

# CONSTITUTIONAL COMPLAINTS AS EXTRAORDINARY LEGAL REMEDIES AGAINST VIOLATIONS OF CITIZENS CONSTITUTIONAL RIGHTS

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## Abstract

*Indonesia adheres to the doctrine of constitutionalism, thus the assurance of protection for citizens' constitutional rights needs to be implemented. Constitutional violations against citizens' rights currently lack extraordinary legal measures to address them. Therefore, the author analyzes the necessity of extraordinary legal measures (Constitutional Complaint) for ensuring the protection of citizens' constitutional rights. The author employs a normative legal research method with a normative juridical approach, collecting secondary and primary legal sources, including secondary and tertiary sources. The legal materials used consist of books, journals, scholarly works, articles, and relevant legal foundations. In this research, the primary legal foundation emphasized is the 1945 Constitution of the Republic of Indonesia. To analyze this data, a descriptive analysis technique is used by gathering references from various sources, aligning them with the used legal foundation, and then conducting an analysis. The results of this research indicate the necessity of granting Constitutional Complaint authority to the Constitutional Court to provide legal certainty and ensure the protection of the constitutional rights of justice seekers.*

**Keywords:** *Constitutional Rights, Constitutional Complaint, Constitutional Court.*

## I. INTRODUCTION

Indonesia adheres to the ideology of constitutionalism, stated in Article 1 Paragraph (2) of the 1945 Constitution of the Republic of Indonesia (1945 Constitution) namely "sovereignty is in the hands of the people and implemented according to the Constitution". This understanding means that the administration of government or the state, namely law, becomes a barrier to the possibility of arbitrariness of power and secondly, full political accountability from the government to those who are governed ( *governed* ).<sup>4</sup>

The status of the 1945 Constitution plays an important role as the highest basic law in a country to guarantee the protection of the human rights of citizens and as a rule that limits the powers of the state government.

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<sup>4</sup> CH. Mellwain< in Point tutik Quarter, 2008, Fundamentals of Indonesian Constitutional Law After the Amendments to the 1945 Constitution, page 77.

But there are still violations of citizens' constitutional rights at this time because the existence of a legal norm turns out to be contrary to the constitutional rights of citizens, violations committed by public institutions (legislative, executive and judicial) are also a problem and are still ongoing.

One of the legal efforts made by citizens to fight for their constitutional rights is through constitutional complaints. Constitutional complaints are complaints or lawsuits filed by individuals (citizens) to court, in this case to the Constitutional Court, against an act or omission committed by an institution or public authority (*public institution, public authority*) which results in the violation of basic rights (*basic rights*) of the person concerned.<sup>5</sup>In general, constitutional complaints can be accepted if all available legal remedies have been passed.

One of the cases in the Constitutional Complaint is the issuance of Governor of East Java Decree Number 188/94/KPTS/013/2011 concerning the Prohibition of the Activities of the Indonesian Ahmadiyah Muslim Community (JAI) in East Java province.<sup>6</sup>Constitutionally, the state guarantees the freedom of each citizen to embrace their own religion.<sup>7</sup>So that the Decree of the Governor of East Java violates the right to freedom of belief, including freedom to worship according to one's beliefs.

In another case, based on Komnas Perempuan data, the number of regional regulations that are discriminatory against women continues to increase. In 2009 - 2012 there were 154 and there were additions of 74 policies, so that there were 228 policies.<sup>8</sup>This policy resulted in women not being able to enjoy their rights guaranteed in the constitution. Resistance to discriminatory policies has been tried by submitting a *Judicial Review* to both the Supreme Court and the Constitutional Court, but the results turned out to be unsatisfactory for the applicants.

