

PANCASILA AND LAW REVIEW

Doktoral Ilmu Hukum, Fakultas Hukum, Universitas Lampung, Bandar Lampung, Lampung, Indonesia.
Volume 2 Issue 1, January-June 2021: pp: 61-78
<http://jurnal.fh.unila.ac.id/index.php/plr>
P-ISSN: 2723-262X
E-ISSN: 2745-9306



The Position of Constitutional Complaint in the Constitutional Court of the Republic of Indonesia

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Submitted: 30 March 2021; Reviewed: 14 April 2021; Accepted: 25 April 2021

Article's Information

Abstract

Keywords: *Constitutional; Complaint; Court; Position.*

DOI:
<https://doi.org/10.25041/plr.v2i1.2308>

The purpose of this research is to determine the constitutional complaint mechanism based on comparisons in other countries, practices, and adaptation of constitutional complaints under the authority of the Constitutional Court of the Republic of Indonesia. Many cases with constitutional complaint substance have been submitted to the Constitutional Court of the Republic of Indonesia even though they don't have this authority. This research uses a normative legal research method using a statutory approach, a conceptual approach, a comparative approach, and a case approach. This research indicates that the constitutional complaint mechanism in Germany, South Korea, and South Africa has



been well implemented. In practice, cases with constitutional complaint substance are filed to the Constitutional Court of the Republic of Indonesia by changing the form by using the legal means of a judicial review, such as case number 16/PUU-VI/2008, case number 140/PUU-XIII/2015 and case number 102/PUU-VII/2009. Due to the consideration of the structure, substance, and culture of law, adaptation of constitutional complaint within the authority of the Constitutional Court of the Republic of Indonesia needs to be carried out by amending Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court.

A. Introduction

The Constitutional Court was formed as a fundamental change in the field of law and politics in Indonesia. The Constitutional Court has 4 (four) powers and 1 (one) obligation as stated in Article 24C of the 1945 Constitution of the Republic of Indonesia and Article 10 of Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court.¹ One of the Constitutional Court powers is to examine laws against the 1945 Constitution of the Republic of Indonesia or what is known as a judicial review. With this authority, the Constitutional Court can provide protection for human rights or so that the constitutional rights of citizens, which are guaranteed by the law against the 1945 Constitution, are still protected.² However, the question is what if there is a violation of constitutional rights that occurs not because of the unconstitutionality of legal norms but because of the unconstitutionality of acts or negligence of public officials or what is called a constitutional complaint.

Violation of the constitutional rights of citizens, as stated in the 1945 Constitution, is not only due to the articles or paragraphs of law but also can arise from the actions (policies) of public officials who have great potential to threaten the constitutional rights of citizens. The action or product of this policy does not yet have a legal channel for complaints of citizens who have violated their constitutional rights. So that there is no constitutional complaint mechanism, it can create a legal loophole that can lead to violations of the constitutional rights of citizens guaranteed in the constitution. The vacuum of constitutional protection also causes the absence of legal certainty and injustice to justice seekers because there are no legal remedies for those whose constitutional rights have been violated.³

¹ Article 24C paragraph 3 of the 1945 Constitution of the Republic of Indonesia.

² Saldi Isra, "Peran Mahkamah Konstitusi Dalam Penguatan Hak Asasi Manusia Di Indonesia 1," *Jurnal Konstitusi*, vol. 11, May 20, 2016, <https://doi.org/10.31078/JK%X>.

³ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) Upaya Hukum Terhadap Pelanggaran Hak Hak Konstitusional Warga Negara*, (Jakarta: Sinar Grafika, 2013), 6.

A constitutional complaint is a complaint filed by an individual (citizen) to the constitutional court against an act or negligence committed by a public institution or authority, which results in the violation of the person's constitutional rights. In general, the constitutional complaint can only be accepted (admissible) if all available legal remedies for solving the problem have been passed (exhausted).⁴ The object of the complaint can be aimed at the actions of public officials, which can be broadly interpreted as including acts or omissions of government agencies, laws, or court decisions.⁵ However, the constitutional complaint has not been regulated in the constitutional court mechanism in the Constitutional Court of the Republic of Indonesia. In fact, as a guardian of the constitution, the existence of a constitutional complaint mechanism is essential for the Constitutional Court to guarantee the protection of citizens' constitutional rights.

With the absence of the authority of the Constitutional Court to adjudicate constitutional complaints, many cases injure the constitutional rights of citizens. However, they do not find a way to obtain justice. As a result, what is happening now is that the legal means taken to file a case for the constitutional complaint to the Constitutional Court is through the legal means of a judicial review. According to I Dewa Gede Palguna, at least 30 judicial review cases from 2003-2010 substantially contained claims regarding the constitutional complaint.⁶ Based on the results of the investigation by Pan Mohammad Faiz, based on letters and requests received by the Registrar's Office of the Constitutional Court during 2005, 48 letters or requests could be categorized as a form of a constitutional complaint. This amount is three times the number of requests for judicial review submitted to the Constitutional Court in the same year.⁷ The type of judicial review submitted through a judicial review contained constitutional complaint, namely the Constitutional Court Decision Number 16/PUU-VI/2008,⁸ the Constitutional Court Decision Number 140/PUU-XIII/2015,⁹ and Constitutional Court Decision Number 102/PUU-VII/2009.¹⁰ Based on the three case examples, a case request with the substance of the constitutional complaint was submitted through a judicial review. This causes the protection of citizens' constitutional rights not fulfilled.

Looking at the Constitutional Courts in other countries such as Germany, South Africa, and South Korea, this constitutional complaint case has already been resolved because it has implemented a constitutional complaint mechanism. But in Indonesia, that authority does not apply. Whereas in ensuring the fulfillment of the constitutional rights of citizens guaranteed in the constitution, a mechanism must be provided as a legal measure to defend these constitutional rights through a constitutional judicial process.¹¹ This is closely related to the theory of responsive legal development, which is a theory that states that the legal frame must, in principle, be participatory and contains appropriate values based on legal principles that develop in society.¹²

⁴ *Ibid.*, pg. 9.

