
[343] Kelik Wardiono. *Paradigma profetik : Pembaruan basis epitemologis ilmu hukum*, (Yogyakarta: Genta Publishing, 2014), 41.

studied as the creation of Allah, the Creator, transcendence for Muslims is defined as *tukminuna billah* or have faith in Allah SWT.[344]

The concept of transcendence, if related to the context to Indonesia, is in accordance with the first principle of the Pancasila, "Godhead". This first precept is in harmony with the word of Allah SWT in Q.S. al-Ikhlas verse 1:

قُلْ هُوَ اللهُ اَحَدٌ - ١

Which means, "Say: He is Allah, the One".[345]

Surah al-Ikhlas verse 1 contains teachings about monotheism. This letter is also called Surah al-Asas, *Qul Huwallahu Ahad, At Tauhid, Al Iman*, and many other names.[346]

> Imam Ibn Kathir *rahimahullah* said, "Namely: He is the First and the One, there is no match and helper, there is no equal and nothing resembles Him, and there is nothing comparable (with Him). This word is not used to refer to anyone other than *Allah Subhanahu wa Ta'ala*, because He is Perfect in all His attributes and deeds. "[347]

> Asbabun nuzul from this letter as described by Abusy Shaykh who narrated in the book of *al-'Azhamah* from Aban from Anas who said, "Once the Khaibar Jews came to the Messenger of Allah and said, 'O Abal Qasim, Allah has created angels from the light of His curtain, Adam from clay who was given form, Satan from the blaze, sky from clouds, and earth from the froth of water. Therefore, tell us what is the nature of your Lord? 'The Prophet did not answer the question until Gabriel arrived with this letter."[348]

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[344] Kutowijoyo, *Islam sebagai Ilmu: Epistemologi, Metodologi dan Etika*, (Yogyakarta: Tiara Wacana, 2006), 107.
[345] Al-Qur'an Al-Karim
[346]https://rumaysho.com/907-memahami-surat-al-ikhlas-sepertiga-al-quran.html Diakses pada Minggu, 15 Maret 2020 pukul 10:47
[347] https://almanhaj.or.id/5402-tafsir-surat-alikhlas.html Diakses pada Minggu, 15 Maret 2020 pukul 10:48
[348] Jalaluddin as-Suyuthi, *Asbabun Nuzul: Sebab Turunnya Ayat Al-Qur'an*, (Jakarta: Gema Insani, 2008), 649-650.

This first precept also means that Indonesian citizens are given the freedom to choose a belief from several beliefs recognized by the State. Freedom of belief is a very crucial thing in the context of the application of citizens' constitutional rights.

The 1945 Constitution also guarantees religious freedom for each of its citizens. The guarantee of religious freedom is contained in Article 28E paragraph (1), Article 28E paragraph (2), and Article 28I paragraph (1) of the 1945 Constitution.[349]

Freedom of religion in the 1945 Constitution is in accordance with Q.S. al-Kafirun verse 6:

لَكُمْ دِيْنُكُمْ وَلِيَ دِيْنِ ٦ -

Meaning: "*For you your religion, and for me, my religion".*[350]

Religious freedom in Islam is also guaranteed by Allah with certain consequences. These provisions are contained in Q.S. al-Kahfi verse 29:

وَقُلِ الْحَقُّ مِنْ رَّبِّكُمْ فَمَنْ شَاۤءَ فَلْيُؤْمِنْ وَّمَنْ شَاۤءَ فَلْيَكْفُرْ ۚاِنَّآ اَعْتَدْنَا لِلظّٰلِمِيْنَ نَارًا ۙاَحَاطَ بِهِمْ سُرَادِقُهَا ۗوَاِنْ يَّسْتَغِيْثُوْا يُغَاثُوْا بِمَاۤءٍ كَالْمُهْلِ يَشْوِى الْوُجُوْهَ ۗبِئْسَ الشَّرَابُ ۗوَسَاۤءَتْ مُرْتَفَقًا - ٢٩

Meaning: "And say: "The truth comes from your Lord; so whoever wants (to believe) he should believe, and whoever wants (unbeliever) let him disbelieve". Indeed, We have provided for the wrongdoers of hell, whose turmoil surrounds them. And if they ask to drink, they will surely be given water to drink like boiling iron that scorches their faces. That is the worst drink and the worst resting place."[351]

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[349] Article 28E paragraph (1) of the 1945 Constitution of the Republic of Indonesia: "Everyone is free to embrace religion and worship according to his religion", Article 28E paragraph (2) is contained in the phrase: "Everyone has the right to freedom of belief", and to Article 28I paragraph (1) states: "The right to religion is a human right that cannot be reduced under any circumstances".

[350] Al-Qur'an Al-karim

[351] Al-Qur'an Al-karim

> Although the verse gives freedom to choose according to his will, but that does not mean there are no implications later in the afterlife. People who believe will certainly get good in the hereafter. Conversely, people who do not believe will not get kenikman in the afterlife. Imam al-Zamakhsyari in the interpretation of al-Kasyaf explained that the content of the meaning above is in the form of threats and warnings. Those who are good will go to heaven, unbelievers will go to hell.[352]

The faithfulness of God Almighty was also stated by the Indonesian people in the opening of the 1945 Constitution the third paragraph which read: "By the grace of Allah Almighty and by being encouraged by a noble desire, so that a free national life, then the people of Indonesia declare with this independence."[353] The opening sentence contains an understanding, that the independence obtained by the Indonesian people is not just the result of the people's struggle, more than that actually because of the blessing of Allah's Almighty.

The explanations above show that the dimension of transcendence is very closely related to the constitutional system in Indonesia, especially in guaranteeing the constitutional rights of citizens to provide freedom of belief. It also shows that the process of transcendence in the prophetic legal paradigm is in accordance with the first precept of Pancasila, namely "the Almighty God". Pancasila which is the philosophy of life of the nation should be in every joint of the implementation of the life of the nation and state, thus, the transcendental process in the prophetic

[352] https://islami.co/tafsir-surat-al-kahfi-ayat-29-azab-mengerikan-bagi-orang-zalim/ Diakses Pada Minggu, 15 Maret 2020 Pukul 09:54.
[353] Pembukaan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Alinea Ketiga

legal paradigm is in accordance with the basis of the existing state administration.

b. Humanity (Humanization)

Humanity is related to the appreciation of "degree and dignity" as a human being free from slavery and others.[354] The prophetic legal paradigm calls this aspect of humanity humanization.

