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CHAPTER I

INTRODUCTION

1.1 Background.

The principle of the state of law gives the law the highest status to be the basis for state administration.¹ Friedrich Julius Stahl has the opinion that the principle of the state based on the law has 4 (four) main points; the enforcement of human rights (hereinafter abbreviated as human rights), the division or separation of powers, government based on the law, and an independent administrative judiciary.² This principle also emphasizes that every citizen is recognized as equal before the law and also power that is subject to the law.³

The *trias politica's* separation of powers introduced by Montesquieu aims to guarantee individual independence because it can only be guaranteed if state power is not centralized in one institution or person but is divided among branches of power.⁴ Jimly Asshiddiqie added that the separation of powers requires differentiation of functions, the prohibition of dual positions, independence between institutions, checks and balances mechanisms, and equal coordinating relations. This principle of separation of powers tends to require the branches of power to be moderately moderate in fighting for the needs and interests of the people but firm in practicing their authority.⁵

¹ Raden S. *Rekonstruksi Hukum Tata Negara Dasar, Struktur Ketatanegaraan, dan Sistem Pemerintahan Indonesia*. (Bogor : Divya Media Pustaka : 2025). Hlm. 49.

² *Ibid.* Hlm. 50. Dikutip dari Sahran Raden dalam *Dinamika Politik Hukum Pemilu dalam Konstruksi Negara Hukum Demokrasi*, Yogyakarta : Cakrawala : 2020, Hlm. 9.

³ Kusumaatmaja M. *Pengantar Ilmu Hukum*. (Bandung : Alumni: 2000). Hlm. 50.

⁴ *Ibid.* Hlm. 104.

⁵ Asshiddiqie, J. *Pengantar Ilmu Hukum Tata Negara Jilid 2*. (Jakarta : Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI : 2006). (Selanjutnya disingkat Asshiddiqie, J., I). Hlm. 22.

In the context of a state of law that demands a limitation of power, the state must uphold the supremacy of the constitution. The constitution as the highest legal norm in a state serves as the main foundation for upholding fundamental values such as freedom and common welfare.⁶ Mahfud MD argues that the nature of the law in a state cannot be separated from the political configuration that underlies it, a democratic configuration tends to give birth to responsive laws and vice versa.⁷ The relationship with the constitution is that if the constitution regulates a state to become democratic, then the legal system under it in accordance with the hierarchy of laws and regulations will refer to the democratic administration of the state.

The Constitutional Court of the Republic of Indonesia (hereinafter referred to as MKRI) is the embodiment of constitutional supremacy in the Indonesian constitutional system. The existence of the MKRI as a constitutional adjudication institution is regulated in Article 24 paragraph (2) and Article 24C of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia), which is further regulated in Law Number 24 of 2003 and its amendments, namely Law Number 8 of 2011 and Law Number 7 of 2020. The Constitutional Court of the Republic of Indonesia as a judicial institution that stands independent of other branches of power carries out its role when the constitutional rights of citizens are harmed by the enactment of a law. This is in line with its main function as a protector of the constitutional rights

⁶ Asshiddiqie, J. *Pengantar Ilmu Hukum Tata Negara Jilid 1*. (Jakarta : Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi RI : 2006). (Selanjutnya disingkat Asshiddiqie, J., II) Hlm. 149.

⁷ MD., M. *Politik Hukum di Indonesia*. (Jakarta : RajaGrafindo Persada : 2017). Hlm. 7.

of citizens as well as a guardian of democracy.⁸ The MKRI consists of 9 (nine) judges with 3 (three) each nominated by the President, the House of Representatives (*Dewan Perwakilan Rakyat*, hereinafter referred to as DPR), and the Supreme Court (*Mahkamah Agung*, hereinafter referred to as MA).

The regulation regarding the Nomination of candidates for constitutional judges is regulated in Article 20 paragraph (1) of Law No. 7 of 2020 which gives authority to each proposing institution to determine the procedures for proposing constitutional judges. Each institution still has room to regulate the nomination process but is limited by the principles of objectivity, accountability, transparency, and participation (*vide* Article 19 of Law No. 24 of 2003 *jo.* Article 20 paragraph (2) of Law No. 7 of 2020).

As a judicial institution whose role is to maintain the supremacy of the constitution and uphold the principles of the state of law and democracy, the MKRI must be independent from the influence of the proposing institution. This is affirmed in MKRI Regulation Number 09/PMK/2006 concerning the Implementation of the Declaration of the Code of Ethics and Conduct of Constitutional Judges which states that the independence of judicial power is a prerequisite for the realization of a sovereign state of law. This elaboration makes the mechanism for proposing constitutional judges need to be regulated with great caution to ensure the independence of judicial power while improving the quality of its procedures.

⁸ Sitabuana, T.H. *Hukum Tata Negara Indonesia*. (Jakarta : Konstitusi Press : 2020). Hlm. 198.

Among these proposing institutions, the House of Representatives has different characteristics of authority and functions because the essence of the House itself is a representation of the people's political interests as well as playing a role in the formation and supervision of the administration of state power. The implication of these powers and functions is that the House of Representatives has a responsibility to act responsibly and in accordance with democratic principles rather than just exercising constitutional authority in a formal manner. This makes the Nomination of constitutional judges by the House of Representatives has a more complex normative side because it deals with the legitimacy of the House of Representatives as a representative institution which of course must prioritize public participation.

This study limits the focus of the study to the authority of constitutional judge candidates by the House of Representatives without ruling out the roles of the President and the Supreme Court. This focus restriction is carried out to maintain normative analysis so that the research focuses more on examining in depth the authority of the House of Representatives as the proposing institution. Another thing is because the DPR's Nomination mechanism has a wide space to facilitate a procedure that involves the public or participates in order to increase the legitimacy of the public to a decision made by the DPR as a representative institution.

Public participation is a fundamental element in a democratic system, because Article 1 paragraph (2) and Article 28C paragraph (2) of the 1945 Constitution of the Republic of Indonesia affirm that the community as the owner of the highest sovereignty has the right to advance their state by participating. Public participation is not only a formal thing but also a benchmark for the legitimacy of a democratic

constitutional system.⁹ A democratic constitution but public participation is only used as a formal procedure, so the democratic system with its positive laws has no legitimacy.¹⁰ Public participation can be said to be meaningful if it meets 3 (three) preconditions, namely the *right to be heard*, the *right to be considered*, and the right to obtain an explanation for the participation given (*right to be explained*). With the fulfillment of these three elements, this participation is known as the principle of meaningful participation.

The principle of meaningful participation originated in *the Doctors for Life* case at the South African Constitutional Court. The applicant in the case explained that there were 3 (three) Bills that were passed by the *National Council of Provinces* without involving public participation.¹¹ The Constitutional Court of South Africa found that indeed the Provincial National Council did not facilitate public participation in the ratification of the 3 (three) Bills, while the South African constitution required the establishment of a democratic state that was *mutually supportive*.

This meaningful participation was adopted in the Indonesian legal system in the Constitutional Court Decision Number 91/PUU-XVIII/2020 (hereinafter referred to as the Constitutional Court Decision No. 91 of 2020). The MKRI argues that the House of Representatives must pay attention to and consider meaningful public

⁹ Damanik, E.R., Farina, T., Nugraha, S. (2025). Krisis Partisipasi Publik dalam Pembentukan Undang-Undang di Indonesia: Problematika Hak Konstitusional dan Pengabaian Aspirasi Rakyat. *Innovative: Journal Of Social Science Research*, 5(2), 2518–2540. Hlm. 2158.

¹⁰ Lewar, P.P., dan Madung, O.G.N. (2022). Demokrasi Sebagai Diskursus dan Deliberasi Menurut Jorgen Habermas. *Jurnal Ledalero*, 21(2). Hlm. 154.