⁵ I DG Palguna, "Yang 'Terlepas' Dari Kewenangan Mahkamah Konstitusi RI Pengaduan Konstitusional (Constitutional Complaint)," *Lex Jurnalica* 3, no. 3 (2006), <https://media.neliti.com/media/publications/17932-ID-yang-terlepas-dari-kewenangan-mahkamah-konstitusi-ri-pengaduan-konstitusional-con.pdf>.

⁶ *Ibid.*, pg. 701.

⁷ <http://Panmohamadfaiz.com>, accessed on April 12, 2020.

⁸ Gugun El Guyanie, "URGensi PENGUJIAN CONSTITUTIONAL COMPLAINT OLEH MAHKAMAH KONSTITUSI REPUBLIK INDONESIA," *Jurnal Agama Dan Hak Azazi Manusia* 3, no. 1 (2013), <http://202.0.92.5/syariah/inright/article/viewFile/1259/1087>.

⁹ <https://mkri.id/index.php?page=web.Berita&id=12492> accessed on May 28, 2020.

¹⁰ Vide of the Constitutional Court Decision Number 102/PUU-VII/2009.

¹¹ *Ibid.*, pg 13.

¹² I. P. (Indah) Sari, M. (Mexasai) Indra, and J. (Junaidi) Junaidi, "Gagasan Kewenangan Mahkamah Konstitusi Dalam Menyelesaikan Perkara Constitutional Complaint Berdasarkan Undang-Undang Dasar 1945," *Jurnal*

Based on the description above, the authors examine several problems: How is the constitutional complaint mechanism based on comparisons in other countries? How is the practice of constitutional complaint in the Constitutional Court of the Republic of Indonesia? How is the adaptation of constitutional complaint within the Constitutional Court of the Republic of Indonesia? In writing, using normative research methods.¹³ The research is carried out using a statutory approach, a concept approach, a comparative approach, and a case approach.¹⁴

A. Discussion

1. Comparison of States that Implements the Constitutional Complaint Mechanism

Before analyzing and seeing the application of the constitutional complaint mechanism in other countries, it is necessary to first understand the meaning and meaning of constitutional complaints. A constitutional complaint is a complaint filed by an individual (citizen) to the constitutional court against an act or negligence committed by a public institution or authority, which results in the violation of the person's constitutional rights. In general, the constitutional complaint can only be accepted (admissible) if all available legal remedies for solving the problem have been passed (exhausted).¹⁵ According to Gerhard Dannemann, the characteristics of the constitutional complaint are:¹⁶

- 1) Availability of remedies through courts for violations of constitutional rights.
- 2) Separate trial proceedings that only relate to the constitutionality of an act and not with other legal issues related to the case.
- 3) It can be proposed by individuals who are directly affected by an action.
- 4) The court which decides the constitutionality complaint case has the authority to restore the rights of the victim.

In many states, the constitutional complaint is one of the jurisdictions of a constitutional court. Several countries have implemented constitutional complaint, including:

a. Germany

Grounds	Explanation
Philosophical	The German Constitutional Court (<i>Bundesverfassungsgerichts</i>) is the first Constitutional Court recognized as the most established in defending the country's fundamental values and fundamental rights, including strengthening its constitutional system. ¹⁷ The composition of the German Constitutional Court has 8 judges on the second panel to handle constitutional complaint cases. ¹⁸ In the mention of constitutional complaint, in Germany, it uses the term <i>verfassungsbeschwerde</i> . ¹⁹

Online Mahasiswa Fakultas Hukum Universitas Riau, vol. 3 (Riau University, 2016), <http://harryrizki.blogspot.com/2013/02/constitution>.

¹³ I Gede A.B.Wiranata, *Metode Penelitian Dan Penulisan Ilmiah Bidang Hukum*, (Bandar Lampung: Zam Zam Tower, 2017), 60.

¹⁴ Peter Mahmud Marzuki, *Penelitian Hukum*, (Jakarta: Kencana Prenada Media Group, 2012), 93.

¹⁵ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) ...Op.Cit.*, pg. 9.

¹⁶ Dannemann Gerhard, "Constitutional Complaints: The European Perspective," *The International and Comparative Law Quarterly* 43, no. 1 (1994), <https://www.jstor.org/stable/760826?seq=1>.

¹⁷ Jimly Asshiddiqie dan Ahmad Syahrizal, *Peradilan Konstitusi di 10 Negara*, (Jakarta: Sinar Grafika, 2011), 39.

¹⁸ *Ibid.*, pg. 43.

¹⁹ *Ibid.*

Juridical	The authority of constitutional complaint is stated in the German Constitution, namely Article 93 paragraph (1) GG and the Law on the German Constitutional Court and Article 90-Article 95 <i>BVerfGG</i> . ²⁰ Based on Article 93 paragraph (1) points 4a and 4b GG, parties that can file a request for constitutional complaint are individuals or individuals. ²¹ The object of the constitutional complaint can be addressed due to acts or omissions committed by public officials (both at the Federal and state levels), court decisions, or laws (Article 95 <i>BVerfGG</i>). ²² The period for a request for a constitutional complaint is 30 days based on Article 93 <i>BVerfGG</i> . ²³
Sociological	Currently, Germany has an average of 5,000 to 6,000 complaints per year. And only about 2% of the requests were granted. ²⁴ Permohonan <i>constitutional complaint</i> baru dapat dilakukan apabila telah melalui semua upaya hukum yang tersedia (<i>exhausted</i>). ²⁵

b. South Korea

Grounds	Explanation
Philosophical	The Korean Constitutional Court has become the embodiment of Korea's new democratic constitutional order. ²⁶ The Constitutional Court of South Korea has 9 constitutional judges. ²⁷ In South Korea, the terms constitutional complaint is called Hun-Ma and Hun-Ba. ²⁸
Juridical	In Article 111 paragraph (1) of the 1987 South Korean Constitution, the South Korean Constitutional Court has regulated the authority to try constitutional complaint cases. ²⁹ Based on this authority, there are two types of constitutional complaints held by the South Korean Constitutional Court. First, based on Article 68 paragraph (1) of the South Korean Constitutional Court Law, anyone who claims that their fundamental rights have been violated by acts or negligence of state power or officials. This application requires that all

²⁰ Hamdan Zoelva, "CONSTITUTIONAL COMPLAINT DAN CONSTITUTIONAL QUESTION DAN PERLINDUNGAN HAK-HAK KONSTITUSIONAL WARGA NEGARA," *Jurnal Media Hukum*, vol. 19, June 30, 2012, <https://journal.umy.ac.id/index.php/jmh/article/view/1984>.

