

**THE AUTHORITY OF THE CONSTITUTIONAL COURT IN
HANDLING CONSTITUTIONAL COMPLAINTS: A
COMPARATIVE STUDY WITH GERMANY AND SOUTH KOREA**

***KEWENANGAN MAHKAMAH KONSTITUSI DALAM MENANGANI
PENGADUAN KONSTITUSIONAL: STUDI KOMPARATIF
DENGAN JERMAN DAN KOREA SELATAN***

**Desak Ayu Gangga Sitha Dewi^{1*}, Xavier Nugraha^{2*}, Melva Emely
Laurentius³**

^{1*,2,3} Faculty of Law, Universitas Airlangga
Jl. Dharmawangsa Dalam Selatan Airlangga, City of Surabaya, East Java
Province

*Email: desak.ayu.gangga-2019@fh.unair.ac.id,
nugrahaxavier72@gmail.com

Volume 1, Number 2, September 2022

Received: July 10, 2022 Accepted: August 30, 2022 Online Published: September 30, 2022.

ABSTRACT

Until now, there is still no authority of the Constitutional Court to examine constitutional complaint cases, even though at least 30 (thirty) cases are declared unacceptable because the substance of the petition is constitutional complaint. In several countries, constitutional complaint has become one of the powers of the Constitutional Court as a legal remedy that citizens can take if there is a violation of their constitutional rights, such as in Germany and South Korea. Based on this background, the formulation of the problem in this is first, what is the urgency of adding constitutional complaint as the authority of the Constitutional Court of the Republic of Indonesia? Second, how is the legal construction of the implementation of constitutional complaint in Indonesia? This research is legal research with a statutory, conceptual, and comparative approach. This research will describe first, the urgency of adding constitutional complaint as the authority of the Constitutional Court of the Republic of Indonesia and second, the legal construction of the application of constitutional complaint in Indonesia by comparing the arrangement and implementation of constitutional complaint in other countries, namely Germany and South Korea.

Keywords : Comparative Approach; Constitutional Complaint; Constitutional Court

ABSTRAK

Hingga saat ini masih belum ada kewenangan Mahkamah Konstitusi dalam memeriksa perkara pengaduan konstitusional, padahal setidaknya tidaknya terdapat 30 (tiga puluh) perkara yang dinyatakan tidak dapat diterima karena substansi permohonannya adalah pengaduan konstitusional. Di beberapa negara di dunia, pengaduan konstitusional telah dijadikan salah satu kewenangan Mahkamah Konstitusi sebagai upaya hukum yang dapat ditempuh oleh warga negara apabila terdapat pelanggaran atas hak konstitusionalnya, seperti di Jerman dan Korea Selatan. Berdasarkan latar belakang tersebut, maka rumusan masalah di dalam ini adalah pertama, apa urgensi penambahan pengaduan konstitusional sebagai kewenangan Mahkamah Konstitusi Republik Indonesia? Kedua, bagaimana konstruksi hukum penerapan pengaduan konstitusional di Indonesia? Penelitian ini adalah penelitian hukum dengan pendekatan perundang-undangan, konseptual, dan perbandingan. Adapun di dalam penelitian ini akan diuraikan pertama, urgensi penambahan pengaduan konstitusional sebagai kewenangan Mahkamah Konstitusi Republik Indonesia dan kedua, konstruksi hukum penerapan pengaduan konstitusional di Indonesia dengan membandingkan pengaturan dan penerapan pengaduan konstitusional di negara lain, yaitu Jerman dan Korea Selatan.

Kata Kunci : Pendekatan Perbandingan; Pengaduan Konstitusional; Mahkamah Konstitusi

I. INTRODUCTION

Indonesia is a state of law (*rechtstaat*). This is as contained in the provisions of Article 1 paragraph (3) of the 1945 Constitution of the Republic of Indonesia. As a state of law, fulfilling the fundamental rights of its citizens is one element that must be implemented in the administration of the State.¹ In this regard, the State's obligations and responsibilities within the framework of a human rights-based approach: are to respect, protect, and fulfill.² One form of effort to fulfill these fundamental rights is reflected in authority granted by the Constitution to state institutions to carry out their duties and functions.

