

A PROSPECT AND CHALLENGES FOR ADOPTING CONSTITUTIONAL COMPLAINT AND CONSTITUTIONAL QUESTION IN THE INDONESIAN CONSTITUTIONAL COURT

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Abstract

A jurisdiction of the Indonesian Constitutional Court concerning constitutional adjudication is only limited to review the constitutionality of national law. There is no mechanism for challenging any decision or action made by public authorities that violate fundamental rights enshrined in the Indonesian Constitution. This article argues that constitutional complaint and constitutional question might be adopted as new jurisdictions of the Indonesian Constitutional Court in order to strengthen the protection of fundamental rights of its citizen. It also identifies main problems that will be faced by the Constitutional Court in exercising constitutional complaint and constitutional question. For instance, the Court will be burdened with too many cases as experienced by other countries. A clear mechanism for filtering applications lodged to the Constitutional Court and the time limit for deciding cases are important elements that have to be regulated to overcome the problems. In addition, the institutional structure of the Constitutional Court has to be improved, particularly to support its decision-making process.

Keywords: Constitutional Complaint, Constitutional Court, Constitutional Question, Fundamental Rights, Individual Application.

I. INTRODUCTION

One of the main agendas from constitutional reform in Indonesia that occurred from 1999 to 2002 is to strengthen the protection and promotion of human rights. The result of constitutional amendments has incorporated a specific chapter concerning constitutional guarantees of fundamental rights and freedoms which were adopted from the Universal Declaration of Human Rights and various international covenants. An effort to enforce those human rights is carried out by establishing several state institutions, particularly the Constitutional Court as a separate and independent court from the Supreme Court.

The Indonesian Constitutional Court is granted several constitutional powers, namely: (1) to review constitutionality of law; (2) to decide disputes concerning the authorities of state institutions whose powers are derived from the Constitution; (3) to decide matters concerning dissolution of political parties; (4) to decide disputes over the result of general elections; (5) to decide legal matters concerning impeachment process of the President and/or the Vice President. At the time of writing, the Constitutional Court has decided 3,519 cases with detailed statistics as follows.

Figure 1
Statistics of the Constitutional Court Decisions
(August 2003 – April 2016)

Type of Jurisdiction	Total Decision	Grant-ed	Re-jected	Inad-missible	With-drawn	Injuc-tion	Dis-missed
Constitu-tional Review	815	187	280	261	87	-	-
Dispute of State Institution	25	1	3	17	4	-	-
Legislative Election	1,826 (is-sues)	120	1,224	400	44	38	

Type of Jurisdiction	Total Decision	Grant-ed	Re-jected	Inad-missible	With-drawn	Injuc-tion	Dis-missed
Presidential Election	4	-	4	-	-	-	-
Local Election	849	73	459	288	26		3
Dissolution of Political Party	-	-	-	-	-	-	-
Impeach-ment	-	-	-	-	-	-	-

Source: Website of the Indonesian Constitutional Court

Mechanism of constitutional review in the Constitutional Court is the most frequent legal remedy used by justice seekers to protect their fundamental rights. The legality of a part or an entire law that is contrary to the Indonesian Constitution can be annulled by the Constitutional Court. However, constitutional review in the Indonesian Constitutional Court is only limited to national law, not other types of laws or decisions. From the perspective of constitutional government, it is believed that the current jurisdiction of the Indonesian Constitutional Court cannot optimally protect fundamental rights of its citizens. There is no direct mechanism available to the Court when citizens feel their fundamental rights have been violated by decisions, policies or actions made by public authorities or state institutions. In addition, the Indonesian constitutional adjudication system does not provide a mechanism for ordinary judges to ask the Constitutional Court concerning the constitutionality of laws or regulations being used as the basis for examining their cases.

Based on a comparative study of constitutional courts from different countries, the two mechanisms explained above are known as constitutional complaint and constitutional question. What are the characteristic of constitutional complaint and constitutional question cases? How can constitutional complaint and

constitutional question be adopted as the Indonesian Constitutional Court's jurisdiction? This article will investigate what constitutional complaint and constitutional question are and how the mechanisms could be adopted into the constitutional adjudication system in Indonesia. It will also highlight several aspects that should be considered seriously if these mechanisms are to be adopted by the Indonesian Constitutional Court.

