



Juridical analysis of the implementation of constitutional complaints in the judicial review process by the constitutional court in Indonesia

Dedy Kurniawan*, Joko Setiyono

Master of Law Study Program, Faculty of Law, Diponegoro University, Imam Bardjo, Semarang, Indonesia

Abstract

The protection of citizens' constitutional rights is an important thing to be implemented for a country to provide justice for its citizens. However, in Indonesia at present, there have been various efforts to make constitutional complaints submitted by citizens to the Constitutional Court. It was not accepted because constitutional complaints were an authority possessed by the Constitutional Court in Indonesia, in contrast to other countries which have implemented this authority to protect the constitutional rights of their citizens. This scientific article analyzes the mechanisms for implementing constitutional complaints in Indonesia. This scientific article research uses a normative juridical approach through statutory, historical, conceptual, and comparative approaches. Based on the results of the research that has been done, it can be concluded that there is an urgency for a constitutional complaint and a mechanism for implementing a constitutional complaint so that it can be implemented in Indonesia. It is hoped that the application of constitutional complaints in Indonesia, it can create maximally just legal development.

Keywords: *Constitutional Complaint*, constitutional court, justice

Introduction

The idea of a rule of law state, according to Abdul Mukhtie Fadjar, whether under the influence of the idea of *Rechtsstaat* from the Civil Law Tradition or the influence of the idea of Rule of Law from the Anglo Sakson Legal Tradition (Common Law Tradition), is, in fact, one of the understandings of Indonesian Constitutionalism which is expressed and implied in all Constitutions that have been in effect in Indonesia, although with different formulations (Fadjar, 2003) ^[5]. Even the notion of the rule of law and/or the rule of law became one of the New Order credos (1966-1998) and was included in The Broad Guidelines of State Policy (GBHN) and the Five Year Development Plan or Repelita (Fadjar, 2002).

Legal development is an essential and comprehensive matter and cannot be separated from the development of citizens' constitutional rights. According to Jimly Asshiddiqie, legal development is a conscious, systematic, and continuous effort to build a more advanced, prosperous, secure, and peaceful society, nation, and state life within a just and certain legal framework and foundation (Asshiddiqie, 1998). From this understanding, it implies that the law must carry out its function, namely a means to bring about order and prosperity in the framework of building the Indonesian people as a whole with harmony, and harmony and as a means to create an entirely just Indonesian society. The development of democratic national law must minimize the implementation and application of norms that cause injustice because the application of such legal practices will lead to new injustices.

Legal development has a continuous concept and never stops, so law enforcement must not ignore the circumstances and the time dimension when the law was enacted and enforced. Apart from being unwise, this, in turn, has the potential to deny legal certainty itself (Randang, 2009) ^[10]. The biggest problem in the development of national law at

this time has not changed, namely: there is a gap between the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution of the Republic of Indonesia), which clearly, according to the text and spirit is motivated by social justice and in favor of the concept of maximizing the prosperity of the people, with political lines and legislation that composes it (Lubis, 2003) ^[7]. This gap is the main factor in rearranging the social justice system and always maximizing legal development in Indonesia.

The term rule of law in Indonesia has been explicitly stated in the 1945 Constitution of the Republic of Indonesia. Prior to amendments to the 1945 Constitution of the Republic of Indonesia, Article 1 paragraph (3) reads, "Indonesia is a state based on the rule of law." Meanwhile, after the amendment became "Indonesia is a state of law." Even though there are differences before and after the amendment, the two sounds have the same goal: to make the Indonesian state a constitutional state. A state based on law is characterized by the principle of legality (legal certainty), among which is that all actions or actions of a person, whether individual or group, people or government, must be based on legal provisions and statutory regulations that existed before the action or action was carried out or based on the applicable regulation.