Then, based on the letters and applications received by the Registrar's Office of the Constitutional Court during 2005, there were at least 48 letters or requests that could be categorized as *Constitutional Complaints* or 3 (three) times the number of *Judicial Review requests* in the same year.<sup>9</sup>

Various efforts have been made by citizens to fight for their constitutional rights. However, the Constitutional Court refused to examine and decide on Constitutional Complaint cases on the grounds that they did not have the authority to handle *Constitutional Complaint cases*. In the understanding of constitutionalism, the Constitution guarantees and protects the basic rights of citizens, also provides

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<sup>5</sup>I Dewa Gede Palguna, 2013, *constitutional complaint (constitutional complaint) against legal remedies against violations of citizens' constitutional rights*, Sinar Graphic, Jakarta, page 5

<sup>6</sup>Moh. Mahfud MD, 2010, "Constitution and Law in Controversial Issues", Jakarta Rajawali Press, pp.286-287.

<sup>7</sup>Article 29 paragraph (2) of the 1945 Constitution of the Republic of Indonesia.

<sup>8</sup>Working paper of the Women's Commission, 2013, strengthens the mechanism for fulfilling women's constitutional rights through constitutional complaints at the Constitutional Court, page 2

<sup>9</sup>Secretariat General and Registrar of the Constitutional Court of the Republic of Indonesia, Summary of Constitutional Court Decisions 2003-2008.

or determines procedures or procedures for realizing these constitutional rights. It is the duty of the state to protect and realize these rights. However, in reality the 1945 Constitution does not give authority to any state institution to handle constitutional complaints against citizens whose constitutional rights have been violated by public institutions.

Based on the brief description above, the author wishes to conduct a study entitled "Constitutional Complaints as Extraordinary Legal Remedies Against Violations of Citizens' Constitutional Rights."

## II. DISCUSSION

### **The Urgency of Setting Constitutional Complaints as Extraordinary Legal Measures Against Violations of Citizens' Constitutional Rights**

The 1945 Constitution has regulated and guaranteed the constitutional rights of citizens. Regulated in Article 27, Article 28 and Article 29 of the 1945 Constitution. Of course these regulations apply to all citizens without exception. However, in practice, not all violations of citizens' constitutional rights are caused by provisions in the constitution that are considered contrary to citizens' fundamental rights caused by state institutions or public bureaucracy. To guarantee the constitutional rights of citizens, it is necessary to have extraordinary legal remedies, namely Constitutional Complaints which have been implemented in several countries such as the United States, Germany and South Korea.

On the one hand, Indonesia adheres to the *civil law* tradition, where *precedent* is not the main source of law but only as a law it should be interpreted, so that it is not a binding source of law. So that different decisions arise in cases or similar issues which are very open because the judge is not bound by the previous decision. In relation to Constitutional Complaints, such legal uncertainty increases because in the event of a case where there are two or more different judges' decisions regarding a similar problem and all of the judge's decisions are decisions of the highest level court, then in such circumstances there is definitely a violation of constitutional rights, namely the right to fair legal certainty.

In a modern democratic legal state, *Constitutional Complaint* is a legal effort to legally safeguard human dignity which cannot be contested so that it is safe from acts of state power. *Constitutional Complaint* is a mechanism for constitutional lawsuits as a means of protecting human rights. *Constitutional Complaints* provide guarantees that in determining processes in the administration of the state, both in the making of laws, the process of state administration and judicial decisions, they do not violate constitutional rights.<sup>10</sup>The absence of a *Constitutional Complaint mechanism* in Indonesia will reduce Indonesia's legitimacy as a modern, democratic

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<sup>10</sup>Slamet riyanto, "Protection of Constitutional Rights with the *Constitutional Complaint Mechanism* through the Constitutional Court", <http://riyants.wordpress.com/>, accessed on 29 May 2019

legal state because there is no effort by the public to question the treatment of authorities who are indicated to have violated their human rights guaranteed by the 1945 Constitution.

Based on Pan Mohamad Faiz's investigation of letters and requests received by the MK Registrar's Office during 2005, there were 48 letters or requests that could be categorized as *Constitutional Complaints*. This number is three times the number of *Judicial Review applications* submitted to the Constitutional Court in the same year.<sup>11</sup> That is, this number at least shows that the need for citizens to channel *Constitutional Complaints* in order to defend their constitutional rights is important and urgent.

