INSTITUTIONALIZING THE CONSTITUTIONAL QUESTION AUTHORITY IN THE CONSTITUTIONAL COURT AND POSSIBILITY INSTITUTIONALIZING IN SUPREME COURT

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FILE	HUKUM_1321900011_SAUT_PARULIAN_MANURUNG.DOCX (50.5K)		
TIME SUBMITTED	08-JAN-2021 06:03PM (UTC+0700)	WORD COUNT	4941
SUBMISSION ID	1484511301	CHARACTER COUNT	26781

INSTITUTIONALIZING THE CONSTITUTIONAL QUESTION AUTHORITY IN THE CONSTITUTIONAL COURT AND POSSIBILITY INSTITUTIONALIZING IN SUPREME COURT

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Abstract

This article aims to analyze and discuss the institutionalization of the idea of a *constitutional question* at the Constitutional Court, and the possibility of its institutionalization at the Supreme Court. The method used is a statutory approach, a conceptual approach, and a comparative approach. This article takes the position of "agreeing" if the idea becomes the authority of the Constitutional Court. However, from a different perspective, this article also discusses the possibility of its institutionalization through the Supreme Court. Institutionalization of the *constitutional questi*at the Constitutional Court can at least be carried out in three ways, namely, by amending the 1945 Constitution of the Republic of Indonesia, revising the Law on the Constitutional Court, and through Jurisprudence. On the other side, as a role model for practice and the regulation of a *constitutional question* mechanism, the Austrian and German states were taken as an example. While institutionalizing the idea at the Supreme Court, theoretically, this is very prospective when referring to comparative studies with the United States, because the US Supreme Court currently has the authority to examine the constitutionality of laws. The goal, if institutionalized in the Supreme Court, is for the Supreme Court to take part in realizing law and constitutional enforcement.

Keyword: Constitutional Question; Constitutional Court; Supreme Court.

INTRODUCTION

Revision or reform of the law and the legal system in order to improve the constitutionality of judges' decisions as judicial authorities are things that cannot be postponed. Revision or reform of the law and the legal system can at least be put forward on 2 (two) fundamental elements, namely, *legal structure* and *legal substance.* This improvement is something that is inevitable from the existence of the Indonesian state which has declared itself a rule of law,[4] so that it is required to apply the principles of *supremacy of law, equality before the law,* and *due process of law*. Therefore, to apply these principles, the Constitutional Court of the Republic of Indonesia (MKRI) and the Supreme Court of the Republic of Indonesia (MARI) are state organs that play an important role in realizing these principles. Thus, to maximize law and constitutional enforcement, it is necessary to institutionalize the idea of a *constitutional question* in the judicial system in Indonesia. On the other hand, given the mechanism of *constitutional question* yet exist in Indonesia, the problem is because of a legal vacuum *(vacuum of norm*), so that the need for regulation/institutionalization of *constitutional question*.

Constitutional question is a method or mechanism for constitutional review that is requested by judges (*ordinary court*) to the MKRI, this is due to doubts arising from within

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[4] Sartiani Lubis, Melani Hutabarat, and Muhammad Rifan Nasution, *Constitution of the Republic Indonesia of 1945*., vol. 4, 2019.

the judges of the general court regarding the constitutionality of the statutory provisions that will be used. in the case he's currently working on.[5] Therefore, *constitutional question is* also termed *"the constitutionality of law upon the request of the court"* or refers to the terminology with the term of submission *(judicial referral of constitutional question* or *referral from court).*[6]

The purpose of the *constitutional question* is to prevent law enforcement (in general courts) that contradicts by the constitution. For example, Case Number 013-022 / PUU-IV / 2006 Eggi Sudjana (as Petitioner-I) and Pandapotan Lubis (as Petitioner-II). In this case the petitioner is still a defendant and is undergoing a trial process for the alleged criminal act of insulting the head of state based on Article 134, Article 136 and Article 137 of the Criminal Code. This case began when the Petitioner asked and came to the KPK building to confirm the rumors of giving a number of luxury cars from businessman Hary Tanoesudibyo to President Soesilo Bambang. Yudhoyono, on this basis the applicant was reported to Polda Metri Jaya based on Police Report No.16 / K / F / 2006 / SPK.[7]