II. DISCUSSION

A. Constitutional Complaint

Constitutional complaint provides one of the major powers of constitutional courts to protect the fundamental rights of citizens. It is defined as a complaint to a constitutional court, lodged by individuals who feel their fundamental or constitutional rights are being violated by public authorities.¹ In some circumstances, municipalities or associations of municipalities, on the basis of their right to self-government, may also lodge a constitutional complaint.² Dannemann suggests that constitutional complaint has several characteristics determined by four factors: (1) availability of legal remedies against violations of constitutional rights; (2) existence of a separate process that only examines constitutional issues of an act, not other legal issues; (3) it can be submitted by individuals who are directly affected by that act; and (4) the court that decides a constitutional complaint has a power to restore the rights of victims.³

The constitutional complaint can only be accepted by a constitutional court if all available legal remedies have been carried out or exhausted through the judicial process. In addition, all possibilities to correct or prevent violations of the Constitution must be used. This requirement is also identified as subsidiarity of the constitutional complaint.⁴ In some countries, the constitutional complaint can be directed towards an act of public authority, the constitutionality of laws

¹ Victor Ferreres Comella, "The Consequences of Centralizing Constitutional Review in a Special Court: Some Thoughts on Judicial Activism", *Texas Law Review*, Volume 82, Issue 7, June 2004, p. 710.

² Article 93(1)(4b) of the Basic Law for the Federal Republic of Germany.

³ Gerhard Dannemann, "Constitutional Complaints: The European Perspective", *The International and Comparative Law Quarterly*, Volume 43, Issue 1, January 1994, p. 142.

⁴ See The Federal Constitutional Court of Germany, *Constitutional Complaint*, http://www.bundesverfassungsgericht.de/EN/Verfahren/Wichtige-Verfahrensarten/Verfassungsbeschwerde/verfassungsbeschwerde_node.html, accessed 8 March 2016.

or court decisions.⁵ The constitutional court only examines the conformity of an act against the Constitution, while the assessment of legal issues and other facts remain the authority of ordinary courts. As long as no violation of fundamental rights or constitutional rights occurs, the constitutional court is bound by decisions of ordinary courts.⁶

A study conducted by the Venice Commission in 2010 concerning the efficiency of individual complaint procedures in over fifty countries concluded that there are two types of individual access, namely: (1) a normative constitutional complaint that allows the individual to file a complaint on the violation of fundamental rights based on the unconstitutionality of a law; and (2) a full constitutional complaint that allows the individual to file a complaint on the violation of fundamental rights not only based on the unconstitutionality of law, but also an unconstitutional decision made by other ordinary courts and the Supreme Court.⁷

Constitutional Court power to examine constitutional complaint cases exists in many countries. This power is also known by different terms. For instance, in Western Europe, the Austrian Constitutional Court uses the original term of *Individualbeschwerde*,⁸ the German Constitutional Court knows it as *Verfassungsbeschwerde*⁹ and the Spanish Constitutional Court refers to this power

⁵ Constitutional complaint against decisions of an ordinary court is not intended to review the decisions as a whole, but to examine whether the court has violated constitutional law. When there is a fact concerning the presence of a mistake in the process, findings, interpretation or application of a law in individual cases, it cannot be directly interpreted as a violation of fundamental rights. See The Federal Constitutional Court of Germany, *Instructions on Lodging a Constitutional Complaint with the Federal Constitutional Court*, http://www.bundesverfassungsgericht.de/EN/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt_node.html;jsessionid=2C026E2CDFCF7EA417D663C5E084D94C.2_cid361, accessed 8 March 2016.

⁶ I Dewa Gede Palguna, *Pengaduan Konstitusional (Constitutional Complaint) sebagai Upaya Hukum Perlindungan Hak-Hak Konstitusional Warga Negara: Studi Kewenangan Mahkamah Konstitusi Republik Indonesia dengan Rujukan Amerika Serikat, Republik Federal Jerman, dan Korea Selatan sebagai Perbandingan* [Constitutional Complaint: Legal Remedy of Protection of Citizen's Constitutional Rights: A Study on the Indonesia's Constitutional Court Competence in a Comparative Perspective], Doctoral Thesis, The University of Indonesia, 2011, p. 1.

⁷ Gianni Buquicchio, "Constitutional Complaint as an Instrument for Protecting Fundamental Rights of Citizen" in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint*, the Constitutional Court of the Republic of Indonesia, 2015, pp. 168-169.