¹¹ Constitutional Court of South Africa. Summary of "Doctors for Life International v Speaker of the National Assembly and Others". SAFLII. <https://www.saflii.org/za/cases/ZACC/2006/11.html>. Hlm. 1.

participation in the law-making process. The MKRI provides judicial *orders* related to the implementation of meaningful participation in the 5 (five) law-making processes; the submission of draft laws (hereinafter referred to as the Bill), joint discussions between the House of Representatives and the President and/or the Regional Representative Council (hereinafter referred to as the DPD), and the approval of the Bill into law. This meaningful participation is not only about the formation of laws, but is a principle related to the democratic administration of the state, especially by the House of Representatives, which is a representation of the interests of the people.

The urgency of implementing meaningful participation is getting stronger as irregularities are found in the practice of its implementation. On August 3 (three), 2025, the MKRI submitted an official notification to the House of Representatives regarding the term of office of judge Arief Hidayat which will end (*vide* Article 23 paragraph (1) letter c *jo*. Article 26 paragraph (1) letter a of Law No. 7 of 2020).¹² The House of Representatives is obliged to submit a replacement candidate to the President within a maximum period of 30 (thirty) days from the receipt of the notification, in this context ending on September 17 (seventeen) 2025.

The House of Representatives through the Consultative Body held a consultation meeting on August 19, 2025 to discuss the mechanism for proposing candidates for replacement constitutional judges. Furthermore, on August 20, 2025, Commission III (three) of the House of Representatives carried out *a fit and proper*

¹² Muhammad Wildan. "MK Sudah Mengirim Surat ke DPR Soal Pergantian Hakim Arief Hidayat". Tempo.co. <https://www.tempo.co/politik/mk-sudah-mengirim-surat-ke-dpr-soal-pergantian-hakim-arief-hidayat-2058234>. (Diakses pada 10 November 2025).

test for the proposed candidate, namely Inosentius Samsul.¹³ On the same day, Commission III (three) gave approval to the candidacy. The process then continued to the 3rd Plenary Meeting of the House of Representatives of the Republic of Indonesia for the First Trial Period (one) of the 2025-2026 Session Year, Inosentius Samsul was officially approved as a candidate for a constitutional judge to replace Arief Hidayat.

The analysis of the case of Inosentius Samsul was carried out to assess the extent to which the DPR applies the principle of meaningful participation. In the case of the candidacy and election of Inosentius Samsul to become a candidate for constitutional judge in August 2025, the House of Representatives through Commission III (three) carried out a rapid determination procedure. There is no mechanism for open consultation, absorption of aspirations, or official responses to public input, as stipulated in Article 19 of Law No. 24 of 2003. According to Angga Prastyo, the principle of meaningful participation if applied, the House of Representatives must proactively facilitate the participation of affected/interested communities, academics/experts/practitioners, and Non-Governmental Organizations (hereinafter referred to as NGOs).¹⁴ Thus, the process of proposing Inosentius Samsul by the House of Representatives shows that there are no facilities for the implementation of substantial participatory constitutional judge Nominations.

¹³ Parlementaria. "DPR Gelar Fit and Proper Test Calon Hakim Konstitusi Inosentius Samsul". DPR RI. <https://www.dpr.go.id/kegiatan-dpr/berita/DPR-Gelar-Fit-and-Proper-Test-Calon-Hakim-Konstitusi-Inosentius-Samsul-58546>. (Diakses pada 10 November 2025).

¹⁴ Prastyo, A. (2022). Limitation of Meaningful Participation Requirements in the Indonesian Law-Making Process. *Jurnal Hukum dan Peradilan*, 11(3), 405-436. Hlm. 426.

This topic was raised with the consideration that the quality of the implementation of democracy in practice shows a tendency to decrease in effectiveness. This condition reflects the gap between legal norms that require public participation and political implementation within the House of Representatives which does not fully reflect these principles. Therefore, the topic and especially this case is very important to be studied juridically because there is an acceleration of the Nomination and election of candidates for constitutional judges by the House of Representatives without public participation, which is contrary to the principle of meaningful participation related to the democratic administration of the state. The author feels that there is a need for practical limits in the concept of "participatory" as measured by the principle of meaningful participation in the arrangement of the nomination and election of constitutional judges so that the institution that is authorized to propose is not arbitrary, especially regarding the possibility of implications of a political relationship between constitutional judges and their proposing institutions, which of course makes the MKRI not independent. The above reasons ultimately led the author to conduct research in a undergraduate thesis entitled **"THE URGENCY OF THE REGULATION OF MEANINGFUL PARTICIPATION NORMS IN THE PROCEDURE FOR NOMINATING CONSTITUTIONAL JUDGES BY THE HOUSE OF REPRESENTATIVES (CASE STUDY OF THE NOMINATION OF INOSENTIUS SAMSUL)"**.

1.2 Problem Formulation.

1. What is the urgency of setting the norm of meaningful participation in the procedure for proposing constitutional judges by the House of Representatives?
2. How is the placement of the appropriate hierarchy of laws and regulations on the regulation of meaningful participation norms in the procedure for proposing candidates for constitutional judges by the House of Representatives?

1.3 Research Objectives.

1. Analyze the urgency of regulating meaningful participation norms in the procedure for proposing constitutional judges by the House of Representatives.
2. Analyze the placement of the appropriate hierarchy of laws and regulations on the regulation of meaningful participation norms in the procedure for proposing candidates for constitutional judges by the House of Representatives.

1.4 Research Benefits.

1. Academically.

To contribute ideas for students in the field of law, especially in the concentration of Constitutional Law.

2. Practically.

- 1) It is an evaluative basis for the House of Representatives in developing a mechanism for the selection of constitutional judges based on the

principle of transparency and encouraging substantive public involvement.

- 2) It is a material for the development of constitutional law studies, especially in the aspect of public participation in the procedure for proposing state institution officials.

1.5 Originality of the Research.

To strengthen the conceptual foundation, the author examines several previous scientific works that are relevant to the undergraduate thesis theme. The sub-chapter of the authenticity of this study aims to highlight the scope of the study that has been discussed by the previous researcher to show the similarities and differences with this study. Based on the research conducted by the author, several studies in the last 5 (five) years were found that are related to the issues in this undergraduate thesis research, including:

Table 1. Differences with previous research.¹⁵

Previous Research Titles	Similarities with Undergraduate thesis	Differences with Undergraduate thesis
<i>Kajian Hukum Mengenai Kewenangan Dewan Perwakilan Rakyat Dalam Pengisian Jabatan Hakim Konstitusi Ditinjau Dari Prinsip Negara Hukum dan Demokrasi di Indonesia.</i> ¹⁶	This research also focuses on the involvement of the House of Representatives in the selection process of constitutional judges and the importance of accountability and public participation in democracy.	This research has a more conceptual paradigm in political science and not a dogmatic juridical discussion.
<i>Politik Hukum Pengusulan Jabatan Hakim Konstitusi (Studi</i>	This research has the same scope, namely the recruitment of	This research focuses on the legal politics of the recruitment of

¹⁵ Compiled by the Author

¹⁶ Parhusip, T.E., Gusliana, H.B., Rauf, M.A. (2024). Kajian Hukum Mengenai Kewenangan Dewan Perwakilan Rakyat Dalam Pengisian Jabatan Hakim Konstitusi Ditinjau Dari Prinsip Negara Hukum dan Demokrasi di Indonesia. *Jurnal Ilmiah Wahana Pendidikan*, 10(15), 663-671.

Previous Research Titles	Similarities with Undergraduate thesis	Differences with Undergraduate thesis
<i>Atas Pengusulan Inosentius Samsul oleh Dewan Perwakilan Rakyat Republik Indonesia</i>). ¹⁷	constitutional judges by the House of Representatives and also conducts a case study on the Nomination of Inosentius Samsul to become a constitutional judge by the House of Representatives.	constitutional judges in Indonesia and is compared with the case of Inosentius Samsul's Nomination by the House of Representatives to look for weaknesses. However, regarding public participation, it does not use meaningful participation parameters.
<i>Reformasi Sistem Rekrutmen Hakim Konstitusi Indonesia yang Sejalan dengan Nilai Kerakyatan Pancasila</i> . ¹⁸	This previous research focused on the importance of the principle of public participation based on the principles of transparency and accountability in the recruitment of constitutional judges.	This research offers systemic innovation by establishing an external selection panel and a public information site "SHAKTI".