The Constitutional Court is one of the state institutions whose authority is given directly by the 1945 Constitution of the Republic of Indonesia (*mittelbare organ*).³ The authority of the Constitutional Court itself is regulated by the provisions of Article 24C of the 1945 Constitution of the Republic of

¹ Asshiddiqie, J. (2010). Pengantar Ilmu Hukum Tata Negara. *Rajawali Pres*, 343.

² I. I. P. Perangin-angin, R. Rahayu, and N. Dwiwarno. (2019). Kewajiban Dan Tanggungjawab Negara Memberikan Perlindungan Hukum Terhadap Perempuan Korban Revenge Porn Di Indonesia. *Diponegoro Law Journal*, 8 (1), 458.

³ Harimurti, Y. W. (2019). Dasar Hukum Penataan Lembaga Negara Yang Tidak Diatur Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*, 4(1), 187.

Indonesia, which includes: judicial review of the Constitution; deciding disputes over state institutions whose authority is granted by the Constitution; deciding on disputes over election results; decide on the dissolution of a political party; and give a decision on the opinion of the DPR regarding alleged violations by the President and/or Vice President. This authority arises from several functions attached to the Constitutional Court, one of which is as the protector of citizens' constitutional rights.⁴ Constitutional rights themselves come from human rights that have been regulated and become part of the Constitution.⁵

However, until now, there are still various cases of violations of the constitutional rights of citizens that the Constitutional Court cannot handle due to the limited authority of the Constitutional Court. In case Number 16/PUU-I/2003 concerning the review of Article 67 of Law Number 14 of 1985 concerning the Supreme Court concerning the review of the Supreme Court's Judicial Review decision which, according to the Petitioner, is contrary to Article 28D paragraph (1) of the 1945 Constitution of the Republic of Indonesia. However, the petition was finally rejected by the Constitutional Court because the petition was a form of constitutional complaint that had not been regulated in Indonesian law. Even citing the statement of I Dewa Gede Palguna, based on data from the Registry of the Constitutional Court until December 2010, at least 30 (thirty) cases were declared unacceptable because the substance of the petition was a constitutional complaint which is not within the scope of authority granted to the Constitutional Court.⁶

A constitutional complaint itself is a citizen's complaint before the court, especially the Constitutional Court, for the action of a public official or the inaction of a public official, which has implications for the reduction of the fulfillment of the constitutional rights of the citizen concerned.⁷ A constitutional complaint is also a form of people's control mechanism over the State to restore citizens' constitutional rights.⁸ In several countries, the constitutional complaint has been made one of the powers of the Constitutional Court as a legal remedy that citizens can take if there is a violation of their constitutional rights.⁹

Reflecting on the large number of cases that the Constitutional Court cannot accept due to the absence of authority to adjudicate constitutional complaints, it has the potential to reduce and minimize people's control over the fulfillment of their constitutional rights. There is no authority in

⁴ Yulida, D., Utama, K.W., Nugraha, X. (2022). Verifikasi Manual Manifestasi Asas Kecermatan Sebagai Batu Uji Terhadap Keputusan Tata Usaha Negara. *Usm Law Review*, 5(1), 37.

⁵ Palguna, I.D.G. (2017). Constitutional Complaint and the Protection of Citizens the Constitutional Rights. *Constitutional Review*, 3(1), 2. <https://doi.org/10.31078/consrev311>

⁶ Palguna, I.D.G.. (2013). Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara. *Sinar Grafika Jakarta*, 701.

⁷ *Ibid.* p 13-14.

⁸ Zoelva, H. (2010). Penerapan Pengaduan Konstitusional (Constitutional Complaint) Di Berbagai Negara. *Makalah Mahkamah Konstitusi Republik Indonesia*, 45.

⁹ Nugraha, X., Katherina, A.M.F., Ramadhanty, S.F., Tanbun, E.P. Constitutional Question: Alternatif Baru Pelindungan Hak Konstitusional Warga Negara Melalui Concrete Review di Indonesia. (2019). *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan*, 10(1), 130.

adjudicating constitutional complaints also causes the unavailability of legal remedies through constitutional courts for citizens regarding violations of their constitutional rights generated by the actions of state institutions or public officials and not by the unconstitutionality of laws against the fundamental Constitution.¹⁰ Therefore, to provide space and legal certainty for citizens to obtain justice for violations of their constitutional rights, precise and concrete arrangements and authorities are needed for the Constitutional Court to decide and adjudicate constitutional complaint cases. Furthermore, to find the construction of the application and the granting of authority related to constitutional complaints, this paper will conduct a comparative study on several countries, namely: Germany and South Korea, against Indonesia.