This stage of humanization emphasizes efforts to understand social reality and internal problems that are actually faced and must be overcome.[355] Humanization is a constructive interpretation of the lafadh *"amar ma'ruf"* whose original meaning advocates or enforces virtue.[356]

The concept of humanization is in harmony with the second principle of Pancasila "Fair and Civilized Humanity". This precept emphasizes the importance of human nature based on justice and virtues such as virtue or morals, because humans were created by God as the most perfect creature compared to other creatures, then fairness is an absolute trait that humans must have.[357]

This second precept contains the values of Islamic teachings relating to human morals, both towards fellow human beings and towards the natural surroundings. Mission of Islam as a religion *that rahmatan lil*

[354] Nurcholis Majid, *Islam, Doktrin dan Peradaban*, (Jakarta: Paramadina, 1999), 6.
[355] Kelik Wardiono. *Paradigma profetik : Pembaruan basis epitemologis ilmu hukum*, (Yogyakarta: Genta Publishing, 2014), 41.
[356] Kuntowijoyo, *Muslim Tanpa Masjid : Esai-Esai Agama, Budaya dan Politik dalam Bingkai Strukturalisme Transedental*, (Bandung: Mizan, 2001), 364-365
[357] Wahid Subhan, *Nilai-Nilai Al-Qur'an dalam Sila Kedua Pancasila,* Skrispi, (Yogyakarta: Universitas Islam Negeri Sunan Kalijaga, 2013), 23.

alamin is a command of goodness and peace not only to humans but also to nature and the environment. As the word of God in Q.S. al-Anbiya verse 107 which explains that Allah SWT sent the Prophet Muhammad as a Messenger of Allah and a mercy for all nature.[358]

One important aspect in the second precept is respect for human rights (HAM). In the Islamic view, human rights originate from Allah SWT and are based on human beings as Allah's khalifah on earth, this is in accordance with the Word of God in the QS. al-Baqarah verse 30 which means:

وَاِذْ قَالَ رَبُّكَ لِلْمَلٰۤىِٕكَةِ اِنِّيْ جَاعِلٌ فِى الْاَرْضِ خَلِيْفَةً ۗقَالُوْٓا اَتَجْعَلُ فِيْهَا مَنْ يُّفْسِدُ فِيْهَا وَيَسْفِكُ الدِّمَاۤءَۚ وَنَحْنُ نُسَبِّحُ بِحَمْدِكَ وَنُقَدِّسُ لَكَ ۗقَالَ اِنِّيْٓ اَعْلَمُ مَا لَا تَعْلَمُوْنَ - ٣٠

Meaning: "Remember when your Lord said to the Angels:" Verily I want to make a caliph on the face of the earth ". They say: "Why do you want to make (the caliph) on earth a person who will cause damage to him and shed blood, even though we always glorify by praising you and purifying you?" God says: "Verily, I know that which you do not know."

Human rights are gifts from the creator because humans are given privileges or glory. This statement is in accordance with the Word of God Q.S al-Isra 'verse 70:

وَلَقَدْ كَرَّمْنَا بَنِيْٓ اٰدَمَ وَحَمَلْنٰهُمْ فِى الْبَرِّ وَالْبَحْرِ وَرَزَقْنٰهُمْ مِّنَ الطَّيِّبٰتِ وَفَضَّلْنٰهُمْ عَلٰى كَثِيْرٍ مِّمَّنْ خَلَقْنَا تَفْضِيْلًا ۝ ٧٠ -

Meaning: "And verily We have glorified the children of Adam, We transported them on land and in the sea, We gave them sustenance from the good and We exaggerate them with perfect advantages over most of the creatures We have created."[359]

[358] Allah says in Q.S. al-Anbiya verse 107 which means: "*And We sent not you, but to (be) a mercy to the worlds.*"

[359] Al-Qur'an Al-Karim

Human rights are something that is natural, because of their nature then there is no power in the world that can deprive every human being of human rights.[360] Human rights are not only humanitarian matters, but also problems related to the problem of God.

According to Abu al'Ala al-Maududi, there are two concepts about rights. First, human rights or *huquq al-insan al-dharuriyyah*. Second, the right of Allah or Allah's *huquq*.[361]

Islam views three forms of human rights when viewed from its level. The following explanation:

1) *Darury* rights (basic rights), i.e. if the right is violated, it not only makes people miserable, but also their existence is lost, even the dignity of humanity is lost. Examples of basic rights are the right to life.
2) *Hajj* rights (secondary rights), ie rights that if not fulfilled will result in the loss of elementary rights, for example, the right of a person to obtain adequate food and clothing, will result in the loss of the right to life.
3) *Tahsiny* rights (tertiary rights), namely rights whose level is lower than primary and secondary rights.[362]

The enforcement of human rights in Indonesia is contained in the constitution, the 1945 Constitution. The collection of human rights guaranteed in the constitution is then called constitutional rights. Explanations related to human rights in the constitution can be seen in Chapter XA on Human Rights.[363]

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[360] Ubaidillah dan Abdul Rozak, *Demokrasi Hak Asasi Manusia* (Jakarta: UIN Syarif Hidayatullah, 2006), 253.
[361] Abu A`la Al Maududi, *Hak Asasi Manusia dalam Islam* (Jakarta: YAPI, 1998), 13.
[362] Suparman Marzuki dan Sobirin Mallan, *Pendidikan Kewrganegaraan dan HAM* (Yogyakarta: UII Press, 2002).
[363] BAB XA tentang Hak Asasi Manusia Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

Explanations related to human rights can also be seen in Law Number 39 of 1999 concerning Human Rights (Human Rights Law). Article 1 paragraph (1) of the Human Rights Law states that

