



# The Constitutional Court Proceeds with Constitutional Questions Appeals Through Judicial Review

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**Abstract.** The constitutional question has been raised in Germany, South Korea, Turkey, and the United States, with varying results and settings. The purpose of the constitutional question itself, namely the existence of a unified interpretation of a law, will provide more certainty in its implementation and increase the effectiveness of a law. This normative juridical research was conducted in order to identify elements in the constitutional question that are appropriate and applicable in Indonesia, the constitutional examination, and as an alternative to the settlement of constitutional cases. This study discovers that the mechanism of constitutional inquiry is identical to that of constitutional review, with the exception that it departs from concrete cases, namely cases that have been or are being examined in lower courts. A concrete constitutional review refers to a constitutional question. If there is doubt about a law that will be used to resolve cases, legal standing other than individuals and legal entities can submit constitutional questions to the Constitutional Court. Because it deviates from a specific case, the individual or legal entity with legal standing is a party to the case under consideration by the court. Furthermore, by examining the practice of constitutional review at the Indonesian Constitutional Court, it was discovered that there were 7 cases that were actually cases of constitutional questions, but would be examined by the Court at the entrance via the submission of a constitutional review. As a result, there is a huge opportunity for constitutional questions to be applied in Indonesia in order to provide an alternative for constitutional cases to be settled at the Constitutional Court.

**Keywords:** constitutional justice · concrete review · constitutional question · constitutional review

## 1 Introduction

The establishment of constitutional review in the Amendment to the 1945 Constitution is closely related to the transition from an authoritarian regime to a democracy. The Constitutional Court is increasingly playing an important role, but at the same time it has been able to avoid overreaction from political actors. The Constitutional Court is a new product for Indonesia and the characteristics of the Constitutional Court's constitutional

review follow the centralized model which is also referred to as the Austrian model or the European model. In contrast to the decentralized model embraced in America and Japan. The Constitutional Court as a special constitutional court with a system of constitutional testing is centralized on it. In Europe, centralized review is basically associated with the value of legal certainty. Centralized testing is intended to avoid disagreement among courts against the interpretation of the constitutionality of a law, so not all courts were given the power to review the constitutional validity of legislation. The centralized review model was initiated as an effective solution to the problem of dissent among the courts (the problem of judicial divergence).

The centralized review model is based on the judicial body's dual structure (a two-list structure), namely the judicial body (in a broad sense) divided into two parts, namely the ordinary courts and the Constitutional Court. The ordinary judicial duty is to carry out ordinary judicial functions, such as applying the law to decide concrete cases, whereas the Constitutional Court carries out constitutional functions, such as reviewing legislation under the constitutional Constitution. The dual structure is used in Indonesia, with the division of jurisdiction between the Constitutional Court, which tests the constitutionality of laws and regulations, and the Supreme Court and the judicial bodies subordinate to it in the general judicial environment, the religious judicial environment, the military judicial environment, and the state administrative court environment that apply the law to decide concrete cases.

This article will describe the Constitutional Court's current constitutional question. As a result, the following research questions are addressed in this article: How does the prospect of constitutional question implementation in the Indonesian Constitutional Court?

## 2 Research Method

This research is considered normative because it seeks to discover the truth about the problem's coherence and legitimacy, specifically whether the rules, regulations, or laws are consistent with norms, theories, and legal philosophy. This study's analysis is based on secondary data in the form of applicable laws and regulations relevant to the legal issues at hand.

## 3 Findings and Discussion

### A. Constitutional Review; Constitutional Complaint; and Constitutional Question

What exactly is meant by a constitutional question or *constitutional question* and a constitutional *complaint*. Then how exactly is the test of legislation or *constitutional review* which is the authority of the Constitutional Court, why it is not enough to be able to solve it, considering that both Institutions are substantially a test of the constitutionality of a law or public policy. To clear it up, the Author will outline the three Institutions starting from constitutional review, constitutional questions, and constitutional complaints.