The formulation of the problem in this article is, first, what is the urgency of adding the constitutional complaint as the authority of the Constitutional Court of the Republic of Indonesia? Second, how is the legal construction of the implementation of constitutional complaint in Indonesia? The purpose of this article is first to analyze the urgency of adding a constitutional complaint as the authority of the constitutional court of Indonesia. Second, analyze the legal construction of the implementation of constitutional complaint in Indonesia.

II. METHOD

This is a legal research. The approach used in this research is the statutory, conceptual, and comparative approach. The main focus of the approach is a comparative approach, particularly between Indonesia, Germany, and South Africa. The main reason for emphasizing the approach used is the comparative approach because it can provide theoretical and practical benefits in holistic research because it looks at the regulation and application in other countries of a rule of law.

Vicki C. Jackson and Mark Tushnet mention that a comparison of constitutional law is valuable and useful to find out and find other perspectives on the structure of governance, as well as different approaches to building a just, effective, and stable government to provide the flexibility needed to meet changes sustainable needs and stability.¹¹ Furthermore, Vicki C. Jackson and Mark Tushnet also explained that one of the objects or substances of comparative constitutional law is the role of the constitutional court or the part of the Constitutional Court, which includes explicitly reviewing the forms of testing, identifying claims related to the impact of testing, as well as the advantages and disadvantages of a political case when it is resolved through the courts.¹² Thus, through a legal comparison, especially a comparison of state administration, the author would like to

¹⁰ Ritonga, R. (2020). Analisis Pengujian Pengaduan Konstitusional (Constitutional Complaint) Pada Mahkamah Konstitusi Indonesia Sebagai Salah Satu Upaya Perlindungan Hak-Hak Warga Negara. *Lex Administratum*, 8(1), 35.

¹¹ Manan, B. (2017). Perbandingan Hukum Tata Negara Sebagai Obyek Penyelidikan Keilmuan Dan Pengajaran Pada Program Pendidikan Tinggi Hukum, Konferensi Nasional Asosiasi Dosen Pengajar Hukum Perbandingan Indonesia (ADPHI) "Perbandingan Hukum dan Perkembangan Sistem Hukum: Konvergensi atau Divergensi?". *Fakultas Hukum Universitas Airlangga Surabaya*, 7.

¹² Ibid. p 9

analyze the rules and implementation of constitutional complaint to determine whether it is appropriate or not applied in Indonesia.

Considering that one of the objectives of this paper is contained through the results of the discussion of the second issue related to "Construction of the application of constitutional complaint in Indonesia", then another perspective is needed regarding the implementation of the authority of the Constitutional Court in deciding constitutional complaint in other countries. With the description of the undertaking, then it can be found or constructed related to the application of the correct constitutional complaint to be applied in Indonesia by adjusting the needs and conditions of the State of Indonesia itself. In addition, because the comparison is made related to the role or authority of the Constitutional Court in several countries and the validity of legal remedies that citizens can take to protect their constitutional rights, the object of this comparison is within the scope of constitutional law.

In addition, South Korea and Germany were chosen as comparison countries for Indonesia considering that there are several similarities and differences between the three countries, namely: first, these countries apply the principle of constitutional supremacy in the administration of the State; second, the three countries are republics which place the highest government sovereignty on the people; third, Germany and Korea *The South* has rigid arrangements regarding the authority of its Constitutional Court in dealing with constitutional complaints. These settings are contained in Art. 93 para (1) of the Federal Constitution of Germany relating to the scope of authority of the Constitutional Court and Art. 68 para (1) jo. paragraph (2) The Constitutional Court Act of Korea in which the two regulations explicitly authorize the Constitutional Court of the country concerned to handle applications for constitutional complaint .