> *"Human rights are a set of rights inherent in the nature of human existence as God's creatures, which are His gifts that must be respected, upheld and protected by the state, law, government, and everyone for the honor and protection of human dignity."*[364]

Related to guarantees in law enforcement, Article 28D paragraph (1) of the 1945 Constitution can be seen.[365] The article states that: *"Everyone has the right to recognition, guarantees, protections and certainty of law that is fair and the same treatment before the law."*

The importance of fair enforcement of the law as a realization of human rights is also mentioned in the Word of God Q.S. an-Nisaa 'verse 58:

إِنَّ اللهَ يَأْمُرُكُمْ اَنْ تُؤَدُّوا الْاَمٰنٰتِ اِلٰى اَهْلِهَاۙ وَاِذَا حَكَمْتُمْ بَيْنَ النَّاسِ اَنْ تَحْكُمُوْا بِالْعَدْلِۗ اِنَّ اللهَ نِعِمَّا يَعِظُكُمْ بِهٖۗ اِنَّ اللهَ كَانَ سَمِيْعًاۢ بَصِيْرًا ـ ٥٨

> *Meaning: "Verily, Allah tells you to deliver the message to those who are entitled to receive it, and (tells you) if you establish a law between humans so that you determine it fairly. Surely Allah gives you the best teaching. Allah is All-Hearing, All-Seeing. "*[366]

Observing the explanations mentioned above, it can be understood that Islam really respects the rights that exist in human beings, including in terms of law enforcement. The affirmation related to respecting human rights can be seen in several verses in *al-Qur'an al-Karim*. The

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[364] Pasal 1 ayat (1) Undang-Undang Nomor 39 Tahun 1999 tentang Hak Asasi Manusia. Lembaran Negara Republik Indonesia Tahun 1999 Nomor 165.
[365] Pasal 28D ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945
[366] Al-Qur'an Al-Karim

principle of upholding human rights is one aspect that is in harmony with the second principle of Pancasila "Fair and Civilized Humanity".

Respect for human rights in the context of humanizing humanity is also in accordance with the process of humanization in the prophetic legal paradigm. So in terms of its application, the humanization process in the prophetic legal paradigm which is the construction of lafadh amar ma'ruf, is very much in accordance with the philosophy of life of the Indonesian people (the second principle of Pancasila precepts), and of course also comes from Divine revelation, in this case the Qur'an.

c. Justice

Liberalization is the next stage / process in the prophetic legal paradigm which is a constructive interpretation of the lafadl *"nahi mungkar". Nahi mungkar* means prohibiting or opposing any destructive crime.

> Liberalization in the context of Islamic scholarship is based on transcendence values which then pushes for the presence of prophetic responsibilities to free people from cruelty, poverty, violence, domination of oppressive structures and the life of false consciousness.[367]

Liberalization in this discussion will then be linked to the principle of justice so that humans are free from misery and get guaranteed legal certainty, this is in accordance with the fifth precept "Social Justice for All Indonesian People".

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[367] Husnul Muttaqien, *Menuju Sosiologi Profetik : Telaah Gagasan Kuntowijoyo Tentang Ilmu Sosial Profetik dan Relevansinya Bagi Pengembangan Sosiologi*, Skripsi. (Yogyakarta: Fakultas Ilmu Sosial dan Ilmu Politik Universitas Gadjah Mada, 2003), 125.

Justice itself comes from the Arabic *Al-Adl* which is a mashdar form of the word *adala ya'dilu adlan wa udulun wa adlat*, which means first: the word "*Adala*" means to straighten or sit straight, the second: the word *"ya'dilu"* means running away, departing or dodging from (wrong path) to another (correct) path, the third: i.e. 'title' means equal or equivalent or equivalent and the fourth: i.e. 'adare' means to balance or balance, equal or in a balanced state.[368]

Justice is a humanitarian value that is basic, impartial, impartial, and even. Justice is related to man's relationship with his God, man with man and man with the universe and man with himself.[369]

Justice is the attitude of the soul most favored by God because the sense of justice is the closest to the realization of the view of life related to piety to God. Justice illustrates the concept of a State, which upholds the principle of equality by prioritizing honesty and sincerity. So between God, humanity, and justice are interconnected.[370]

Once the importance of the value of justice in Islam, so al-Qur'an refers to it as much as 78 times with a variety of expressions include: *al-'adl, al-qisth*, and *al-mizan. Al-'adl* is mentioned 28 times, *al-qisth* is mentioned 27 times, and *al-mizan* is mentioned 23 times.[371]

Some verses of al-Qur'an related justice as in the Word of God in the QS. An-Nisa 'verse 58 that:

اِنَّ اللّٰهَ يَأْمُرُكُمْ اَنْ تُؤَدُّوا الْاَمٰنٰتِ اِلٰٓى اَهْلِهَاۙ وَاِذَا حَكَمْتُمْ بَيْنَ النَّاسِ اَنْ تَحْكُمُوْا بِالْعَدْلِۗ اِنَّ اللّٰهَ نِعِمَّا يَعِظُكُمْ بِهٖۗ اِنَّ اللّٰهَ كَانَ سَمِيْعًاۢ بَصِيْرًا ۔ ٥٨

Meaning: "Verily, Allah tells you to deliver the message to those who are entitled to receive it, and (tells you) if you establish a law

[368] M. Quraish Shihab, *Ensiklopedi Al-Qur''an*: *Kajian Kosakata* (Jakarta: Lentera Hati, 2007), 12.
[369] Zulaikha Fitri Nurngaisah, *Keadilan Dalam* Al-*Qur'an,* Skripsi, (Fakultas Ushuludin StudyAgama Dan Pemikiran Islam, Uin Sunan Kalijaga. Yogyakarta, 2015), 5.
[370] Nurcholis Majid, *Islam, Doktrin dan Peradaban*, (Jakarta: Paramadina, 1999), 8.
[371] Shihab, Quraish, *Wawasan Al-Quran: Tafsir Tematik Atas Pelbagai Persoalan Umat*, (Bandung: Mizan, 2007), 147.