The difference from previous studies lies in the focus and parameters or benchmarks for analyzing the legal issues being studied. This study specifically examines the regulation of constitutional judges' Nominations based on meaningful participation as a normative benchmark to assess the suitability of practice with the concept of a sovereign state of law and applicable provisions. The case study of Inosentius Samsul's Nomination is used to illustrate existing practices (*Das sein*) to

¹⁷ Widodo, L. (2025). Politik Hukum Pengusulan Jabatan Hakim Konstitusi: Studi Atas Pengusulan Inosentius Samsul Oleh Dewan Perwakilan Rakyat Republik Indonesia. *Journal De Facto*, 12(1), 15–31.

¹⁸ Hamadi, I.G., dan Angelina, F. "Reformasi Sistem Rekrutmen Hakim Konstitusi Indonesia yang Sejalan dengan Nilai Kerakyatan Pancasila." *Ma'mal: Jurnal Laboratorium Syariah dan Hukum*, 5 (5): 456-476.

be tested for compatibility with transparency, accountability, and public participation.

Previous research was only based and aimed at analyzing legal politics and conceptual only, while this research uses measurable and norm-based evaluative parameters so that later it can be used as a legal construction that is more in accordance with the principles that have been explained earlier. This research seeks to fill the research *gap* on how the authority of the House of Representatives in proposing constitutional judges should be carried out based on the provisions of laws and regulations and the principle of the sovereign state of law. Meaningful participation is used as a benchmark for legal standards and their implementation to assess the recruitment procedure for constitutional judges.

Methodologically, this study examines and analyzes the applicable provisions and is further strengthened by theories from literature studies that are related to the substance of this undergraduate thesis. This undergraduate thesis also analyzes to show that public participation is not a procedural but is the main basis of the principle of the sovereign state of law. Thus, the legal construction of the implementation of the recruitment of constitutional judges is more democratic.

1.6 Research Methods

1.6.1 Types and Nature of Research.

The type of research used by the author in this stage of research is normative juridical research or also called doctrinal law research. This research emphasizes the focus on the norm system as an object of study to be used in

answering the legal issues studied.¹⁹ The selection is based on the character of this research which examines the regulation of the authority and procedures for proposing constitutional judges by the House of Representatives, as well as assessing the conformity between the practice of proposing in the case of Inosentius Samsul with the applicable provisions and the principles of the implementation of the sovereign state of the people. Through this approach, this study places the principle of meaningful participation as a tool to measure the suitability of the process of proposing constitutional judges with the democratic standards required by law.

The nature of the research used by the author is explanatory research. Explanatory research itself is research that describes 2 (two) aspects that are researched and then explain the relationship or influence of the two aspects.²⁰ So explanatory research not only describes existing phenomena but also explains the relationship, relevance, and implications of legal provisions with practices that occur.

The author uses the nature of explanatory research because the research does not stop at the presentation of the arrangements regarding meaningful participation and the mechanism for proposing constitutional judges by the House of Representatives. This research also uses illustrations through a case study of Inosentius Samsul's Nomination to explain legal issues related to applicable legal provisions. The author uses the principle of meaningful

¹⁹ Irwansyah. *Penelitian Hukum: Pilihan Metode & Praktik Penulisan Artikel*. (Yogyakarta : Mirra Buana Media: 2023). Hlm. 100.

²⁰ *Ibid*. Hlm. 40.

participation to measure whether the case of Inosentius Samsul's Nomination has met the "participatory" provisions in the mechanism for proposing candidates for constitutional judges, especially related to the democratic administration of the state. Therefore, the nature of explanatory research is used to analyze the connection between norms, doctrines, and practices that occur.

1.6.2 Approach.

The research approach in this context is a conceptual and procedural planning of the research, this includes a detailed methodology in the analysis materials based on the data used.²¹ Furthermore, the approach also functions as a tool to find out what materials or data are used and also to determine what things must be studied in this study. The research in this undergraduate thesis uses 3 (three) approaches, namely:

1. Statute Approach.

The statute approach is used by the author as a method to review and analyze all provisions of laws and regulations that have relevance and relevance to the legal issues that are the object of research.²² The author examines the case of Inosentius Samsul's Nomination and will be compared with the principle of meaningful participation, the study is carried out dogmatically according to the Law that regulates the Constitutional Court, the decision of the Constitutional Court, and also other relevant laws and regulations.

²¹ *Ibid.* Hlm. 133.

²² Marzuki, P.M. *Penelitian Hukum*. (Jakarta : Prenadamedia Group : 2005). Hlm. 133.

2. Conceptual Approach.

This approach is used to examine and understand the basic ideas that underlie a norm by placing legal issues within the framework of the values contained in the process of standardizing a regulation.²³ Through this approach, the author examines various views and doctrines in legal science that are related to the issue being researched so that they can be used as a conceptual reference in formulating answers to the legal problems proposed. The process of studying and analyzing the doctrine is directed to deepen the understanding of the concept of meaningful public participation in the context of the implementation of a sovereign state of law, which is then used as an analytical basis in examining the case of Inosentius Samsul's Nomination.

3. Case Approach.

This approach is used to examine relevant court decisions, especially the Constitutional Court Decision No. 91 of 2020 which is the basis for affirming the principle of meaningful participation in state administration. Through the case approach, the researcher can see how the principle is applied by the MKRI and will then be compared in the case of proposing candidates for constitutional judges. This approach is important because it provides an overview of how a norm works in

²³ Irwansyah. *Op. Cit.* Hlm. 147.

a concrete context, so that the analysis is not only conceptual and theoretical but also takes into account existing legal practice.

1.6.3 Legal Substances.

This undergraduate thesis research requires support from research sources as a foundation in strengthening arguments. The legal materials used consist of primary legal materials (laws and regulations and court decisions), secondary legal materials (books, journals, legal dictionaries, and legal doctrines).²⁴ In addition, this research is also equipped with non-legal materials as supporting materials such as books or journals outside the legal discipline, as well as relevant news articles to clarify the factual context behind this research.²⁵ Legal materials in the study include:

1.Primary.

- a. The 1945 Constitution of the Republic of Indonesia;
- b. Law No. 24 of 2003 concerning the Constitutional Court;
- c. Law No. 48 of 2009 concerning Judicial Power;
- d. Law No. 8 of 2011 concerning Amendments to Law No. 24 of 2003 concerning the Constitutional Court;
- e. Law No. 12 of 2011 concerning the Establishment of Laws and Regulations;
- f. Law No. 7 of 2020 concerning the Third Amendment to Law No. 24 of 2003 concerning the Constitutional Court;

²⁴ Marzuki, P.M. *Op. Cit.* Hlm. 181.

²⁵ *Ibid.* Hlm. 204.

- g. DPR Regulation No. 1 of 2020 concerning Rules;
- h. MKRI Regulation No. 09/PMK/2006 concerning the Implementation of the Declaration of the Code of Ethics and Conduct of Constitutional Judges;
- i. MKRI Decision No. 91/PUU-XVIII/2020;
- j. the Constitution of South Africa;
- k. *Judicial Service Commission Act, Procedure of the Commission*;
- l. *Doctors for Life Case*.

2.Secondary.

Secondary legal materials using books from legal experts from the last 5 (five) years or more if there are theories that are still relevant, research journals of the last 5 (five) years both with legal and non-legal topics, expert comments on court decisions, and also using MKRI decisions related to meaningful participation.

3.Non-Legal.