*First, Constitutional review* is defined by the constitutional testing of a rule of law against the constitution (Constitution). In developments after World War II, *constitutional review* was associated with the principle of the supremacy of the constitution (*supremacy of constitution*). The Constitutional Court was established to ensure the rule of the constitution, so the [1] Constitutional Court must stand as an independent institution free from the influence of legislative or executive branches of power. In the comparative literature of the modern constitution, it is stated that the main function of the constitutional court is to conduct *constitutional review* with two main tasks; (1) maintain the functioning of democratic processes in the interplaying relationship between the legislative, executive, and judicial institutions. (2) protect the rights or personal life of citizens from violations committed by one of the branches of state power. Through [2] *constitutional review*, it is the power of the court to overturn inappropriate laws and administrative actions.

*Second, the constitutional question* [3] is related to the mechanism for testing the constitutionality of an applicable Law. The Constitutional Court will only decide the issue of constitutionality of act, not decide the case. But as long as the Supreme Court has not declared its verdict, the examination of the case in court must be stopped. *Constitutional questions* contain two meanings, general and special. In a general sense, *constitutional question* is a term that refers to any issue related to the constitution (and which is usually the authority of the Constitutional Court to decide it). Whereas in a special sense, [4] *constitutional question* refers to a mechanism for testing the constitutionality of a law in which a *regular court judge* who is adjudicating a case assesses or doubts the constitutionality of the law applicable to the case, then can submit “constitutional questions” to the Constitutional Court (regarding the constitutionality of the statute). The Constitutional Court only ruled on the issue of the constitutionality of the law, so it is not deciding the case itself, but as long as the Constitutional Court has not declared its verdict, the examination of the case is stopped [5].

*Third, constitutional complaints or constitutional complaints* meaningfully refer to any question related to the constitution that is very broad in nature, and the authority to decide it is within the realm of the authority of the Constitutional Court. In Germany and Austria, *constitutional complaints* can be filed by individual citizens. The requirements for filing a *constitutional complaint* include requiring a very serious actual disturbance to the rights of an individual citizen, so that the elements of: (1) actual losses that are not only potential in nature are met; (2) interference of a direct, not indirect nature; (3) a high degree of seriousness; and (4) the attempt to recover or recover the damages is completely final (*exhausted*) and no other remedy is available. In Germany, [6] *individual requests* or individual claims are also called *constitutional complaints*. The authority of the German Constitutional Court to decide cases of human rights violations is regulated in Article 93 letter 4a of the *Basic Law of 1949*. Constitutional suits filed by individual citizens are used to postulate alleged violations of constitutional rights to the Constitutional Court. The demands are directed to the articles or paragraphs of a law. In addition, demands can also be appealed to the direct actions of state officials that are detrimental to the constitutional rights of the applicant [7]. *Constitutional complaints* are mechanisms for restoring the constitutional rights of citizens violated by state organizers [8].

## B. The Constitutional Question Trial in the Constitutional Court

In terms of the protection of the basic rights of citizens, which is carried out in parallel with the testing of laws by the Constitutional Court since 2003 until now, in some decisions the Constitutional Court does not always decide with a purely black and white approach. The application of *moral reading* to the 1945 Constitution made the Constitutional Court able to several times make the constitutional norms intended to be of absolute meaning to be relatively meaningful. The intended statutory test uses the examination method, but transforms into a resolution method. With such an approach, it will very clearly produce interpretations that have the potential to (even have) been able to change the imperative norms contained in the constitution.

For example, in the application for testing conducted by Pollycarpus against Article 23 paragraph (1) of Law Number [9, 10]: 4 of 2004 concerning Judicial Power. Pollycarpus' application for testing was motivated by the granting of a review application filed by the Public Prosecutor at the Central Jakarta District Attorney's Office against the verdict at the Cassation level that had acquitted Pollycarpus of all charges. Based on the provisions of Article 263 paragraph (1) of the Criminal Procedure Code (KUHP), it is stated that those who can apply for judicial review remedies are the convict or his heirs. This provision very rationally refers to the protection of the human rights of convicts given in the interests of justice. However, in the Judgment of Supreme Court No. 84/PK/Pid/2006, the Supreme Court rejected the application of judicial review filed outside the convict or his heirs, on the consideration that the *due process of law* serves as a restriction on state power in acting against citizens of society and is normative, so it cannot be interpreted and cannot be distorted, because it would violate justice and legal certainty.