Decision No. 013-022 / PUU-IV / 2006 ruling by the court judge stated, article 134, article 136, article 137 of the Criminal Code contradicts the 1945 Constitution of the Republic of Indonesia. At that time, Eggi, who had been convicted by the Central Jakarta District Court, then he made an appeal and cassation, but the judge still found him guilty, even the application for a review was rejected. In fact, the articles used to ensnare Eggi have been declared contrary to the 1945 Constitution of the Republic of Indonesia by the Constitutional Court.

Regarding the description above, the petitioner feels that his constitutional rights have been severely harmed due to the events that have occurred because based on Article 28F of the 1945 Constitution of the Republic of Indonesia that everyone has the right to communicate and obtain information to develop their personal and social environment, as well as the right to seek, obtain, own, store, process, and convey information using all available channels. This means that the right of the applicant to obtain and confirm the information requested is a constitutional right of citizens guaranteed by the 1945 Constitution of the Republic of Indonesia.

Based on this description, it can be concluded that the role of general court judges in deciding the case *a quo* is very important. the court no longer violates the constitutional rights of every citizen. Therefore, the idea of a *constitutional question* is a very appropriate alternative to maintain the constitutionality of court decisions. On the other hand, *constitutional questions* can also be a preventive effort to avoid court decisions that injure the constitutional rights of citizens.

The *constitutional question* in Indonesia currently does not belong to the Constitutional Court, the issue of institutionalizing the idea of a *constitutional question* in research currently developing in Indonesia (especially regarding this issue), ideally gives ideas of

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[5] Josua Satria Collins, "Addition of Constitutional Question Authority in the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights," *Jurnal Konstitusi* 15, no. 4 (2019): 688.
[6] Ibid.
[7] Ainul Yaqin Arief, *Constitutional Question: The Forgotten Authority and Ideas for Institutionalizing It in the Constitutional Court*, 1st ed. (Jakarta: Sinar Grafika, 2018).

constitutional question being the authority of the MKRI. However, on the other side, if we refer to the role model in the United States, constitutional review allows it to be submitted to the Supreme Court United States, so that the discourse of institutionalizing a *constitutional question* through MARI based on such thoughts can be carried out. So, if later a *constitutional question* has been adopted in the judicial system in Indonesia, then this is a manifestation of the state's function, namely *to respect, to protect* and *to respect.*

Research on the idea of a *constitutional question* in the last 3 (three) years, there were at least 3 (three) researchers who examined the urgency to put the idea of a *constitutional question* into the authority of the Constitutional Court. *First, the* research was conducted by Purba Yossita Nora Sima with the title "Addition of the Authority of *Constitutional Questions* to the Constitutional Court of the Republic of Indonesia to Ensure Constitutional Rights of Citizens." The research was conducted in 2019. The writing method used was juridical normative with library materials. The orientation of the research discussion is to answer the urgency of implementing *constitutional questions* if it becomes the authority of the Constitutional Court in the future. So, in his research findings Purba raises the urgency of the authority of According to *constitutional questions*, this authority has been touched on in the Constitutional Court Decision No. 14 / PUU-VI / 2008 in this decision does not question the issue of norms which are contrary to the constitution, but rather an error in the application of law which should be covered by the existence of a mechanism *constitutional questions*. On the other hand, Purba discussed how the Constitutional Court can use the powers of *constitutional questions.* Therefore, at the end of the discussion Purba suggests the need to adopt the idea of *constitutional questions* so that they can be applied in Indonesia, namely by amending the 1945 Constitution, revising the Constitutional Court law, or by expanding the legal standing of the applicant who carries out a *constitutional review.*[8]