The non-legal materials used in this undergraduate thesis include news articles, media reports, and expert opinions published on trusted *platforms*. The use of non-legal material is not intended as the basis for the main analysis, but rather as a reference to clarify the chronology of events and to obtain an idea of the dynamics that occur outside the text of norms and regulations. In this way, the research remains focused on normative juridical analysis,

while non-legal information serves to help researchers place legal issues in a more comprehensive context.

1.6.4 Legal Material Collection Procedure.

The process of collecting legal materials in this undergraduate thesis is carried out through a comprehensive literature study of existing legal materials. The search is carried out by identifying, accessing, and studying laws and regulations, court decisions, and legal doctrines obtained online and offline. In addition, the use of media articles and legal doctrine is carried out selectively to provide affirmation of the factual context of the case being analyzed. All materials that have been collected are then selected and classified based on their relevance to the legal problems being researched so that it is possible for a systematic and targeted analysis in accordance with the context of this undergraduate thesis research.

1.6.5 Analysis of Legal Substances.

This undergraduate thesis research uses a systematic and structured analysis of primary, secondary, and non-legal materials that have been collected previously. All legal materials that have been classified based on their level of relevance are then analyzed through the approaches used. The analysis process is based on deductive reasoning, namely by applying general norms to the concrete situation that is the object of the undergraduate thesis research. Legal interpretation techniques carried out systematically and teleologically are used to examine the meaning and purpose of norms related to the principle of meaningful participation. With this analytical framework, this undergraduate

thesis research aims to provide clarity on the extent to which normative provisions are in line with the practice of proposing constitutional judges by the House of Representatives and formulate comprehensive answers to the legal issues studied.

1.6.6 Writing Structure.

The author raises the title "**THE URGENCY OF REGULATING THE NORM OF MEANINGFUL *PARTICIPATION* IN THE PROCEDURE FOR PROPOSING CANDIDATES FOR CONSTITUTIONAL JUDGES BY THE HOUSE OF REPRESENTATIVES (CASE STUDY OF THE NOMINATION OF INNOCENT SAMSUL)**". This research is arranged in 4 (four) chapters that are arranged systematically, logically, and correlated with each other, the purpose is to make it easier to understand the explanations in this study.

Chapter I (one), contains an introduction consisting of five sub-chapters, namely the background, problem formulation, research objectives, research benefits, and research authenticity. This chapter also describes the research methods which include the types and nature of research, approaches, legal materials, procedures for collecting legal materials, analysis of legal materials, and writing systematics. Furthermore, this chapter also presents a literature review as a theoretical basis that includes discussions about the Islamic State, the state of law, democracy, and also the theory of legal norms as a theoretical basis in this undergraduate thesis research.

Chapter II (two) entitled "The Urgency of Regulating Norms of Meaningful Participation in the Procedure for Proposing Constitutional Judges by the House of Representatives", contains the results of research and discussion of legal issues discussed by the author in the formulation of the first problem. Chapter 2 has 2 (two) sub-chapters, sub-chapter 1 (one) discusses "Review of the Procedure for Proposing Constitutional Judges in the Case of Proposing Innocent Samsul" and the second discusses "The Urgency of Setting Meaningful Participation Norms in the Procedure for Proposing Constitutional Judges by the House of Representatives". The results of this research will review the urgency of setting meaningful participation norms by analyzing the case study of Inosentius Samsul as a basis for this undergraduate thesis research.

Chapter III (three) entitled "Proper Placement of Hierarchy of Laws and Regulations for the Regulation of Norms of Meaningful Participation in the Procedure for Proposing Candidates for Constitutional Judges by the House of Representatives", which will discuss the problems in the formulation of problem number 2 (two). Chapter 3 will have 1 (one) sub-chapter entitled "Placement of Meaningful Participation Norms in the Hierarchy of Laws and Regulations Related to the Procedure for Proposing Constitutional Judges by the House of Representatives". The results of the research in this chapter will discuss the construction of meaningful participation norms in the procedure for proposing constitutional judges by the House of Representatives as well as the location of the placement of these norms based on the hierarchy of laws and regulations as stipulated in Law No. 12 of 2011.

Chapter IV (four), is the conclusion that includes the conclusions and suggestions of this undergraduate thesis research. The entire discussion of this research from beginning to end is concluded in a more concise and concise paragraph but still comprehensive regarding the discussion of this research. Suggestions are things that the author expects to do after the legal issues researched in the undergraduate thesis, which ultimately turns the discussion of research by the author into proxy.

1.6.7 Research Schedule.

The research schedule is a detailed report related to the time of undergraduate thesis completion activities that are systematically designed based on a certain time. This research schedule was designed by the author to explain the time of the activity starting from the submission of the undergraduate thesis supervisor to the oral exam. The research schedule is detailed in the following table:

Table 2. Research Schedule.

Yes	Stages	Year & Month								
		2025				2026				
		8	9	10	11	12	1	2	3	4
1	Submission of Supervisor									
2	Submission of Undergraduate Thesis Proposal Title									
3	Supervisor Title Approval									
4	Preparation of Undergraduate Thesis Proposal									

1.7 Literature Review

1.7.1 Rule of Law State.

1.7.1.1 The Concept of the Rule of Law State

Conceptually, the state of law places the law as the highest authority in the administration of state power, so that state power is not exercised based on the will of individuals but is subject to the provisions of law.²⁶ In Julius Stahl's thought, the state of law is characterized by 4 (four) main elements, namely the existence of guarantees for human rights, the division/separation of powers, the administration of government based on legal provisions, and the existence of an independent administrative judiciary.²⁷ Meanwhile, A.V. Dicey stated 3 (three) main points, namely the rule of law, equality of standing before the law, and the guarantee of fair legal process.²⁸ This view was then elaborated by *The International Commission of Jurists* which emphasized that the state of law requires state obedience to the provisions of the law, respect from the government for individual rights, and also the existence of an independent and impartial judiciary.²⁹

Based on this conceptual description, the state of law is essentially a constitutional system that places law as the main basis in every decision-making. The consequence is that the exercise of power must not

²⁶ Istiqamah, H. Yanlua, S.Z. Yanlua, M.A. Konsep Negara Hukum *Rechtsstaat* dan *Rule of Law*. *Jurnal Al-Muqaranah: Jurnal Hukum dan Pemikiran Islam*, 3(1), 9-18. Hlm. 14.

²⁷ Asshiddiqie, J. *Konstitusi dan Konstitusionalisme Indonesia*. (Jakarta:Sinar Grafika:2014). (Selanjutnya disingkat Asshiddiqie, J., III) Hlm. 125.

²⁸ *Ibid.* Hlm. 126.

²⁹ *Ibid.*

be arbitrary and must be carried out through a mechanism of limitation on state power to guarantee individual freedom. The principle of separation requires that each branch of power operate independently without interference from other branches of power and operate on checks *and balances*. In the development of the modern legal state, there has also been an emphasis on the importance of monitoring mechanisms over the political process to prevent abuse of power. This is in line with the purpose of the law which not only emphasizes the aspect of certainty but also prioritizes the value of justice and utility. In the end, the concept of the state of law that is developing today no longer stops at the enforcement of the law that is formal, but is oriented towards the achievement of substantive justice.

1.7.1.2 The State of Law in the Indonesian Constitutional System.

The 1945 Constitution of the Republic of Indonesia as the highest legal norm in Indonesia emphasizes through Article 1 paragraph (3) that Indonesia is a state based on the law. This provision places the law as the basis for the administration of state power and not on the will of power alone. The state of law is not only based on laws and regulations but also based on Pancasila as *a staatsfundamentálnorm* as affirmed in Article 2 of Law No. 12 of 2011.³⁰ Article 7 of Law No. 12 of 2011 explains the

³⁰ Supryadi, A., et al. (2023). Negara Hukum Pancasila Dalam Sistem Ketatanegaraan Indonesia. *CIVICUS: PPKn & Law Journal*, 10(2), 19-25. Hlm. 22.

hierarchy of laws and regulations in Indonesia which are tiered in accordance with the binding force and scope of regulation.