III. ANALYSIS AND DISCUSSION

a. The Urgency of Adding a Constitutional Complaint as the Authority of the Constitutional Court of the Republic of Indonesia

Every country has rules that serve as the basis and guidelines in the life of the State, called the Constitution.¹³ Furthermore, Brian Thompson argues that the Constitution is a document that contains the rules for managing an organization.¹⁴ Associated with an organization in the form of a state, the Constitution in the state administration system can determine the composition and role of state institutions, regulate relations between state institutions, and regulate the affairs of state institutions with citizens.¹⁵

One of the contents of the Constitution is related to the protection of the constitutional rights of citizens. Conceptually, the meaning of constitutional rights contained in the 1945 Constitution of the Republic of Indonesia is about the teachings of western doctrine related to individual rights, where individual rights implemented as natural rights develop into human rights

¹³ Ramadhan, F., Nugraha, X., Felany, P. I. (2020). Penataan Ulang Kewenangan Penyidikan Dan Penuntutan Dalam Penegakan Hukum Pelanggaran HAM Berat. *Veritas et Justitia*, 6(1), 178.

¹⁴ Thompson, B. (1997). Textbook of Constitutional and Administrative Law . *Balestone Press London*, 3.

¹⁵ Duchacek, ID (1987). Constitution/Constitutionalism . *Blackwell* , 36.

teachings. The development and expansion of the scope and meaning of human rights give rise to constitutional rights that the State protects through the Constitution and the courts.¹⁶ Furthermore, the Indonesian Constitution, namely the 1945 Constitution of the Republic of Indonesia, adopts human rights in writing and expressly, which causes the State to be obliged to guarantee the status and protection of the rights of its citizens, which are then referred to as constitutional rights. Such protection implies that if a provision under the Constitution or an act of the State violates the constitutional rights of citizens, then it is unconstitutional.¹⁷ For this reason, a mechanism is needed to realize the protection of the constitutional rights of citizens both through the judicial process (judicial) and outside the court (non-judicial).¹⁸

As the Guardian of the Constitution and the Protector of The Citizen Constitutional Rights, in Indonesia, the Constitutional Court was then given the authority to carry out examinations related to the constitutionality of a law and became the only judicial institution authorized to interpret the Constitution.¹⁹ Thus, if an Indonesian citizen feels disturbed or impaired by his constitutional rights due to enacting a law, the citizen concerned can submit a constitutional review to the Constitutional Court. However, the mechanism is only limited to reviewing the constitutionality of a law, so in some cases, the Constitutional Court rejects the applicant's application because he thinks that the application is not within the authority of the Constitutional Court. In fact, in its development, violations of constitutional rights then arise not only as a result of the existence of a law but also include the application of the norms of the law, the interpretation of law enforcement in the implementation of the law, as well as policies made by state institutions and public officials who where these matters cannot be resolved by a *constitutional review mechanism* which can only examine the constitutionality of norms in the law. This raises the urgency to implement the practice of constitutional complaint in Indonesia. The absence of a complaint mechanism causes the lack of legal remedies through the constitutional court to resolve cases of violations of the constitutional rights of citizens, which arise not as a result of the unconstitutionality of a law but due to the actions or omissions of state institutions or public officials.²⁰

Theoretically, 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.²¹ As already described, the Constitutional Court was formed to carry out the role of

¹⁶ Siagian, A. H. (2020). Constitutional Complaint as Strengthening Constitutionalism in Indonesia. *Rand Inter Social Sci*, 1(3), 488.

¹⁷ Asmono, A. (2011). Gagasan Pengaduan Konstitusional Dan Penerapannya Dalam Sistem Ketatanegaraan Indonesia. *Yuridika*, 26(23), 213.

¹⁸ Purnamasari, G.C. (2017). Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara Melalui Pengaduan Konstitusional (Constitutional Complaint). *Veji*, 3(2), 248.

¹⁹ Sanusi, H.M.A. (2011). Tebaran Pemikiran Hukum Dan Konstitusi. *Milestone*, 835.

²⁰ Palguna. (2013). Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara. *Sinar Grafika*, 4.

²¹ Ibid. p 312.

constitutional review. One of the tasks of constitutional review is to protect the constitutional rights of citizens from violations committed by the branches of state power. A constitutional complaint is one manifestation or form of the constitutional review.²²

In the administration of justice, one of the principles that must be applied is the principle of *ius curia novit*, which has a deep meaning, that the court may not examine, try, or decide a case because there is no law or there is legal ambiguity.²³ In this case, the violation of the constitutional rights of citizens cannot be ignored with the argument that there are no rules that explicitly regulate the authority of the Constitutional Court in resolving applications for constitutional complaints.²⁴ This is also a concrete manifestation of the protection of holistic constitutional rights.