Several cases of violations of citizens' constitutional rights that were not handled because there was no institution to channel *Constitutional Complaints* were the issuance of the Decree of the Governor of East Java Number 188/94/KPTS/013/2011 concerning Prohibition of the Activities of the Indonesian Ahmadiyya Muslim Community (JAI) in the province.<sup>12</sup> who violates the right to freedom of belief including the freedom to worship according to one's beliefs. In addition, there were several cases examined and decided by the MK, including: *first*, Case Number 016/PUU-I/2003 which was a request for cancellation of the Supreme Court Review Decision filed by Main Bin Rinan. The Court in its Decision Amar stated that the Constitutional Court of the Republic of Indonesia had no authority to try this case. *Second*, Case Number 061/PUU-II/2004 which is a request for cancellation of two conflicting Supreme Court Review Decisions submitted by the CDR. HR Prabowo Surjono. In its Decision Amar the Court is of the opinion that the petition cannot be accepted.<sup>13</sup>

*Third*, Case Number 004/PUU-III/2005 with the principal case Review of Law Number 4 of 2004 Concerning Judicial Power Chapter VI Article 36 paragraphs (1), (2), and (3) is contrary to the Constitution of the Republic of Indonesia of 1945. The application was filed by Melur Lubis, who stated in the petition that there was an alleged element of bribery in the decision of the Supreme Court. In its Decision Amar, the Court is of the opinion that the petition of the petitioner cannot be accepted. *Fourth*, Case Number 013/PUU-III/2005 with the subject matter of Reviewing Law Number 41 of 1999 concerning Forestry against the 1945 Constitution of the Republic of Indonesia. The request was filed by the Central Leadership Council of the People's Shipping Entrepreneurs Association (DPP PELRA) which in its application stated that there had been deviations from the application of statutory

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<sup>11</sup> <http://panmohamadfaiz.com>., accessed on 3 July 2011.

<sup>12</sup> <http://www.republica.co.id>. 02/03/2011, accessed on 29 September 2011.

<sup>13</sup> MK Republik Indonesia, 2019, "The Constitutional Court Decision", Serial Online, (Cited, 2019, October, 15), Available from: URL: <http://www.https://mkri.id/index.php?page=web.Verdict&id=1&kat=1&search>.

norms. In its Amar Decision, the Mahkamah is of the opinion that the petition cannot be accepted.<sup>14</sup>

*Fifth*, Case Number 018/PUU-III/2005 with the subject matter of Reviewing Law Number 23 of 2002 Concerning Child Protection Against the 1945 Constitution of the Republic of Indonesia. The request filed by Ruyandi M. Hutasoit stated in his petition that there was a wrong interpretation in the application of the law. In its Decision Amar, the Court is of the opinion that the Petition cannot be accepted.<sup>15</sup>

Seeing the substance of the petitioner's petition in broad outline is a *Constitutional Complaint matter* . The problems in this case include the implementation of laws, government policies that violate constitutional rights, conflicting general court decisions, allegations of irregularities in law enforcement to government negligence in compiling the Final Voters List (DPT) for the Presidential Election, which of these matters are several cases of judicial review at the Constitutional Court which are substantially more towards *Constitutional Complaint*

Therefore it can be concluded that at least Indonesia needs a *Constitutional Complaint mechanism* in realizing the constitutional rights of its people which have been adapted to the conditions in Indonesia. So that in relation to constitutional complaints, such legal uncertainty is very urgent considering the increasing number of cases related to violations of citizens' constitutional rights.

### **Mechanism for Settlement of Constitutional Complaints in the Context of Fulfilling Citizens' Constitutional Rights Violated by Public Institutions**

Based on the urgency of the need for *Constitutional Complaints* to be implemented in Indonesia. So the question now is which institution has the authority to handle this *Constitutional Complaint case* considering that there is no single institution that has been specifically given authority to handle *Constitutional Complaint cases* . For this reason, it is necessary to study further regarding which institution is appropriate to be given authority .

One of the judicial institutions in Indonesia is the Constitutional Court (MK). The establishment of the Constitutional Court was also driven by reasons, among others , as a consequence of the realization of a democratic rule of law and a democratic state based on law. The fact shows that a decision reached democratically is not always in accordance with the provisions of the constitution which apply as the supreme law. Therefore, we need an institution that has the authority to examine the constitutionality of laws, namely the Constitutional Court.