between humans so that you determine it fairly. Surely Allah gives you the best teaching. Surely Allah is All-Hearing, All-Seeing. "[372]

In this verse Allah Almighty ordered to determine the law (to decide the case) among humans fairly. The Word of Allah SWT Q.S. an-Nahl verse 126 also ordered to be fair in the enforcement of the *qishash* punishment, the editorial of the verse ie:

وَاِنْ عَاقَبْتُمْ فَعَاقِبُوْا بِمِثْلِ مَا عُوْقِبْتُمْ بِهٖۗ وَلَىِٕنْ صَبَرْتُمْ لَهُوَ خَيْرٌ لِّلصّٰبِرِيْنَ - ١٢٦

Meaning: "And if you give a reply, then reply with the same reward as the torture inflicted on you. But if you are patient, that's actually better for people who are patient".[373]

The verses above contain the value that religious teachings are not only vertical, how a person is with his God, but also related to relationships with others. This is also confirmed by Allah in the QS. al-Maidah verse 8:

يٰٓاَيُّهَا الَّذِيْنَ اٰمَنُوْا كُوْنُوْا قَوّٰمِيْنَ لِلّٰهِ شُهَدَاۤءَ بِالْقِسْطِۖ وَلَا يَجْرِمَنَّكُمْ شَنَاٰنُ قَوْمٍ عَلٰٓى اَلَّا تَعْدِلُوْا ۗ اِعْدِلُوْاۗ هُوَ اَقْرَبُ لِلتَّقْوٰىۖ وَاتَّقُوا اللّٰهَ ۗاِنَّ اللّٰهَ خَبِيْرٌۢ بِمَا تَعْمَلُوْنَ - ٨

Meaning: "O you who believe, you should be those who always uphold (the truth) because of Allah, be a fair witness. And do not ever have your hatred towards a people, pushing you to be unjust. Be fair, because fair is closer to piety. And fear Allah, indeed Allah is All-Knowing what you do. "

Islam views that there is a close connection between law and justice. Both can not be separated, because MAking of the rule of law is to

[372] Al-Qur'an Al-Karim
[373] Al-Qur'an Al-Karim

achieve justice. Allah is the holder of sovereignty, ruler and law maker through the revelation of the Qur'an and the hadith.[374]

Law and justice in a prophetic paradigm are actually norms (prohibited acts) both in regulations and in religion. In accordance with the opinion of the scholars of Jurisprudence, the law is the word of God or the words of the Prophet which contains demands (orders, prohibitions, acquisition) for the actions of believers or that makes one particular thing as a cause or condition or a barrier from these demands.[375]

Provisions related to the necessity of upholding justice in the constitution are listed in Article 28D paragraph (1) of the 1945 Constitution which states that: *"Every person has the right to recognition, guarantees, protection, and certainty of law that is fair and equal treatment before the law."*[376]

Article 28H paragraph (2) of the 1945 Constitution also states that: *"Every person has the right to get special facilities and treatment to obtain equal opportunities and benefits in order to achieve equality and justice."*[377]

The values of justice are also in accordance with the five precepts of Pancasila namely, "Social justice for all Indonesian people". Social

[374] Wahid Subhan, *Nilai-Nilai Al-Qur'an dalam Sila Kedua Pancasila,* Skrispi, (Yogyakarta: Universitas Islam Negeri Sunan Kalijaga, 2013), 24.
[375] M. Syamsudin, *Ilmu Hukum Profetik : Gagasan awal landasan Kefilsafatan Dan Kemungkinan pengembangannya Di Era Postmodern*, (Yogyakarta. Pusat Studi Hukum UII, 2013), 283.
[376] Pasal 28D ayat (1) Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.
[377] Pasal 28H ayat (2) Undang-Undang Dasar Negara Republik Indonesia Tahun

justice means justice that prevails in society in all aspects of life, both materially and spiritually, so that every Indonesian gets fair treatment in the legal, political, social, economic, and cultural fields..[378]

The value of social justice in Islamic teachings is also reflected in the Word of Allah SWT in Q.S. an-Nahl verse 90:

إِنَّ اللهَ يَأْمُرُ بِالْعَدْلِ وَالْإِحْسَانِ وَإِيْتَآئِ ذِى الْقُرْبٰى وَيَنْهٰى عَنِ الْفَحْشَآءِ وَالْمُنْكَرِ وَالْبَغْيِ يَعِظُكُمْ لَعَلَّكُمْ تَذَكَّرُوْنَ - ٩٠

Meaning: "Verily, Allah commands (you) to do justice and to do good, to give to relatives, and God forbids cruel, evil and hostility. He teaches you so you can take lessons."[379]

Observing the explanations above, it is clear that the value of justice in Islam is very much in accordance with the values of justice in the Pancasila and the 1945 Constitution, and also mirror the process of liberalization (liberation from misery and tyranny due to injustice) in the prophetic legal paradigm.

The explanation above also shows that the role of Islam in Pancasila is a top priority, this is reflected in each of the precepts in the Pancasila which contains the values of Islamic teachings, so it can be concluded that the philosophy and basis of the Indonesian State is also sourced from main framework of Islamic teachings.

Another conclusion that can be drawn from the explanations above is that the prophetic legal paradigm is very compatible with the values

[378] A. Syafi' AS, *"Pengaruh Nilai-nilai Pancasila dan Ajaran Islam Terhadap Tujuan Pendidikan Nasional"*. Sumbula Vo. 1 No. 1 2016, 66-67.
[379] Al-Qur'an Al-Karim

of Pancasila. Pancasila as the basis and philosophy of the nation must certainly be applied in every aspect of the administration of the state, including in the practice of administering judicial power.

The next discussion will then focus on how to implement the prophetic legal paradigm in judicial power, especially the MK. The next discussion will discuss how the prophetic legal paradigm can be an alternative perspective that can be applied in the practice of constitutional testing at the MK, so that the MK can carry out its functions comprehensively in protecting the constitutional rights of citizens, especially those related to testing concrete norms related to litigation processes in court (constitutional question).

