

CONSTITUTIONAL COMPLAINT THROUGH CONSTITUTIONAL COURT AS PROTECTION OF CONSTITUTIONAL RIGHTS OF CITIZENS (COMPARATIVE STUDY OF THE CONSTITUTIONAL COURTS OF GERMANY AND SOUTH KOREA)

Rofi Rasyidah
Mohammad Jamin

ABSTRACT

Constitutional Complaint is part of the constitutional court's authority and the best solution in providing comprehensive protection of citizens' constitutional rights. South Korea and Germany both have adopted this authority, but Indonesia didn't. The constitutional complaint mechanism is proof of commitment in realizing the constitutional right's protection and the fundamental rights of citizens. The Constitutional complaint mechanism is not an impossibility to be realized as the new authority of the Indonesia's constitutional court. Furthermore, Indonesia should adopt the concept of constitutional Complaints, like Germany and South Korea did. The solution to this problem is to amend article 24c paragraph 1 of the Indonesia's constitution (the 1945 Constitution) by adding a clause on the authority of the Constitutional Court to handle constitutional complaints and revising Law No. 24 of 2003 on Constitutional Court.

Keywords: Constitutional Complaint, Constitutional Court, Germany, South Korea.

INTRODUCTION

Fundamental rights as Indonesian citizens, are clearly regulated in the basic constitution on the 1945 constitution, including our constitutional right (Palguna, 2013). The various powers of the Constitutional Court are in the fundamental basis of the Indonesian state, one of which is conducting a Judicial Review. Based on article 24c paragraph 1 of the Indonesian constitution, the constitutional court can examine laws against the 1945 constitution. In addition, the constitutional court has the right to decide cases concerning disputes between institutions, disbanding political parties, and disputes over election results. More details the structure of the authority of the Constitutional Court is described in Law No. 24 of 2003 on the Constitutional Court. The legislators have reasons and considerations so that they place the judicial review of the Constitution in the first order, which logically means that the essential power of the Constitutional Court is to lead a constitutionalism examination. For this reason, the Constitutional Courts in other countries, apart from being given the authority of judicial review or constitutional review, and adjudicate cases of constitutional question and constitutional complaint.

Along with the increasing awareness of the people's constitutional rights, the idea of a constitutional complaint was proposed as an alternative to protect human rights. Although not yet popular among the general public, constitutional complaint is a hot topic of discussion among academics and practitioners of constitutional law when applied in Indonesia. When a violation of constitutional rights happens, the party who feels aggrieved can submit his case to the Constitutional Court as a constitutional complaint. There are no regulatory instruments to litigate legal settlement path. The issues submitted were government policies, statutory regulations under laws that exclusively violated the contents of the Constitution but did not violate higher laws and limitations under the Constitution, and court decisions that violated constitutional rights even though they had been had permanent legal force and could not be rechallenged with higher regulatory efforts, for example, a decision on cassation or judicial review comes from the Supreme Court which turns out to be detrimental to a person's constitutional rights (Isharyanto, 2016).

Meanwhile, the presence of this Constitutional Complaint should provide more comprehensive access to justice for the community. The discourse to adopt the authority of the Constitutional Court has been included in the Problem Inventory List (DIM) of the Constitutional Court Bill, to be precise in Article 10A of the initial draft of the Constitutional Court Bill. However, after a few days of discussion, the constitutional complaint arrangement was agreed to be abolished. The reason for the rejection by le is because of the background of political interests.

Indonesia, especially its Constitutional Court, does not yet have the authority to handle and decide cases of constitutional complaints until now. Several academics and the public have begun to criticize the rejection of the draft addition to the constitutional complaint authority. In addition, constitutional complaints have been discussed explicitly in decision number of the Constitutional Court Number 013-022/PUU-IV/2006 contained a dissenting opinion. Constitutional Justices I Dewa Gede Palguna and Soedarsono argued about a constitutional norm that, when applied in practices, could cause a violation of a person's constitutional rights due to misinterpretation and application of the models (Abdul Latif, 2009).