The Constitutional Court of the Republic of Indonesia (hereinafter referred to as the Constitutional Court of the Republic of Indonesia) is an institution known as the protector of citizens and human rights (Asshiddiqie, 2012) ^[1]. The presence of the Constitutional Court of the Republic of Indonesia is inseparable from the history of upholding citizens' human rights. Maintaining, protecting, and upholding the constitutional rights of citizens is the duty and authority of one of these judicial institutions in Article 24C of the 1945 Constitution of the Republic of Indonesia Jo. Article 10 of Law Number 24 of 2003 concerning the

Constitutional Court, the Indonesian Constitutional Court has 4 (four) powers and 1 (one) obligation. However, the authority of the Constitutional Court of the Republic of Indonesia is limited because this authority is regulated directly in the state constitution.

Based on Article 24C of the 1945 Constitution of the Republic of Indonesia, the Constitutional Court of the Republic of Indonesia has the authority to try at the first and final levels whose decisions are final to review laws against the Constitution, decide disputes over the authority of state institutions whose powers are granted by the Constitution, decide on the dissolution of political parties and resolve disputes about election results. In addition, the Constitutional Court of the Republic of Indonesia has one obligation, namely, to render a decision on the opinion of the People's Representative Council regarding alleged violations by the President and/or Vice President according to the Constitution), namely testing the implementation of legal products made by public officials to citizens, which in practice may be unconstitutional.

Without the authority to adjudicate Constitutional complaint cases, there could be an injustice that citizens could feel because their rights were not protected and prosecuted. Such was the case in case number 7/PUU-VII/2009 with Rizal Ramli as the Petitioner, with the subject matter namely Review of Article 160 of the Criminal Code against the 1945 Constitution of the Republic of Indonesia and at that time the Constitutional Court of the Republic of Indonesia stated that the Petitioner's application was rejected. The petition was rejected because the substance of the Petitioner's petition had an element of constitutional complaint. According to the Petitioner, the application of Article 160 of the Criminal Code had limited the space for the movement of the Petitioner as an activist and politician in expressing opinions and criticizing government policies. It was an assassination of the character of the Petitioner as well as an assassination of the Petitioner's political career so that the substance is not related to the constitutionality of norms but the application and interpretation of legal norms that are not appropriate so that they are contrary to the 1945 Constitution of the Republic of Indonesia.

In order to strengthen the protection of citizens' constitutional rights, it is necessary to expand the authority of the Constitutional Court of the Republic of Indonesia by incorporating a constitutional complaint mechanism into one of the powers of the Constitutional Court of the Republic of Indonesia. The addition of this authority serves to protect the rights of citizens who have the potential to be violated by actions or policies issued by the government (executive), The House of Representatives (legislative), and court decisions (judicative). Constitutional complaints are a form of legal action that can be taken to protect citizens' constitutional rights (Setiawan, 2017) ^[11]. The absence of a Constitutional complaint mechanism in Indonesia can reduce Indonesia's legitimacy as a modern, democratic legal state.

Formulation of the problem

Based on the background presented, the following is the formulation of the problem in this scientific article:

1. How is the Enforcement Mechanism in the Judicial Review of Citizens' Constitutional Rights in Indonesia?
2. How is the Urgency of Implementing the Constitutional Complaint Mechanism in the Constitutional Court of the Republic of Indonesia?

Research methods

In compiling this article, the research was a type of Normative Juridical Approach. This research is used by examining library materials or secondary data. Normative legal research is library law research as the main foundation in conducting this legal research. This research uses various types of approaches. The first type of approach was the Statutory Approach. This statutory approach is carried out by studying the compatibility between the laws and regulations applied in Indonesia. Then the second type of approach is the Historical Approach, which is an approach that is carried out by examining cases related to the legal issues at hand and is strengthened by the third type of approach, namely the Conceptual Approach, which moves from an understanding of the doctrines that develop in the science of law to serve as a basis for building legal arguments when resolving the legal issues at hand. The source of data used in this paper is secondary data, namely, obtained from library materials. The data that has been obtained is then processed and included in this writing article. The data collection method used data and information search through documents, journals, books, and electronic documents that can support the process of writing this article.