²¹ H. M. Laica Marzuki, *Pengaduan Konstitusional (Constitutional Complaint), Sebuah Gagasan Cita Hukum, dalam Menjaga Denyut Konstitusi; Refleksi Satu Tahun Mahkamah Konstitusi*, (Jakarta: Konstitusi Press, 2004), 29.

²² *Ibid.*

²³ I Dewa Gede Palguna, *Pengaduan Konstitusional... Op.Cit.*, pg. 417.

²⁴ <https://panmohamadfaiz.com/2006/09/17/constitutional-complaint-dan-hak-asasi-manusia/> accessed on December 7, 2020.

²⁵ Meirina. Fajarwati, "UPAYA HUKUM UNTUK MELINDUNGI HAK KONSTITUSIONAL WARGA NEGARA MELALUI MAHKAMAH KONSTITUSI," *Legislasi Indonesia* 13, no. 3 (2016), <https://ejournal.peraturan.go.id/index.php/jli/article/view/129>.

²⁶ I Dewa Gede Palguna, *Pengaduan Konstitusional... Op.Cit.*, pg. 450.

²⁷ Jimly Asshiddiqie dan Ahmad Syahrizal, *Peradilan Konstitusi...Op.Cit.*, pg. 239.

²⁸ Pan mohammad faiz dan Lutfi Chakim, *Peradilan Konstitusi Perbandingan Kelembagaan dan kewenangan konstitusional di Asia*, (Depok: PT. Raja Grafindo Persada, 2020), 178.

²⁹ Pasal 111 ayat (1) Konstitusi Korea Selatan.

	available legal processes and remedies have been followed (exhausted). A period of 90 working days after the constitutional loss occurs. ³⁰ Second, the type of constitutional complaint is stated in Article 68, paragraph (2) of the South Korean Constitutional Court Law. Suppose a request made based on Article 41 paragraph (1) of the Constitutional Court Law to submit a request for the law's constitutionality is rejected by a general court, a maximum of 30 days. In that case, the litigant can file a constitutional complaint to the Constitutional Court. ³¹
Sociological	Based on data collected by Pan Mohamad Faiz, there are 1000 to 2000 cases of constitutional complaints submitted annually. ³²

c. South Africa

Grounds	Explanation
Philosophical	South Africa is a country whose people groups have experienced oppression. Empirical studies show that the compromise and reconciliation process to end the apartheid regime began drafting a draft Interim Constitution. ³³ The composition of the South African Constitutional Court consists of the President, Deputy President, and 9 other member judges. A panel will hear the cases submitted by at least eight judges. ³⁴
Juridical	Based on the provisions contained in Article 167 of the South African Constitution, the Constitutional Court has five powers, including the Constitutional Court, to decide the final constitutionality of laws produced by parliament, regional legislation, or actions of the President of South Africa. ³⁵ Article 17 of the Constitutional Court Rule states that individuals or groups are guaranteed to submit applications to the Constitutional Court directly, without going through public courts or public courts. ³⁶
Sociological	According to Deputy Chief Justice, Mosenke, data on the inclusion of constitutional complaint cases in the South African Constitutional Court in the past year has been recorded at 570 cases. ³⁷

Structurally, the German Constitutional Court has 8 judges, the South Korean Constitutional Court has 9 judges, and the South African Constitutional Court has 9 judges in handling a constitutional complaint. At least these three countries have an average number of judges equal to the judges in the Constitutional Court of the Republic of Indonesia, consisting

³⁰ Pan Mohammad Faiz dan Lutfi Chakim, *Op. Cit.*, pg. 98.

³¹ *Ibid.*, pg.99.

³² Meirina Fajarwati, *Ibid.*, pg. 329.

³³ Jimly Asshiddiqie dan Ahmad Syahrizal, *Peradilan Konstitusi...Op.Cit.*, pg. 263.

³⁴ *Ibid.*, pg. 274.

³⁵ The provisions of Article 167 paragraph 1 of the South African Constitution.

³⁶ Jimly Asshiddiqie dan Ahmad Syahrizal, *Op. Cit.*, pg. 279.

³⁷ <https://panmohamadfaiz.com/2006/09/17/constitutional-complaint-dan-hak-asasi-manusia/> accessed on September 20, 2020.

of 9 (nine) judges. For this reason, it does not rule out if the Constitutional Court of the Republic of Indonesia can also resolve the constitutional complaint case even though there is a possibility that there will be a lot of case accumulation.

There are two models of constitutional complaint norming in terms of regulation and granting of authority: First, there are countries that explicitly regulate constitutional complaints in their constitutions. Second, some countries simply include general authority to protect the constitution, but the constitutional complaint is regulated firmly and in detail in the Constitutional Court Law.³⁸ Based on comparisons in other countries described above, such as Germany, South Africa, and South Korea, the problem of the constitutional complaint case has been resolved in practice. It has been strictly regulated in the constitution or the laws of each of these countries. However, in Indonesia, the Constitution of the Republic of Indonesia as the state constitution has not regulated the authority of the Constitutional Court of the Republic of Indonesia to handle the constitutional complaint.