One of the reasons that are often stated in the refusal regarding the expansion of the authority of the Constitutional Court to carry out constitutional complaints is that there have been legal remedies that can be taken if there are actions by state officials that harm the community, namely through the lawsuit mechanism at the State Administrative Court. However, referring to the provisions of Article 1 point 10 of Law Number 51 of 2009 concerning the scope of State Administrative disputes where state administrative disputes include disputes arising in the field of state administration between private persons or civil legal entities and state administrative bodies or officials both at the center and in the regions. Furthermore, the scope of disputes examined at the State Administrative Court is limited to disputes relating to government administration carried out by state agencies or officials. So, if there are unconstitutional actions or violations of the constitutional rights of citizens carried out by state institutions that are not part of the scope of the State Administrative Court and are not material or cases that can be resolved through constitutional review, then there is a void regarding legal remedies that can be taken by society. Thus, it is necessary to have a legal mechanism to accommodate these needs.

b. Legal Construction on the Implementation of Constitutional Complaints in Indonesia

1) Powers of Constitutional Complaints by the Constitutional Courts of Germany and South Korea

As explained in the previous section, the implementation of constitutional complaint has been applied in several countries worldwide. Anwar Usman explained that the constitutional complaint itself is one of the powers possessed by the Constitutional Court in various countries in the world, whose mechanism is through examinations proposed by judges or other parties in a case on a concrete case.²⁵

a) German

²² Ibid. p 320

²³ Siahaan, M. (2010). Hukum Acara Mahkamah Konstitusi. *Konstitusi Press*, 16.

²⁴ Azis, A., Izlindawati. (2018). Constitutional Complaint & Constitutional Question Dalam Negara Hukum. *Prenada Media*, 241.

²⁵ Mkri.id. (2022). Ketua MK: Constitutional Question Sebagai Perlindungan Konstitusional Warga Negara.

The authority over the constitutional complaint itself was first applied by the German Federal Constitutional Court (*Bundesverfassungsgerichts*).²⁶ The provisions relating to the authority of *constitutional complaint* by the German Federal Constitutional Court itself are regulated in the provisions of Art. 93 paragraph (1) of the German Federal Constitution, which reads:

(1) The Federal Constitutional Court shall rule:

1. on the interpretation of this Basic Law in the event of disputes concerning the extent of the rights and duties of a supreme federal body or other parties vested with rights of their own by this Basic Law or by the rules of procedure of supreme federal bodies;

2. in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law or the compatibility of Land law with other federal law on application of the Federal Government, of a Land government or of one quarter of the Members of the Bundestag;

2a. in the event of disagreements as to whether a law meets the conditions set out in paragraph (2) of Article 72, on application of the Bundesrat or of the government or legislature of a Land;

3. in the event of disagreements concerning the rights and duties of the Federation and the Länder, especially in the execution of federal law by the Länder and in the exercise of federal oversight;

4. on other disputes involving public law between the Federation and the Länder, between different Länder or within a Land, unless there is recourse to another court;

4a. on constitutional complaints, which may be filed by any person alleging that one of his basic rights or one of his rights under paragraph (4) of Article 20 or under Article 33, 38, 101, 103 or 104 has been infringed by public authority;

4b. on constitutional complaints filed by municipalities or associations of municipalities on the ground that their right to self-government under Article 28 has been infringed by a law; in the case of infringement by a Land law, however, only if the law cannot be challenged in the constitutional court of the Land;

4c. on constitutional complaints filed by associations concerning their non-recognition as political parties for an election to the Bundestag;

5. in the other instances provided for in this Basic Law.

Based on these provisions, the scope of authority of the German Federal Constitutional Court includes:

- 1) Decide on constitutional complaint cases filed by those who feel that their constitutional rights have been violated;
- 2) Judicial review of federal laws if they are considered unconstitutional;
- 3) A particular judicial review is carried out by any regular court that feels that the law at issue in a specific case is unconstitutional, must adjourn the case, and bring this law before the Federal Constitutional Court;

²⁶ Lailam, T. (2021). Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional. *Jurnal HAM*, 13(1), 66.