Second, further research was conducted by Josua Satria Collins and Pan Mohamad Faiz. His research entitled "Increasing the Authority of *Constitutional Questions* in the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights" in 2018. This research is a normative juridical study with a qualitative approach and library materials. There are at least (2) important points in the discussion researched by Pan Moh. Faiz. *First*, the idea of *constitutional questions* is of very important urgency, because so far the judicial review conducted by the Constitutional Court is only at the level *abstract norm review,* while on the one hand, many people have asked the Constitutional Court to test at the level *concrete norm review.* However, this desire failed because the Constitutional Court stated that the petition was rejected *(niet ontvankelijk verklaard)*, because it is not the authority of the Constitutional Court. *Second,* Pan Moh. Faiz raises an alternative to the implementation of the mechanism *constitutional questions*, according to this, is necessary to add the idea of *constitutional questions* in the 1945 Constitution of the Republic of Indonesia to the authority of the Constitutional Court. Furthermore, according to him, in its application, if they are tried in relation to will be suspended *constitutional questions*,

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[8] Yossita Nora Sima Purba, "Addition of Constitutional Question Authority to the Constitutional Court of the Republic of Indonesia to Guarantee Constitutional Rights of Citizens," *Universitas Pembangunan nasional Veteran Jakarta* (2019): 1–16.

the trials in the general court temporarily until a decision is made by the Constitutional Court.[9]

Third, the research was conducted by Xavier Nugraha, et al. Entitled "*Constitutional Question*: A New Alternative to Citizens' Constitutional Rights Protection through *Concrete Review* in Indonesia" in 2019. The research uses a dogmatic legal research approach, namely laws as primary legal materials, books and journals as secondary legal materials. Furthermore, this study points to 2 (two) things that are considered very important. *First*, that the *constitutional question* is an assessment of a *concrete review*, this is done when a general court judge has doubts about the constitutionality of the law that applies to the case. Through this mechanism, respect, fulfillment and protection of citizens' constitutional rights guaranteed by the constitution can be maximized. Furthermore, there are several countries that have adopted a mechanism *constitutional question*, including Germany and Croatia. *Second,* because seeing the authority of the Constitutional Court in Indonesia which can only test at the level *abstract review*, it is necessary then to form a arrangement *constitutional question* as one of the powers of the Constitutional Court. Further regulation regarding this matter can be carried out by amending the 1945 Constitution of the Republic of Indonesia or through the revision of the Law on the Constitutional Court. However, this is seen as a challenge and an opportunity to include the idea of a *constitutional question* under the authority of the Constitutional Court, for example, regarding legal certainty, especially regarding the time limit for a case. Therefore it is necessary to further regulate the application of the *constitutional question* so that in the future it does not conflict with the principles of speed, simplicity and low cost.[10]

The Problem

Formulation of the problem in this research is: How is the institutionalization of the *constitutional question* as the authority of the Constitutional Court and the possibility of its institutionalization in the Supreme Court?

Research Methods

This research was conducted with 3 (three) research methods, namely the statute approach, the conceptual approach, and the compharative approach. This research is analyzed based in legal theory, concepts, and norms. Therefore, legal research is aimed at analyzing and explaing issues in accordance with legal principle.[11]

DISCUSSION

A. Three Ways to Institutionalize *Constitutional Question* as Authority of the

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[9] Collins, "Addition of Constitutional Question Authority in the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights."

[10] Xavier Nugraha et al., "Constitutional Question: A New Alternative to the Protection of Citizens' Constitutional Rights through Concrete Reviews in Indonesia," *Jurnal Negara Hukum* 10, no. 1 (2019): 130.

[11] Herlambang P Wiratraman, "Challenges of Interdisciplinary Research Methods in Indonesia Legal Education," *Mimbar Hukum* 31, no. 3 (2019): 402–418.

