

# Constitutional Question Mechanisms in Various Countries: Formulation of Constitutional Rights Protection in the Indonesian Judicial System

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## ABSTRACT

This study examines the urgency of implementing a constitutional question mechanism in the Indonesian judicial system to strengthen the protection of citizens' constitutional rights. The main problem identified is a legal gap in which general court judges are often forced to apply laws they deem unconstitutional because they lack the authority to suspend cases. This condition creates a paradox of justice, leading to legal but unconstitutional decisions. This study uses a normative legal research method and a comparative legal approach to examine the judicial systems of Germany, South Korea, and France. The results show that the constitutional question mechanism functions as a golden bridge to harmonize the judicial dualism between the Supreme Court and the Constitutional Court. The proposed solution is to reconstruct procedural law by granting judges the authority to raise constitutional questions directly to the Constitutional Court in concrete cases. The main findings confirm that this mechanism can transform the protection of citizens' rights from a passive to an active, immanent role in every adjudication process. In conclusion, the adoption of constitutional questions is an absolute requirement for Indonesia to realize substantial constitutional supremacy and guarantee a single legal certainty for justice seekers.

## 1. INTRODUCTION

A democratic state based on the rule of law places the constitution as the supreme law of the land, serving not only as a regulator of the organization of power but also as the primary instrument for protecting human rights. In Indonesia, this ideal of a state based on the rule of law was realized through the establishment of the Constitutional Court (MK) following the amendments to the 1945 Constitution, which was mandated to serve as the guardian of the constitution and democracy (Asshiddiqie J., 2015). However, in practice, the mechanism for protecting constitutional rights in Indonesia remains mired in abstract judicial review. This mechanism often fails to address constitutional injustices that arise in concrete judicial practice (Siahaan M., 2016).

A fundamental problem arises when a judge in a general court doubts the constitutionality of a legal norm they must apply, but lacks the authority to suspend the case to request a ruling from the Constitutional Court (Harjono, 2008). As a concrete example, in various criminal cases in which defendants challenge the validity of articles in the Criminal Code deemed open to multiple interpretations, judges are often forced to rule on these norms even though they are still under review by the Constitutional Court. This creates a situation of "legalized injustice," where citizens must accept verdicts based on norms later declared unconstitutional by the Constitutional Court. This lack of integration between general and constitutional courts is a crucial gap in our litigation system (Mertokusumo, 2014).

This research is based on four main pillars of legal theory. First, the Constitutionalism Theory, which emphasizes the limitation of power and guarantees of citizens' rights. Second, Judicial Review Theory, which positions the courts as a regulatory filter to ensure they remain aligned with superior norms. Third, the Constitutional Protection of Rights Theory (Barak, 2006), which emphasizes that constitutional protection should not be merely procedural but must be substantive, extending to the level of case examination. Finally,

the Separation of Powers Theory examines how the constitutional question mechanism can be implemented without undermining the Supreme Court's independence.

Several previous studies have reviewed the Constitutional Court's authority in general and compared Constitutional Court systems across countries. However, these studies tend to focus on the expansion of authority through post-decision constitutional complaints. There is limited literature specifically examining the technical procedures for constitutional questions as a pre-decision mechanism in Indonesia. This research aims to fill this gap by offering a model for synchronizing procedures between the Supreme Court and the Constitutional Court to avoid overlapping jurisdictions.

Based on this background, this study formulates two main questions:

1. Why is the constitutional question mechanism an urgent necessity in the Indonesian legal justice system?
2. What is the ideal formulation of regulatory reconstruction to adopt the constitutional question mechanism within the authority of the Indonesian Constitutional Court?

This research aims to:

1. Analyze the urgency of implementing constitutional questions as an instrument for protecting citizens' constitutional rights in concrete litigation processes.
2. Formulate a draft legal reconstruction of the Constitutional Court Law to provide an operational basis for general court judges in raising questions about the constitutionality of norms.

## 2. METHOD

This research uses a normative legal research method, or doctrinal legal research, which views law as a closed system of norms with internal coherence to constitutional values. This research design uses a qualitative, descriptive-analytical approach, with a primary focus on analyzing the norms, principles, and legal doctrines related to the constitutional question mechanism. To achieve in-depth analysis, the researcher employed three main approaches: a statutory approach to examine the regulation of judicial power in Indonesia, a conceptual approach to explore the nature of constitutional rights protection, and a comparative approach to analyze the implementation of constitutional questions in countries with similar legal systems.