Discussion

The Enforcement Mechanism in the Judicial Review of Citizens' Constitutional Rights in Indonesia today

The constitutional complaint mechanism, or in German, it is called *verfassungsbeschwerde*, is the right that every person or group has to make statements of disapproval or rejection of the government's treatment of them (Devanta, 2010) ^[4]. In this case, certain people or groups feel that public officials have violated their constitutional rights. The purpose of this constitutional complaint is for each person or group to have freedom and equality in participating in the administration of the state and to uphold democratic principles, including responsibilities regarding the protection of constitutional power owned by the community. Constitutional complaints guarantee that the processes of determining the administration of the state, both in making laws, processes of state administration, and judicial decisions, do not violate constitutional rights.

Article 1, paragraph (2) of the 1945 Constitution of the Republic of Indonesia states: "*Sovereignty is in the hands of the people and is implemented according to the Constitution.*" The article shows that the people as holders of people's sovereignty, which can be interpreted that the form of democracy in the administration of the state is not limited to determining who sits in state power through the people's voting rights which are the constitutional rights of citizens but also the rights regulated in the constitution both human rights and human rights. as well as the rights of citizens who are not violated and ignored by state administrators. Therefore, all branches of state power are obliged to protect and respect it.

The Constitutional Court in Indonesia also colors the dynamics of state administration and discourse on state laws. In practice, the constitutional dynamics have been, are being, and will continue to develop along with the presence of the Constitutional Court of the Republic of Indonesia as the guardian of the 1945 Constitution of the Republic of Indonesia. Apart from being an institution guarding the constitution, the Constitutional Court of the Republic of

Indonesia also functions as the interpreter of the constitution, as well as the guardian of democracy (the guardian and the sole interpreter of the constitution, as well as the guardian of the process of democracy). The idea of forming the Constitutional Court of the Republic of Indonesia only encourages the administration of power and better Indonesian state administration. At least four things form the background and become the basis for the formation of the Constitutional Court of the Republic of Indonesia, namely (Soimin et al., 2013) as an implication of the notion of constitutionalism, checks and balances mechanism; clean state administration; and protection of human rights.

To protect the constitution, the Constitutional Court of the Republic of Indonesia is equipped with a constitutional control mechanism driven by requests from applicants who have legal standing to defend their interests. The choice of the applicant's words and not the lawsuit submitted to the Indonesian Constitutional Court, when compared with the Civil Procedure Code, is as if the case was a one-party case (*ex parte*) and no other party was withdrawn as a party or respondent and who had the right to fight the application. This is only sometimes true because, in certain types of cases, there must be parties who are expressly defined and withdrawn as parties and who have the right to answer or respond to the request (Siahaan, 2003)^[12]. Disputes brought to the Constitutional Court of the Republic of Indonesia have their character and are different from disputes faced daily by ordinary courts. Decisions requested by the applicant and given by the Constitutional Court of the Republic of Indonesia will bring legal consequences that affect not only individuals but also other people, state institutions, government apparatus, or society in general, particularly in reviewing laws against the Constitution (Judicial review). In terms of its four powers and one obligation, the Constitutional Court of the Republic of Indonesia is obliged to give a decision in which the five decisions are Final and Binding so that no further legal action can be taken. Furthermore, the decision that has been issued by the Constitutional Court of the Republic of Indonesia is binding on the person submitting the applicant and all Indonesian citizens. This resulted in all Indonesian citizens being obliged to comply with the decision that the Constitutional Court of the Republic of Indonesia had issued.

The Urgency of Implementing the Constitutional Complaint Mechanism at the Constitutional Court of the Republic of Indonesia

Protecting constitutional rights is one of the most fundamental issues that need in-depth study. Therefore, every country must uphold and provide citizens' constitutional rights fairly and fully in accordance with the provisions stated in the country's constitution. The Constitutional Court of the Republic of Indonesia is an institution that was born in addition to upholding the principles of the rule of law and is also based on providing maximum protection for democracy and the basic rights of citizens.

