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The Urgency of the Constitutional Question by the Constitutional Court and Its Relevance to the Indonesian Democracy Index during the COVID-19 Pandemic

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Abstract
The Constitutional Court's authority to conduct the judicial review contains deficiencies implied upon the less maximum efforts to actualize constitutional democracy during the COVID-19 pandemic. Hence, the constitutional question is crucial in responding to the issue; it influences the increase of the Indonesian democracy index during the COVID-19 pandemic. The present study aimed to examine and analyze the urgency of constitutional questions by the Indonesian Constitutional Court in actualizing constitutional democracy with a particular design if it is to be regulated in the Constitution and the laws of the Constitutional Court. The research belongs to normative juridical with library research method. The results showed the urgency of the Indonesian Constitutional Court's authority to impose constitutional questions. (1) It is to increase the Indonesian democracy index during the COVID-19 pandemic (2) It is to protect the citizens' Constitutional Rights; (3) It is to increase the citizens' constitutional awareness; (4) It is to connect the judges' interpretation; (5) It is to actualize progressive and responsive substantive justice. Besides, the research compared the authorities of the constitutional courts applied by countries such as Austria, Germany, and Russia, where the Constitutional Courts in several countries have constitutional question authority. A recommendation of constitutional question arrangement within the Indonesian constitutional system accompanied this research.

Keywords: Constitutional court; Constitutional democracy; Constitutional question; Covid-19 pandemic; Judicial review

1. Introduction

According to The Economist Intelligence Unit (EIU), Norway has become the country with the highest democracy index globally, reaching a score of 9.81. Meanwhile, Indonesia has been ranked low in the last fourteen years, and the score has kept decreasing during the COVID-19 pandemic (Putra, 2021). Ireland occupies second place with 9.37, Sweden with 9.26, New Zealand with 9.25, and Canada with 9.24. Indonesia ranked 64th in Asia with a score of 6.3 (Putra, 2021), while the lowest score was reached by North Korea, with 1.08. In Indonesia, the decrease during the pandemic was caused by the ignorance of the government in that they did not include the public in the discussion of urgent issues (Novianto, 2020).

Constitutional Court is the manifestation of the commitment and efforts to strengthen the concept of constitutional democracy and to ensure a check and balance system among the branches of the state's authorities in Indonesia after the reformation

era. In Indonesian state administration, the Constitutional Court was established based on the amendment of the 1945 Constitution. One of the significant materials of the amendment is the position of the Constitutional Court that handles cases and disputes in the state administration. It maintains the Constitution fairly and responsibly under the people's will and democratic goals (Thohari, 2009). Further, according to Sutiyoso (2016), the Constitutional Court attempts to implement the institution's main purpose: the Constitution upholds to actualize a democratic legal state for the dignity of the life of the people and the nation.

Several authorities granted to the Constitutional Court based on Article 24 C paragraph (1) of the 1945 Constitution are: "adjudicating at the first and final instance, the judgment of which is final, to review laws against the Constitution, to judge on authority disputes of state institutions whose authorities are granted by the Constitution, to judge on the dissolution of a political party, and to judge on disputes regarding the result of a general election." With the power, the Constitutional Court has marked a period in the judicial power system in which several regions are now subjected to law. For example, no institution was granted the authority to conduct a judicial review against the Constitution in the past. Nowadays, the Constitutional Court can solve the issue (Sutiyoso, 2016). The judicial review authority granted is the result of the Constitutional Court's efforts to strengthen the principles of constitutional democracy.

Nevertheless, the judicial review authority granted to the Constitutional Court is not without drawbacks. The actualization of the principles was not as expected. For instance, the scope of the judicial review is limited to the abstract components. However, the issues related to norms against the laws are observable through a concrete case of the norms.

Some examples are the review case Number 013-22/PUU-IV/2006 filed by Eggi Sudjana and Pandapotan Lubis. In the decision, the panel of judges approved the applicant's request. It stipulated that Articles 134, 136 bis, and 137 of the Indonesian Criminal Code (KUHP) regarding the contempt of the president and the vice president is against the 1945 Constitution. Hence, it does not imply a binding effect. Another is case Number 6/PUU-V/2007, filed by Panji Utomo. In the verdict, the judges approved the applicant's request concerning Articles 154 and 155 of the Indonesian Criminal Code. It concerns the crime of publicly expressing feelings of hostility, hatred, and contempt against the Government of Indonesia. The last example the Case Number 7/PUU-VII/2009, which Rizal Ramly proposed. The judges decided that Article 160 of the Indonesian Criminal Code shall be interpreted as a material offense instead of a formal offense. Therefore, the Constitutional Court stipulated that the draft of Article 160 of the Criminal Code is liable.