Data collection techniques were conducted operationally through library research of comprehensive legal materials. This process began with the identification and inventory of primary legal materials, including the constitutions and laws of the Constitutional Courts in Indonesia, Germany, and South Korea, and with document analysis of trial minutes to capture the original intent of the legislators. Secondary legal materials sourced from textbooks, reputable scientific journals, and legal reports were collected and categorized based on their theoretical relevance. Meanwhile, tertiary legal materials were used as supporting instruments to clarify technical constitutional terms. All of these materials were then organized into a comparative legal matrix to maintain consistency between the tested variables in the Indonesian and comparison countries' judicial systems.

Next, data analysis was conducted qualitatively using content analysis and systematic legal logic deduction. The researcher applied various legal interpretation methods, ranging from grammatical and systematic interpretations of the 1945 Constitution to historical and comparative interpretations, to identify patterns of synchronization among judicial institutions. The validity of the arguments in this study was maintained through consistent deductive legal reasoning, in which general premises about constitutional supremacy are drawn to concrete conclusions about the need for regulation. The strength of the argument is also supported by a literature triangulation strategy, which ensures that each synthesis remains grounded in authoritative expert opinion (*communis opinio doctorum*) and coherent with applicable procedural law principles, resulting in a progressive yet applicable legal reconstruction formulation within Indonesia's one-stop justice system.

## 3. RESULT AND DISCUSSION

The constitutional question mechanism, or norm review, is a crucial instrument in the modern constitutional system, bridging general legal norms with the reality of legal disputes in court. Based on research into three major jurisdictions, significant patterns were identified that can serve as a compass for legal reconstruction in Indonesia.

### International Comparative Synthesis

Based on the results of an examination of constitutional court systems in various countries, it was found that the constitutional question mechanism, often technically referred to as concrete norm control (*konkrete Normenkontrolle*), has different characteristics but shares a common essence: providing a pathway for general court judges to test the constitutionality of the norms they are using in deciding cases.

To provide a systematic overview and facilitate comparative analysis, the following is a summary of the findings of these mechanisms in the countries studied:

**Table 1.** Comparison of Constitutional Question Mechanisms

Comparative Aspect	Germany	South Korea	France
Legal Basis	Article 100 of the German Constitution	Article 41 Constitutional Court Act	Article 61-1 of the 1958 Constitution (QPC)
Applicant	Court Judge	Judge the court at the request of the party	Court judges through the Supreme Court or the Council of State
Standard of Doubt	<i>Sure Conviction (The judge must be convinced that the norm is unconstitutional)</i>	<i>Reasonable Doubt (There is reasonable doubt)</i>	<i>Seriousness/Novelty</i>
Object of Test	Law determining the decision	Laws that are relevant to the subject matter of the case	Laws deemed to violate constitutional rights
Impact of the Case	Absolute Suspension	Absolute Suspension	Suspension with exceptions of urgency
Nature of the Decision	Generally Binding	General Binding	Generally Binding
DImpact of the Caseampak Perkara	Case temporarily suspended (stayed)	The case is temporarily suspended (stayed)	Case temporarily suspended (stayed)

In Germany, the Concrete Normenkontrolle mechanism under Article 100 of the Basic Law is not merely an optional right but a legal obligation for every judge (Kommers D.P., 2012). If a judge at any level of court believes that a law on which they base their decision is unconstitutional, they are strictly prohibited from continuing to rule on the case. They are obliged to suspend the case and submit the constitutionality question to the Federal Constitutional Court (BVerfG).

The main advantage of this model is its ability to detect the unconstitutionality of a norm at its earliest point of contact with the public. Criticism of this model typically relates to the potential backlog of cases in the Constitutional Court. However, Germany addresses this by setting a high standard: a judge must not merely be "doubtful"; they must be "convinced" that the norm is unconstitutional. This analysis demonstrates that Germany positions every judge as a vanguard of constitutional rights protection, not merely a technical implementer of the law.