In substance, the practice in South Africa, individuals and groups who feel their constitutional rights are violated by legal products or direct actions of government officials have direct access to submit applications to the Constitutional Court. If proven true, they can regain their fundamental rights. Recognition of human rights plays a vital role in the formation of a constitutional complaint institution.³⁹

From the practice of constitutional complaints in Germany and South Korea, there is no substantial difference between a constitutional complaint and judicial review under certain conditions. This happens when the action or action being complained of to be tested for its constitutionality is a legislative action, namely a law. Under these conditions, the practice of reviewing the constitutionality of laws currently in force in Indonesia, according to Article 51 of Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court, when compared to the practice of constitutional complaint in Germany and South Korea, is more of a constitutional complaint.⁴⁰

This can be seen based on the provisions regarding parties having legal standing in requests for judicial review in Indonesia compared to parties having legal standing in submitting requests for constitutional complaint in Germany and South Korea, as well as based on the provisions concerning *ratione material* or things that can be requested to be tested for the constitutionality of the constitutionality test in Indonesia as well as in the constitutional complaint in Germany and South Korea which have similarities.⁴¹

In the prevailing practice in Germany, individuals can propose a law as an object of constitutional complaint if the law has directly damaged the special rights of individuals even before the occurrence and administrative measures to enforce the law. In such circumstances, the requirement to exceed all exhausted remedies does not apply. As a result of constitutional complaint, the object of which is a law, if it is granted, is the same as the legal consequences if a judicial review submitted by an individual Indonesian citizen is granted, namely that the law is declared null and void or has no binding legal force.⁴²

Compared with the practice in South Korea, as previously described, there is also no substantial difference between the constitutionality review of the law in Indonesia, which petition is an individual citizen, and a constitutional complaint whose object is the law in South Korea. Even if there are differences, the differences are procedural differences, where individual citizens do not have the legal standing to directly apply for a judicial review of the

³⁸ *Ibid.*

³⁹ Jimly Asshiddiqie dan Ahmad Syahrizal, *Peradilan Konstitusi...Op.Cit.*, pg. 288.

⁴⁰ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) ...Op.Cit.*, pg. 485.

⁴¹ *Ibid.*, pg. 486.

⁴² *Ibid.*, pg. 487.

constitutionality of a law to the South Korean Constitutional Court, but must go through an ordinary court based on a concrete case where the law to be applied for review it applies to that case. If the court rejects such an application, the person concerned can submit the law as a constitutional complaint to the South Korean Constitutional Court.⁴³

Dilihat dari banyaknya jumlah perkara *constitutional complaint* yang diajukan dari masing-masing negara tersebut yaitu Jerman, Korea Selatan dan Afrika Selatan, hal ini menunjukkan bahwa mekanisme *constitutional complaint* banyak dimanfaatkan oleh warganya untuk membela hak-hak konstitusionalnya.

Based on the description above, in structure, substance, and legal culture, the constitutional complaint mechanism has been well implemented based on each of these countries' philosophical, juridical, and sociological aspects. Based on a comparative analysis of constitutional complaints in other countries, granting the authority to try constitutional complaint cases to the Constitutional Court of the Republic of Indonesia is necessary to protect citizens' constitutional rights. In addition, constitutional complaints and constitutional review of the law are derived from the same parentage, namely constitutional review. Therefore, it is conceptually possible to give the Constitutional Court of the Republic of Indonesia the authority to adjudicate constitutional complaint cases.

2. Constitutional Complaint Practices in the Constitutional Court of the Republic of Indonesia

In current practice, since 2003, many petition cases containing constitutional complaints have been submitted to the Constitutional Court through judicial reviews. Several Constitutional Court decisions containing constitutional complaints include the Constitutional Court Decision Number: 16/PUU-VI/2008, the Constitutional Court Decision Number: 140/PUU-XIII/2015, the Constitutional Court Decision Number 102/PUU-VII/2009. This shows that in practice currently, the Constitutional Court has not directly rejected a case related to the constitutional complaint but has first examined the case regardless of whether the petition was received or not.

This is based on the provisions of legal standing as stated in Article 51 paragraph (1) of Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court, namely parties who consider their constitutional rights and/or authorities to have been impaired by the enactment of the law being tested,⁴⁴ namely (a) individual citizens or groups of people who have the same interest, (b) customary law community units, (c) public or private legal entities, (d) state institutions⁴⁵ And based on the Constitutional Court Decision Number: 006/PUU-III/2005 dated May 11, 2005, as well as subsequent decisions of the opinion that the constitutional rights and/or authority as referred to in Article 51 paragraph (1) of Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court must meet five requirements: the applicant's constitutional impairment is specific (extraordinary) and actual or at least potential in nature, which, according to practical reasoning, will undoubtedly occur.⁴⁶

As in the Constitutional Court Decision Number: 16/PUU-VI/2008 filed by Pollycarpus Budihari Priyanto, the substance of which is related to the constitutional

⁴³ *Ibid.*, pg 488.

⁴⁴ Achmad Roestandi, *Mahkamah Konstitusi Dalam Tanya Jawab*, (Jakarta: Konstitusi Press, 2006), 43.

⁴⁵ Article 51 paragraph (1) of Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court.

⁴⁶ Vide of Constitutional Court Decision No.006/PUU-III/2005.

complaint, namely the Supreme Court Decision which accepts the Request for Reconsideration submitted by the Prosecutor/Public Prosecutor based on a broad interpretation of the phrase “concerned” in Article 23 paragraph (1) of Law Number 4 of 2004 by ignoring Article 263 paragraph (1) of Law Number 8 of 1981 concerning Criminal Procedure Law which regulates that only the accused and their heirs are entitled to apply for a judicial review. The Petitioner submits two decisions as evidence which can show the inconsistencies that have occurred in the application of the provisions of Article 23 paragraph (1) of Law Number 4 of 2004 by the Supreme Court regarding who is entitled to apply for a Judicial Review in criminal cases so that in practice it creates law uncertainty as regulated in Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia and is detrimental to the Petitioner's constitutional rights. In their decision, the judge stated that the Petitioner's petition could not be accepted because the Constitutional Court did not have the authority to examine the constitutional complaint.⁴⁷