3. Implementation of Constitutional Questions in Constitutional Review in Indonesian Constitutional Court in the Perspective of Prophetic Law Paradigm

The MK has affirmed itself as the guardian of democracy's state institution that upholds the principles of justice that upholds substantive justice in every authority and decision.[380] This is in line with MAndate of Article 24 paragraph (1) of the 1945 Constitution.[381]

According to the Court, the value of justice to be achieved is not merely procedural justice, but actual justice, substantial, essential, and recognized, perceived, and living in society. According to Roger Cotterrell, it is the

[380] Mahkamah Konstitusi, *Mengawal Demokrasi Menegakkan Keadilan Substantif*, (Jakarta: Laporan Tahunan MK, 2009), 8.
[381] Article 24 paragraph (1) of the Constitution of the Republic of Indonesia states that: *"Judicial Power is an independent power to administer justice in order to uphold law and justice."*

judge's obligation to understand, explore the value and sense of justice, which exists in society (already exists). Justice does not only represent or belong to MAjority, but also belongs to and protects the minority.[382]

The MK in the framework of realizing substantive justice through the exercise of authority and each decision is not only based on the spirit of formal legality, but also consistent with the responsibility to realize the objectives of the legal norm itself, namely its substantive value.[383] The spirit of upholding the values of substantive justice is answered by the MK decisions that are not supported by the limitations of the normative formulation of the law, for example with conditional constitutional decisions, conditional unconstitutional decisions, interlocutory decisions, decisions that apply retroactively, and so forth.[384]

The area of substantive justice is not exactly the same as the area of positive law as the basis of procedural justice. The size of the acceptance of related parties and the wider community can be a benchmark for the fulfillment of justice.[385]

The substantive values of justice that the Court seeks to apply are in accordance with the fifth principle of Pancasila, "Social justice for all Indonesian people". The MK interpreted the law based on the spirit of social

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[382] Roger Cotterrell, *The Politics of Jurisprudence, A Critical Introduction to Legal Philosophy*, (Philadelphia: University of Pennsylvania Press, 1992), 29.
[383] Martitah, *Mahkamah Konstitusi dari Negative Legislature ke Positive Legislature*, (Jakarta: Konstitusi Press, 2016), 101.
[384] Moh. Mahfud MD, *Konstitusi dan Hukum dalam Perdebatan Isu*, (Jakarta: Rajawali Press, 2009), 11.
[385] Martitah, *Mahkamah Konstitusi dari Negative Legislature ke Positive Legislature*, (Jakarta: Konstitusi Press, 2016), 148.

justice and substantive justice which made the constitutional text not as MAin center, but paid attention to the context and contextualization of an article with the present conditions.[386] The MK must be able to interpret constitutional texts more flexibly so that progressive and responsive interpretations of the law will make the constitution alive (living constitution) and truly materialize in response to the dynamics of legal development in the community.

The application of the values of justice has also been explained in CHAPTER II Principles of the Implementation of Judicial Power Article 2 paragraph (1) and (2) Law of the Republic of Indonesia Number 48 Year 2009 Concerning Judicial Power which states:

(1) *Judgment shall be carried out "FOR THE SAKE OF JUSTICE UNDER THE ALMIGHTY GOD".*

(2) *State justice implements and enforces law and justice based on Pancasila.*[387]

It can also be seen in every head of the MK's Decision that reads, "For the Sake of Justice Based on Godhead". According to Bismar Siregar, this can be interpreted that in setting the verdict, first of all a judge is worthy of Allah SWT. On his behalf the verdict is pronounced. He swears in the name of God Almighty.[388]

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[386] Mahrus Ali, 2010, "*Mahkamah Konstitusi dan Penafsir Hukum yang progresif*", Jurnal Hukum Sekretariat Jenderal dan Kepaniteraan MK Vol. 7 No. 1, 2010, 68-69.
[387] Pasal 2 ayat (1) dan (2) Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman. Lembaran Negara Republik Indonesia Nomor 5076.
[388] Bismar Siregar, *Hukum Hakim dan Keadilan Tuhan,* (Jakarta: Gema Insani Press, 1995), 19-20.

Observing the law and each head of the MK's Decision, the nature of the justice to be decided is transcendental justice. Transcendental justice is justice that is full of divine meaning and values that animates in a decision. For judges, justice that is to be decided is not only accounted horizontally to fellow human beings, but also vertically accountable to God Almighty.[389]

Transcendental justice whose spirit or soul is based on the values of the Holy Qur'an is what is fought for and exemplified by the Prophets and Apostles, so that it can be called prophetic justice in the prophetic legal paradigm. The explanation above can be concluded that the values of justice applied in the MK are in line with transcendental justice in the prophetic legal paradigm.

Transcendental justice in the prophetic legal paradigm is also in accordance with the value of social justice in the five precepts of the Pancasila, so that basically the enforcement of social justice is not just a form of social contract but also a responsibility towards God. Social justice in a democratic society becomes an obligation, where social justice is an important element for the formation of peace and prosperity.[390]

Indonesia as a State based on Pancasila makes understanding human rights important, namely by placing human beings by their nature,

[389] M. Syamsudin, *Ilmu Hukum Profetik : Gagasan awal landasan Kefilsafatan Dan Kemungkinan pengembangannya Di Era Postmodern*, (Yogyakarta. Pusat Studi Hukum UII, 2013), 238

[390] Roro Fatikhin, *"Keadilan Sosial Dalam Perspektif Al-Qur'an Dan Pancasila".* Panangkaran, Jurnal Penelitian Agama Dan Masyarakat, Volume 1, Nomor 2, Juli-Desember 2017, 295.

dignity and dignity. The establishment of a MK such as the MK is then intended to ensure that the 1945 Constitution as the highest law is actually implemented and enforced as a guideline in the administration of the state, so that it can protect human rights guaranteed in the constitution or often referred to as the constitutional rights of citizens.[391]

Respect for constitutional rights is one element or aspect in the second principle of the Pancasila "Fair and Civilized Humanity". This precept emphasizes the importance of human nature based on justice and virtues such as virtue or morals, because humans were created by God as the most perfect creature compared to other creatures.[392]