Constitutional Court of the Republic of Indonesia

Position of the Constitutional Court can be understood as a basic reinforcement of constitutionalism in the 1945, on the other hand, the presence of this institution is seen as a form of balancing power between state institutions *(check and balances)*.[12] In the context of *judicial review,* Constitutional Court functions to control and to abolish unconstitutional norms statutory so that they cannot be applied by other organs.[13]

Theoretically, the Constitutional Court belongs to the variant / model of *centralized judicial review,* namely placing the authority for constitutional review centrally through the Constitutional Court.[14] As a consequence of such an understanding, judicial review of laws that are considered / suspected to be contrary to the constitution (UUD NRI 1945) can only be tested *(constitutional review)* in the Constitutional Court and cannot be carried out by other organs (the Supreme Court).

Considering that the *constitutional question* is a mechanism for reviewing the constitutionality of a law, where a judge who is trying a case assesses or is in doubt about the constitutionality of the law in effect, therefore the judge can raise *constitutional question* to the Constitutional Court.[15] Based on this definition, the relevant institutions have the authority to *constitutional question* is the Constitutional Court, because the critical parameter / test-stone used to judge whether a law is constitutional is the constitution itself (UUD NRI 1945), as well as considering the function of the Constitutional Court as "*the final interpreter of the constitution*".

The 1945 Constitution neither stipulates nor limits the scope of the constitutional review conducted by the Constitutional Court, whether it only includes an *abstract review* or a *concrete review*, or even both.[16] In the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia the authority of the Constitutional Court is formulated as follows:

"*The Constitutional Court ... has the authority to examine laws against the Constitution*".

If we look at the provisions of the article, such formulation is actually general in nature, therefore, there is an open interpretation for legislators to formulate a law on the Constitutional Court whether it includes abstract norm testing, concrete norm testing or both. This problem, in fact, is within the authority of the legislators to formulate it.

However, as mentioned above, it is very unfortunate that the legislators chose not to

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[12] Nanang Sri Darmadi, "Position and Authority of the Constitutional Court in the Indonesian State Legal System," *Jurnal Konstitusi* 7, no. 1 (2010): 667–690.
[13] Nurul Qamar, "The Judicial Review Authority of the Constitutional Court," *Jurnal Konstitusi* Volume 1, no. 1 (2012): 1–15.
[14] Arief, *Constitutional Question: The Forgotten Authority and Ideas for Institutionalizing It in the Constitutional Court.*
[15] Asmaeny Azis Izlindawati, *Constitutional Complaint & Constitutional Question in the Rule of Law* (Jakarta: Prenadamedia Group, 2018).
[16] Arief, *Constitutional Question: The Forgotten Authority and Ideas for Institutionalizing It in the Constitutional Court.*

adopt the idea of a *constitutional question/concrete review* in the system in the Constitutional Court. Jimly Asshidiqie stated the same thing, according to him, that the system of testing the prevailing laws and regulations in Indonesia only adheres to an *abstract review*.[17]

Based on the above description, ideally there are 2 (two) alternative ways to institutionalize a *constitutional question* in the Constitutional Court. The first way, namely by amending the 1945 Constitution of the Republic of Indonesia. The second way, by revising the law on the Constitutional Court. From another perspective (which is later referred to as the third way), namely through the jurisprudence of the Constitutional Court decisions.

The first way is to add authority *constitutional question* to the Constitutional Court through amendments to the 1945 Constitution of the Republic of Indonesia. The mechanism *constitutional question* must be regulated through amendments to the 1945 Constitution of the Republic of Indonesia, this is because the granting of authority *constitutional question* to the Constitutional Court will have stronger legitimacy than through other legal instruments. When compared with other countries that already have the authority *constitutional question*, it appears that they place the legitimacy of this authority in the constitution.[18]

Putting/place the *constitutional question* authority into the constitution, it is necessary to amendments the 1945 constitution. To amendments constitution have at least 2 (two) ways. *First,* amendments are made by the legislature body.[19] *Second,* through amendments that have been determined by themselves in the constitution itself, or are referred to as formal amendments.[20]