- 4) Decide on state agency disputes, including state-federal disputes;
- 5) Control of the investigative committee;
- 6) Resolution of violations of election laws;
- 7) Be competent in impeachment proceedings against the Federal President, judge, or member of one of the Federal High Courts, by the Bundestag, the Bundesrat, or the federal government, based on a violation of constitutional or federal law;

Concerning the constitutional complaint, the German Constitution stipulates that the application can only be carried out under several conditions, in which essentially the Petitioner can postulate that there are policies of public institutions that have injured the constitutional rights of citizens which the Constitution has guaranteed.²⁷ Furthermore, referring to the provisions of Art. 23 paragraph (1) of Part II of the German Constitution, it is stated that the submission of an application for a constitutional complaint must at least contain the following:²⁸

- 1) The lawsuit must contain the object of the constitutional complaint, which can be in the form of court decisions, administrative policies, legal policies, and other actions issued by state institutions that are considered binding, accompanied by the decision number and the relevant regulatory number including the date of its validity, which must still be valid until the time the application is submitted;
- 2) The lawsuit must clearly describe the constitutional rights that have been violated upon the enforcement of a regulation or decision;
- 3) The lawsuit must clearly explain how the enforcement of the regulation or decision causes constitutional harm to the applicant.

These provisions aim to prevent or minimize the entry of applications with unclear or vague arguments. Thus, in applying to a constitutional complaint, the Petitioner must pay attention to these provisions.

One of *the constitutional complaint cases* that the German Federal Constitutional Court has handled is a constitutional complaint related to the prohibition of slaughtering animals, a form of policy of the German Federal Government. In a *quo* dispute, the German Federal Government banned killing animals because it was considered contrary to the Animal Protection Act. The ban then sparked resistance from the German Muslim community, who felt that the freedom to practice their religion as a right guaranteed in the German Federal Constitution was disturbed. Germany's Federal Constitutional Court later granted the complaint.

2) South Korea

Another country that has the authority to make a constitutional complaint at its Constitutional Court is South Korea. Such authority is contained in the provisions of Art. 68 para (1) jo. Art. 68 para (2) The Constitutional Court Act of Korea (South Korea Constitutional Court Law) which reads:

- 1) "Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a Constitutional Complaint, except the

²⁷ Palguna. *Loc.Cit.* 409

²⁸ Sanusi, H. M. A. *Loc.Cit.* 838

judgments of the ordinary courts, with the Constitutional Court: Provided, That if any relief process is provided by other laws, no one may file a Constitutional complaint without having exhausted all such processes”

- 2) “If the motion made under Article 41 (1) for adjudication on constitutionality of statutes is rejected, the party may file a Constitutional complaint with the Constitutional Court. In this case, the party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned.”

The constitutional complaint authority of the South Korean Constitutional Court is related to the authority of the South Korean Constitutional Court in carrying out a judicial review in which the only party that can submit a request for judicial review of the constitutionality of the law in South Korea is the court through a decision or motion or request which the party submits litigation using the relevant regulations. Furthermore, to make room for the party whose motion was rejected, they may submit the relevant law as the object of a constitutional complaint case.²⁹ Thus, the Constitutional Court of South Korea can only accept applications for constitutional complaint that have previously gone through legal remedies, if the case has been decided in an ordinary court, then the application for a constitutional complaint can be filed within 90 days after the decision is received.³⁰

One of the application disputes related to the constitutional complaint is in the case of complaints of discriminatory treatment by the Government of the Republic of South Korea through the awarding of extra points for war veterans in all types of examinations and selection tests for Civil Servants. Upon the request for the complaint, the Constitutional Court of South Korea later declared that the government's policy was unconstitutional because it was contrary to the provisions of Art. 11, The Korean Constitution deals with the right to equality and Art. 25 The Korean Constitution relates to equal rights to the opportunity to participate in government.³¹

2) Construction of Constitutional Complaint Application in Indonesia

Regarding the two countries, there are two ways to grant constitutional complaint authority to the Constitutional Court. The first is to regulate these powers in the Constitution, and the second is to include them in the Constitutional Court law. However, considering that the Indonesian Constitutional Court was formed from a constitutional mandate and whose authority is regulated in the 1945 Constitution of the Republic of Indonesia, it would be more appropriate if this authority was included in an article related to the authority of the Constitutional Court in the 1945 Constitution of the Republic of Indonesia.