The court has tried and acquitted all the applicants in the cases; some have served a sentence before proposing to the Constitutional Court. In other words, although the Constitutional Court has approved the request, stipulated the conditional constitutional, or annulled the articles, it is necessary to know that the decision is not retroactive. It means that the applicants must follow the verdict of the public court through the articles stipulated as unconstitutional. In particular, no restoration shall be conducted if the applicant has served a sentence. From the explanation, the authority granted to the

Constitutional Court is highly limited. Collins and Faiz (2018) found that the authority's delimitation can potentially reduce the Constitutional Court's function in actualizing constitutional democracy. From the legal perspective, it tends to create a fatal issue, where the laws stipulated as unconstitutional are imposed on the citizens.

The Constitutional Court, born from the mandate of reform in its development, has always received a positive response from the community. It seeks to build a culture and court management that leads to decisions emphasizing the creation of substantive justice (Adhani, 2021). One of the efforts to ensure the rights is by proposing the Constitution question authority for the Constitutional Court. A constitutional Question is a series of judicial review mechanisms proposed by the judge adjudicating a case in which the judge raises a question regarding the constitutionality of laws to be used in assessing and stipulating a decision. A constitutional Question is a series of mechanisms that begins with litigation or a trial of a concrete case in an ordinary court. The mechanism is Concrete Judicial Review (Chalid & Yaqin, 2019). Therefore, the present study discusses the urgency to complete the judicial review by the Constitutional Court through the Constitutional question.

2. Research Method

The research is normative juridical with a statute approach. According to Soekanto and Mamudji (2001), normative juridical research is a law study carried out by examining library materials or secondary data as a basis for research by searching regulations and literature related to the problem researched. Other than the statute approach, the research also employed a comparative approach. The research data were divided into two: primary and secondary. The data collection method or technique used in this research was library research. This method conducted an inventory and studied library data of laws and regulations, books, journals, articles, documents, official websites, and other literature enriched with relevant research about the democracy index during the COVID-19 pandemic. The data were analyzed using content analysis, including description, categorization, interpretation, and creativity.

3. Result and Discussion

3.1. The Urgency of Constitutional Question Authority

The term Constitutional question is only used as an adaptation of the German phrase *konkrete normenkontrolle* (Currie, 1994). It is also known as "Preliminary Question," which means the mechanism proposed by the judge of a public court to the Constitutional Court before applying the legal norm under question in a concrete case (de Visser, 2014).

The term constitutional question contains two meanings, general and particular. In general, it refers to each matter related to the Constitution. Meanwhile, particularly, it relates to a review mechanism of the constitutionality of law when a judge adjudicates a case or doubts the constitutionality of the applicable laws while adjudicating the case. The question is proposed to the Constitutional Court (Azis & Izlindawati, 2018). If the constitutional question has been proposed, the Constitutional Court determines the

constitutionality of the laws instead of judging the adjudicated case by the public court. Hence, the Constitutional Court is not an institution to judge the case. It is limited to judging the constitutionality of a law.

Generally, judicial review consists of two mechanisms: abstract and concrete (constitutional question). According to Victor Fererres in Yaqin (2018), "There are two avenues of judicial review of legislation: abstract review and concrete review". Abstract review is a model of judicial review that can be filed by anyone who feels their constitutional rights have been violated through law. Meanwhile, a concrete review is a model of judicial review proposed by judges in the scope of general justice when questioning the constitutionality of a law on concrete cases being handled in court. The two concepts differ from the current situation in Indonesia, in which the judicial review mechanism is limited to abstract review. However, it is common for the norms against the law to be observable through a concrete case.

The examples are case Number 013-022/PUU-IV/2006, requested by Eggi Sudjana and Pandapotan Lubis. In their decision, the panel of judges granted the applicant's request. It stated that Article 134, Article 136, and Article 137 of the Criminal Code concerning the treatment of the President and Vice President are contrary to the 1945 Constitution of the Republic of Indonesia, and violence does not have binding legal force. Next, in case Number 6/PUU-V/2007 by Panji Utomo-in its decision, the panel of judges granted the applicant's request regarding Articles 154 and 155 of the Criminal Code concerning the crime of expressing feelings of hostility, hatred, or public humiliation against the Government of the Republic of Indonesia. According to the Court, offenses in the two articles mentioned above are formal offenses, so they have the potential to create a tendency for abuse of power because they can easily be interpreted according to the tastes of the authorities. Last, Case Number 7/PUU-VII/2009 by Rizal Ramly. The panel of constitutional judges stated that the provisions of Article 160 of the Criminal Code must be construed as a material offense, not as a formal offense. Thus, the Constitutional Court stated that the formulation of Article 160 of the constitutional Criminal Code was conditional, so it had to be treated as a material offense. There had to be a criminal act caused by the incitement in question.