According to formal amendments, amendments to the 1945 Constitution of the Republic of Indonesia are regulated based on the provisions of Article 37. Base on Article 37 amendments shall at least use 4 (four) steps. *Steps one,* amendments of the constitution can be scheduled by People's Consultative Assembly, if they are submitted at least 1/3 of the total members. *Step two*, amendments must be written, clearly and details. *Step three,* to amendments articles of the 1945 Constitution, the People's Consultative Assembly must be attended by at least 2/3 of the total members. *Step four,* the decisions of the amendments is made with the approval of at least 50% plus one from all members of the People's Consultative Assembly.

Initiate a *constitutional question* into the authority of the Constitutional Court through amendments to the 1945 Constitution of the Republic of Indonesia is not an exaggeration. Even so, this does not mean that apart from the debate on the pros and cons, some experts

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[17] Ibid.
[18] Collins, "Addition of Constitutional Question Authority in the Constitutional Court as an Effort to Protect Citizens' Constitutional Rights."
[19] Udiyo Basuki, "The Fifth Amendment of the 1945 Constitution as a Mandate for Reform and Democracy," *Panggung Hukum* 1, no. 1 (2015): 1–24.
[20] Ibid.

argue that the granting of the authority to judge *constitutional complaint* and *constitutional question* to the Constitutional Court does not have to be through amendments to the 1945 Constitution of the Republic of Indonesia.[21] Other opinions say that even though the Constitution The 1945 NRI does not rule out amendment, but changes to the constitution are very difficult to do. Because, politically, the People's Consultative Assembly (MPR) consists of members of the People's Representative Council (DPR) and members of the Regional Representative Council (DPD), thus, it is considered very difficult to unite the different political views of various members. DPR and DPD.[22]

Procedurally, we can see for ourselves in the provisions of Article 37 of the 1945 Constitution, at least it requires that a change is proposed by 1/3 of the MPR members, the session must be attended by 2/3 members of the MPR, and the amendment decision requires 50% plus one member from all MPR. This is seen as a difficulty in itself if the idea of a *constitutional question is* carried out by means of amendments to the 1945 Constitution.

Regarding the description above, difficulties procedural must not seem as pessimistic, therefore in this section different perspectives will be explained as supporting arguments, why then the idea *the constitutional question was* added to the Constitutional Court through amendments to the 1945 Constitution of the Republic of Indonesia. The provisions of Article 37 of the 1945 Constitution of the Republic of Indonesia should not be seen as excessive difficulty, because it is seen as a consequence of a democratic state. In a democratic country, where the right to take political decisions is carried out based on the concept of representation and based on existing procedures, this term is called *representative democracy.*

The provisions of Article 37 of the 1945 Constitution of the Republic of Indonesia are so flexible in the constitution, in the sense that the constitution is easy to change so the constitution is flexible.[23] So, assuming that the provisions of Article 37 of the Constitution It is procedural that complicates the amendment of the Constitution, so this opinion is considered too excessive/incorrect.

The second way is to revise the Law on the Constitutional Court. Seeing the provisions of Article 24C paragraph (1) of the 1945 Constitution which are general in nature and open up space for interpretation, can the Constitutional Court be examining concrete norms, abstract norms or even both. As described in the previous review, it is very unfortunate that the legislators in the Constitutional Court law did not adopt a *concrete review / constitutional question*, so that this is considered not a deficiency in the 1945 Constitution but a lack of contained in the law of the Constitutional Court which is

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[21] Hamdan Zoelva, "Constitutional Complaint Constitutional Question and Protection of Citizen's Constitutional Rights," *Jurnal Media Hukum* 19, no. 1 (2012): 152–165.
[22] Nugraha et al., "Constitutional Question: A New Alternative to the Protection of Citizens' Constitutional Rights through Concrete Reviews in Indonesia."
[23] Dadi Aprizon Putra, "Juridical Review of the Existence of Regulations Environment in The State Law of the Republic Indonesia 1945 and The Constitution of the Fifth Republic of France," *Al-Imarah: Jurnal Pemerintahan dan Politik Islam* 4, no. 1 (2019): 26–40.

formed by the legislature that's why it is to add a *constitutional question* deemed unnecessary to the authority of the Constitutional Court through amendments to the 1945 Constitution.