The Supreme Court was inconsistent in the matter of Judicial Review, in this case Pollycarpus as a convict was greatly aggrieved. The Supreme Court applied Article 263 of the Criminal Procedure Code and Article 23 of Law 4/2004 to the Pollycarpus case separately, resulting in Pollycarpus being harmed by his constitutional rights, because the Supreme Court only used Article 23 of Law No. 4 Of 2004, while the provisions of Article 263 of the Criminal Procedure Code were not applied to the case. In this case Pollycarpus through an application for statutory testing asked the Constitutional Court to be able to precisely see the relationship between the two articles reviewed the position and intent of the two. The substance of the application for statutory testing carried out by Pollycarpus is not solely for the testing of the law itself, but rather the constitutional harm suffered by Pollycarpus due to the Penvoy of public officials, in this case the Supreme Court, which is considered unfair or violates human rights (HAM).

The mechanism of Judicial Review was held to provide protection for the human rights of the convicted, but what happened was that the Penvoy of the Supreme Court had harmed the convict and violated the human rights of the convict. Actually, in the examination of Judicial Review Public Prosecutor on Pollycarpus Case there is a constitutional issue, namely Supreme Court has given a verdict against the filing of Judicial Review

from the Public Prosecutor, when it should be that Supreme Court rejected Review's application returned.

The same Supreme Court ruling occurred in 2008, namely that the Supreme Court rendered a judgment on the application for Judicial Review by the Attorney General's Office on convicted Djoko Tjandra. The heirs of Djoko Tjandra, in this case his wife, Anna Boentaran, filed an application for the examination of Article 263 paragraph (1) of the Criminal Procedure Code to the Constitutional Court because the case against her husband was considered unfair. Anna Boentaran as the heir felt aggrieved over the prosecutor's application for Judicial Review. Initially, Djoko was ruled free by the South Jakarta District Court until the cassation level in 2001. The reason is that the acts charged are not criminal acts, but the scope of civil acts. 8 years later, the Public Prosecutor filed an application for Judicial Review of the cassation verdict that acquitted Djoko Tjandra in 2008. In the end, the Constitutional Court passed Decision No. 33/PUU-XIV/2016 on May 12, 2016, stating that philosophically the application for Judicial Review from the beginning was aimed at protecting the interests of the convict or his heirs, not the interests of the state represented by the prosecutor's institution, the victim, or other parties, thus affirming that the Public Prosecutor should not apply for Judicial Review. This decision No. 33/PUU-XIV/2016 actually reaffirmed the Constitutional Court Decision No. 16/PUU-VI/2008 relating to the test of the Judicial Power Act, it has been mentioned by Article 263 paragraph (1) of the Criminal Procedure Code, that the filing of Judicial Review is the right of the convict or his heirs, not the right of the public prosecutor in criminal cases.

In other cases, for example, the application for testing conducted by Antasari Azhar against Article 268 paragraph (3) of the Criminal Procedure Code. The background of Antasari Azhar's application for testing this law is that Antasari Azhar's application for Judicial Review was rejected by the Supreme Court because the evidence submitted was deemed to be improper. Article 268 Subsect. (3) which states that if there are new circumstances giving rise to strong allegations, that if those circumstances are already known while the trial is still ongoing, the result will be a free judgment or a judgment independent of any prosecution or the public prosecutor's claim is inadmissible or against the case a lesser criminal provision is applied.

The Constitutional Court Decision No. 34/PUU-XI/2013 invalidated the provisions of Article 268 paragraph (3) of the Criminal Procedure Code because it was considered contrary to Article 28 J of the 1945 Constitution. In the petition, Antasari Azhar argued that the right to get justice is the right of every citizen without exception especially citizens who are fighting for justice and anyone should not hinder citizens or seekers of justice from getting justice. It appears evident that Antasari Azhar felt aggrieved by the constitutional rights by the restrictions in the filing of applications for extraordinary remedies as specified in Article 268 (3) of the Criminal Procedure Code.