⁸ Article 139, Article 140 and Article 144 of the Austrian Constitution and § 82 of the Austrian Constitutional Court Law. The Austrian model of constitutional complaint does not allow to challenge a court decision before the Constitutional Court although the court's decision is alleged to violate fundamental rights. However, this mechanism is being studied to be improved and has been included in the constitutional reform draft. See Anna Gamper and Francesco Palermo, "The Constitutional Court of Austria: Modern Profiles of an Archetype of Constitutional Review" in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds & Hill, 2009, pp. 44-45.

⁹ Article 93(1)(4a) of the Basic Law for the Federal Republic of Germany and §§ 90 et seq. of the German Federal Constitutional Court Law. See also Donald P. Kommers and Russell A. Miller, "Da Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court" in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds & Hill, 2009, pp. 112-113.

as *recurso de amparo*.¹⁰ A constitutional complaint mechanism is also practiced in Central and Eastern European countries, such as Croatia,¹¹ Czech Republic,¹² Hungary,¹³ Poland,¹⁴ Russia¹⁵ and Ukraine.¹⁶

In Asia, several constitutional courts hold a power to examine constitutional complaint cases, such as in Azerbaijan,¹⁷ South Korea,¹⁸ Thailand¹⁹ and Turkey.²⁰ Furthermore, many constitutional courts in Latin America have similar power to constitutional complaint known as *juicio de amparo* or *writ of amparo*, for

¹⁰ Article 53(2) of the Spanish Constitution and Article 41 to Article 47 and Article 50 of the Spanish Constitutional Court Law. See also Victor Ferreres Comella, "The Spanish Constitutional Court: Time for Reforms" in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds & Hill, 2009, pp. 182-183.

¹¹ Article 128 of the Constitution of the Republic of Croatia; Article 62 to Article 80 of the Constitutional Court Law of the Republic of Croatia; and Article 24 to Article 25 and Article 80 to Article 82 of the Rule of Procedure of the Constitutional Court of the Republic of Croatia. Further discussion on constitutional complaint cases in Croatia, see Dragana Bjelić and Mirela Mezak Stastny, "Constitutional Complaint as an Instrument of Fulfilling the Worker's Rights in Croatian Legal System", *International Journal of Social, Behavioral, Educational, Economic, Business and Industrial Engineering*, Volume 5, Issue 5, 2011, pp. 750-753.

¹² Article 87(1) of the Constitution of the Czech Republic and Article 72 to Article 84 of the Constitutional Court Law of the Czech Republic.

¹³ See Article 24(2) of the Fundamental Law of Hungary (as enacted on 25 April 2011); Article 26 to Article 31 of the Constitutional Court Law of Hungary (2011); and the Decision 1001/2013. (II. 27.) AB Tű. on the Constitutional Court's Rules of Procedure. Discussion on the development of constitutional complaint in Hungary, see Fruzsina Gárdos-Orosz, "The Hungarian Constitutional Court in Transition - From Actio Popularis to Constitutional Complaint", *Acta Juridica Hungarica*, Volume 53, Issue 4, 2012, pp. 302-315.

¹⁴ Article 79(1) and Article 188 of the Constitution of the Republic of Poland; Article 27 and Article 46 of the Constitutional Tribunal Law of the Republic of Poland. Further discussion on constitutional complaint in Poland, see Lech Garlizky, "Constitutional Complaint in Poland", a paper presented at the *Conference of the Constitutional Control Organs of the Countries of New Democracy*, the Constitutional Court of Armenia and the European Commission for Democracy through Law of the Council of Europe, Yerevan, 24 October 1997.

¹⁵ Article 125 (4) of the Constitution of the Russian Federation and Article 3 of the Federal Constitutional Law of the Constitutional Court of Russian Federation. See also Mikhail I. Kleandrov, "Institute of Constitutional Complaint of Citizens at the Constitutional Court of the Russian Federation", in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint*, the Constitutional Court of the Republic of Indonesia, 2015, pp. 221-224.