Because the absence of the authority of the *constitutional question* is a deficiency of the law of the Constitutional Court, so, a revision of the law is necessary. Revision of the Constitutional Court Law can be based on two things. *First,* based on article 24C of the 1945 Constitution of Republic Indonesia which can still be interpreted. *Second,* based on the provisions of Article 29 paragraph (1) of Law No. 48 of 2009 concerning Judicial Power:

> The Constitutional Court has the authority to judge at the first and last levels whose decisions are final for:
>
> a. Testing laws against the 1945 Constitution of the Republic of Indonesia;
> b. Resolving disputes over the authority of state institutions whose authority is granted by the 1945 Constitution of the Republic of Indonesia;
> c. Deciding to dissolve political parties;
> d. Resolving disputes about the results of general elections;[24] and
> **e. Other powers granted by law.**

Based on Article 29 paragraph (1) letter e, which reads: "*other powers granted by law*". This means that the authority of the Constitutional Court is very possible to be regulated by law, so there is no need for amendments to the 1945 Constitution to initiate a *constitutional question* as the authority of the Constitutional Court.

The third way is to accommodate *constitutional questions* through the jurisdiction of the Constitutional Court Decisions. Jurisprudence is a source of law that can be used as a reference by judges in deciding cases, or, at certain times, jurisprudence is used by litigant parties as a rule of law in court proceedings. However, debates regarding the use of jurisprudence, especially in Indonesia, are inevitable, because the legal system used by Indonesia is a Dutch legacy, namely *civil law,* which places jurisprudence as a reference for legal sources that do not bind judges in deciding cases.[25] However, this study does not intend to discuss this debate.

For example, jurisprudence regarding the *constitutional question* on the Constitutional Court Decision Number 013-022 / PUU-IV / 2006, in it's legal considerations the judge stated as follows:

> If a judge (other than a constitutional judge) doubts the constitutionality of a legal norm to be applied in a concrete case before deciding on the case concerned the judge concerned first submits a request (question) to the Constitutional Court regarding the constitutionality of the said legal norm.[26]

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[24] Oktavani Yenny, "Expanding the Authority of the Constitutional Court as the Guardian of the Constitution," *Tanjungpura Law Journal* 4, no. 1 (2020): 39–58.
[25] Oly Viana Agustine, "The Applicability of Jurisprudence on the Authority of Judging Laws in the Constitutional Court Decisions," *Jurnal Konstitusi* 15, no. 3 (2018): 642.
[26] "Constitutional Court Decision Number: 013-022/PUU-IV/2006" (2006).

Learning from the decision of the Constitutional Court above, to accommodate the adjudication of the *constitutional question*, it can refer to this decision, so that there is no need to amend the constitution 1945 or revision of Constitutional Court Law. Thus, the expansion of authority, especially regarding *constitutional question*, can be accommodate through the interpretation of court decisions *(jurisprudence)*. The purposes is that the interpretation of the constitution is not only based on the original intent aspect, but sees it as a practical necessity and political benefit for the present and the future.[27]

B. Institutionalizing *Constitutional Question* on Supreme Court of the Republic of Indonesia

In the previous descriptions it has been explained about the discourse of institutionalizing the idea of a *constitutional question* in the Constitutional Court of the Republic of Indonesia, and several countries as *role models* that have implemented this idea into their authority their constitutional court. So far, institutionalizing the idea of a *constitutional question* has always been directed so that this authority is owned by the Constitutional Court, for example, Hamid Chalid and Arief Ainul Yaqin stated that the idea of a *constitutional question* can be constructed as part of the authority of the Constitutional Court.[28]

This research will discuss through different perspectives regarding the institutionalization of the idea of a *constitutional question*, not within the authority of the Constitutional Court but part of the authority of the Supreme Court (as a novelty). Such an opinion also has its own arguments, namely referring to a comparative study of constitutional judgments conducted by the *Supreme Court of the United States*. Even so, the authors understand and are aware that there are very basic differences in the legal system between Indonesia and the United States, however, this issue is not discussed in this study, because in this study it is focused on discussing constitutional testing, especially *constitutional questions*.