The substance of the application for statutory examination conducted by Antasari Azhar, is the same as that of Pollycarpus and Anna Boantaran, i.e., feeling that it has been harmed its constitutional rights by public officials, in this case the institution of the court. In all three cases there are serious constitutional issues.

On the other hand, these three cases show the inconsistencies of the judicial institutions in interpreting a law, in this case interpreting the Criminal Procedure Code. The

judges in Supreme Court do not seem to have a definite and fundamental handle to interpret a law. Based on Article 79 of Law Number 14 of 1985 concerning the Supreme Court of the Republic of Indonesia as amended and supplemented through Law Number 5 of 2004 and Law Number 3 of 2009, the Supreme Court is given attributive authority to issue a regulation aimed at further regulating matters necessary for the smooth implementation of justice, if there are matters that have not been sufficiently regulated in the law.

In this authority, the Supreme Court has the authority to issue two forms of products, namely the Supreme Court Circular which is a directive from the top brass of the Supreme Court to all levels of the judiciary under it whose content is an administrative direction, and the Supreme Court Rules which regulate the principle of law if it has not been regulated in law. However, both have a very technical judicial content, not an interpretation of a statute, it is not impossible if the Judges will decide with different judgments in cases of violation of the same article, or in other words, there is a disparity in the judge's decision. Likewise, in the case of determining which should take precedence over the truth or whether material truth, legal justice or legal certainty, becomes very difficult when it is based on the judge's belief alone. When the Judge has carried out his duties by giving a verdict, the other side of the victim and or his heirs feels that he does not get justice with the existing process because the Judge decides to base on personal interpretation.

In the three cases above, the Constitutional Court still gave its ruling, even though in fact the three requests for testing the law were more of a matter of applying the law to a case, not a test of the constitutionality of the law in question. The Constitutional Court must still render a ruling, in order to provide constitutional justice and maintain legal certainty for the petitioner parties, in order to avoid a constitutional impasse or crisis. Actually, the three individuals mentioned above, took issue with the Supreme Court Judge's interpretation of the provisions in the Criminal Procedure Code relating to Judicial Review. The three cases above can actually be viewed as the existence of constitutional harm suffered by citizens due to the application of the law or the interpretation of the law by the Judge. Actually, the principle of constitutionalism, which is the central doctrine contained in the 1945 Constitution as the highest law, actually has reasons for judges and parties to complain about constitutional issues that occur when the judicial process is underway. In this case, the Judge and the parties are given the opportunity to ask the Constitutional Court about the level of constitutionality of a law, so that the Judge feels more confident in giving the verdict. Legal certainty must be placed within the framework of *justice enforcement*, so that if the two are not in line, then justice must be won, because the law is a tool for upholding substantial (material) justice in society, not a tool to seek victory formally [11].

The inconsistencies of the judiciary in interpreting a law, shows the absence of a unified interpretation of the provisions of the Judicial Review among the Chief Justices. Likewise, Pollycarpus, Anna Boentarran, and Antasari Azhar considered that the Supreme Court had made a mistake in interpreting the provision, so the three submitted an application for a test of the law to the Constitutional Court, to request the Constitutional Court's constitutional interpretation of Article 263 paragraph (1) of the Criminal Procedure Code and Article 268 paragraph (3) of the Criminal Procedure Code. Finally,

the Constitutional Court gave a constitutional interpretation of these articles in Decision No. 34/PUU-XI/2013 stating that it canceled the provisions of Article 268 paragraph (3) of the Criminal Procedure Code because it was considered contrary to Article 28 J of the 1945 Constitution. Meanwhile, in Decision Nomor 16/PUU-VI/2008 related to the testing of the Judicial Power Law, Article 263 paragraph (1) of the Criminal Procedure Code has been mentioned, the Constitutional Court stated that the submission of Judicial Review is the right of the convict or his heirs, not the right of the public prosecutor in criminal cases.