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<sup>14</sup>MK Republik Indonesia, 2019, "Putusan MK", Serial Online, (Cited, 2019, October, 15), Available from: URL : <https://mkri.id/index.php?page=web.Putusan&id=1&kat=1&cari=013%2FPUU-III%2F2005> +

<sup>15</sup>MK Republik Indonesia, 2019, "Putusan MK", Serial Online, (Cited, 2019, October, 15), Available from: URL : <https://mkri.id/index.php?page=web.decision&id=1&kat=1>

currently Indonesian citizens think their constitutional rights have been impaired by the enactment of a law, they can directly submit the law in question to the Constitutional Court of the Republic of Indonesia to be tested for its constitutionality, without even having to be represented or accompanied by legal counsel, and if it is proven that the law is indeed detrimental to the constitutional rights of the Indonesian citizens concerned, the Constitutional Court of the Republic of Indonesia will declare that the law is contrary to the 1945 Constitution and at the same time declares it to have no binding legal force.<sup>16</sup>

The existence of a Constitutional Complaint mechanism has become a necessity, both theoretically and empirically. In other words, having the authority to try cases of Constitutional Complaints by the Indonesian Constitutional Court is a necessity. It's just that, to make it happen is not easy, because the authority of the Constitutional Court of the Republic of Indonesia has been regulated and determined in a limited way in the 1945 Constitution, especially in Article 24 C Paragraph (1).

If one looks at the history of the presence of Constitutional Complaints or what are known as *Constitutional Complaints*, the Constitutional Court was the first to implement and develop *Constitutional Complaint authority* as the German Federal Constitutional Court (*Bundesverfassungsgerichts*). Article 93 paragraph (1) point 42 *Grundgesetz Bundesrepublik Deutschland* (19th amendment, January 29, 1969) gave constitutional authority to the German Federal Court (*Bundesverfassungsgerichts*) to handle and adjudicate Constitutional Complaint cases by individuals, on the grounds that their human rights as citizens of the state or one of the human rights thereof, as set forth in certain articles in the constitution (*Grundgesetz*), have been violated by government officials.<sup>17</sup>

Testing the constitutionality of legal norms, in this case statutory norms, as a form of constitutional review has its own meaning, especially in the history of the growth of the idea of a rule of law state. It can be said as a marker of the birth of the principle of constitutionalism which later emerged as the main characteristic of a rule of law and democracy.<sup>18</sup> The review of the constitutionality of laws or *Judicial Review on the constitutionality of law*, which was later popularly called *the Judicial Review*, is based on the idea that the constitution is a basic or fundamental law. Meanwhile, the notion that the constitution is a basic or fundamental law was born after the US registered itself as the nation as well as the first state to formulate its constitution in written form. Meanwhile in Germany, the idea of adopting a *Judicial Review* actually existed for almost half a century before the birth of the German

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<sup>16</sup>I Dewa Gede Palguna, op. cit., p. 493

<sup>17</sup>HM Laica Marzuki, "Constitutional Complaint, An Idea of Legal Minds", in "Maintaining the Pulse of the Constitution; Reflection on One Year MK" (editor Refly Harun et al), (Jakarta: Constitution Press), 2004, p. 29

<sup>18</sup>*Ibid.*, p. 253

Constitutional Court (which was formed at the same time as the acceptance of the new German constitution, namely the *Basic Law* or *Grundgesetz* in 1949).<sup>19</sup>

Seen from the point of view of protecting citizens' constitutional rights, the institution of reviewing the constitutionality of laws or *Judicial Review* is an affirmation as well as a guarantee that constitutional rights are fundamental rights, so that violations against them, even if carried out by law, are violations of legal provisions. fundamental that guarantees that right, namely the Constitution.<sup>20</sup> So looking at the history of the birth of the Constitutional Court and the purpose of forming MKs in the world, it becomes consistent if we place the authority of Constitutional *Complaints* into the authority of the Indonesian Constitutional Court.