Germany and South Korea serve as guides for researchers in reviewing the relevant constitutional complaint arrangements as the Indonesian constitutional court's new powers. As is known, Germany, Korea, and Indonesia are countries that have the same principle (the rule of law). Both Indonesia and Germany adhere to the civil law system, although the legal system is different (Mauro Cappelletti, 1989). Meanwhile, South Korea and Indonesia are united states. In both countries, Germany and South Korea have implemented constitutional complaints as part of the authority of the constitutional court. Based on these similarities, Indonesia needs to implement a constitutional complaint, like those two countries.

RESEARCH METHODS

This type of research is legal research, centered on the object of legal science in the form of coherence between legal norms and legal principles, between legal rules and legal norms (Peter Mahmud, 2014). The data used in this research was secondary data, mostly from books and journal articles (Soejono Soekanto, 2007). The researcher used a comparative approach, to analyze and explain similarities and differences across the practice of implementing Constitutional Complaints in the two countries, Germany and South Korea. Legal research compiled by the author is normative legal research or doctrinal research in order to find out and formulate the legal arrangements regarding constitutional complaints in terms of legality.

RESULT AND DISCUSSION

A. The authority of constitutional complaints to the constitutional courts of the German and South Korean constitutional courts in a comparative perspective

The function of constitutionality in a state of the law is essential. In its implementation, various countries have carried out to provide public access to constitutional review. The existence of limitations in presenting Constitutional Complaints is a challenge in itself. Besides that, several countries have implemented the concept of Constitutional Complaints first. Citizens who feel disadvantaged because of a decision that is considered detrimental to their constitutional rights cannot file a Constitutional Complaint effort because Indonesia has not adopted this authority.

The implementation of the constitutional review is more specific with Constitutional Complaints in various countries, including Germany and South Korea. Understanding of the practice of Constitutional Complaints in two countries, it can be seen that both countries are Germany and South Korea, which adhere to constitutional testing with a centralized model (centralized model). Constitutional Complaint is proof of the state's commitment to the protection of citizens. Thus, the implementation of constitutional complaints in the two countries can be a guideline for the Indonesian state to adopt it as the new authority of the constitutional court the Republic of Indonesia.

Article 111 paragraph (1) of the Law of the South Korea's Constitutional Court, explained about the powers granted include, among others, constitutional review, impeachment, dissolution of political parties, disputes over the authority of state institutions, and constitutional complaints. The various powers possessed by the South Korean Constitutional Court reflect the Constitutional Court, which maximizes the function of the constitutional institution as a guardian of the constitution as an unitary state.

Article 68 paragraph (2) of the Law of the South Korea's Constitutional Court, regulates the types of constitutional complaints. First, any citizen who claims the government has violated his constitutional rights files a constitutional complaint, called a constitutional complaint as a remedy of right. Second, any individual citizen can submit a review of the law to the general court. However, suppose the public court rejects the request for consideration of the law. In that case, the individual can file a Constitutional Complaint as the Constitutional Review of Statute to the South Korea's Constitutional Court, but on condition that the general court has rejected the constitutionality application (Article 41 paragraph (1) of the Law of the South Korea's Constitutional Court)

The material for a constitutional complaint is the same: a written application to the court that includes information of the appealing general court, information on the case and the parties, reasons for the law to be interpreted as unconstitutional, and other necessary matters. The applications is limited to 30 days after notification of the refusal from the general court to request a constitutional review. In that condition, the Constitutional Court can stop the exercise of government power that violates fundamental rights.

For the examination procedure, under Article 72 of the Law of the South Korea's Constitutional Court, the President of the Constitutional Court may appoint a Panel of Judges consisting of three Constitutional Judges each and request the Panel of Judges to examine all complaints of violations of constitutional rights. The Panel of Judges will stop the process of examining the constitutional Complaint by unanimous vote if it does not meet the formal requirements to file a constitutional complaint. Suppose the Panel of Judges does not obtain a final decision beyond 30 days of applying. In that case, Constitutional Justices will take over and examine it.