Article 7 paragraph (1) of Law No. 12 of 2011 places the 1945 Constitution of the Republic of Indonesia as the constitution of the Indonesian state in the highest place, this makes the legal system in Indonesia apply constitutional supremacy. With the concept of Indonesia as a sovereign state of law, the people provide a limit that the administration of the state is the implementation of the constitution.³¹

The concept of the state of law in the constitutional system in Indonesia has the goal, namely a legal system that is certain and just.³² This basis is in line with the legal goals according to Gustav Radbruch; justice, utility, and legal certainty.³³ The implementation of the rule of law in Indonesia also relies on agreements based on the will of the people which is a reflection of the fourth precept of Pancasila.³⁴ With the virtue of justice in the purpose of law, strengthened by the concept of the implementation of the state of law in Indonesia based on Pancasila, the law is not only the main dogmatically but must also run democratically.

³¹ Riewanto, A., *et. al. Hukum Tata Negara*. (Depok:RajaGrafindo Persada:2023). Hlm. 169.

³² Supryadi, A. *Loc. Cit.*

³³ Afdhali, D.R. Syahuri, T. (2023). Idealitas Penegakan Hukum Ditinjau Dari Perspektif Teori Tujuan Hukum. *Collegium Studiosum Journal*, 6(2), 555-561. Hlm. 556.

³⁴ Supryadi, A. *Op. Cit.* Hlm. 23.

1.7.2 Theory of Democracy.

1.7.2.1 General Concept of Democracy.

The terminological definition of democracy is generally interpreted as the power and sovereignty of the people being the highest in a state.³⁵ Robert A. Dahl stated that the condition for a democratic system requires an opportunity for effective participation from the community, meaning that the community has equal rights before the law and must be effectively implemented in order to be able to express their opinions regarding the policies to be enforced.³⁶

Another opinion about democracy was put forward by Jurgen Habermas who emphasized that a system can be said to be democratic if it rests on the opinions and will of citizens that are implemented deliberatively.³⁷ The term 'deliberation' itself is used by Habermas to designate the process of rational consideration and discussion of a problem. Furthermore, Habermas views that legal legitimacy can only be guaranteed through democratic procedures.³⁸ In this perspective, deliberative democracy requires the state to ensure the fulfillment of people's rights in participating in the democratic administration of the

³⁵ Mau, H.A. Ditisrama, T. *Hukum Tata Negara Indonesia: Teori dan Penerapan*. (Purwokerto:Amerta Media:2024). Hlm. 57.

³⁶ Dahl, R. A. *On democracy*. (New Haven: Yale University Press:1998). Hlm. 37.

³⁷ Lewar, P.P. Madung, O.G.N. *Op. Cit.* Hlm. 151.

³⁸ *Ibid.*

state. The concept is intended to cover up the weaknesses of democracy that only relies on voting mechanisms and parliamentary representation.³⁹

The problem of deliberative democracy is about the subject who will participate in a certain policy (*demos*), because if indeed the legitimacy of the democratic administration of the state must be based on the deliberation of the community, then who is the public who can participate in making certain policies, this problem is called *the boundary problem*.⁴⁰ Robert A. Dahl explained that policies that will affect one or more people must be made with the *explicit agreement* of the affected subject, this is called the affected subject principle or *all affected interest principle*.⁴¹ If you use Robert A. Dahl's *all-affected interest principle*, it will create an unstable democratic condition (*problem of stability*), because there is no absolute or normative benchmark regarding the subject who can participate, especially when it comes to the intrinsic capability of the subject in making a state policy.⁴² The strategic step is to determine normatively related to the subject who can participate (*just inclusion*) and a *contrario* then the subject who cannot participate (*just exclusion*) appears.⁴³ Furthermore, the solution to *boundary problems* is

³⁹ Muthhar, M.A. (2016). Membaca Demokrasi Deliberatif Jurgen Habermas Dalam Dinamika Politik Indonesia. *Ushuluna: Jurnal Ilmu Ushuluddin*, 2(2), 49-72. Hlm. 55.

⁴⁰ Theuns, T. (2021). Pluralist Democracy and Non-Ideal Democracy Legitimacy Against Functional and Global Solutions to the Boundary Problem in Democratic Theory. *Berghahn Journals*, 8(1), 23-49. Hlm. 23.

⁴¹ Dahl, R.A. *Op cit*. Hlm. 153.

⁴² Miller, D. (2020). Reconceiving The Democratic Boundary Problem. *Philosophy Compass*, 15(11), 1-9. Hlm. 2.

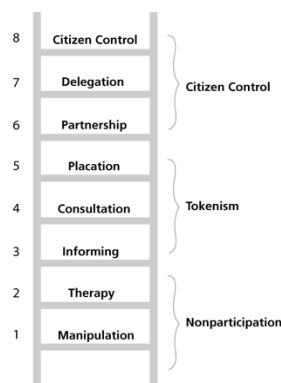
⁴³ Spitzer, A.J. (2022). Approaching the Boundary Problem: Self-Determination, Inclusion, and the Unpuzzling of Transboundary Conflicts. *Journal of International Political Theory*, 18(2), 244-261. Hlm. 246.

decision-making that requires careful consideration to see the criteria of subjects who can participate and also anticipate their intrinsic qualities in decision-making.⁴⁴

1.7.2.2 Arnstein's *Ladder*.

In the literature related to public participation, there is a theory that discusses the level of public participation called the "Ladder of Public Participation" or *the Ladder of Public Participation* put forward by Sherly Arnstein. Arnstein's theory is a concept that measures the extent to which a society's participation in the decision-making process is a ladder, and it is described as a ladder with the lowest level reflecting minimal participation.⁴⁵

Image 1. Levels of Public Participation in Arnstein's Ladder.



This ladder is a guide to see who has the power in decision-making. The levels in the Arnstein staircase concept are:⁴⁶

⁴⁴ Miller, D. *Op cit.* Hlm. 7.

⁴⁵ Nusa, R.A. Annisa, F. (2025). Analisis Konsep Arnstein's Ladder of Participation Dalam Mega Proyek Ibu Kota Nusantara. *MULTIPLE: Journal of Global and Multidisciplinary*, 3(3), 5048-5057. Hlm. 5051.

⁴⁶ Nura, R.A. Annisa, F. *Op. Cit.* Hlm. 5052.

- 1) Non-Participation is carried out by:
 - a. Manipulation, public involvement is not carried out on the grounds that a number of individuals have been chosen to act as representatives, so that the public ultimately does not get information about the decision-making process;
 - b. Therapy, the public has begun to be accommodated regarding its involvement but is still limited to the stage of receiving information about the decisions that have been determined.
- 2) Tokenism or Pseudo. At this level, all public participation is only seen in terms of procedures and formalities, not substantial enough. This degree is done by:
 - a. Informing, the competent authorities basically do not close the space for public participation, but also do not follow up on the participation that has been conveyed but is instead limited to one-way communication without any real implementation;
 - b. Consultation, the ruling authority has held a two-way discussion but the ruling authority still determines whether the results of public participation will be used;
 - c. Placation, here public participation is used as a symbolic recognition, it does not mean anything and has no impact

on the decision to be taken. The authorities in power tend to promise to follow up but the results are not necessarily done.

- 3) Citizen Control or full power by the public. This level is the highest, where the public has full control over the decisions taken and arguably the authority that reigns at this level is the public itself. This level is done by:
 - a. Partnership is carried out when there is a collaboration of various parties to compile or implement decisions such as the private sector or the government.
 - b. Delegation, the public has a majority vote in a committee or decision-making board. Here the public has the most powerful position to make a decision;
 - c. Citizen Control, this highest level describes public domination. Not only in decision-making but in evaluating the performance of the ruling authority.