In the Constitutional Court Decision Number: 140/PUU-XIII/2015 submitted by Erwin Arifin, SH, MH, the substance related to the constitutional complaint is the Decree of the East Lampung Regency KPU Number 56/Kits/KPU.Kab008.435605/2015 referring to Article 83 General Election Commission Regulation Number 9 of 2015 concerning General Election Commission Regulations concerning Nominations for the Election of Governors and Vice Governors, Regents and Vice Regents and/or Mayors and Vice Mayors, regulations based on the provisions of Article 54 paragraph (5) of Law Number 8 of 2015. Based on the provisions in the article, the Petitioner feels that this has caused a constitutional loss for the applicant because the applicant was unable to participate in the regional elections simultaneously in 2015. After all, the Deputy Regent Candidate accompanying the applicant passed away, resulting in the loss of his right to be elected in the Election of Regent and Deputy Regent of East Lampung Regency. There is an inconsistency in applying the meaning to the phrase "candidate pair" in the election stages in Law Number 8 of 2015 concerning Elections for Governors, Regents, and Mayors, which results in discriminatory treatment of candidate pairs who are declared permanently unable. In its decision, the Constitutional Court considered that it could be authorized to try. However, because the Petitioner had lost the object of the case, the Constitutional Court stated that the Petitioner's petition could not be accepted.⁴⁸

Furthermore, in the Constitutional Court Decision Number 102/PUU-VII/2009 filed by Refly Harun and Maheswara Prabandono, regarding the examination of the provisions of Article 28 and Article 111 paragraph (1) of Law Number 42 of 2008 concerning the General Election of President and Vice President which requires citizens countries registered as voters or listed in the Final Voter List or *Daftar Pemilih Tetap* (DPT) to be able to vote have eliminated citizens' constitutional rights to vote. In this case there was dissatisfaction from the Petitioner with the preparation of the final voter list in the Presidential Election. This has entered into the realm of constitutional complaint stating dissatisfaction with the General Election Commission or *Komisi Pemilihan Umum* (KPU) due to negligence in drafting the DPT for the presidential election. In its decision, the Constitutional Court considers that the Petitioners' petition is conditionally constitutional, namely by stating that Article 28 and Article 111 of Law Number 42 of 2008 concerning the General Election of the President and Vice President are constitutional as long as it is interpreted as including citizens who are not registered in the DPT. with the terms and methods determined by the Constitutional Court. In this case, the Constitutional Court granted the Petitioner's petition so that voters who were not

⁴⁷ Vide of the Constitutional Court Decision Number: 16/PUU-VI/2008.

⁴⁸ Vide of the Constitutional Court Decision Number: 140/PUU-XIII/2015.

registered in the DPT could only participate in the Presidential Election by showing their Identity Card or Passport.⁴⁹

From the three cases above, it can be concluded that the main point of the petition is not the existence of laws that are contrary to the 1945 Constitution of the Republic of Indonesia. However, because of inconsistencies in the application of laws and negligence caused by the actions or actions of public officials or what is meant by constitutional complaint, it is submitted through a judicial review legal means.

Judging from the Constitutional Court decisions regarding these cases, it can be said that the constitutional rights of citizens have not received maximum protection in the constitutional court mechanisms currently in effect in Indonesia. Because the petition has the substance of the constitutional complaint, it is filed through legal means of judicial review. The Constitutional Court decides it with a judicial interpretation that relies on the judge's courage to decide the case.⁵⁰ Thus, decisions on cases with the substance of constitutional complaint tend to be casuistic in nature, so there is no legal certainty. This can be seen in the decisions of the cases above. In the Constitutional Court Decision Number: 16/PUU-VI/2008, the Constitutional Court rejected it because it did not have this authority. However, in the Constitutional Court Decision Number: 140/PUU-XIII/2015 and Constitutional Court Decision Number 102/PUU-VII/2009, the Constitutional Court has the authority to hear and decide the case. Even in the Constitutional Court Decision Number 102/PUU-VII/2009, the Constitutional Court, in its decision, granted the petition.

In its development, the Constitutional Court decisions in resolving such cases sometimes expand the Interpretation of the Constitutional Court decisions, which are not only limited to declaring a law contrary to the 1945 Constitution of the Republic of Indonesia but by declaring it contrary to the law. The Constitution of the Republic of Indonesia Year 1945 is conditionally or contrary to the exception called conditionally unconstitutional (contrary to the constitution conditionally) or states conditionally constitutional (still valid if the Constitutional Court's conditions are implemented called as conditional constitutional). Decisions of the Constitutional Court, which are conditionally constitutional, consider the practice or implementation of a norm.⁵¹ This can be seen from the Constitutional Court Decision Number 102/PUU-VII/2009 submitted by Refly Harun, whose decision was accepted by the Constitutional Court. In its decision, the Constitutional Court considered that the Petitioners' petition was conditionally constitutional. This is in line with the dissenting opinion of the constitutional judges H. Harjono and H. Abdul Mukthie Fadjar in the Constitutional Court Decision Number: 16/PUU-VI/2008 proposed by Pollycarpus Budihari Priyanto.

As such, the Constitutional Court has practiced constitutional complaint resolution in several matters addressed. Although in fact, it was not explicitly given such authority to the Constitutional Court to adjudicate it. However, it is limited only if what is detrimental is the law and does not include actions of the government or institutions which are not based on law but based on actions or provisions under the law.

3. Adaptation of Constitutional Complaint in the Authority of the Constitutional Court

The current tendency is that the cases submitted to the Indonesian Constitutional Court are constitutional complaint cases. However, because there are no legal means to facilitate this

⁴⁹ Vide of the Constitutional Court Decision Number 102/PUU-VII/2009.

⁵⁰ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint)...*, pg. 280.

⁵¹ Hamdan Zoelva, *Op. Cit.*, pg. 161.

problem, the petitioners have changed the form by wrapping the constitutional complaint case through the constitutional review method.⁵²

Thus, there are many cases of judicial review that are not accepted because the main point of the petition is not against the rules in the law that are contrary to the constitution, but problems related to the implementation of laws, government policies that violate constitutional rights, contradictory public court decisions and alleged irregularities in law enforcement, which are several cases of judicial review at the Constitutional Court which in substance are more in the direction of a constitutional complaint, where the application of the rules of the law causes the violation of one's constitutional rights.⁵³

The enactment of a law does not only potentially violate violations of the constitutional rights of the community, but the rights of citizens, of course, also have the potential to be harmed by actions (policies) issued by the executive (government), The House of Representatives of the Republic of Indonesia or *Dewan Perwakilan Rakyat* (DPR) (legislative), as well as violations issued by the judicial authority. So that by only providing a constitutional review mechanism, this could cause the protection of the constitutional rights of citizens to be not maximal and lead to a legal vacuum. Therefore, it is necessary to have a constitutional complaint mechanism to protect the constitutional rights of citizens effectively.