Although the Constitutional Court's Decision is final and binding, it will not be enforced retroactively, and the punishment received by Polycarpus, Djoko Tjandra, and Antasari Azhar must still be carried out, because the Supreme Court Decision already has a fixed legal force, and no legal remedy can be made on it. Related to the fact that there are two things that should be considered to develop a constitutional case settlement mechanism, namely: *first*, if the case occurs in Germany, South Korea, or countries that apply constitutional complaints then the three can pursue constitutional complaints to the Constitutional Court. All three, after the Supreme Court Decision, which has permanent force, can file legal remedies with the Constitutional Court through a *constitutional complaint* application. *Secondly*, the Constitutional Court's Decision should be able to be used by the Judge in deciding the case of Judicial Review filed by Antasari Azhar, if it is requested for constitutional testing to the Constitutional Court before the Supreme Court takes judgment on the case of Antasari Azhar, Djoko Tjandra and Polycarpus.

The usual mechanism is that judges and parties can submit *constitutional questions* to the Constitutional Court, as practiced in South Korea and Germany. Polycarpus, Djoko Tjandra, and Antasari Azhar did not have to wait until the judgment of Supreme Court was established, meaning that the application filed by the three was a constitutional question application, not a statutory test. While the trial is ongoing, all three can apply for constitutional appeals to the Constitutional Court. This application is more appropriate for the third legal remedy than the test of the law, considering that the decision of the Constitutional Court will be applied by the Judge in deciding the case, because in accordance with the principle of *res judicata pro veritate habetur*, [12] that the decision of the Constitutional Court which has legal force must be considered correct, is binding so it must be followed and implemented by anyone.

The Constitutional Court's decision on the constitutional interpretation of the provisions of the Criminal Procedure Code will actually be able to negate the inconsistencies of the judicial institutions in interpreting a law, meaning that there has been a unified interpretation of a provision of the law. So based on the Constitutional Court's Decision, the judge who is examining a case no longer doubts the constitutionality of the law used as a basis for examining, adjudicating, and deciding cases, because the Constitutional Court has decided the constitutionality of the provisions in the law or the law as a whole. On the other hand, the Judge will also be able to apply laws that have been tested for constitutionality, so that the Judge can make efforts to prevent possible violations of the constitutional rights of citizens.

The constitutional harm suffered by Polycarpus, Djoko Tjandra and Antasari Azhar, should not have occurred, when the Judge and the parties were given the opportunity to ask the constitutional issue of an Act to the Constitutional Court by submitting an

application for a constitutional *question* or filing a constitutional complaint or filing a constitutional complaint or *constitutional complaint* to the Constitutional Court. However, the two Institutions do not include the authority of the Constitutional Court granted by the 1945 Constitution.

### C. Prospect of the Constitutional Question in the Constitutional Court

Constitutional questions have prospects to be applied in Indonesia in order to maintain the constitution and seek maximum protection of the constitutional rights of citizens, considering that the construction of thought and substance in constitutional questions is a test *of the law (the examination of the law)*. Although the test of the law to which the Constitutional Court is authorized is abstract - *posteriori*, while the constitutional question is the test of concrete-*posteriori* legislation, then the constitutional question is still possible to adopt given that the construction of thought and the substance of the constitutional question is the test of legislation. The prospect of constitutional questions that can be adopted in Indonesia is studied by looking at the philosophical foundations, juridical foundations and sociological foundations.

Philosophically the application of constitutional questions is closely related to the main function of constitutional courts is to conduct *constitutional review* with two main tasks; (1) maintain the functioning of democratic processes in the interplaying relationship between the legislative, executive, and judicial institutions. (2) protect the rights or personal life of citizens from violations committed by one of the branches of state power. The subsequent development of *constitutional review* in various countries, that *constitutional review* is used as a mechanism to protect the constitutional rights of citizens.

In the Indonesian context, constitutional questions become relevant to be regulated in Indonesia considering that the Indonesian state is a country of law and a democratic state, as stated in the 1945 Constitution. For Indonesia, which also wants to realize a democratic state life and at the same time a state of law, considering adopting a constitutional question mechanism as an effort to better protect the constitutional rights of citizens is important. Even logically, constitutional questions have become a necessity, so that substantive changes to the authority of the Constitutional Court to examine constitutional question cases become an idea that needs to be studied in more depth, taking into account the social, historical, and juridical conditions of the Indonesian nation. Indonesia is a democracy as well as a country of law. The two most important consequences of this affirmation – in accordance with the principles of constitutionalism and the respect, protection, and fulfillment of human rights that are important markers of a democratic state and a state of law. The constitutional question becomes relevant to be regulated in Indonesia considering that the Indonesian state is a country of law and a democratic state, as stated in the 1945 Constitution.