The Arnstein staircase concept is used by the author to see the position of the community in the process of participation that occurs. Meaningful participation standards do regulate the basic rights that must be met, but they are not enough to show whether the community's involvement is really heard or only formal. This is where Arnstein's concept comes in. With this concept, research can illustrate whether people are only given information, asked for opinions without follow-up,

or really given space to influence decisions. Therefore, Arnstein's concept does not replace the measure of meaningful participation, but rather to help clarify the quality of participation that takes place.

1.7.2.3 Meaningful Participation.

The principle of meaningful participation emerged from the case in the South African Constitutional Court. In such cases, the democratic administration of the state must be based on public participation in a policy. The case also explains that the state (especially the legislative or parliamentary institutions) has an obligation to facilitate public participation when making a policy, especially in lawmaking. Furthermore, it was explained that the existence of a dialogue discussion between the representative institution and the participating community *is* not a competition but "mutually supportive" to create an ideal democratic implementation.⁴⁷

This principle was adopted in Indonesia through the Constitutional Court Decision No. 91 of 2020. By definition, the principle of meaningful participation is a benchmark related to how public participation in policymaking can be said to be meaningful. In the decision, it is stated that the prerequisites for public participation can be said to mean that there are 3 (three); the right to be heard, the right to be considered, and the right to an explanation or answer to the opinion given. Meaningful participation aims to accommodate people's aspirations for a

⁴⁷ Constitutional Court of South Africa. *Op. Cit.* Hlm. 3.

policy, especially for people who are concerned about a policy or for people who are directly affected by the policy to be enforced.

The 1945 Constitution of the Republic of Indonesia stipulates that people have a constitutional right to actively fight for their rights (*vide* Article 28C paragraph (2)). This norm has the implication that people are allowed to even have a constitutional right to participate in the formulation of state policies.⁴⁸ Thus, the constitutional rights of citizens are obliged to be respected, enforced, and fulfilled by the proactively implementers of state power (*vide* Article 28I paragraph (4)).

1.7.3 Constitutional Court.

1.7.3.1 General Concept of the Constitutional Court.

The fundamental idea of the Constitutional Court stems from Hans Kelsen's view of the need for a special institution distinct from the legislative power to check the conformity of a law with the constitution and annul it if it is 'contrary to the constitution'.⁴⁹ The existence of the constitution as a basic norm is the basis for the validity of a legal system, on the other hand, if a law is drafted not in accordance with the provisions of the constitution, then the law does not apply.⁵⁰ Kelsen assumes that there is a special institution called the 'constitutional court' or

⁴⁸ Mandak, A.P.A. (2024). Penerapan Partisipasi Masyarakat Bermakna Dalam Pembentukan Undang-Undang Pasca Putusan Mahkamah Konstitusi Nomor 91/PUU-XVIII/2020. LEX PRIVATUM, 13(5). <https://ejournal.unsrat.ac.id/v3/index.php/lexprivatum/article/view/56821>. Hlm. 1.

⁴⁹ Kelsen, H. *Teori Umum Tentang Hukum dan Negara Edisi Terjemahan*. (Bandung:Nusa Media:2015). (Selanjutnya disingkat Kelsen, H., I). Hlm. 225.

⁵⁰ Kelsen, H. *Pure Theory of Law (Rheine Rechtslehre)*. (New Jersey: The Lawbook Exchange:2005). (Selanjutnya disingkat Kelsen, H., II). Hlm. 45.

constitutional adjudication established to monitor the constitutionality of a regulation, a system for testing the constitutionality of this law is called judicial review.⁵¹ If administrative acts can be controlled by judicial control through an administrative court or state administrative court for enforcement of their legality, then laws and regulations (general regulative norms and especially laws) It must also be able to be sued through judicial power because of its constitutionality, this according to Hans Kelsen falls within the scope of the constitutional court's authority.⁵² Furthermore, Hans Kelsen added that the function of the Constitutional Court is very important for democracy, because the enforcement of the constitution can protect the political position of the minority.⁵³

Hans Kelsen further emphasized that the existence of the Constitutional Court is very important to protect the norms of the constitution so that it is protected from potential violations by state power administrators.⁵⁴ Regarding the urgency of constitutional enforcement, Kelsen explained:⁵⁵

"The legal-political demand for guarantees of the constitution, for institutions, in other words, that control the behaviour of certain organs immediate to the constitution, such as parliament or government, with respect to its conformity to the constitution, conforms to a principle

⁵¹ *Ibid.*

⁵² Kelsen, H. *The Essence and Value of Democracy*. (Maryland:Rowman & Littlefield Publishers, Inc.:2013). (Selanjutnya disingkat Kelsen, H., III). Hlm. 83.

⁵³ *Ibid.*

⁵⁴ Vinx, L. *The Guardian of the Constitution: Hans Kelsen and Carl Schmitt on the Limits of Constitutional Law*. (United Kingdom: Cambridge University Press:2015). Hlm. 174.

⁵⁵ *Ibid.* Hlm. 175.

specific to the rule-of-law state, namely that the exercise of the state's functions be as lawful as possible."

The reason why the authority to test the constitutionality of the law cannot be carried out by the legislative or executive branches, because the two branches of power are powers that will be limited by the testing of the constitutionality of the law itself, then the two branches of power will be biased because they have the best legal chance and also the strongest political motive to violate the constitution.⁵⁶ The elaboration emphasized that the existence of the Constitutional Court is vital for the implementation of a state that is sovereign and follows the law.

The practical form of Kelsen's theory occurs in the Austrian Constitution of 1920 which was also drafted by Kelsen, which provides for a special court called the Constitutional Court (*verfassungsgerichtshof*) with the authority to test laws based on the constitution.⁵⁷ This form of constitutional court authority is basically related to the principle of constitutional supremacy which gives the authority to resolve constitutional problems to be left to the constitutional court specifically.⁵⁸ Kelsen further emphasized that democracy depends on the existence of the constitutional court as a form of juridical control over the actions of state administrators.⁵⁹

⁵⁶ *Ibid.*

⁵⁷ Harman, B.K. *Mempertimbangkan Mahkamah Konstitusi: Sejarah Pengujian UU terhadap UUD*. (Jakarta:Kepustakaan Populer Gramedia:2013). Hlm. 69.

⁵⁸ *Ibid.* Hlm. 88.

⁵⁹ Kelsen, H., III. *Loc Cit.*

1.7.3.2 Constitutional Court of the Republic of Indonesia.

The MKRI is one of the organizers of judicial power in addition to the Supreme Court, as stipulated in Article 24 paragraph (2) of the 1945 Constitution of the Republic of Indonesia. In accordance with the characteristics of free judicial power, the Constitutional Court functions as an independent institution from all branches of power, and has the responsibility to maintain the supremacy of the constitution.⁶⁰ As a judicial powerhouse, the MKRI is classified as a type of high state institution in the Indonesian constitutional system which is explicitly regulated by the 1945 Constitution of the Republic of Indonesia.

Based on its authority and position, the MKRI has a central function to enforce the constitution, interpret the constitution, and also protect the constitutional rights of citizens.⁶¹ Saldi Isra explained that the Constitutional Court with the authority to test the constitutionality of a law aims to ensure that every process of making and implementing the law remains in accordance with the constitution and is not authoritarian.⁶²

⁶⁰ Asosiasi Pengajar Hukum Acara Mahkamah Konstitusi. *Hukum Acara Mahkamah Konstitusi*. (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia:2010). Hlm. 10.

⁶¹ *Ibid.*

⁶² Isra, S. *Lembaga Negara: Konsep, Sejarah, Wewenang, dan Dinamika Konstitusional*. (Depok:RajaGrafindo Persada:2020). Hlm. 319.