The effectiveness and success of law enforcement must touch the three components of law delivered by Lawrence M. Friedman, which include: (a) legal structure, (b) legal substance, (c) legal culture.⁵⁴ Therefore, concerning the urgency of using a constitutional complaint mechanism, at least several things can be used as a basis for reasons, namely:

1) Structural Factors

The concept of a rule of law and a democratic state has brought the principle of separation or division of power into separate organs: the legislative, executive, and judiciary.⁵⁵ This division or separation of powers is often known as “trias politica”. The concept of trias politica put forward by Montesquieu, written in his book *L'esprit des Lois* (the spirit of laws), offers a concept of state life by separating power which is expected to limit power so that there is no concentration of power in one hand which will lead to authority abuse.⁵⁶ As a judicial institution, the position of the Constitutional Court in the Indonesian constitutional system is part of the judicial power and has an equal position with the Supreme Court.⁵⁷ Based on Article 24C of the 1945 Constitution of the Republic of Indonesia and elaborated by Law Number 24 of 2003 jo. Law Number 7 of 2020

⁵² Heru Setiawan, “MEMPERTIMBANGKAN CONSTITUTIONAL COMPLAINT SEBAGAI KEWENANGAN MAHKAMAH KONSTITUSI,” *Lex Jurnalica* 14, no. 1 (2017): 146952, <https://www.neliti.com/publications/146952/>.

⁵³ Hamdan Zoelva, *Op. Cit.*, pg. 161.

⁵⁴ Lutfil Ansori, “REFORMASI PENEGAKAN HUKUM PERSPEKTIF HUKUM PROGRESIF,” *Jurnal Yuridis* 4, no. 2 (January 11, 2018): 148–63, <https://ejournal.upnvj.ac.id/index.php/Yuridis/article/view/244>.

⁵⁵ Nugroho Rahmat, “URGensi PENGATURAN PERKARA CONSTITUTIONAL COMPLAINT DALAM KEWENANGAN MAHKAMAH KONSTITUSI,” *Novelty* 7, no. 1 (2016): 11–24, <https://core.ac.uk/download/pdf/205738486.pdf>.

⁵⁶ Efi Yulistiyowati, Endah Pujiastuti, and Tri Mulyani, “Penerapan Konsep Trias Politica Dalam Sistem Pemerintahan Republik Indonesia : Studi Komparatif Atas Undang–Undang Dasar Tahun 1945 Sebelum Dan Sesudah Amandemen,” *Jurnal Dinamika Sosial Budaya* 18, no. 2 (2017): 328–38, <https://doi.org/10.26623/jdsb.v18i2.580>.

⁵⁷ Ahmad Saleh, Armen Yasir, Budiyo, Martha Riananda, Muhammad Iwan Satriawan, Muhtadi, Rudy, Yulia Neta, Yusdianto, Yusnani Hasyim Zum dan Zulkarnain Ridlwan, *Hukum Tata Negara*, (Bandar Lampung: CV Anugrah Utama Raharja, 2018), 210.

concerning the Constitutional Court, the Constitutional Court has several powers, namely:⁵⁸

- 1) Reviewing the law against the 1945 Constitution of the Republic of Indonesia.
- 2) To decide on disputes over the authority of state institutions whose authority is granted by the constitution.
- 3) Deciding to dissolve political parties.
- 4) Resolving disputes over the results of general elections.

The theoretical adherence to the authority to adjudicate constitutional complaint cases at the Constitutional Court can also be explained based on the characteristics or characteristics of the Constitutional Court as an organ or institution that is given the function to carry out the constitutional review. The function of the Constitutional Court as the guardian of the constitution cannot be separated from the authority of the Constitutional Court to adjudicate constitutional complaint cases because a constitutional complaint is one of the mechanisms to protect the constitutional rights of citizens. In contrast, constitutional rights themselves are an inseparable part of the constitution or the 1945 Constitution of the Republic of Indonesia. If the Constitutional Court is said to be the guardian of the basic constitution or the constitution, he also automatically safeguards constitutional rights.⁵⁹

2) Substantial Factors

Constitutional complaint merupakan bagian dari persoalan yang lebih luas yakni persoalan pengujian konstiusionalitas (*constitutional review*). Dalam konteks pengujian konstiusional, ada bentuk lain yang memiliki kemiripan dengan *constitutional complaint* yaitu adalah pengujian konstiusionalitas undang-undang (*judicial review*) atau yang sering disamakan dengan istilah *constitutional review*.⁶⁰

The difference between judicial review and constitutional complaint is not a fundamental difference because it starts from the same theoretical foundation, namely the theory of the function or task of constitutional review. However, substantively, judicial review and constitutional complaint must be distinguished. In this case, judicial review and constitutional complaint must be distinguished because the judicial review object is the law, while the constitutional complaint that becomes the object is the act or negligence of public officials or the law. In the judicial review, the issue is the norm or the making of law contrary to the constitution, including whether it is against constitutional rights. Whereas in the constitutional complaint, the issue is that acts or negligence of public officials have violated the constitutional rights of the Petitioner.⁶¹ The difference in characteristics between the constitutional review and constitutional complaint also lies in the implications of the decision. The impact is that the law is canceled, while constitutional complaint implies that it directly impacts the parties or petitioners in litigation and becomes a reference for previous decisions. So it can be concluded that the constitutional complaint did not directly impact erga omnes, or the article was canceled immediately.⁶²

⁵⁸ Nanang Sri Darmadi, "KEDUDUKAN DAN WEWENANG MAHKAMAH KONSTITUSI DALAM SISTEM HUKUM KETATANEGARAAN INDONESIA," *Jurnal Hukum* 28, no. 2 (May 17, 2020): 1088, <https://doi.org/10.26532/jh.v28i2.9783>.

⁵⁹ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) ...Op.Cit.*, pg. 314.

⁶⁰ *Ibid.*, pg. 247.