All the applicants have been tried and convicted. Some served the public court sentence through the law reviewed by the Constitutional Court, which then stipulated the law as unconstitutional or against the Constitution. It is necessary to note that although the Constitutional Court has approved, stipulated the conditional Constitution, or annulled the articles, the decision is not retroactive. The applicants must follow the verdict. Further, no restoration shall be conducted.

Hence, the constitutional question authority granted to the Constitutional Court is expected to respond to and solve the constitutionality problem of laws. The legal efforts referred to are the equivalence of legal remedy. It is an effort a legal subject makes to defend their rights through the judicial mechanism. However, the rights are limited to constitutional rights. Therefore, in actualizing the constitution-based democracy, Indonesia needs to consider the adoption of the constitutional question mechanism to the authority granted to the Constitutional Court.

Some urgencies appeared before the constitutional question was granted to the Constitutional Court. First is upholding the principles of a constitutional democratic state during the COVID-19 pandemic; second is protecting the citizen's constitutional rights; third is increasing the citizen's constitutional awareness; fourth connecting the judges' interpretation; and fifth is actualizing progressive and responsive substantive justice.

3.1.1. Upholding the Principles of Constitutional Democracy

Asshiddiqie, in his book Konstitusi dan Konstitusionalisme (2005), stated that Indonesia adheres to people's sovereignty. Hence, constitutional procedures consisting of laws and the Constitution is necessary. Similarly, legal sovereignty needs democratic methods. Therefore, law and democracy are inseparable within a constitutional democracy.

The characteristic of the constitutional democracy concept is the government system with limited power. Besides, the state must not carry out arbitrary actions against the citizens. The state power has been divided in such a way as to prevent power abuse. One of the ways is to share the authority with several persons or bodies instead of centralizing it to one person or body.

One of the popular media from the UK, the Economist, through one of the business entities, the Economist Intelligent Unit (EIU), announced the global Democracy Index in February 2021. The Economist Intelligence Unit (EIU) in (Kurnia, 2021) mentioned that the COVID-19 pandemic negatively impacts the democracy index and quality in many countries. Globally, the rate of the democracy index has decreased to 5.37 from 4.44. EIU explained that the pandemic had limited civil freedom.

Further, Kurnia (2021) stated that EIU had studied 167 countries; among them, 116 countries have experienced a decrease in their democracy index. The rest is divided into two categories: 38 countries have the index increased, and 13 others have remained the same. The pandemic has become an excuse to silence the opposition party in several countries, including Western Europe and North America. EIU also reported that the democracy index of Indonesia decreased in 2020, which was 6,30 on a scale of 1-10. In other words, Indonesia ranked 64th of 167 countries studied by the EIU.

Furthermore, the score reached in 2020 is the lowest since 2006, when the index was established. In 2019, the Indonesian democracy index score was 6.48. The latest score has categorized Indonesia as a flawed democracy. The EIU uses five variables in calculating the democracy index. Those are the organization of the general election and pluralism, government function, political participation, political culture, and civil freedom (Kurnia, 2021).

Among the five variables, Indonesia experienced a significant decrease in political culture, scoring 4.38. It was significantly lower than the achievement in 2019. According to Wijayanto and Fajar Nursahid, the democracy issue in Indonesia includes the absence of a critical civil society toward authority. Based on the explanation, it is clear that the principles of constitutional democracy cannot be implemented ideally in Indonesia.

After the COVID-19 pandemic, which negatively impacted the index and quality of democracy in many countries, including Indonesia, it is important to optimize the

various existing tools of state power to increase the democracy index in Indonesia, for example, by maximizing the function of judicial review owned by the Constitutional Court.

The Constitutional Court was established to uphold and defend the Constitution's supremacy and was important in preventing democratic backsliding. It is in line with statistics from 163 countries from 1960–2000 stated by Gibler and Randazzo that the Constitutional Court as an independent judiciary has a positive and significant effect in preventing the possibility of democratic decline (Baidhowa, 2021). It conducts a review of the laws having the potential of being against the Constitution. The expansion of powers of judicial review by the Indonesian Constitutional Court is limited to the abstract review. It is expected to conduct a concrete review (constitutional question). However, it implies strengthening the power of judicial review by the Constitutional Court, allowing the state to strengthen the concept of constitutional democracy. Hence, it provides more opportunities to conduct judicial reviews of the laws issued by the Executive or Legislative institutions.