¹⁶ Article 150 of the Constitution of Ukraine (as amended by the Law № 2952-VI dated 1 February 2011) and the Law № 586-VII dated 10 September 2013; Article 13, Article 42, Article 43, and Article 82 to Article 85 of the Constitutional Court Law of Ukraine dated 17 May 2012. A case example of constitutional complaint in Ukraine, see The Constitutional Court of Ukraine, "Decision of the Constitutional Court of Ukraine in the Matter of the Constitutional Petition of Sixty People's Deputies of Ukraine Regarding an Official Interpretation of the Provisions of Article 103.1 of the Constitution of Ukraine in the Context of the Provisions of Its Articles 5 and 156, and the Constitutional Complaint of Citizens Vadym Serhiiovych Halaichuk, Viktoria Valentynivna Podhorna, and Tetiana Volodymyrivna Kysla Regarding an Official Interpretation of the Provisions of Articles 5.2, 5.3, and 5.4 of the Constitution of Ukraine (Case of the Exercise of Power by the People)", *Statutes and Decisions*, Volume 44, No. 3, May-June 2009, pp. 26-34.

¹⁷ Article 130 para V of the Constitution of the Republic of Azerbaijan (as result of Referendum held on 18 March 2009) and Article 34 of the Constitutional Court Law of the Republic of Azerbaijan.

¹⁸ Article 111(1) of the Constitution of the Republic of Korea; Article 68(1) and (2) of the Constitutional Court Law of the Republic of Korea. The constitutional complaint becomes a very important power for the Constitutional Court of Korea. See also Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases*, Cambridge: Cambridge University Press, 2003, pp. 206-246.

¹⁹ Section 212 of the Constitution of the Kingdom of Thailand. Further discussion on the Constitutional Court of Thailand, see Chalermpon Ake-uru, "Promotion of Democracy and Constitutional Justice: the Case of Thailand", <http://www.aaccei.org/ccourtDo wn?bbsSeqn=258&fileSeqn=2>, accessed 28 February 2016, pp. 6-7; Andrew Harding and Peter Leyland, "The Constitutional Courts of Thailand and Indonesia: Two Case Studies from South East Asia" in Andrew Harding and Peter Leyland (eds), *Constitutional Courts: A Comparative Study*, London: Wildy, Simmonds & Hill Publishing, 2009, p. 122.

²⁰ Article 148 of the Constitution of the Republic of Turkey (as amended on September 12, 2010; Act No. 5982); Article 45 to Article of Law on the Establishment and Rules of Procedure of the Constitutional Court of Turkey (Law No: 6216, adopted 30 March 2011). The regional position of the Constitutional Court of Turkey is interesting. Turkey is a member of the Conference of European Constitutional Court and a member of the Association of Asian Constitutional Court and Equivalent Institution (AACCEI). In examining constitutional complaint or individual application cases, the Court uses the European Convention on Human Rights (ECHR) as its foundation. Further discussion on the constitutional complaint in Turkey, see Hüseyin Ekinci and Musa Sağlam, *Individual Application to the Turkish Constitutional Court*, Ankara: The Constitutional Court of Turkey, 2015; Nazlı Can Ülvan, "Constitutional Complaint and Individual Complaint in Turkey", *Ankara Bar Review*, Volume 6, Issue 2, 2013, p. 179-186.

example Chile, Colombia, Ecuador, Mexico and Venezuela.²¹ Currently, some countries, such as France, Italy, Lithuania and Macedonia, lack a constitutional complaint mechanism and are working towards developing one to be adopted as an additional power in their constitutional courts.²²

In Indonesia, the Constitutional Court does not have a power to examine constitutional complaint cases. However, in a draft constitutional amendment, the Constitutional Commission (*Komisi Konstitusi*) proposed a constitutional complaint mechanism to the People's Consultative Assembly (*Majelis Permusyawaratan Rakyat* or MPR), suggesting that the Constitutional Court should hold a power to examine constitutional complaint cases.²³ According Palguna, Justice of the Indonesian Constitutional Court who involved in amending the Constitution, there was no further discussion in the MPR concerning this issue. The MPR members did not follow up the Constitutional Commission's proposal.²⁴ There is no clear explanation for why the MPR rejected this idea.²⁵ Nevertheless, there are several possible reasons to explain the MPR's stance.