The prophetic legal paradigm calls this human value humanization. Humanization is a constructive interpretation of the lafadl *"amar ma'ruf"*, the original meaning of which is advocating or upholding virtue.[393] The existence of human values related to the appreciation of the "degree and dignity" as a human being, it is hoped that humans will be free from slavery and others.[394]

Human liberation in the prophetic legal paradigm is called liberalization. Liberalization in the context of Islamic scholarship is based on the values of transcendence which then encourage the

[391] Moh. Mahfud Md Dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: Ub Press, 2010), 60.
[392] Wahid Subhan, *Nilai-Nilai Al-Qur'an Dalam Sila Kedua Pancasila,* Skrispi, (Yogyakarta: Universitas Islam Negeri Sunan Kalijaga, 2013), 23.
[393] Kuntowijoyo, *Muslim Tanpa Masjid : Esai-Esai Agama, Budaya dan Politik dalam Bingkai Strukturalisme Transedental*, (Bandung: Mizan, 2001), 364-365
[394] Nurcholis Majid, *Islam, Doktrin dan Peradaban*, (Jakarta: Paramadina, 1999), 6.

presence of prophetic responsibilities to free people from cruelty, poverty, violence, dominance of oppressive structures and the life of false consciousness.[395] This exemption is also a manifestation of human rights in social life.

Observing the explanations mentioned above, it can be understood that the establishment of the MK is also an embodiment of the second principle of Pancasila in the framework of protecting the constitutional rights of citizens. The protection of constitutional rights is then very closely related to the dimensions of humanization and liberalization in the prophetic legal paradigm, so that the prophetic legal paradigm is very much in line with the values applied by the MK as the guardian of constitution. Then the next question is, is in reality the MK in accordance with the values of transcendental justice, and respect for the constitutional rights mentioned above?

The idea of establishing a MK which has judicial review authority at least gives a role to strengthen the constitutional rights of citizens,[396] but as explained in the previous discussion, the MK's judicial review authority is currently only limited to the authority of abstract reviews.

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[395] Husnul Muttaqien, *Menuju Sosiologi Profetik : Telaah Gagasan Kuntowijoyo Tentang Ilmu Sosial Profetik dan Relevansinya Bagi Pengembangan Sosiologi*, Skripsi. (Yogyakarta: Fakultas Ilmu Sosial dan Ilmu Politik Universitas Gadjah Mada, 2003), 125.

[396] Kartono, *"Politik Hukum Judicial Review di Indonesia".* Jurnal Dinamika Hukum Vol. 11 Edisi Khusus Februari 2011, 19.

MK's constitutional review authority has not yet reached the concrete review or constitutional question.[397]

The limited authority of the MK from the legal side can cause problems because it is considered to limit the rights of justice seekers. The constitutional question then becomes important to be used as the authority of the MK to realize justice for citizens.[398]

The urgency of applying constitutional questions can also be seen from the perspective of the prophetic legal paradigm. This paradigm can be used as a new alternative in the settlement of cases in the courts, as well as in the state administration system in Indonesia, because like the explanations above, that this prophetic legal paradigm in reality is in accordance with the values of the Pancasila and the 1945 Constitution as philosophy and basis Indonesian law.

The legal process in the Indonesian judicial environment to date has not fully reflected the true values of justice (substantial justice), so the spirit to uphold justice that is based on the almighty God must be revived within the judicial institution. The development of the application of prophetic legal paradigm can then be a solution in order

[397] Although the Constitutional Court does not have the authority to review concrete, in practice many cases have been formally submitted to the Constitutional Court in the form of judicial review, but substantially including constitutional question, on the grounds that there are constitutional losses suffered by the applicant because they have been tried and even punished based on the provisions the constitutionality doubtful. (Look at Hamdan Zoelva, "*Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara"*. Jurnal Media Hukum, Vol. 19 No.1 Juni 2012, 153.)

[398] Heru Setiawan, *Rekonseptualisasi Kewenangan Mahkamah Konstitusi Dalam Upaya Memaksimalkan Fungsi Mahkamah Konstitusi Sebagai The Guardian Of Constitution, Thesis*, (Semarang: Universitas Diponegoro, 2017), 10.

to provide legal certainty and justice[399] in accordance with legal objectives.

In order to realize the legal objectives, as explained in the previous discussion, institutionalization of the constitutional question mechanism must be extended to extend the authority of the MK in examining the law against the 1945 Constitution,[400] without making changes to the 1945 Constitution. Amendments to this law are intended to create legal certainty for the community, especially justice seekers.

The institutionalization of constitutional question mechanism is also carried out in order to create real justice, which is in accordance with the values in society. This real justice is justice that breathes in a prophetic spirit, or transcendental justice (justice based on the almighty God) which is rooted in the law of God in the Qur'an.[401] The following will then be presented a table of theoretical and empirical research findings to make it easier to understand the overall research results in this paper.

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[399] Radbruch said that law enforcement was related to three things as basic values, namely justice, certainty, and social benefits to realize legal objectives into reality. (Look at Satjipro Rahardjo, *Masalah Penegakan Hukum Suatu Tinjauan Sosiologis,* (Bandung: Sinar Baru, 1986), 15.)

[400] Moh. Mahfud MD dkk, *Constitutional Question (Alternatif Baru Pencarian Keadilan Konstitusional),* (Malang: UB Press, 2010), 47.

[401] God's law must be the ethical foundation for the laws of human creation. The law of human creation is basically a consistent continuation of God's law. Laws made by humans must reflect the mission of humanization, liberalization, and transcendence as an embodiment of prophetic ethics. (Look at M. Syamsudin, *Ilmu Hukum Profetik : Gagasan awal landasan Kefilsafatan Dan Kemungkinan pengembangannya Di Era Postmodern,* (Yogyakarta. Pusat Studi Hukum UII, 2013), 218).