According to Jati (2021), what caused a decline in democracy during the COVID-19 pandemic was restrictions on community activities that wanted to voice protests against policies made by the government based on health protocol rules. For example, the action against the RKUHP and the Employment Creation Law caused controversy. Therefore, it becomes important to activate various constitutional channels, such as constitutional questions, to uphold the principles of constitutional democracy. Constitutional democracy requires a balance between state power and citizens through constitutional legal remedies.

The judicial review authority for the Constitutional Court using the constitutional question is theoretically based on the main function of the judicial review against the Constitution applied in modern countries. The functions have been mentioned by (Harman, 2013). First, it is to protect the Constitution as the supreme law. Second, it is to ensure the drafting of the Constitution. The third is to protect the state's fundamental values. The fourth is to control the legislative power, and the fifth is to ensure that the state administrators and the people obey the Constitution. Sixth, it is to ensure the establishment of control and balance principles. The seventh is to maintain the consistency of the legal norm hierarchical system. Eighth, it is to uphold constitutional democracy principles and values.

3.1.2. Protecting the Citizen's Constitutional Rights

The limited scope of the judicial review has decreased the Constitution's position as the supreme law in Indonesia. Similarly, it reduces the protection of the people's constitutional rights, especially those on trial and subject to a sentence of which the constitutionality of the laws is doubtful. Under such conditions, the abstract review cannot accommodate the protection of the people (MD, Hamidi, Palguna, Safa'at, & Lutfi, 2010).

The current system of judicial review at the Constitutional Court allows each citizen to file a petition if laws potentially violate constitutional rights. However, when the application for judicial review is from a concrete case in the court, it is beyond the

constitutional question context. From the formal procedural perspective, the Indonesian Constitutional Court is not accomplished with the authority to adjudicate concrete review cases or constitutional questions. Besides, the application for judicial review does not end the litigation process in the court until the Constitutional Court makes the decision.

The concept of constitutional question can delay the litigation process of the concrete cases on trial until the judicial review by the Constitutional Court is completed. It is to avoid constitutional loss of the citizens at the litigation stage of the trial, of which the constitutionality of the applicable laws is in question (Yaqin, 2018). The quo authority granted to the Constitutional Court can strengthen the constitutional protection for citizens undergoing a litigation process under the mentioned conditions.

3.1.3. The Minimum Constitutional Awareness of The Citizen

The term constitution is understood in various state administrative practices in two ways. First, the Constitution is a broader concept than the basic law. Further, the Constitution contains written laws and unwritten state administrative customs. Second, the Constitution is similar to the basic law (Sukriono, 2016). Overall, the Constitution refers to the main law and the manifestation of the people's will. Hence, all acts, deeds, and rules established by the policy-maker as delegated by the Constitution shall not be against the Constitution.

Simon Halliday and Bronwyn Morgan in Crouch (2021) emphasized the importance of culture and legal awareness, including constitutional culture. Considering the significance of the Constitution, the citizen needs to be more aware of it. The awareness can be in several forms, such as by controlling the implementation of the Constitution through judicial review in the Constitutional Court. Conceptually, constitutional awareness means the citizen's personal quality through knowledge, attitude, and behavior following the message of the Constitution.

The minimum constitutional awareness of the people adds to the importance of constitutional question authority for the Constitutional Court. It helps to increase the citizen's constitutional awareness. Indeed, a matter of constitutionality is unknown to the people. In the implementation, the case examiner can be more active and sharp in observing the constitutionality of the laws applied in the arbitration proceedings.

Enny Nurbaningsih, the Constitutional Court Judge, presenting the ideas in the National Seminar APHTN-HAN in Yogyakarta in 2022, mentioned that the constitutional question of institutionalization could accommodate the minimum awareness of the people. Hence, the urgency of the constitutional question for the Constitutional Court is crucial.

3.1.4. Connecting the Judges' Interpretation

Legal interpretation is an approach to the legal findings in which the existing laws cannot be appropriately implemented. It becomes complicated when no laws can specifically be applied to the case. In this case, nevertheless, the incomplete legal materials do not allow the judge to refuse to examine and adjudicate the case (Khalid, 2014). It is in line with *ius curia novit*, suggesting that the judge is considered to have legal literacy; thereby, the judge needs to adjudicate each case assigned.

The constitutional question and *ius curia novit* principles attached to a judge are contradictory. The former creates room for the judge to raise a constitutional question to the constitutional court if the constitutionality of a particular law is doubtful. On the other hand, the latter mandates the judge to comprehend the law and solve the case independently based on his knowledge and understanding of the legal findings.