The Germany's Federal Constitutional Court is the supreme constitutional court, named *Bundesverfassungsgericht*. Article 90 of *BverfGG*, the constitutional Complaint can only be submitted when all legal remedies have been taken and are still detrimental to the complainant (exhausted). However, the German Constitutional Court can immediately decide on a constitutional lawsuit even though legal remedies have not been entirely carried out with specific provisions. When the constitutional complaint has fulfilled the elements, the Germany's Constitutional Court can directly make a decision. A settlement through another court taken first would cause a severe and unavoidable loss to the complainant. The complainant can file a constitutional complaint at the State Constitutional Court and will not be affected by the constitutional complaint to the German constitutional court. The application for a constitutional complaint contains a violation of rights due to negligence or the actions of the relevant organ or official suspected of committing a breach. Parties who can apply for a constitutional complaint are individuals or individuals for violations of fundamental rights or rights specified explicitly in the GG, and the commune or commune associations, for violations related to the rights of the commune to organize its government.

The explanation of the facts for the legal standing constitutional complaint must be in such detail that the possibility of this violation of human rights becomes clear. That is the aspect of substance fulfilment. The request should be the current impact, meaning that the perceived impact must be actual. Regarding expiration, in Germany, the time limit for filing a constitutional complaint against a single decision is one month. On the other hand, challenging a law is one year after the law has permanent legal force.

The practice of implementing Constitutional Complaints in South Korea and Germany has its differences. The South Korea's Constitutional Complaint within its authority is more limited than that of the Germany's Constitutional Court. The judicial review of the law's constitutionality at the South Korean Constitutional Court can only exercise this authority in concrete cases, and which has legal standing as an applicant is the court. Legal entities are not permitted to be as applicants. Meanwhile, in Germany, individuals are given legal standing to file the constitutional complaint as judicial review of the law's constitutionality. Like Germany, which recognizes abstract law testing, South Korea does not have that authority.

B. The ideal legal arrangement for the Republic of Indonesia's Constitutional Court

Based on the relevance or similarities of various state structures, Indonesia should obtain one of the authorities regarding Constitutional Complaints because the primary function of establishing the Constitutional Court in a country is to carry out the constitutionality testing.

The idea of a constitutional complaint is theoretically related to the existence of the function of the Constitutional Court as an institution authorized to carry out the role of constitutional review. So, there is no exercise of authority by one branch of state power that sacrifices the jurisdiction of another unit of state power, and the implementation of checks and balances in the control of the constitutional court to protect the state's constitutional rights. Because the welfare of the citizens of the fulfillment of human rights as aspired by the basic Constitution is a consequence of the Indonesian state adhering to the rule of law. This constitutional mechanism will have its meaning due to the strong urge to uphold the principles of constitutionalism and the regulations of a democratic state. Thus, keeping the principles of constitutionalism will provide hope for the citizen's protection against injustice. Legal constitutionalism concerns constitutional rights and the protection of these rights from political interference. Therefore, issues of urgency must be given special attention as the background for making amendments to the fundamental Constitution. The application for constitutional Complaints in Indonesia is valid in a limited way when the existence of a law is considered to interfere with the constitutional rights of citizens (through judicial review) (Jimly Asshiddiqie, 2012)

Arrangement ideas Constitutional Complaint by the Court Constitution can be made using several ways, including revising the law of the constitutional court Law No. 24 of 2003 of Constitutional Court, by adding the letter e after the letter f in Article 10 paragraph 1 with "deciding on the constitutional complaint." After that, there needs to be an amendment to the fundamental constitution, especially in Article 24c paragraph 1, to add the constitutional complaint in one of the constitutional court's powers.