Thus, the provisions of Article 24C paragraph (1) of the 1945 Constitution of the Republic of Indonesia can be amended as follows:

²⁹ Palguna, *Loc.Cit.* 463-464.

³⁰ Marzuki, H. M. L. (2004). *Menjaga Denyut Konstitusi Refleksi Satu Tahun Mahkamah Konstitusi. Konstitusi Press*, 31.

³¹ Zoelva, H. (2012). *Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara. Media Hukum*, 19(1), 158-159.

The Constitutional Court has the authority to adjudicate at the first and final levels whose decisions are final to examine the law against the Constitution, decide cases on constitutional complaints, decide on disputes over the authority of state institutions whose authority is granted by law given by the Constitution, decide on the dissolution of political parties, and decide on disputes about the results of the general election.”

Furthermore, several things must be considered in granting the authority of constitutional complaint to the Constitutional Court of the Republic of Indonesia, which are related to:³²

- 1) The need for strengthening the organizational structure of the Constitutional Court, is related to the possibility of an increasing number of cases that will be accepted, so it is necessary to increase the number of constitutional researchers and clerks to support and ensure the constitutional justice runs well;
- 2) The need for a case screening mechanism by the judges of the Constitutional Court, so that the authority related to the preliminary examination can be exercised by the panel judge and not by the Registrar or administrative staff to determine whether the case can be further examined or terminated;
- 3) Provide clear boundaries related to cases of constitutional complaint that can be tested.

Concerning these restrictions, Indonesia can apply conditions by combining several provisions used by Germany and South Korea, namely:

- 1) The application must be submitted by a person who has suffered a constitutional loss
- 2) An application can only be filed if the applicant has made all legal remedies.
- 3) An application can only be submitted within a specific time limit after issuing a court decision, action, or act of a public official or state institution that violates the applicant's constitutional rights.

As the Protector of Citizen's Constitutional Rights, *the granting of* constitutional complaint authority is appropriate to be given to the Constitutional Court to provide guarantees for the protection of citizens' constitutional rights. This is then expected to be able to realize the ideals of a state of law and maximum protection of the constitutional rights of citizens.

IV. CONCLUSION

In order to protect citizens' constitutional rights, there is an urgency to implement the practice of constitutional complaint in Indonesia. Reflecting on the implementation in Germany and South Korea, the authority is given to the Constitutional Court as the holder of the authority over constitutional review and functions as the Guardian of the Constitution and the Protector of Citizen's Constitutional Rights. Furthermore, such authority can be granted by increasing the scope of authority of the Constitutional Court in the 1945 Constitution of the Republic of Indonesia. This is considering that the

³² Faiz, P.M. (2016). A Prospect and Challenges For Adopting Constitutional Complaint and Constitutional Question In The Indonesian Constitutional Court. *Constitutional Review*, 2(1), 114-115.

Constitutional Court is an institution or state institution whose formation is based on the Constitution. In addition, in its implementation, it is also necessary to regulate the limitations or conditions for submitting a *constitutional complaint* by a person whose constitutional rights have been violated.