The United States of America is designed to be a Federal State with several states. The legal system in the United States is seen as having its own uniqueness, because each state has its own legal system and has its own system of courts.[29] Thus, it can be seen that in the United States two types apply legal systems namely between the federal legal system and the legal systems of the states.

Although there are two different legal systems, since the adoption of the United States constitution, this has created a common consensus to strengthen the federal government. The desire to strengthen the federal state is embodied in the principle of the term *"Where*

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[27] Zoelva, "Constitutional Complaint Constitutional Question and Protection of Citizen's Constitutional Rights."
[28] Hamid Chalid and Arief Ainul Yaqin, "Initiating the Institutionalization of the Constitutional Question through the Extension of the Constitutional Court's Authority in Examining the Law," *Jurnal Konstitusi* 16, no. 2 (2019): 363.
[29] Izlindawati, *Constitutional Complaint & Constitutional Question in the Rule of Law*.

the federal Constitution speak, no state may contradict it" (Where the federal constitution speaks, no state can oppose it).[30]

Focusing on the context of constitutional, the *judicial review* conducted by the United States (*Supreme Court US*) has become a historic momentum and phenomenon, especially regarding the case of "Marbury Versus Madison" (1803), which at that time John Marshall as *chief of justice*. Therefore, it is not surprising that these examples and models are imitated in several countries in the world.[31]

Related to descriptions above, John Marshall in his decision (in the case of Marbury Versus Madison) used the argument of Alexander Hamilton (the designer of the United States constitution), emphasizing that the government system is very important to be based on the concept of limiting power, and last but not least, the decision John Marshall's work has described the role of the judiciary as the enforcer of the constitution or what is often known as the principle of constitutional supremacy. This principle aims to ensure that there are no laws that contradict the constitution, the organ that holds this role is the court.[32]

In addition, *judicial reviews* in the United States use model *a decentralized or diffuse or dispersed review*. The main characteristic of this model is that constitutional review can only be carried out if it is related to a concrete case in court and the trial is also carried out by the judge who is handling the concrete case itself.[33]

Interestingly and as a difference between the United States and Indonesia, the function of "*the guardian of the constitution*" in Indonesia is always conceived as a function of the Constitutional Court of the Republic of Indonesia. Meanwhile in the United States, *the US Supreme Court* itself maintains and carries out function of *the guardian of the constitution*,[34] means, the *US Supreme Court is* not only a law enforcer in court, but also obliged to uphold the constitution.

Furthermore, the arrangement that authorizes the *US Supreme Court* to conduct constitutional review is not regulated in the United States constitution, particularly in *Article III the Constitution of the United States*.[35] According to him, the practice of *judicial review* in the United States actually does not have a clear constitutional basis, but is only carried out based on traditional practices developed by the *US Supreme Court*.[36]

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[30] Ibid.
[31] Jimly Asshiddiqie, "History of the Constitutional Review and the Ideas for the Establishment of the Constitutional Court," *dalam laman http://jimlyschool. com/read/analisis/276/sejarah-constitutionalreview-gagasan-pembentukan-mk/. accessed on 02/11 / 2020.* (2013).
[32] I.D.G Palguna, *Constitutional Court: Rationale, Authority, and Comparison with Other Countries* (Jakarta: Constitution Press, 2018).
[33] Arief, *Constitutional Question: The Forgotten Authority and Ideas for Institutionalizing It in the Constitutional Court*.
[34] Asshiddiqie, "History of the Constitutional Review and the Ideas for the Establishment of the Constitutional Court."
[35] Arief, *Constitutional Question: The Forgotten Authority and Ideas for Institutionalizing It in the Constitutional Court*.
[36] Ibid.