TABLE 1.5 RESEARCH FINDINGS

No.	*Legal Issue*	Findings	
		Theoritical	Empirical
1.	The relevance of the application of constitutional question in The State System of the Republic of Indonesia	Theoretically, the relevance of the application of constitutional question in the Indonesian constitutional system is very much in line with the theory of constitutional democracy[402], this is because the characteristic of constitutional democracy is the idea of limiting power and protecting the rights of citizens through supremacy of the constitution as the highest law. Likewise with the constitutional question mechanism which aims to protect the rights of citizens guaranteed in the constitution (constitutional rights), so as to realize the supremacy of the constitution in accordance with the theory of constitutional democracy. Relevance The application of constitutional question in the Republic of Indonesia constitutional system also intersects with the theory of constitutional treview model presented by Mauro Cappelleti, in which the establishment of the Constitutional Court is a model of centralized judicial review and can have the authority to test abstract norms (abstract review) as well as concrete norm testing. Based on this theory, Indonesia which	Relevance The application of constitutional question in the Republic of Indonesia constitutional system also intersects with the theory of constitutional review model presented by Mauro Cappelleti, in which the establishment of the Constitutional Court is a model of centralized judicial review and can have the authority to test abstract norms (abstract review) as well as concrete norm testing. Based on this theory, Indonesia which adheres to the centralized judicial review model by establishing the Constitutional Court can also have the authority to test concrete norms by applying the constitutional question mechanism in constitutional review at the Constitutional Court, but currently the Constitutional Court only has

[402] Bambang Yuniarto, *Pendidikan Demokrasi Dan Budaya Demokrasi Konstitusional.* (Yogyakarta: Penerbit Deepublish, 2018), 85.

		adheres to the centralized judicial review model by establishing the Constitutional Court can also have the authority to review concrete norms by applying the constitutional question mechanism in constitutional review at the Constitutional Court, but currently the Constitutional Court only has abstract review authority.	abstract review authority.
2.	The legal politics for applying the constitutional question mechanism in constitutional review in the Constitutional Court of the Republic of Indonesia	Theoretically, the legal politics of applying the constitutional question mechanism in constitutional review at the Constitutional Court is relevant to the theory of legal certainty, given that legal certainty will be achieved when a regulation is made and enacted with certainty.[403] Institutionalizing the constitutional question mechanism through proper legal politics will provide legal certainty for every citizen whose constitutional rights are violated in the court litigation process. The institutionalization of the constitutional question mechanism can be done by extending the constitutional review authority at the Constitutional Court through changes to the Constitutional Court Law, while related to the technical submission of constitutional question requests can then be explained by PERMA or PMK so that there are clear regulations and legal	Empirically, this research found that in the reality of constitutional review in the Constitutional Court there is a request for testing constitutional question, but there are no regulations that clearly regulate the mechanism of constitutional question in the authority of constitutional review in the Constitutional Court, so that it can cause legal vacuum. This problem can be overcome by institutionalizing constitutional question in the authority of constitutional review in the Constitutional Court.

[403] Christine S.T Kansil, dkk, *Kamus Istilah Hukum*, (Jakarta, 2009), 385.

		certainty for the community,[404] bearing in mind that the purpose of the law is to guarantee the realization of legal certainty.[405]	
3.	The implementation of constitutional question based on the perspective of the Prophetic Legal Paradigm	Theoretically, the implementation of constitutional question in accordance with the basic principles of the prophetic legal paradigm, this can be seen from: (1) Justice based on God Almighty which is the basis of every Constitutional Court decision is in line with transcendent values in the prophetic legal paradigm, where justice that is intended to be applied is true justice that breathes divine values and can be horizontally accountable to fellow human beings, and vertically to God Almighty.[406] This transcendent justice can be achieved if the Constitutional Court also has constitutional question authority, so that everyone can get real justice based on laws that do not violate the constitution. (2) Protection of the constitutional rights of citizens which is the purpose of the establishment of the Constitutional Court is very	Empirically, it can be seen that the Constitutional Court in each of its decisions applies the values of justice based on God Almighty (transcendent justice) in accordance with the values of justice in the prophetic legal paradigm. The application of this transcendent justice can be seen from every head of the Constitutional Court's ruling that reads, "For the Sake of Justice Based on Godhead".[407] The Constitutional Court also applies transcendent values in every regulation issued, both the Constitutional Court Regulations (PMK), and the Regulations of the Chief Justice. These transcendent values can be seen from the head /

[404] Josua Satria Collins dan Pan Mohamad Faiz, *"Penambahan Kewenangan Constitutional Question di Mahakamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara"*. Jurnal Konstitusi, Vol. 15, No. 4, Desember 2018, 701.
[405] Achmad Ali, *Menguak Tabir Hukum (Suatu Kajian Filosofis dan Sosiologis)*, (Jakarta: Penerbit Toko Gunung Agung, 2002), 82-83.
[406] M. Syamsudin, *Ilmu Hukum Profetik : Gagasan awal landasan Kefilsafatan Dan Kemungkinan pengembangannya Di Era Postmodern*, (Yogyakarta. Pusat Studi Hukum UII, 2013), 238
[407] Bismar Siregar, *Hukum Hakim dan Keadilan Tuhan,* (Jakarta: Gema Insani Press, 1995), 19-20.

		much in accordance with the principle of humanization in the prophetic legal paradigm, in which human degrees and dignity are highly respected, so that every human being can provide virtue in accordance with the lafadh construction *"amar ma'ruf"* . The Constitutional Court in realizing this goal must protect the constitutional rights of citizens as a whole, including in terms of testing concrete norms related to litigation in the court (constitutional question). (3) Liberation of the people from violating their constitutional rights in the court litigation process is in accordance with the principle of liberalization in the prophetic legal paradigm. laws that violate the constitution.	opening of the regulation that reads, "By the Grace of God Almighty".[408] The application of the value of transcendent justice has also been mentioned in the principles of the implementation of judicial power in Article 2 paragraph (1) of Law no. 48 of 2009 concerning Judicial Power which states: Justice shall be conducted "FOR JUSTICE BASED ON ALMIGHTY GOD*".*[409]

[408] https://mkri.id/index.php?page=web.Peraturan&id=6&menu=6&status=2 Diakses Pada Minggu, 31 Mei 2020 Pukul 12:03

[409] Pasal 1 Undang-Undang Republik Indonesia Nomor 48 Tahun 2009 Tentang Kekuasaan Kehakiman. Lembaran Negara Republik Indonesia Nomor 5076.