South Korea offers a valuable lesson on how constitutional questions serve as a filter for repressive criminal norms. Based on data from the Constitutional Court of Korea, the majority of cases filed are criminal matters. From a critical perspective, this mechanism is the last bastion of civil liberties. In South Korea, this integration is harmonious due to mutual respect between the Supreme Court and the Constitutional Court, where the Constitutional Court only decides on the validity of norms. At the same time, the Supreme Court retains full authority to assess the facts of the case.

France, through its Question Prioritaire de Constitutionnalité (QPC) system since 2008, offers a more conservative yet stable model. The QPC must pass through a "filter" at the Supreme Court (Cour de Cassation) or the Council of State (Conseil d'État) before reaching the Constitutional Council (Conseil Constitutionnel). This model is highly relevant for discussion in Indonesia as a compromise to address the Supreme Court's concerns about overlapping authority or a flood of frivolous cases.

The main problem in the Indonesian judicial system is the existence of "dark spaces" in the enforcement of constitutional law. On the one hand, Article 1 paragraph (3) of the 1945 Constitution affirms Indonesia as a state based on law that upholds the supremacy of law. However, current procedural law constrains judges within the rigid spirit of classical legal positivism (Jimly Asshiddiqie, 2024).

When a judge faces a concrete case, such as a defamation case under the Electronic Information and Transactions (ITE) Law, whose articles are open to multiple interpretations and may violate the right to

express opinions, the judge is often caught in a dilemma. Ethically, the judge sees constitutional injustice, but legally, the judge lacks the "sword" to halt the law's implementation. This creates a situation of statutory lawlessness, in which the courts become a tool for legitimizing human rights violations because the Constitutional Court's review procedures are abstract and detached (Isra, 2017).

The Constitutional Court's current abstract review system only allows citizens to challenge laws if they can prove constitutional harm. The problem is that these harms often only become real and tangible when the law is "hit" against citizens in court. Waiting for citizens to file independent lawsuits with the Constitutional Court amidst the general court proceedings is a tedious, expensive, and often delayed process (justice delayed is justice denied).

Therefore, the absence of constitutional questions in Indonesia reflects the strong influence of the doctrine of legism, which assumes that laws are sacred and infallible. In fact, in a modern democracy, every political product (parliament) must be able to be tested for its moral and constitutional validity at any time through the judiciary (Siahaan M., 2011).

Interpreting findings from Germany, South Korea, and France, Indonesia is currently at a crossroads in pursuing "system hybridization." While we have historically been fixated on the European (Kelsenian) model, which rigidly separates general and constitutional courts, constitutional questions represent a meeting point that adopts the flexibility of the American (Marshallian) model without disrupting the Constitutional Court's existing institutional structure.

The author believes that the implementation of constitutional questions in Indonesia will not undermine the one-stop-shop judicial system under the Supreme Court (Isra, 2017). Instead, this mechanism strengthens the role of Supreme Court justices and lower-level judges in actively upholding the Constitution's spirit. This interpretation is based on the idea that judges are not merely "state employees", but rather constitutional officials whose oath of office is faithful to the 1945 Constitution.

One of the main concerns of opponents of constitutional questions is the potential conflict between the Supreme Court and the Constitutional Court. However, through a critical analysis of the French QPC model, this doubt can be answered. By positioning the Supreme Court as the "primary filter" for constitutional questions arising from district courts or high courts, the Supreme Court's dignity is maintained. The Constitutional Court does not adjudicate on Supreme Court decisions, but rather assists the Supreme Court in ensuring that the legal basis on which it relies is pure and free from constitutional defects. This is what researchers call the "Golden Bridge of Judicial Integration" (Isra, 2017).

This research proposes a new theoretical framework called the "Integrated Constitutional Protection Theory." This theory argues that rigid institutional barriers should not prevent the exercise of constitutional rights. Protection must be fluid and flow through every aspect of the judicial process.