Therefore, it is necessary to expand the authority of the Constitutional Court by amending the 1945 Constitution of the Republic of Indonesia With the presence of the fifth amendment to the 1945 Constitution of the Republic of Indonesia, it will be very possible to increase the authority of the Constitutional Court in handling *Constitutional Complaint cases* to answer and overcome problems that have been experienced by Indonesian citizens in fighting for their constitutional rights. In addition, the logical consequence of the presence of the 1945 Amendment is that the related law will be revised following the amendment to the 1945 Constitution.

Besides that, Settlement of *Constitutional Complaint* Without Going Through Amendments to the 1945 Constitution. To expand the authority of the Constitutional Court can also be done without going through a formal amendment to the 1945 Constitution of the Republic of Indonesia, because theoretically and empirically a *Constitutional Complaint* is a citizen's need. For this reason, efforts that can be made are through *Legislative Interpretation* and through *Judicial Interpretation*.<sup>21</sup>

*Legislative interpretation* is an authentic or official interpretation of the legislature regarding a number of meanings in the law, in this case the Constitutional Court Law (UUMKL). As is well known, the official interpretation or interpretation is the interpretation made by legislators regarding certain meanings or terms used in the laws they make.<sup>22</sup> Meanwhile, *Judicial Interpretation* is an interpretation with a way of thinking that explains how the judiciary should provide a legal interpretation of a law, especially the Constitution.<sup>23</sup>

Thus, if the Constitutional Court of the Republic of Indonesia can develop a constitutional interpretation that events or cases which substantially constitute Constitutional Complaints fall within the scope of their authority, then the

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<sup>19</sup>Donal P. Kommers, *The Constitutional Jurisprudence of the Federal Republic o Germany* , Duke University Press, Durham and London, 1989.

<sup>20</sup> *ibid*

<sup>21</sup>I Dewa Gede Palguna, Constitutional Complaint, op.cit. matter. 600

<sup>22</sup>R. Soeroso, 2008, Introduction to Law, Sinar Graphic: Jakarta, p. 107-108.

<sup>23</sup>Saldi Isra and Feri Amsari, Changes to the Constitution Through Interpretation of Judges, (Cited 2019 October 9 ) Available From: URL : [http://bphn.go.id/data/documents/makalah\\_fgd.rtf](http://bphn.go.id/data/documents/makalah_fgd.rtf)

procedural law can be regulated in the Constitutional Court Law without having to wait for the amendments to the 1945 Constitution of the Republic of Indonesia.

### III. CONCLUSION

The 1945 Constitution regulates and guarantees the constitutional rights of citizens through Article 27, Article 28, and Article 29. Although these rules apply to all citizens, there have been violations of these rights in practice, both by state institutions and public bureaucracy. In an effort to ensure the constitutional rights of citizens, a Constitutional Complaint Mechanism is necessary. This is needed to protect human rights, ensure the legality's compatibility with the constitution, and safeguard human dignity from state actions. Legal uncertainty becomes a serious issue when there are differing judicial decisions on similar matters. In countries that follow a civil law tradition like Indonesia, where precedent is not the primary source of law, different decisions can arise. This can lead to violations of the right to legal certainty. Indonesia needs a Constitutional Complaint Mechanism to safeguard the constitutional rights of its citizens. This is crucial to maintain Indonesia's legitimacy as a modern democratic rule of law state and provide the public with a tool to question the actions of authorities that are deemed to violate constitutional rights.

Currently, the Constitutional Court (MK) in Indonesia is the institution empowered to test the constitutionality of laws. Indonesian citizens can submit laws believed to infringe upon constitutional rights to the Constitutional Court for constitutional review. There's a possibility of expanding the authority of the Constitutional Court through the fifth amendment to the 1945 Constitution. This would grant the Constitutional Court more authority in handling Constitutional Complaint cases and addressing the constitutional rights issues experienced by citizens.

Expanding the Constitutional Court's authority can also be achieved without amending the 1945 Constitution. This can be done through interpretation by the legislative body or through interpretation by judicial institutions.

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