The juridical basis for the application of the constitutional question is Article 24C of the 1945 Constitution. The construction of the constitutional question is actually a test of the law, as provided for in Article 24C of the 1945 Constitution. In determining the further arrangement of the provisions of Article 24C of the 1945 Constitution, the Legislator may use the legislative interpretation, namely the legislator's authentic or



official interpretation of a number of meanings in the law, in this case the Constitutional Court Law.

The constitutional question is a concrete constitutional test, so that in the author's view it does not require changes to the constitution. Basically, the review of laws is already the authority of the Constitutional Court, so what is needed for further regulation is the elaboration of the implicit meaning of statutory testing is explicitly in the law. The constitutional review is interpreted as an abstract constitutional test. The determination of formal testing and material testing is a legislator's interpretation of the implicit meaning of the norms of the constitution. It may be that in formulating it does not dichotomously mention abstract testing and concrete testing, meaning that constitutional questions do not also need to be mentioned explicitly in the provisions of the article. For example, it is enough to mention that the petitioner for statutory testing is a court based on the concrete case he is examining. Basically, the examination of constitutional questions is the examination of the constitutional test of the statute, the distinguishing one is the prerequisite of the condition and the petitioner. A prerequisite of the condition is that the application is based on the actual case being examined in court. The party that has legal standing asking constitutional questions is the court that is examining the actual case.

The sociological basis for the application of constitutional questions is related to empirical facts, namely the practice of constitutional questions in the Constitutional Court. Constitutional questions are asked by the applicant in the form of statutory testing, as in the Constitutional Court Decision Case of the Constitutional Court Decision No. 013—22/PUU-IV/2006, The Constitutional Court Decision No. 06/PUU-V/2007, the Constitutional Court Decision No. 16/PUU-VI/2008, the Constitutional Court Decision No. 65/PUU-IX/2011, the Constitutional Court Decision No. 114/PUU-X/2012, the Constitutional Court Decision No. 14/PUU-VI/2008, and the Constitutional Court Decision No. 34/PUU-XI/2013. In these judgments, elements of constitutional questions were found, including: 1) Submissions based on actual cases being examined in ordinary courts; 2) the reason for the submission is the existence of doubts and allegations from the parties that the provisions of the law to be applied to the actual case are unconstitutional; and 3) the petitioner is still a party to the actual case being heard in ordinary court, and (4) the petitioner conjecture is likely to suffer constitutional harm by the application and interpretation of a statute in his case by the Magistrate. By looking at the empirical facts that occur in the Constitutional Court, the constitutional question can actually be adopted into one of the authorities of the Constitutional Court.

The protection of constitutional rights is one of the fundamental constitutional issues. Indonesia wants to realize a democratic state life and at the same time a state of law, so it is very important that constitutional questions get an in-depth study as an effort to better protect the constitutional rights of citizens. The urgency of applying the constitutional question can be examined from the following points: *first*, constitutional rights are the human rights provided for in the constitution. Constitutional rights are not merely related to the constitution, but are part of the constitution. Obedience to constitutional rights should be (*enforceable*). One of those coercive tools is a court ruling.

*Second*, the guarantee of human rights in the 1945 Constitution places the Constitutional Court as one of the perpetrators of judicial power as well as a pillar of the modern legal state that has a strategic role in the promotion and protection of constitutional

rights. The granting of constitutional question authority to the Constitutional Court will provide an opportunity for the state (through Judges) to provide maximum protection and enforcement of constitutional rights. Judges will be able to use laws that have been guaranteed legal certainty and constitutionality to examine, adjudicate, and decide cases. The judge's decision as a law not only resolves disputes and punishes those found guilty, but also has a certain social influence. Granting the authority to adjudicate constitutional questions will contribute to efforts to strengthen respect for human rights, intensify the protection of such rights, prevent constitutional violations in the general judiciary, and affirm the guarantee of legal certainty.