A *constitutional complaint* can be a complaint submitted by an individual to the Constitutional Court of the Republic of Indonesia regarding the actions (or omissions) of a public institution that violates the basic or constitutional rights of the person concerned (Palguna, 2013)^[9]. However, it is different in Indonesia; the Constitutional Court of the

Republic of Indonesia has not yet had the authority to adjudicate cases in the form of constitutional complaints because it has not been included in one of its powers.

The Constitutional Court is a new phenomenon in the world of state administration. This means that the constitutional complaint authority possessed by the Constitutional Court of the Republic of Indonesia in various countries in general is also a new phenomenon for countries that are transitioning towards constitutional democracy. Considering that these model countries have experienced authoritarian political history, there are many state violations of the constitutional rights of their citizens (Guyanie, 2013)^[6].

It has been described previously that constitutional rights are part of the constitution, so constitutional rights also have a role as a limitation on state power. A constitutional complaint is a form of protecting constitutional rights through a court mechanism. The court referred to here is a court specifically assigned the function of carrying out a Constitutional Review – in this case, the Constitutional Court of the Republic of Indonesia. All countries that adopt a constitutional complaint mechanism and institutionalize their constitutional review in a centralized manner give the MK RI the authority to try cases of constitutional complaints. So it can be concluded that constitutional complaint which functions as a mechanism for protecting the constitutional rights of citizens, clearly cannot be separated from the basis for the existence of the Constitutional Court of the Republic of Indonesia as an institution that is deliberately designed to carry out the function of constitutional review. This is because, through the Constitutional complaint mechanism, citizens can bring problems with their constitutional rights to the Indonesian Constitutional Court directly, whereas, through other mechanisms (such as an abstract judicial review or concrete judicial review), access to the Indonesian Constitutional Court can only be done indirectly.

There are other arguments regarding the authority of constitutional complaints, namely that what is emphasized through the establishment of a separate and autonomous institution called the Constitutional Court is that the Constitution provides real protection both for democracy and for the rights of citizens. Constitutional complaints are one clear example of this form of protection (Palguna, 2013)^[9]. In a modern, democratic legal state, the constitutional complaint is a legal effort to legally protect human dignity, which cannot be contested to protect it from acts of state power. Not only regarding concrete problems, the constitutional complaint authority, which until now has not been adopted in Indonesia, has, been adopted and applied in other countries, unlike the case with Indonesia, which until now has not adopted the constitutional complaint mechanism into one of the powers of the Constitutional Court of the Republic of Indonesia.

The concept of the constitutional complaint is very closely related to the principle of constitutionalism because it is one way for individual citizens to fight for their constitutional rights which the government or other state organs have violated; in this case, the violation is not limited to the formulation of laws as in constitutional Review, but wider into the stages of policies or other decisions of state organs. In principle, all forms of loss or violation of the constitutional rights of citizens can be adjudicated through the courts to restore these rights (Zoelva, 2012)^[13].

In its journey, Indonesia has made Constitutional Review a mechanism to protect constitutional rights. It must be

admitted that the existence of this Constitutional Review mechanism has contributed to the strengthening and soundness of the constitutional system and national laws. In the past, many laws created by the government and the DPR were only used as a kind of "rubber stamp" without being able to cancel their validity, even though their contents were considered to be strong violations of the Constitution. Changes to laws that have been problematic in the past can only be carried out through a legislative review, which is heavily influenced by the government (Mahfud, 2010)^[8]. However, there are problems in the Constitutional Review mechanism in Indonesia, namely the existence of restrictions on the legal standing of applicants. One of the reasons which a UUUN can be tested in the Constitutional Court of the Republic of Indonesia is if the law harms the constitutional rights of citizens. Article 51 paragraph (1) of the Constitutional Court Law of the Republic of Indonesia essentially states that those who can become petitioners in reviewing a law against the 1945 Constitution of the Republic of Indonesia are those whose constitutional rights and/or authorities have been harmed by the enactment of a law (Collins et al., 2018)^[3]. These restrictions can certainly have implications for the not optimal function of the Constitutional Court of the Republic of Indonesia in the effort to create a constitutional democracy and develop national law. The condition that the constitutional complaint mechanism has not been adopted at the Constitutional Court of the Republic of Indonesia shows that the constitutional review system in Indonesia still has an imbalance because it is only able to reach the abstract norm review of laws. As a result, the space for constitutional review in Indonesia is narrow.