Regarding the above issue, John Marshall then put forward his statement, namely: "*it is emphatically the province and duty of the judicial department to say what the law is*".[37] Statement is a *landmark decision* Such a becoming the legal basis for giving authority to judge the constitutionality of a law *the Supreme Court the US Supreme Court the*.[38]

Based on the above description, it can be seen that if we refer to the practice of constitutional review of laws in the United States, it is possible if a *constitutional question* institutionalizing at the Supreme Court of the Republic of Indonesia (MARI). Although this understanding is inseparable from debates for or against, this can be seen as an effort to develop science, especially in the field of law. As Sri Soemantri has stated in the Comprehensive Manuscript of Amendments to the 1945 Constitution Book VI on Judicial Power, according to him, *judicial review* in United States is no regulated by the constitution, until occurred case *Marbury versys Madison,* finally the Supreme Court of United States conducted a *judicial review*.[39]

Therefore, specifically regarding the idea of a *constitutional question,* Indonesia can learn from the model of constitutional review conducted by the US *Supreme Court.* On the other side, there is something interesting about the review regarding judicial power in the United States, namely judges are not only law enforcers, but are obliged to uphold the constitution.

In Indonesia, law enforcement and the constitution appear to be implemented differently and are administered by two different institutions. Law enforcement by the Supreme Court, while constitutional enforcement by the Constitutional Court. This definition is wrong, especially in the context of constitutional supremacy. According to Titon Slamet, the mistake lies in the point of view that places the separation between the two agencies, namely the exclusive function of the constitutional court in the Constitutional Court and the function of the ordinary judiciary at the Supreme Court.[40]

Furthermore, according to Titon, such a paradigm increasingly creates differences because the Constitutional Court often claims to be "*the sole interpreter of the Constitution*".[41] In fact, the provisions of Article 1 Paragraph (1) of Law No. 48 of 2009 concerning Judicial Power: Judicial power is obliged to enforce law and justice based in Pancasila the Constitution 1945. This means that the administrators of judicial power, be it the Constitutional Court or the Supreme Court have the same commitment to realizing a constitutional rule of law. Thus, the Supreme Court also has the obligation to uphold the constitution itself. One of the steps to pave the way for the Supreme Court to enforce the constitution is to give the authority of *constitutional question / concrete review* to the Supreme Court of the Republic of Indonesia.

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[37] Titon Slamet Kurnia, "Constitutional Court' by the Supreme Court through a Concrete Review Mechanism," *Jurnal Konstitusi* 16, no. 1 (2019): 61.
[38] Ibid.
[39] Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, *Comprehensive Text of Amendments to the Constitution Book VI of Judicial Power*, vol. 53, 2010.
[40] Kurnia, "Constitutional Court' by the Supreme Court through a Concrete Review Mechanism."
[41] Ibid.

CONCLUSION

Legal reform, especially in the judicial system in Indonesia, is something that must be pursued. In the context of constitutional testing, as described in the previous sections, there is a legal vacuum *(vacuum of norm)*, especially regarding the mechanism *constitutional question / concrete review*. Therefore, this article offers its institutionalization through MKRI or MARI. On the other hand, it is necessary then to change the paradigm, that constitutional enforcement is not exclusively carried out by MKRI. Supposedly, MARI also has the obligation to uphold the law and the constitution itself. Further, regarding the setting and the desire to add authority *constitutional question* to the institutions, this is of course the jurisdiction of the legislators.

INSTITUTIONALIZING THE CONSTITUTIONAL QUESTION AUTHORITY IN THE CONSTITUTIONAL COURT AND POSSIBILITY INSTITUTIONALIZING IN SUPREME COURT

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