This makes testing the constitutionality of the law a necessity and a process of checks and balances in the Indonesian constitutional system.⁶³

The 1945 Constitution of the Republic of Indonesia stipulates that the MKRI consists of 9 (nine) constitutional judges proposed in a balanced manner by the President, the House of Representatives, and the Supreme Court. Article 20 paragraph (1) of Law No. 7 of 2020 stipulates that the regulation of the procedure for proposing constitutional judges is left to the authority of each proposing institution. This authority is given implementation standards that must be accountable, participatory, open, transparent, and objective.

The norm of the provisions that govern the procedure mechanism for proposing constitutional judges gives broad authority to the authorized institutions with the limitations that have been mentioned, this provision is an open legal policy so that there is no rigid mechanism that is consistent with the proposing institutions.⁶⁴ The consequence is that there is an inconsistency in the selection mechanism of each proposing institution, so that the benchmark for meeting the requirements of the candidate for constitutional judges from each institution is not accountable.⁶⁵ Ideally, the nomination of constitutional judges must at least have indicators based on capabilities (merit based principle), this

⁶³ *Ibid.*

⁶⁴ Asosiasi Pengajar Hukum Acara Mahkamah Konstitusi. *Loc Cit.*

⁶⁵ Ulum, M. & Diniyanto, A. (2024). Perbandingan Rekrutmen Hakim Mahkamah Konstitusi Indonesia dengan Jerman. *Manabia: Journal of Constitutional Law*, 4(2), 201-216. Hlm. 205.

aims to create good judges while increasing public trust in judicial power.⁶⁶

1.7.3.3 Independence of Constitutional Judges in the Constitutional Perspective.

Judge independence is a state that makes a judge free from outside pressure to be able to do the right thing according to the law without worrying or fearing the consequences of his decision.⁶⁷ This is corroborated by the opinion of Hans Kelsen, that a judge is bound only by law and is not affected by the instructions or orders of any organ.⁶⁸ Kelsen further explained that the guarantee of the legality of court decisions comes from the independence of the judiciary.⁶⁹

The 1945 Constitution of the Republic of Indonesia provides a mandate, namely the MKRI which has a position as an independent judicial power, this makes the independence of the MKRI a constitutional design. MKRI Regulation No. 09/PMK/2006 defines independence as the freedom of constitutional judges from various direct or indirect influences. The independence of the judiciary is emphasized as the main condition for the realization of the rule of law as well as the enforcement of law and justice. The regulation also defines the principle of impartiality as an objective attitude to maintain a balance between the interests in the

⁶⁶ *Ibid.* Hlm. 207.

⁶⁷ Simamora, A. P. (2025). Independensi Hakim Mahkamah Konstitusi Dalam Perspektif Teori Hukum Murni Hans Kelsen: Studi Atas Putusan MK No. 90/PUU-XXI/2023. *MARAS: Jurnal Penelitian Multidisiplin*, 3(3), 1036-1046. Hlm. 1038.

⁶⁸ Kelsen, H., I. *Op cit.* Hlm. 390.

⁶⁹ Vinx, L. *Op cit.* Hlm. 43.

case, this principle must be reflected in every stage, especially in decision-making. The existence of this regulation shows the commitment of the MKRI to become an independent judicial power, and to side with the legal norms in the decisions that will be made.

The independence of constitutional judges is not only to inter-institutions or politically, but also to public opinion.⁷⁰ Violations of the principle of independence of judicial power (contempt of court) occur if a person uses public opinion to put pressure on judicial power, the judge should ideally decide in accordance with justice and the law.⁷¹ Interference or interference with the power of the judiciary, in particular the judiciary, violates the principle of the ideal rule of law. Although the existence of constitutional judges is carried out based on the proposed mechanism from the proposing institutions, constitutional judges are obliged to uphold the existing code of ethics and code of conduct. This aims to keep constitutional judges oriented to their main function, which is to uphold the supremacy of the constitution based on justice.

The MKRI, whose members are proposed by the President, the House of Representatives, and the Supreme Court, is normatively intended to reflect the principle of checks and balances in the constitutional system.⁷² In practical terms, a selection process that lacks

⁷⁰ Fauziah, S. (2025). Reformasi Kelembagaan Mahkamah Konstitusi Dalam Menjaga Independensi Kekuasaan Kehakiman. *Mahkamah: Jurnal Riset Ilmu Hukum*, 2(2), 54-62. Hlm. 59.

⁷¹ *Ibid.*

⁷² Walangitan, S. (2025). Independensi Mahkamah Konstitusi di Tengah Tekanan Politik. *IJBL: Indonesia of Journal Business Law*, 4(2), 45-56. Hlm. 52.

transparency and accountability ultimately leads to room for the dominance of political rather than juridical considerations and can lead to institutional loyalty to the proposing institution which ultimately affects the independence of the judgment of constitutional judges.⁷³ In line with that, Lon L. Fuller emphasized that judicial independence is a fundamental prerequisite for the realization of justice, because without independence, court decisions lose legitimacy because they are not based on the law and the principles of justice.⁷⁴

1.7.4 Theory of Legal Norm.

1.7.4.1 Theory of the Hierarchy of Legal Norms (*Stufenbau der Rechtsordnung*).

The theory of the hierarchy of legal norms is the thought of Hans Kelsen and Hans Nawiasky, this theory is also called the *stufenbau* theory. The point of this thinking is that a legal norm basically has two sides that originate from and are based on the norms that are on it and also at the same time serve as the basis and source for the legal norms that exist below it.⁷⁵ This makes the enforceability or validity of a legal norm (*rechtskraht*) relatively dependent on higher legal norms.⁷⁶ The relationship between the norms that govern the creation of other norms

⁷³ *Ibid.*

⁷⁴ Putri, W. R., & Husin, M. S. . (2025). Implikasi Yuridis Kewenangan DPR dalam Mencopot Hakim Mahkamah Konstitusi dan Mahkamah Agung terhadap Independensi Kekuasaan Kehakiman. *J-CEKI : Jurnal Cendekia Ilmiah*, 4(3), 2502–2512. Hlm. 2507.

⁷⁵ Muhammad, N.Y.M. *Hierarki Norma Hukum: Dasar Teori dan Implikasinya dalam Penegakan Hukum*. (Yogyakarta: ANAK HEBAT INDONESIA: 2025). Hlm. 22.

⁷⁶ *Ibid.*

and those norms is the relationship of superiority and inferiority in the context of placement, in a nutshell, the norms that determine the creation of other norms are superior while the resulting norms are inferior.⁷⁷ Through this system, the law of a state is formed as a hierarchy of norms that have various levels with the order and distribution of all types of laws that exist.⁷⁸ The basis of the hierarchy system of legal norms is that the lower law must not conflict with the higher law.⁷⁹

Hans Nawiasky in his theory '*Die Theorie Zoom Stufenordnung der Rechtsnormen*' divides the legal norms of a state's legal system into 4 (four) categories; the basic norms of the state, the constitution of the state, formal law, implementing regulations and autonomous regulations, these four types of legal norms are hierarchically located from the highest to the lowest.⁸⁰ A positive legal system does not stand alone but has a legal system with its layers. With this system, a law is considered valid if it is made by an authorized institution or authority and based on higher norms so as to form layers and tiers that produce a hierarchy.⁸¹

Jimly Asshiddiqie distinguishes hierarchies based on their nature, namely formal-structural hierarchy and functional-substantial hierarchy.⁸² The formal-structural hierarchy is a hierarchical system

⁷⁷ Asshiddiqie, J. & Safaat, M.A. *Teori Hans Kelsen Tentang Hukum*. (Jakarta: Sekretariat Jenderal & Kepaniteraan Mahkamah Konstitusi RI: 2006). Hlm. 110.

⁷⁸ Muhammad, N.Y.M. *Op. Cit.* Hlm. 18.

⁷⁹ *Ibid.*

⁸⁰ Asshiddiqie, J. *Teori Hierarki Norma Hukum*. (Jakarta: Konstitusi Press: 2020). (Selanjutnya disingkat Asshiddiqie, J., IV) Hlm. 171.