CHAPTER IV

CLOSING

A. Conclusion

The explanations that have been stated in the previous chapters then provide some conclusions, namely:

1. The dynamics of the Indonesian constitutional system can be divided into 2 phases, before and after the amendment to the 1945 Constitution. The constitutional system of the Republic of Indonesia prior to the amendment to the 1945 constitution does not adhere to a separation of powers, the supremacy of the MPR, and the absence of checks and balances between state institutions. After the amendment to the 1945 Constitution, the holding of constitutional supremacy, the principle of checks and balances was applied in relations between state institutions, and new institutions such as the DPD, KY and MK were born as constitutional justice institutions to realize supremacy of the constitution.

   The amendment to the 1945 Constitution also brought several changes to the judicial authority. The independence of judicial power that was not previously listed in the constitution is then strengthened by guarantees in the constitution, precisely in Article 24 paragraph (1) of the 1945 Constitution. The exercise of judicial power which is independent in Indonesia is actually a form of supremacy of the

constitution. The judiciary then applies the principle of checks and balances in relation to other institutions.

The upholding of the supremacy of the constitution in the concept of constitutional democracy in Indonesia is very important. Efforts to uphold the supremacy of the constitution were then realized by the establishment of the Constitutional Court as the guardian of constitution in the third amendment to the 1945 Constitution. The establishment of the Constitutional Court in Indonesia adopted a centralized judicial review model, but there was no explanation that clearly stated the scope of norm testing in the Constitutional Court including in the variant testing of abstract review norms or concrete review (constitutional question), so that it is then interpreted that constitutional review in the Constitutional Court is only limited to testing abstract norms.

The condition that the constitutional question mechanism has not yet been adopted in this Constitutional Court shows that the constitutional testing system in Indonesia still has inequality because it is only able to reach abstract norm review. The existence of this imbalance makes the constitutional rights of citizens are not protected as a whole, so it is necessary to hold a reconciliation regarding the constitutionality review authority at the Constitutional Court. The reconciliation can be realized by institutionalizing the authority of testing concrete norms (constitutional question) in constitutional review in the Constitutional Court.

2. Discussion about concrete review or constitutional question if viewed from the history of the formation of the Constitutional Court in the amendment to the 1945 Constitution through the minutes of the trial is almost not found. The proposal regarding the granting of concrete review authority or constitutional question to the Constitutional Court was raised by Soetjipto from the faction of the Group of Envoys, but did not get a response back and adequate attention from the formulator of the amendment to the 1945 Constitution.

   The absence of regulation related to the constitutional question mechanism, (while in reality constitutional testing in the Constitutional Court there is a request for testing the constitutional question mechanism) raises the existence of a legal vacuum (vacum of norm) in constitutive testing related to the constitutional question mechanism. This problem can be overcome by institutionalizing the constitutional question mechanism.

   The institutionalization of the constitutional question mechanism can be realized by expanding the constitutional review authority at the Constitutional Court, not adding to the authority of the Constitutional Court. This expansion of authority can be done by changing the Constitutional Court Law, without making changes to the 1945 Constitution. Some technical applications for constitutional questions can then be explained further with the existence of PMK and PERMA,

so there are regulations that clearly regulate, in order to realize legal certainty in every search society. justice and for citizens in general.

The Republic of Indonesia's constitutional system prior to the amendment to the 1945 Constitution did not adhere to the separation of powers, the supremacy of the MPR, and the absence of checks and balances between state institutions. After the amendment to the 1945 Constitution, the holding of constitutional supremacy, the principle of checks and balances was applied in relations between state institutions, and new institutions such as the DPD, KY and MK were born as constitutional justice institutions to realize supremacy of the constitution.

3. The paradigm that can be used as an alternative perspective in realizing the values of justice and the fulfillment of human rights in accordance with the basic state and national philosophy (Pancasila), especially in the practice of constitutional testing at the MK is a prophetic legal paradigm. This is because the values in Pancasila are inseparable from the values of Islamic teachings based on *wahyu illahi*.

The prophetic legal paradigm can revive the spirit to uphold the real justice, which is in accordance with the values in society, and based on the almighty God (transcendent justice), so that the MK can carry out its functions comprehensively in protecting the constitutional rights of citizens, especially which relates to testing concrete norms related to litigation in court (constitutional question). The development of the

application of prophetic legal paradigms can be a solution to provide legal certainty and justice in accordance with the objectives of the law.

B. Recommendation

Based on the results of literature studies that have been done, and then set forth in this research, then there are some suggestions that can be submitted by the author, namely:

1. Reform of law enforcement within the scope of judicial power needs to be carried out, so that everyone can get protection and guarantee of legal certainty which is the constitutional rights of citizens. Every general court within the scope of the Supreme Court should provide a decisions based on laws that do not violate the constitution, as well as the Constitutional Court as the guardian of constitution must also protect the constitutional rights of citizens as a whole.
2. Constitutional Court should institutionalize the constitutional question mechanism through extending the constitutional review authority by adding the provisions in Article 51 paragraph (1) of the Constitutional Court Law concerning the legal standing of the general court judge to ask questions to the Constitutional court.
3. The Constitutional Court should revive the substantive justice it has held for a long time. This substantive justice can be in the form of transcendent justice (Justice based on God Almighty). The enforcement of substantive justice is expected to be a means of fulfilling the constitutional rights of citizens.

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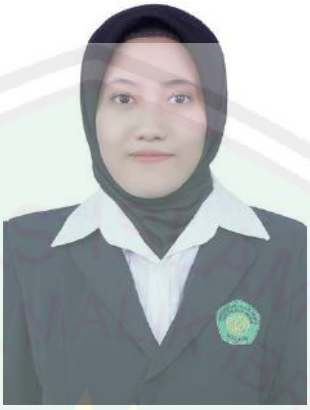

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