Historically, the principles known in the civil law legal system derived from the legalism school of thought. They believe that laws are complete and clear legal products. However, the dynamic development of society has left various laws far behind the realities (Wicaksana, 2018). Besides, a problem of applicable laws and regulations, as mentioned by Suwasta (2011), the laws are not flexible and unable to adjust to the people's conditions. Further, it is explained that laws dan regulations can never fulfill the legal circumstance, thus causing a *recht vacuum*. Therefore, the legalism school of thought and ius curia novit principles are considered legal fiction and difficult to realize.

The ius curia novit principles imply the decision model of the judge. It contains various interpretations leading to the disconnection of the interpretation of a particular law. Therefore, the constitutional question is one appropriate option to answer the problem. Indonesia, which formally does not adhere to *stare dicisis* or precedent, can help form a unified view or understanding among judges other than constitutional judges regarding upholding legal constitutionality (Hamidi & Lutfi, 2016). A legal product reviewed by the Constitutional Court has a binding effect for all the judges examining a case in the public court through the mechanism. Hence, the constitutional judge can connect the multi-interpretation of a particular law produced by various judges.

3.1.5. Ensuring Progressive and Responsive Substantive Justice

Satjipto Rahardjo, with the progressive legal theory, mentioned that law is an institution to lead people to a fair, prosperous, and happy life. Further, Satjipto Rahardjo viewed that progressive law contains a law's concept, function, and objectives that need to be actualized (Raharjo, 2004). Therefore, based on the goals of Pancasila, the theory is relevant to the objectives of the law.

Before the introduction of progressive law, Nonet and Selznick (2008) posed the idea of responsive law, which adopts a new paradigm. Law is not observed as an autonomous entity. Instead, it can interact with other entities to adopt the people's interests. Therefore, the constitutional question of the Indonesian Constitutional Court is necessary for the judge to accomplish the task.

The Constitutional Court serves as the guardian of the Constitution and the guardian of democracy by upholding substantive justice in each decision. The principles and efforts to actualize substantive justice through constitutional questions help a judge adjudicate a case and question the constitutionality of the applicable laws. When the applicable laws are based on legal certainty but against substantive justice, it does not fulfill the expectation of the people. Hence, the constitutional question for the Constitutional Court is highly necessary to uphold progressive and responsive laws, leading to substantive justice for the people.

3.2. Comparison of the Constitutional Court Authority of Several Countries

3.2.1. Austria

One of the authorities granted to the Austrian Constitutional Court is the judicial review through abstract and concrete review (constitutional question). The authority is regulated in Articles 139 and 140 of the Austrian Constitution. Austria is the pioneer of the establishment of the Constitutional Court. Granting the constitutional question to the Constitutional Court aims to uphold constitutional supremacy.

The practice of concrete review (constitutional question) is common in the Austrian Constitutional Court. In 2011, the applicant requested 36 cases with constitutional questions. Among them, 33 applicants won the case. Meanwhile, in his research conducted in 1993, Hausmaninger reported 301 cases of judicial review registered to the Austrian Constitutional Court. Only 4 were abstract reviews; the rest, as many as 297 cases (99%), were concrete reviews or constitutional questions (Yaqin, 2018). Based on the data, concrete review or constitutional question is dominant and central in the Austrian judicial review system.

3.2.2. Germany

As regulated in the Basic Law of the German Federal Constitution, the Constitutional Court applied the concrete review authority (constitutional question) or konkrete normenkontrolle. Compared to Austria, the judicial review practice in both countries is similar, dominated by concrete review (constitutional question) (de Visser, 2014).

Based on the Annual Report of the German Constitutional Constitution in 2015, 3.160 cases were treated with the concrete review or constitutional questions. Meanwhile, the number of cases with abstract review reached only 180 (Yaqin, 2018). Hence, it can be concluded that a concrete review of the statutes in Germany is dominant. It cannot be separated from the people's demands for good and fair constitutional protection.

The constitutional question in the German Constitutional Court is part of the constitutional complaint. It plays a strategic role in controlling the Constitution. Besides, the citizens can prevent any implementation of legal norms that are against the Constitution. Meanwhile, the constitutional complaint controls the Constitution in a repressive manner. In other words, it corrects or restores the implementation of the legal norms that are against the Constitution.

3.2.3. Russia

The Russian Constitutional Court was established based on the Russian Federation Constitution in 1993. The judicial review in Russia is rather complicated because it reviews many legal products. In particular, all laws and regulations issued by the state institution can be an object of judicial review in the Russian Constitutional Court.