REFERENCE

- Asmono, A. (2011). Gagasan Pengaduan Konstitusional Dan Penerapannya Dalam Sistem Ketatanegaraan Indonesia. *Yuridika*, 26(23). <https://doi.org/10.20473/ydk.v26i3.273>
- Asshiddiqie, J. (2010). *Pengantar Ilmu Hukum Tata Negara*. Rajawali Pres.
- Azis, A. (2018). *Constitutional complaint & Constitutional Question Dalam Negara Hukum*. Prenada Media.
- Duchacek, Ivo D. (1987). *Constitution/Constitutionalism*. Blackwell.
- Faiz, P.M. (2016). A Prospect and Challenges For Adopting Constitutional Complaint and Constitutional Question In The Indonesian Constitutional Court. *Constitutional Review*, 2(1). <https://doi.org/10.31078/consrev215>
- Harimurti, Y. W. (2019). Dasar Hukum Penataan Lembaga Negara Yang Tidak Diatur Undang-Undang Dasar Negara Republik Indonesia Tahun 1945. *Jurnal Ilmiah Pendidikan Pancasila dan Kewarganegaraan*, 4(1). <http://dx.doi.org/10.17977/um019v4i1p186-196>
- I. P. Perangin-angin, R. Rahayu, and N. Dwiwarno. (2019). Kewajiban Dan Tanggungjawab Negara Memberikan Perlindungan Hukum Terhadap Perempuan Korban Revenge Porn Di Indonesia. *Diponegoro Law Journal*, 8 (1).
- Laica Marzuki, H.M. (2004). *Menjaga Denyut Konstitusi Refleksi Satu Tahun Mahkamah Konstitusi*. Konstitusi Press.
- Lailam, T. (2021). Peran Mahkamah Konstitusi Federal Jerman Dalam Perlindungan Hak Fundamental Warga Negara Berdasarkan Kewenangan Pengaduan Konstitusional. *Jurnal HAM*, 13(1). <http://dx.doi.org/10.30641/ham.2022.13.1>
- Manan, B. (2017). Perbandingan Hukum Tata Negara Sebagai Obyek Penyelidikan Keilmuan Dan Pengajaran Pada Program Pendidikan Tinggi Hukum". In *Konferensi Nasional Asosiasi Dosen Pengajar Hukum Perbandingan Indonesia (ADPHI) "Perbandingan Hukum Dan Perkembangan Sistem Hukum: Konvergensi Atau Divergensi?.* Fakultas Hukum Universitas Airlangga Surabaya.
- Mkri.id. (2022). Ketua MK: Constitutional Question Sebagai Perlindungan Konstitusional Warga Negara. Retrieved from <https://www.mkri.id/index.php?page=web.Berita&id=15907>
- Nugraha, X., Katherina, A.M.F., Ramadhanty, S.F., Tanbun, E.P. Constitutional Question: Alternatif Baru Pelindungan Hak Konstitusional Warga Negara Melalui Concrete Review di Indonesia. (2019). *Negara Hukum: Membangun Hukum untuk Keadilan dan Kesejahteraan*, 10(1). <https://doi.org/10.22212/jnh.v10i1.1209>
- Palguna, I Dewa Gede. (2013). *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*. Sinar Grafika.

- Purnamasari, G. C. (2013). *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*. Sinar Grafika.
- Purnamasari, G. C. (2017). Upaya Hukum Terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara Melalui Pengaduan Konstitusional (Constitutional Complaint). *Vej*, 3(2).
<https://doi.org/10.25123/vej.2668>
- Ramadhan, F., Nugraha, X., Felany, P. I. (2020). Penataan Ulang Kewenangan Penyidikan Dan Penuntutan Dalam Penegakan Hukum Pelanggaran HAM Berat. *Veritas et Justitia*, 6(1).
<https://doi.org/10.25123/vej.v6i1.3514>
- Sanusi, H.M. A. (2011). *Tebaran Pemikiran Hukum Dan Konstitusi*. Milestone.
- Siagian, A. H. (2020). Constitutional Complaint as Strengthening Constitutionalism in Indonesia. *Rand Inter Social Sci*, 1(3).
<https://doi.org/10.47175/v1i3.102>
- Siahaan, M. (2010). *Hukum Acara Mahkamah Konstitusi*. Konstitusi Press.
- Thompson, B. (1997). *Textbook of Constitutional and Administrative Law*. Balestone Press London.
- Yulida, D., Utama, K.W., Nugraha, X. (2022). Verifikasi Manual Manifestasi Asas Kecermatan Sebagai Batu Uji Terhadap Keputusan Tata Usaha Negara. *Usm Law Review*, 5(1).
<http://dx.doi.org/10.26623/julr.v5i1.4600>
- Zoelva, H. (2010). Penerapan Pengaduan Konstitusional (Constitutional Complaint) Di Berbagai Negara. *Makalah Mahkamah Konstitusi Republik Indonesia*.
- Zoelva, H. (2012). Constitutional Complaint Dan Constitutional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara. *Media Hukum*, 19(1). <https://doi.org/10.18196/jmh.v19i1.1984>