The amendments have been implemented since 1999 until the last 4 times in 2001. Agreements related to amendments to the 1945 Constitution, among others, by not making changes to the fundamental Constitution; Keep up with the Unitary State of the Republic of Indonesia; changes are made through an addendum, not change the official arrangement of government; just as the clarifications of the 1945 Constitution and their explanations are included in the articles. The party that has the power to amend the 1945 Constitution is the People's Consultative Assembly.

The process of amending the 1945 Constitution is certainly not an easy thing to do. The fifth amendment to the constitution is a political necessity. The momentum for carrying out the fifth amendment must be comprehensive under the consensus on which articles need to be amended for the benefit of the citizens. The purpose of the amendment to the 1945 Constitution is to perfect the Constitution. After that, Constitution can reach the goal of forming a constitution as a protector of citizens' rights and providing legal certainty for the community.

If the amendment of the 1945 Constitution happened, it it won't change the chain of importance of laws and guidelines under the Constitution. Because, only the Constitutional Court can decide about constitutional complaints, while the district court will not be given this authority. The constitutional complaint hopefully become the last alternative for the applicant when he has taken other legal remedies. In addition, to avoid the dualism of decisions between fellow judicial institutions.

CONCLUTIONS AND SUGGESTIONS

1. The practice of implementing Constitutional Complaints in South Korea and Germany has its differences. The implementation of South Korea's Constitutional Complaint in its authority is more limited than that of the German Constitutional Court. The judicial review of the law's constitutionality at the South Korean Constitutional Court can only exercise this authority in concrete cases, and which has legal standing as an applicant is the court. Legal entities are not permitted to be as applicants . Meanwhile, in Germany, individuals are given legal standing. Like Germany, which recognizes abstract law testing, South Korea does not have that authority.
2. The ideal legal arrangement of submitting a constitutional complaint into the Constitutional Court's powers, is our hope to uphold the protection of constitutional rights, which the 1945 Constitution protects. The fundamental changes of the 1945 NRI Constitution are essential to explain that a constitutional complaints practice to decide on the constitutional complaint case has become necessary. There needs to be an amendment to the fundamental constitution of Republic of Indonesia, especially in Article 24c paragraph 1, to add the constitutional complaint become part of constitutional court's powers.

REFERENCES

- Abdul, Latif. (2009). *Functions of the Constitutional Court Efforts to Realize a Democratic Rule of Law*. Yogyakarta: Kreasi Total Media.
- I Dewa Gede Palguna. (2013). *Constitutional Complaints Legal Remedies for Violations of Citizens' Constitutional Rights*. Jakarta : Sinar Grafika.
- Isharyanto. (2016). *The State of Law and Constitutional Review in Theory and Practice in Indonesia*. Jakarta: Halaman Moeka Publishing.
- Jimly, Asshiddiqie. (2012). *Constitutional Courts in 10 Countries* . Jakarta : Sinar Grafika,
- Mauro, Cappelletti. (1989). *The Judicial Process in Comparative Perspective*. Oxford: Clarendon Press.
- Peter Mahmud, Marzuki. (2014). *Legal Research Revised Edition*. Jakarta: Kencana Prenada Media Group.
- Soerjono, Soekanto. (2007). *Introduction to Legal Research*. Jakarta: UI Press.
- Constitution of The Republic of Indonesia 1945
- Law No. 24 of 2003 on Constitutional Court
- Law of the South Korea's Constitutional Court
- Law of the of Germany's Constitutional Court (Bundesverfassungsgericht)
- The Indonesian Constitutional Court's Decision No. 013-022/PUU-IV/2006

Rofi Rasyidah
Faculty of Law, Sebelas Maret University
Jl. Ir. Sutami No 36A, Jebres, Surakarta, Indonesia
Email: rofirasyidah8@gmail.com

Mohammad Jamin
Faculty of Law, Sebelas Maret University
Jl.Ir.Sutami No. 36A,Jebres,Surakarta,Indonesia
Email: mohjamin@staff.uns.ac.id