One of the Russian Constitutional Court authorities is conducting a concrete review or constitutional question, regulated in Article 124 paragraph (4) of the Russian Federation Constitution.

"The constitutional court of the Russian Federation, on receiving complaints about violations of the constitutional rights and freedoms of citizens and upon request of courts, shall check, under the procedure established by federal law, the constitutionality of a law which is used or is to be used in a particular case."

The article showed two authorities applied: constitutional complaint and concrete review/constitutional questions. Both are combined due to their similar characteristics. Both aim to sue laws and regulations with a concrete case. Meanwhile, they are different in terms of the condition of filing a claim. The constitutional complaint can be claimed after the court applies the legal norms. In contrast, the constitutional question is before the stipulation of the court decision.

3.3. Constitutional Question Design

Het recht hink achter de feiten aan' means that law will always lag behind the facts. The Adagio is appropriate to debate the argument of the legislators. They believe that the laws produced can accommodate and anticipate various legal violations contained in the relevant law, especially those against the Constitution. Hence, laws are always behind the fact, along with the social structure changes where the law is applied (Hidayat, 2013).

According to Gustav Radburch in Nugraha, Frisa Katherina, Ramadhanty, and Tanbun (2019), the law in achieving its goals cannot be separated from the principles of justice, certainty and expediency. The true law can always provide benefits, which of course, must also be responsive to the reality that occurs in society. The law is, in fact, not responsive to the reality of violations of citizens' constitutional rights, even though legal changes that follow the response to social changes in society can positively impact solving problems by prioritizing the values of justice.

Efforts to uphold the rule of law are attached to the judiciary as the most important pillar to be strengthened. Strengthening can be meaningful regarding independence, independence, and functional aspects as a conflict breaker (Indrayana & Mochtar, 2007). The Constitutional Court, as a type of state institution in the branch of judicial power, functions to realize the ideals of the state and meet the demands of the needs in the state process (Iswandi & Prasetyoningsih, 2020). Ni'Matul Huda in Azis and Izlindawati (2018) explained that an independent branch of judicial power is the freedom to organize the judicial function by examining, judging, or stipulating a judicial application. Montesquieu in Rishan (2013) viewed that the independent branch of judicial power has strategic roles in ensuring the implementation of the human rights principles for each citizen.

Politically, the legal basis for establishing the Constitutional Court is maintaining the Constitution to actualize constitutional democracy. Besides, it is to complete the authority of judicial review in the Indonesian state administrative system. Before the Constitutional Court was established, no institution could conduct a judicial review against the Constitution. Therefore, a constitutional question is necessary within the Constitutional Court to complete the existing judicial review mechanism. The design of the constitutional question authority by the Constitutional Court is as follows.

3.3.1. Regulated in the 1945 Constitution

A quo is considered appropriate through the amendment of the 1945 Constitution to expand the judicial review authority for the Indonesian Constitutional Court. *A quo* authority within a constitution legitimizes the Constitutional Court's power. The 1945 amendment is necessary to actualize constitutional democracy. Other experts supported the argument, such as Guntur Hamzah, the Judge of the Indonesian Constitutional Court, in the National Seminar of APHTN-HAN in Yogyakarta in 2022. Ideally, the institutionalization of the constitutional question authority for the Constitutional Court is regulated within the Constitution.

The regulation within the state administration expects that the Constitutional Court can defend the legal norms to be always in line with the 1945 Constitution. Adding *a quo* authority can strengthen the position and authority of the Constitutional Court, preventing the legislator from changing the regulation.

3.3.2. Object of Review

The abstract review was mostly employed in the context of constitutional question authority for the Indonesian Constitutional Court. It is expected that a concrete review will be included in the future. Meanwhile, the objects of review include all laws that are and have been applied in the Supreme Court or below, consisting of public court, religious court, and state administrative court.

Previously, the constitutional question was a judicial review mechanism beginning with a litigation process of the concrete case in a public court. Since the cases may involve civilians defending their constitutional rights, providing a space for the objects is necessary. It includes the public court, religious court, and state administrative court.

3.3.3. Legal Standing of the Applicant

An adage d'interet point d'action justifies that a charge can be filed for legal interest (Yusa, Sudibya, Aryani, & Hermanto, 2018). However, not everyone can file a claim to the Constitutional Court. Legal interest is not adequate to be the ground for the request.

Article 51, paragraph (1) of Laws Number 24 of 2003 regarding the Constitutional Court mentioned that one of the parties eligible to propose a judicial review against the Constitution is a person of an Indonesian citizen. Further, the explanation of Article 51 paragraph (1) of the same laws elaborates that the person referred to in the article includes a group of persons with the same interest.