*Third*, the guarantee of legal certainty to citizens is expressly specified in the 1945 Constitution. Everyone has the right to recognition, guarantee, protection, and fair legal certainty and equal treatment before the law must be in accordance with the principles of *due process of law* and *equality before the law*, justice must be certain and at the same time certainty must be fair. Granting constitutional question authority to the Constitutional Court will provide an affirmation of legal certainty in the legal process. The guarantee of legal certainty in the ongoing legal process will be realized if the Constitutional Court exercises the authority of constitutional questions. From the point of view of the protection of constitutional rights, if the norm has been clearly formulated and not multi-interpreted, it means that even legal certainty has been guaranteed and protected.

*Fourth*, with the aim of maximizing the protection of the constitutional rights of citizens, in some countries adopt *concrete review* through cases of constitutional questions. The constitutional question is intended to be a serious attempt to stop the violations that occur in the general judiciary. The involvement of the general judiciary, designed so that the general judiciary can participate in maintaining the highest position of the constitution, which may not be obeyed by the executive branch.

*Fifth*, there is a tendency that the test of legislation is not only limited to testing the constitutionality of statutory norms contrary to the Constitution, but also concerns the implementation of statutory norms which largely lead to constitutional complaints and constitutional questions.

The absence of authority to examine constitutional questions has limited the Constitutional Court from interpreting a norm in law. The Constitutional Court expressed its limitations in interpreting a norm, as outlined as follows: "the interpretation and application of the norm is completely different from the unconstitutionality of the norm. To overcome such a problem, the Constitutional Court in other countries, in addition to being given the authority to adjudicate *constitutional review* cases, is also given the authority to adjudicate *constitutional complaints* and *constitutional questions*."

## 4 Conclusion

Based on the above presentation, it can be concluded that the constitutional question has prospects to be applied in constitutional adjudication in Indonesia. Constitutional questions have met philosophical foundations, juridical foundations, and sociological foundations. Constitutional questions have become a practice of constitutional adjudication by basing on jurisprudence. So far, the Constitutional Court has expanded its authority through extensive interpretation, and for the sake of constitutional justice and

providing maximum efforts for the protection of constitutional rights, the Constitutional Court has taken progressive steps while still giving decisions on constitutional questions through examination of statutory reviews.

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10. Article 23 paragraph (1) of Law No. 4 of 2004 states that: "Against a court decision that has obtained permanent legal force, the parties concerned may apply for review to the Supreme Court, if there are certain matters or circumstances specified in the law". Law No. 4 of 2004 has been repealed by Law No. 48 of 2009. The reason for Pollycarpus' application is that P23 subsection (1) contains a constitutional defect because there is a sentence "Parties concerned" which can give rise to a misleading interpretation so as to contravene Article 28 D paragraph (1) of the 1945 Constitution which reads "Everyone has the right to recognition, guarantee, protection and fair legal certainty and equal treatment before the law". Based on this, the petitioner requested the Supreme Court that P23 subsection (1) of the Judicial Power Act be declared contrary to the 1945 Constitution and declared to have no binding legal force. Constitutional Court Decision in Constitutional Court Decision Number: ... stating that the petitioner's application is not sufficiently reasonable and not based on law. Therefore, the application must be rejected. The provisions governing the judiciary to determine which party is entitled to apply for Re-review, have permanent legal force and are not contrary to the 1945 Constitution. A dissenting opinion was put forward by constitutional judges Harjono and Abdul Mukthie Fadjar, who viewed the petitioner's application as a matter of application of the law, not a question of the constitutionality of legal norms.
11. Substantive justice on several occasions many people question those efforts to achieve substantive justice are difficult to achieve because they are difficult to measure and there are no standard criteria for determining what substantive justice is. Justice is relative or relative because it depends on the subjective view, in contrast to the sound of the law whose content emphasizes the element of certainty. Basically, justice cannot always be ascertained first. Justice is imperceptible and can be seen from the legal construction constructed by the

judge by assessing one by one the evidence presented at trial to finally come to a conviction in the verdict. Martitah, 2013, Constitutional Court: From Negative Legislature to Positive Legislature, Jakarta: Constitution Press, p. xvii.

12. *Ibid.*, p. xiii.

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