⁸¹ Astomo, P. *Ilmu Perundang-Undangan: Teori dan Praktik di Indonesia*. (Depok: RajaGrafindo Persada: 2018). Hlm. 135.

⁸² Asshiddiqie, J., IV. *Op. Cit.* Hlm. 164.

based on the status of the hierarchy of norms determined by law, while the functional-substantial hierarchy is a hierarchical system based on the principle of delegation of authority to govern based on the law.⁸³ The formal-structural hierarchy has a system that has been expressly established by law regarding which is higher and which is lower, while the functional-substantial hierarchy is not explained in detail but the law only regulates the delegation of authority to regulate legal norms or regulations to the organs receiving delegated authority.⁸⁴

1.7.4.2 Rules for Norm Formation Based on the Hierarchy of Legal Norms.

According to Jimly Asshiddiqie, a legal norm can be declared to be juridically applicable (*gelding*) if it is determined by a higher legal norm, determined because it shows a necessary relationship between a condition and its consequences, determined based on the applicable legal formation procedure, and determined by the authorized institution.⁸⁵ Regarding the content of a norm according to the hierarchy of legal norms, legal norms that are fundamentally based are generally listed in the constitution as the supreme law, while the highest law under the constitution is the law.⁸⁶ Under the legal norms, it is still necessary to have a lower form of regulation (implementing regulation) that functions

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ Asshiddiqie, J. *Perihal Undang-Undang*. (Depok: RajaGrafindo Persada: 2010). (Selanjutnya disingkat Asshiddiqie, J., V). Hlm. 167.

⁸⁶ *Ibid.* Hlm. 148.

as the norm for the elaboration of the law, because the norms in the law are limited to general matters.⁸⁷ Jimly Asshiddiqie further explained that the drafters of the law usually do not think about the consequences of the articles they make when applied in the field, therefore the provisions of the law regarding operational aspects and details must always be flexible and allow for further adjustment.⁸⁸ These aspects still need to be limited in accordance with the principle of delegating regulatory authority.⁸⁹

Each regulation can contain norms that are mandatory (*dwingendrecht*) or that are directory (*aanvullendrecht*).⁹⁰ The main difference between the two types of norms is that the mandatory norm must be complied with or fulfilled appropriately and absolutely, while the directory norm is sufficiently adhered to or substantially met.⁹¹ Furthermore, the legal consequence of both norms is that if the mandatory norms are not properly complied with, then the actions taken become invalid, while the directory norm if violated does not invalidate the action under the relevant regulations but the violators may be sanctioned for negligence.⁹² Jimly Asshiddiqie explained the characteristics that distinguish the two norms, namely:⁹³

⁸⁷ *Ibid.*

⁸⁸ Asshiddiqie, J., IV. *Op cit.* Hlm. 261.

⁸⁹ *Ibid.*

⁹⁰ Asshiddiqie, J., V. *Op cit.* Hlm. 19.

⁹¹ *Ibid.* Hlm. 20.

⁹² *Ibid.*

⁹³ *Ibid.*

- a. If a law produces rights and obligations by stipulating the way to implement it because the deterrent makes the fulfillment of the provision the main thing in the implementation of the law, then the norm of the provision is mandatory.
- b. If a law stipulates a certain time for the implementation of certain provisions or the implementation of certain tasks whose fulfillment is substantive or material, then the norm of the provision is directory.

The validity of the formation of a law if according to the principle of delegation of legislative authority based on the hierarchy of legal norms is not only based on derivative provisions of the constitution but the basis for the formation of a law can be due to the existence of legal needs.⁹⁴

The delegation of legislative authority from laws to regulations under the law (*subordinate legislations*) aims to regulate the norms of the implementation of legal provisions in matters of a detailed or operational nature.⁹⁵ Jimly Asshiddiqie stated that in the regulatory norms under the law, there should be no reduction of the rights of the people and/or an increase in obligations to the people unless there is such a law.⁹⁶ The delegation of legislative authority needs to include the limitations of the material to be regulated and the type of regulation to be delegated.⁹⁷ This

⁹⁴ Asshiddiqie, J., V. *Op cit.* Hlm. 185.

⁹⁵ Asshiddiqie, J., IV. *Loc Cit.*

⁹⁶ *Ibid.*

⁹⁷ Asshiddiqie, J., V. *Op cit.* Hlm. 150.

applies within the scope of formal-structural hierarchy or functional-substantial hierarchy.⁹⁸

Jimly Asshiddiqie emphasized the importance of a hierarchy of norms in the delegation of legislative authority, where the hierarchy of norms does not absolutely determine the institutional hierarchy and vice versa.⁹⁹ Jimly Asshiddiqie further gave an example that although the stipulation of the MPR as a legal product is above the laws produced by the House of Representatives and the President hierarchically, it does not indicate that the MPR has a higher institutional position than the House of Representatives and the President in the constitution of Indonesia.¹⁰⁰ In essence, the institutional organs of the state as a subject need to be separated from the legal norms that function as their objects.¹⁰¹

1.7.4.3 Hierarchy of Laws and Regulations in Indonesia.

The hierarchy and types of laws and regulations in the Indonesian legal system are based on the provisions of Article 7 paragraph (1) of Law No. 12 of 2011. Article 8 paragraph (1) of Law No. 12 of 2011 states that regulations other than those described in Article 7 paragraph (1) of Law No. 12 of 2011 are regulations made by institutions such as the MPR, DPR, DPD, MA, MKRI, and other state institutions. Furthermore, Article 8 paragraph (2) of Law No. 12 of 2011 states that the regulations described in Article 8 paragraph (1) of Law No. 12 of 2011 are recognized

⁹⁸ Asshiddiqie, J., IV. *Op. Cit.* Hlm. 164.

⁹⁹ *Ibid.* Hlm. 208.

¹⁰⁰ *Ibid.* Hlm. 209.

¹⁰¹ *Ibid.*

for their existence and have binding legal force as long as they are stipulated by higher laws and regulations or formed based on authority, so the existence of regulations in Article 8 paragraph (2) of Law No. 12 of 2011 is included in the functional-substantial hierarchy as described by Jimly Asshiddiqie.¹⁰²

In theory, all regulations described in Article 8 paragraph (1) of Law No. 12 of 2011 can be classified into implementing regulations (*verordnung*).¹⁰³ The scope of binding power is a norm of a regulation that is classified as an implementing regulation that is not as broad as the law, for example, the DPR Regulation is a type of regulation that has the internal scope of the institution only (*interne regeling*).¹⁰⁴ Jimly Asshiddiqie explained that although it is theoretically internal which means that it is only binding to the relevant institution, but in some cases internal regulations are also related to subjects outside the institution.¹⁰⁵

The delegation of legislative authority in Law No. 12 of 2011 must prioritize legal certainty where every regulation must be clear, unambiguous, and must not change arbitrarily.¹⁰⁶ This statement is supported by Hans Kelsen's statement that the law should be clear with limits and provide protection for every individual to avoid legal

¹⁰² *Ibid.* Hlm. 250.

¹⁰³ Hazmi, R.M. *et al.* Kepastian Hukum Kedudukan Peraturan Komisi Yudisial Dalam Hierarki Peraturan Perundang-Undangan di Indonesia. *Ensiklopedia of Journal*, 7(3), 196-205. Hlm. 201.

¹⁰⁴ Asshiddiqie, J., V. *Op cit.* Hlm. 13.

¹⁰⁵ *Ibid.* Hlm. 18.

¹⁰⁶ Hazmi, R.M. *et al.* *Op Cit.* Hlm. 97.

uncertainty.¹⁰⁷ The implementing regulations of laws that are technical and operational in nature must comply with higher regulatory norms, and the law as a must set clear and firm norm limits regarding the regulations in question and the scope of norms that will be regulated by the regulations under them

¹⁰⁷ *Ibid.* Quoting Hans Kelsen, *General Theory of Law and State*, Harvard University Press, 1945, Hlm. 124.