Theoretically, the judge can raise the constitutional question by adjudicating a concrete case in which the constitutionality of the article for the case is doubtful. Since the constitutional question is derived from the concrete case, the applicant's legal standing shall be assigned to the case examiner.

Nevertheless, all parties taking part in the litigation process in an ordinary court can file a claim to the panel of judges when the articles used are against the Constitution. The case examiner shall judge and consider the constitutionality of the articles.

The Austrian Federal Constitution provides one example of legal standing for the constitutional question submission (Figure 1). In Article 140 paragraph (1) juncto Article 57 paragraph (1) and (2) regarding the Austrian Constitutional Court, it has been

mentioned that in a particular condition, the constitutional question can be submitted directly by a person without a judge. Similarly, Germany also applies the mechanism. Article 100 paragraph (1) of the Basic Law of 1949 juncto article 80 paragraph (1) of the Federal Laws regarding the Germany Constitutional Court indicates that the judge shall submit the constitutional question upon his initiative or the initiative of several parties.

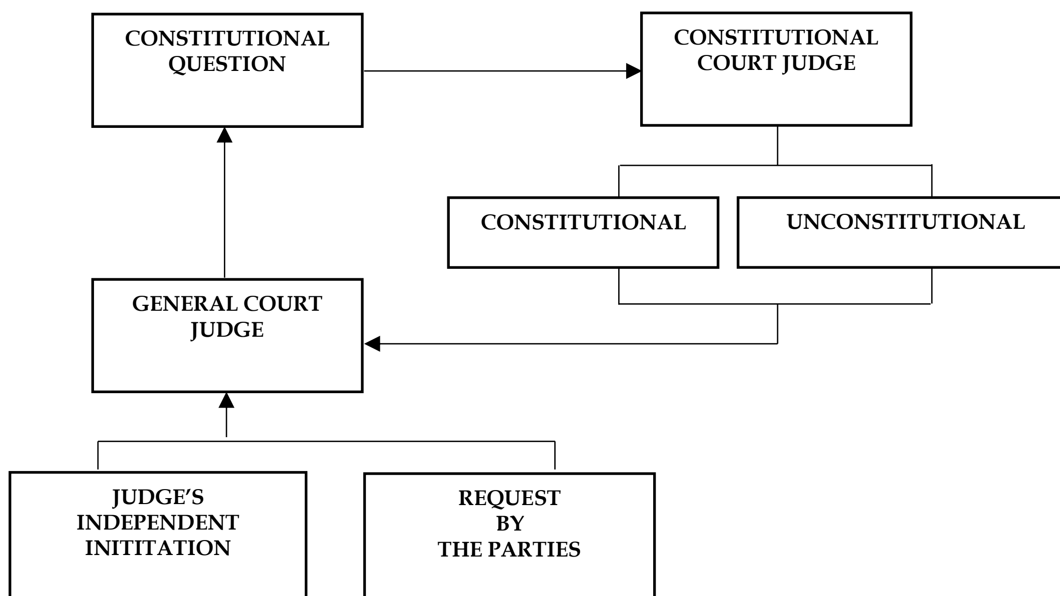

Figure 1. Stages of Constitutional Question Submission

3.3.4. Delaying the Arbitrary Proceeding

To uphold the constitutional supremacy or the constitutionality of the legal norms used in a case of the general jurisdiction of Indonesia, the Constitutional Court may delay the arbitrary proceeding upon the laws in question. The juridical foundation to support the argument is contained in Article 55 of the Laws of the Constitutional Court, mentioning that:

> *"The Judicial review below the laws adjudicated by the Supreme Court shall be terminated in the event that the laws of which the judicial review is based is under the review of the Constitutional Court and shall be continued after the Constitutional Court made the decision upon the laws."*

Further, Article 55 of the Constitutional Court Laws has been amended with the Decision of Constitutional Court Number 93/PUU-XV/2017. The word "terminated" in the previous laws has been declared against the 1945 Constitution and does not have a binding effect as long as it is not interpreted as "delayed." In this case, the judicial review process under the laws shall be delayed until the Constitutional Court decides the disputed laws.

Article 55 of the Constitutional Court Laws indicates that the delayed process of the arbitrary proceeding against the material under review is common in Indonesian state administrative practices. It is recommended that Article 55 of the laws shall be broadened. It should include the litigation process in an ordinary court. The delayed arbitrary proceeding in the ordinary court can be conducted by deciding preliminary order. It contains the delay of the litigation examination upon the norms until the final decision is made.