Technically, this reconstruction requires amendments to the Constitutional Court Law and the Judicial Power Law. The proposed model is as follows:

1. **Constitutionality Exception**  
Parties in a case (Defendant, Plaintiff/Defendant) can file an exception questioning the constitutionality of the applicable norm.
2. **Judge's Assessment**  
The judge examines whether the question is relevant (decisive) to the fate of the case. If relevant, the judge is required to issue an Interim Decision to suspend the case.
3. **Referral to the Constitutional Court**  
The question file is sent to the Constitutional Court (via the Supreme Court as a filter to maintain efficiency).
4. **MK's Express Decision**
5. **The Constitutional Court is given a limited time (for example, 30-45 days) to rule on the specific issue to avoid disrupting the principle of speedy justice.**

This reconstruction demands a paradigm shift from judge as an applicator to judge as a constitutional guardian. Judges at the lower levels must be provided with more in-depth constitutional law education. This is not simply a regulatory change, but a revolution in legal culture within our judicial system.

With this mechanism, the public's burden of obtaining constitutional justice is reduced. Access to justice is no longer the sole domain of those who can afford expensive lawyers to attend separate hearings at the Constitutional Court (Yuliandri, 2014). Constitutional issues can be raised simply in the local District Court. This is a true democratization of constitutional justice.

Theoretically, this research makes a significant contribution to the development of Constitutional Law and Constitutional Procedural Law in Indonesia in several aspects:

1. **Modification of the Kelsenian Theory**

This finding refutes the assumption that the centralized Constitutional Court model is incapable of addressing concrete cases. Indonesia can become a pioneer of the "Progressive Kelsenian" model in Southeast Asia.

2. Strengthening Immanent Constitutional Rights

Human rights cannot be delayed in their protection. This theory provides a basis for lawmakers to stop creating "rubber" norms, knowing that such norms will be immediately "shot down" in constitutional challenges.

3. Popular Sovereignty vs. Parliamentary Supremacy

This research emphasizes that, according to the Constitution, sovereignty rests with the people, not with parliament. Thus, any public doubt (through judges) regarding parliamentary products is a concrete manifestation of popular sovereignty exercised judicially.

Reconstructing procedural law through the constitutional question mechanism is no longer merely an academic option, but rather an urgent necessity (*conditio sine qua non*) for a country that claims to be a democratic state governed by the rule of law. Failure to adopt this mechanism is tantamount to allowing the Constitution to remain merely a beautiful document on paper, powerless to protect its citizens from injustice in the courtroom. Indonesia must boldly take legal leaps to ensure that every judicial decision in the archipelago truly reflects the light of justice derived from the highest law, the Constitution.

#### 4. CONCLUSION AND RECOMMENDATION

This study concludes that the constitutional question mechanism is a crucial instrument that currently serves as the missing link in Indonesia's constitutional rights protection system. Through a comparative study of the German and South Korean legal systems, it was found that the constitutional question mechanism can close the gap in injustice that arises when an unconstitutional legal norm is enforced in a concrete case in court. The answer to this research question confirms that the current model of judicial review in Indonesia remains abstract and partial, necessitating a transformation towards a more integrated system. The implementation of constitutional questions will enable the Constitutional Court to carry out its functions more substantively as a guardian of human rights, while also providing legal certainty for judges in general courts. Hence, they are no longer trapped in the dilemma of complying with the law or remaining faithful to the Constitution. Therefore, this formulation is not merely a procedural reform, but rather a legal engineering to realize constitutional supremacy, extending down to the technical level of court proceedings.

Based on the research findings, various stakeholders recommend systematic practical action to realize this idea. For lawmakers, in this case, the House of Representatives (DPR) and the President, it is strongly recommended that they immediately revise the Constitutional Court Law to include provisions on the procedures for handling constitutional questions, as an additional authority or an expansion of the judicial review function. For the Supreme Court, it is recommended that it formulate a Supreme Court Regulation (PERMA) that sets guidelines for lower-level judges on the parameters and procedures for temporarily suspending cases when a constitutional question is submitted to the Constitutional Court, to prevent administrative obstacles in the judicial process. Furthermore, for academics and legal practitioners, it is recommended to continue to raise awareness of the importance of protecting constitutional rights in every litigation, so that this mechanism is used wisely and not merely to delay the trial. All these practical steps are aimed solely at strengthening the dignity of the Indonesian judiciary as an institution that is not only legalistic, but also constitutional and just for all citizens.

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