Conclusions

Two things must be observed in connection with the proposal to adopt a constitutional complaint mechanism on a limited basis. First, even though the substance of the petition is a constitutional complaint, the petition itself is constructed as a request for law review. That is, it does not add to the powers of the Constitutional Court, which has been determined in a limited manner by the 1945 Constitution. Second, the petition can only be made by a party who has, in fact, suffered from a loss of constitutional rights caused by an erroneous interpretation and application of the law.

In contrast to the practice that has been taking place in the Constitutional Court, where not only parties who have factually suffered from impaired constitutional rights but parties who (according to reasonable reasoning) have the potential to suffer constitutional harm due to the enactment of law have also been deemed to have sufficiently complied. A requirement to be accepted for legal standing as an applicant; in the proposed constitutional complaint mechanism, factual losses are a must to meet the requirements for legal standing.

References

1. Asshiddiqie, Jimly. *Perkembangan & Konsolidasi Lembaga Negara Pasca Reformasi*. Jakarta: Sinar Grafika, 2012.
2. Asshiddiqie, Jimly. *Agenda Pembangunan Hukum Nasional di Abad Globalisasi*. Jakarta: PT Balai Pustaka, 1998.
3. Collins, Satria Josua dan Pan Mohamad Faiz. "Penambahan Kewenangan Constitutional Question di Mahkamah Konstitusi sebagai Upaya untuk Melindungi Hak-Hak Konstitusional Warga Negara (Expanding the Authority of Constitutional Question in the Constitutional Court as an Effort for Protecting Citizens' Constitutional Rights)". *Jurnal Konstitusi*, 2018:15:4.
4. Devanta, Vino. "Menggagas Constitutional question dalam Memproteksi Hak Konstitusional Masyarakat Mengenai Kehidupan dan Kebebasan Beragama di Indonesia". *Jurnal Konstitusi*, 2010, 7(3).
5. Fadjar, Abdul Mukhtie. *Hukum Konstitusi dan Mahkamah Konstitusi*. Jakarta, 2003.
6. Guyanie, El Gugun. "Urgensi Pengujian Constitutional question oleh Mahkamah Konstitusi Republik Indonesia" *Jurnal Agama dan Hak Azazi Manusia*, 2013, 3(1).
7. Lubis, Solly. "Pembangun Hukum Nasional". (makalah disampaikan pada: Seminar Pembangunan Hukum Nasional VIII Tema Penegakan Hukum Dalam Era Pembangunan Berkelanjutan Diselenggarakan oleh Badan Pembinaan Hukum Nasional Departemen Kehakiman dan Hak Asasi Manusia RI). Denpasar 14-18 Juli, 2003.
8. Mahfud MD. Moh. *et al. Constitutional Question: Alternatif Baru Pencari Keadilan Konstitusional*. Malang: Universitas Brawijaya Press, 2010.
9. Palguna, I Dewa Gede. *Pengaduan Konstitusional (Constitutional question): Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*. Jakarta Timur: Sinar Grafika, 2013.
10. Randang B. Frankiano. "Membangun Hukum Nasional yang Demokratis dan Cerdas Hukum". *Servanda Jurnal Ilmiah Hukum*, 2009, 3.
11. Setiawan, Heru. "Mempertimbangkan Constitutional Complaint Sebagai Kewenangan Mahkamah Konstitusi". *Lex Jurnalica* 1, 2017.
12. Siahaan, Maruarar. 2003. *Prosedur Berperkara di Mahkamah Konstitusi dan Perbandingandengan Hukum Acara di Pengadilan Umum dan TUN*. Jakarta: Sinar Grafika.
13. Zoelva, Hamdan. "Constitutional question Dan Constitutional Question dan Perlindungan Hak-Hak Konstitusional Warga Negara". *Jurnal Media Hukum*, 2012, 19(1).