Provisional or provisional requests, whose decisions are referred to as provisional decisions, are not commonly found in cases of judicial review. In procedural law, the Constitutional Court only allows the use of interlocutory decisions in resolving disputes over the authority of state institutions. Article 63 of the Constitutional Court Law states that the Constitutional Court may issue a stipulation ordering the applicant and the respondent to temporarily suspend the exercise of the authority in dispute until a Constitutional Court decision is made. Even though the terminology used is "determination", the Constitutional Court Regulation Number 08/PMK/2006 concerning Guidelines for Proceedings in Disputes of the Constitutional Authority of State Institutions explicitly uses the term "interval decision" (Pasaribu & Putri, 2021).

Austria can be used as the barometer to regulate the provision. Based on Article 57a paragraph (5) of the Federal Laws regarding the Austrian Constitutional Court, submitting the constitutional question to the Constitutional Court can temporarily terminate the trial of the concrete case.

Hypothetically, Yaqin (2018) explained that the aim and objectives of the temporary termination of the concrete case are to prevent the decision made from the legal norms in question. In particular, it is to protect the citizen from the execution of laws against the Constitution. Therefore, the constitutional question authority design in the Constitutional Court should apply the preliminary order to delay the arbitrary proceeding. The delay affirms the importance of the constitutional question.

3.3.5. Constitutional Question Period

Several groups do not fully accept the delay of the arbitrary proceeding because it sets aside speedy trial principles. Under a *legal adagio*, "justice delayed, justice denied." The delay of the arbitrary proceeding must be limited to anticipate the quo matter. Compared to the one applied in several countries, such as Austria and Belgium, the period of constitutional question case needs one year to finish (Collins & Faiz, 2018).

To determine the period for the settlement of the constitutional question, if it is granted to the Constitutional Court, it is necessary to consider the common period needed by the Constitutional Court to complete the judicial review. Formally, the Constitutional Court Laws and the Regulation of the Constitutional Court Number 06/PMK/2005 do not contain a clear regulation regarding the period for the judicial review. The finding supports the Performance Report of the Constitutional Court in 2012, mentioning that, normatively, the period of judicial review is not limited. However, the report explained that the shortest period was the judicial review for Case Number 101/PUU-X/2012 regarding the Review of Laws Number 42 of 2008 on the General Election of the President and the Vice President. It took eleven days. Meanwhile, the longest one was conducted to the review of Laws Number 10/PUU-X/2012 regarding the review of Laws Number 4 of 2009 on Mineral and Coal Mining, which ran for 309 days.

The report also explained several factors influencing the length of the review. First, all parties demand that the trial is opened by presenting experts or witnesses. Second, an in-depth and comprehensive review is necessary to formulate the legal decision.

Further, considering the period of the case settlement in the Supreme Court as regulated in the Decision of the Head of the Supreme Court Number 119/SK/KMA.VII/2013 and Circular Letter of the Supreme Court Number 2 of 2014, the Supreme Court must judge the case for a maximum of 3 (three) months after the case is assigned to the Head of the Panels of the appeal or judicial review. Meanwhile, the Court of Appeal and the Court of the first instance must be no later than three or five months, respectively.

Comparing the period of the constitutional question settlement of various countries and the judicial review period of the Indonesian Constitutional Court, the case settlement of the Supreme Court and below should be adjusted to the one of the Supreme Court, which is three to five months.

Although it abandons the principles of speedy trial common in ordinary courts, the Constitutional Court can cover another aspect. It is to uphold the Constitution and ensure substantive justice for each citizen.

4. Conclusion

The decline in Indonesia's post-Covid-19 democracy index can be a warning to immediately revitalize various constitutional democratic channels, for example, by increasing the authority for judicial review at the Constitutional Court. The authority of the judicial review granted to the Constitutional Court is limited to the abstract review, preventing the efforts to actualize constitutional democracy. The urgency of the constitutional question authority is to implement constitutional democracy, which fell during the COVID-19 pandemic, complete the judicial review, protect the citizens' constitutional rights, increase the citizens' constitutional awareness, connect the judges' interpretation, actualize the progressive and responsive substantive justice, and ensure the effectiveness of the constitutional question practices in several countries. The constitutional question design shall be outlined in the Constitution and the Laws of the Constitutional Court. The review object is limited to the laws applicable in the arbitrary proceedings of the ordinary court. The legal standing of the applicant of the constitutional question is on the judge. However, all involved parties in the litigation process can file a request through the case examiner. The examination process shall be delayed since the constitutional question exists from the proceeding under trial in an ordinary court. Completing the constitutional question in the Constitutional Court shall be limited to 3-5 months.

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