⁶¹ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) ...Op.Cit.*, pg. 153.

⁶² *Ibid.* pg. 9.

In Indonesia, although normatively, the constitutional review mechanism is limited to canceling laws that contradict the 1945 Constitution of the Republic of Indonesia (judicial review), substantially many petitioners have submitted a constitutional review that contains a petition for constitutional complaint.⁶³ So that many requests cannot be accepted.

3) Legal Culture Factors

Based on Pan Mohamad Faiz's investigation of letters and requests received by the Registrar's Office of the Constitutional Court during 2005, 48 letters or requests could be categorized as a constitutional complaint. That number is three times the number of requests for judicial review submitted to the Constitutional Court in the same year.⁶⁴

Based on these data, it can be seen that in practice, currently, cases that are submitted to the Constitutional Court tend to be constitutional complaint cases. However, due to the absence of any means to facilitate this problem, the applicants changed the form by wrapping the constitutional complaint case through the judicial review method. So it cannot be said explicitly that this is a constitutional complaint but rather a pseudo judicial review.⁶⁵ This has led to a vacuum and legal uncertainty in defending the constitutional rights of citizens as a result of the unconstitutionality of the actions of public officials. So it is necessary to give the authority for constitutional complaint at the Constitutional Court of the Republic of Indonesia.

As stated by Satjipto Raharjo, the progressive legal basis is based on two main assumptions. First, the law is for humans, not the other way around. Second, law is not an absolute institution in a final way because the law is always in a continuous process. Therefore, the constitutional complaint mechanism is not something that exists and is even a logical need to be accommodated or implemented in Indonesia and is necessary for the development of state living in a progressive, responsive and sustainable manner.⁶⁶

In connection with the reasons for the structure, substance, and legal culture above, it can be seen that the Constitutional Court has the authority to try constitutional complaint cases as demands theoretically as well as empirically. For this reason, a firm arrangement is needed regarding constitutional complaints so that it can provide legal certainty for citizens who feel that their constitutional rights have been impaired. In making arrangements regarding the constitutional complaint mechanism, it can be done in three ways, namely:⁶⁷

1. Amendments to the 1945 Constitution of the Republic of Indonesia, which are procedurally contained in Article 37 of the 1945 Constitution of the Republic of Indonesia.⁶⁸
2. Legislative Interpretation is an authentic interpretation or official Interpretation carried out by many legislators on several definitions in the law and specific terms used in the

⁶³ Zaka Firma Aditya, *Op.Cit.*, pg. 45.

⁶⁴ <http://Panmohamadfaiz.com>., accessed on April 12, 2020.

⁶⁵ *Ibid.*

⁶⁶ Asmaeny Azis Izlindawati, *Constitutional Complaint Dan Constitutional Question Dalam Negara Hukum*, (Jakarta: Prenadamedia Group, 2018), 207.

⁶⁷ Nilwan Wize et al., "JAMINAN HAK-HAK KONSTITUSIONAL WARGA NEGARA (THE PROTECTOR OF CITIZEN'S CONSTITUTIONAL RIGHT) DENGAN IMPLEMENTASI CONSTITUTIONAL COMPLAINT MELALUI MAHKAMAH KONSTITUSI DI NEGARA KESATUAN REPUBLIK INDONESIA (STUDI PELAKSANAAN CONSTITUTIONAL COMPLAINT DI KOREA SELATAN)," *DIPONEGORO LAW REVIEW*, vol. 5 (Program Studi S1 Ilmu Hukum, Fakultas Hukum, Universitas Diponegoro, March 10, 2016), <https://ejournal3.undip.ac.id/index.php/dlr/article/view/10809>.

⁶⁸ Pasal 37 Undang-Undang Dasar Negara Republik Indonesia Tahun 1945.

laws they have made.⁶⁹ In terms of authentic Interpretation, law-forming institutions have done this through Law Number 22 of 2007 concerning General Election Administrators by broadening the meaning of elections. Where elections are not only limited to elections to elect members of the DPR, DPD, President and Vice President, as well as DPRD as explicitly stated in Article 22E paragraph (2) of the 1945 Constitution of the Republic of Indonesia, but also the election of Regional Heads and Vice Regional Heads. With the existence of an authentic interpretation such as the case above, which lawmaking institutions carry out towards the expansion of the meaning of elections, the transfer of authority to adjudicate general election disputes for Regional Heads and Deputy Regional Heads from the Supreme Court to the Constitutional Court of the Republic of Indonesia is legally possible.⁷⁰

Suppose the authority to adjudicate or decide on a constitutional complaint case is to be added to the authority of the Constitutional Court of the Republic of Indonesia through a legislative interpretation. In that case, this can be done through an amendment to Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court. In this amendment, the legislators provide authentic Interpretation or formal Interpretation of the meaning of “law” and “judicial review of the 1945 Constitution of the Republic of Indonesia” where the meaning of “law” is as long as it relates to the issue of review. Constitutionality is defined as covering all forms of laws and regulations that have a regulatory nature. Meanwhile, the definition of “judicial review of the 1945 Constitution of the Republic of Indonesia” is defined as covering the constitutionality test of statutory norms and the constitutionality of acts or negligence of public officials in carrying out customary laws.⁷¹

3. Judicial Interpretation is an interpretation through a judiciary interpreted as a theory or method of thinking about how a court should provide a legal interpretation of a law, especially the constitution.⁷² The authority to adjudicate and decide on constitutional complaint cases will be “granted” to the Constitutional Court of the Republic of Indonesia through the judicial Interpretation by the Constitutional Court of the Republic of Indonesia itself can be exercised through concrete cases submitted to it, through the Constitutional Court declaring itself authorized to hear and decide on constitutional complaint cases arises because of the actions of public officials who misinterpret the intent of the law or neglect to carry out what is required by law.⁷³ However, suppose the Constitutional Court adheres to the standpoint of original intent, of course. In that case, the Constitutional Court will be declared unacceptable because there was no intention of the drafters of the 1945 Constitution of the Republic of Indonesia to grant constitutional complaint authority to the Constitutional Court.⁷⁴

Based on the description above, the Constitutional Court of the Republic of Indonesia has currently applied a judicial interpretation to judge applications with the substance of the constitutional complaint. However, it is ineffective because there is no precise regulation regarding a constitutional complaint mechanism, so it does not provide legal certainty in

⁶⁹ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) ...Op.Cit.*, pg. 600.

⁷⁰ *Ibid.* pg. 603.

⁷¹ *Ibid.*

⁷² *Ibid.* pg. 605.

⁷³ *Ibid.* pg. 648.

⁷⁴ Galuh Candra Purnamasari, “UPAYA HUKUM TERHADAP PELANGGARAN HAK-HAK KONSTITUSIONAL WARGA NEGARA MELALUI PENGADUAN KONSTITUSIONAL (CONSTITUTIONAL COMPLAINT),” *Veritas et Justitia* 3, no. 2 (December 26, 2017): 244–69, <https://doi.org/10.25123/vej.2668>.

adjudicating this matter. Therefore, the authority to adjudicate constitutional complaint to the Constitutional Court needs to be established legally and formally, namely by changing the formulation imitatively to the 1945 Constitution, which regulates the authority of the Constitutional Court into an open-ended formula so that it opens the possibility for additional authority to be carried out through the provisions of the law, namely by amending it by adding only one phrase, namely “other powers granted by law”.

Suppose the amendments to the 1945 Constitution are quite challenging to implement. In that case, while this has become a very urgent need, the additional authority can be done by amending Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court, where previously the Constitutional Court had four powers and one obligation, was given “additional” powers to handle the constitutional complaint, wherein the law explains the Interpretation that the meaning of the judicial review is expanded to include constitutional complaint in actions or negligence of officials which result in violation of constitutional rights. So with that, at least the constitutional complaint mechanism can be used by the Constitutional Court to guarantee legal certainty for the protection of the constitutional rights of citizens.

If in the future constitutional complaint will be adopted into the authority of the Indonesian Constitutional Court, of course, there will be its impacts and challenges for the Constitutional Court, namely:

1. Concerns about the accumulation of cases in the Constitutional Court of the Republic of Indonesia. During the discussion of the amendments to the 1945 Constitution of the Republic of Indonesia, there was a proposal for constitutional complaint as one of the powers of the Constitutional Court, as stated by I Dewa Gede Palguna in the plenary meeting of the ad hoc MPR RI committee in the amendment to the 1945 Constitution of the Republic of Indonesia in dated June 8, 2000. The proposal was not approved based on various considerations, among others, because the main objective of establishing the Constitutional Court was as a judicial review institution of laws against the 1945 Constitution of the Republic of Indonesia.⁷⁵
2. The authority of constitutional review has been able to become a way of resolving the constitutional complaint. Many applications for the constitutional complaint category were granted by the Constitutional Court using the conditionally constitutional decision model.⁷⁶

In anticipating a massive increase in the caseload, the following steps can be taken. First, all applications submitted must pass through all available legal remedies (exhausted). Second, the applicant must submit the petition which has been directly affected and suffered constitutional harm (directly suffered). Third, it is necessary to provide a grace period to submit a request for a constitutional complaint with an alternative of six weeks to twelve weeks. Apart from these three steps, it is necessary to first strengthen the institutional structure by increasing the number of constitutional judges and judge researchers. Fourth, in terms of procedural law, the Constitutional Court must also specifically prepare procedures for handling cases of constitutional complaint in advance. For example, forming a panel of judges to handle constitutional complaint cases and creating stages such as a dismissal process.⁷⁷

⁷⁵ Hamdan Zoelva, *Loc. Cit.*, pg. 159.

⁷⁶ https://yancearizona.files.wordpress.com/2008/11/di-balik-konstitusionalitas-bersyarat-putusan-mk_final.pdf, diakses pada tanggal 17 Februari 2020, pukul 07.00 WIB.

⁷⁷ Pan Mohamad Faiz, “*Masa Depan Constitutional Complaint*”, *Konstitusi*, No.165, (2020): 117.

Based on the description above, a constitutional complaint mechanism is a necessity both theoretically and empirically. This can be seen from the structure, substance, and legal culture, which shows the urgency of using a constitutional complaint mechanism. Thus, the adaptation of constitutional complaint to the authority of the Constitutional Court of the Republic of Indonesia needs to be carried out by making amendments to Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court. If, in the future, a constitutional complaint mechanism is implemented at the Constitutional Court of the Republic of Indonesia, of course, there will be various challenges that must be faced. However, this can be anticipated by preparing a suitable mechanism and procedural law in handling cases of a constitutional complaint.

C. Conclusion

Based on the research results, it is concluded: Based on a comparative analysis of constitutional complaints in other countries, namely Germany, South Korea, and South Africa, the constitutional complaint mechanism has been well implemented and regulated in the regulations of each of these countries. Conceptually, it is possible to give authority to the Constitutional Court of the Republic of Indonesia to adjudicate a constitutional complaint case. With the authority of the Constitutional Court of the Republic of Indonesia not yet regulated to handle a constitutional complaint, in practice cases with constitutional complaint substance such as the Constitutional Court Decision Number: 16/PUU-VI/2008, The Constitutional Court Decision Number: 140/PUU-XIII/2015, and the Constitutional Court Decision Number: 102/PUU-VII/2009 requested by changing the form by wrapping the constitutional complaint case through the judicial review method. This causes the protection of citizens' constitutional rights not fulfilled. There is an adaptation of constitutional complaint to the authority of the Constitutional Court, which is attached to the consideration of the structure, substance, and culture of the law, so that there is a need for a constitutional complaint mechanism to be provided legally and formally in protecting the constitutional rights of citizens. The author provides suggestions: The constitutional complaint mechanism in Indonesia can adopt a constitutional complaint mechanism in other countries such as Germany, South Africa, and South Korea. There needs to be the courage of judges to decide cases by consistently carrying out a judicial interpretation of cases with the substance of the constitutional complaint. It needs to be given the authority to examine, try, and decide on constitutional complaint cases to the Constitutional Court of the Republic of Indonesia by making amendments to Law Number 24 of 2003 jo. Law Number 7 of 2020 concerning the Constitutional Court.

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