First, to maintain their influence and power, political interests between political factions dominated the constitutional amendment process in establishing the Constitutional Court. Thus, the amendment process was not predominantly led by sound discussions with intent to form a robust constitutional adjudication system. Second, the MPR did not want a Constitutional Court with full authority to protect fundamental rights or constitutional rights of citizens due to concerns

²¹ Discussion on *writ of amparo* in Latin America, see Gianluca Gentili, "A Comparative Perspective on Direct Access to Constitutional and Supreme Courts in Africa, Asia, Europe and Latin America: Assessing Advantages for the Italian Constitutional Court", *Penn State International Law Review*, Volume 29, Issue 4, 2011, pp. 710-715.

²² See Otto Pfersmann, "Concrete Review as Indirect Constitutional Complaint in French Constitutional Law: A Comparative Perspective", *European Constitutional Law Review (EuConst)*, Volume 6, Issue 2, June 2010, p. 223-248; Gentili, *op. cit.*; Aušra Kargaudienė, "Individual Constitutional Complaint in Lithuania: Conception and the Legal Issues", *Baltic Journal of Law & Politics*, Volume 4, Issue 1, January 2011, pp. 154-168; Tanja Karakamisheva, "Constitutional Complaint- Procedural and Legal Instrument for Development of the Constitutional Justice (Case Study – Federal Republic of Germany, Republic of Croatia, Republic of Slovenia and Republic of Macedonia)", a paper presented at *the World Conference on Constitutional Justice*, the Constitutional Court of South Africa and the Venice Commission, Cape Town, 24 January 2009.

²³ Hamdan Zoelva, "Pengaduan Konstitusional (*Constitutional Complaint*) dalam Sistem Peradilan di Indonesia [Constitutional Complaint in Judicial System in Indonesia]" *Jurnal Negarawan*, Volume 16, May 2010, p. 53. The Constitutional Commission was an ad hoc body formed by the MPR to conduct a study and give recommendations on the 1945 Constitutional amendment. This Commission consisted of experts chaired by Professor Sri Soemantri and supported by Albert Hasibuan (Deputy Chairman I), Isaac Latuconsina (Deputy Chairman II), Sri Adiningsih (Secretary), and DR. N.E. Fatima (Deputy Secretary). Unfortunately, recommendations submitted by the Constitutional Commission to the MPR were not binding.

²⁴ Dewa Gede Palguna, "Overcoming Constitutional Obstacles in Dealing with Constitutional Complaint Issues: Indonesia's Experience" in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint*, the Constitutional Court of the Republic of Indonesia, 2015, p. 148.

²⁵ *Ibid.*

that the Court would examine the human right violations committed during the New Order.

Third, the MPR considered that introducing a constitutional complaint mechanism, with aims to challenge actions and decisions of the government, would reduce the authority of state officials and public authorities to act and make decisions, or create policies. Fourth, the MPR also believed the Court would be burdened with too many cases if it held authority to examine constitutional complaint cases, as compared to other countries with a similar mechanism. Fifth, the MPR concerned that giving a constitutional complaint power to the Constitutional Court will lead a potential conflict of jurisdiction with other courts, particularly the Supreme Court.

Now, more than twelve years after the establishment of the Constitutional Court, I am of the opinion that the MPR's reasons in rejecting constitutional complaint are no longer relevant. A constitutional complaint mechanism might be adopted in the constitutional adjudication system in Indonesia that upholds strong principles of constitutionalism and places the Constitution as the supreme law of the land.²⁶ In realising such principles, Indonesia has committed to implementing a system of constitutional government. One of the major elements derived from a constitutional government system is protection of fundamental rights of citizens, as explicitly contained in Chapter XA of the constitutional bill of rights in the Indonesian Constitution.²⁷ However, the inclusion of fundamental rights guaranteed in the Constitution is certainly not enough. It needs a reliable mechanism to protect, adhere to and enforce those rights.

Currently, Indonesia only provides limited protection for citizens who feel their fundamental rights have been violated. Only the Constitutional Court can directly examine a case of constitutional rights violation of individuals, yet it is limited to reviewing the constitutionality of laws. Given that the violations of constitutional rights not only occur because of the substance of national laws, but also because of actions or decisions taken by public authorities or state

²⁶ Article 1 para (2) of the Indonesian Constitution states, 'Sovereignty is in the hands of the people and is implemented according to the Constitution.' Moreover, Article 1 (3) states, 'The state of Indonesia is a law state.'

²⁷ Article 28 to 28J of the Indonesian Constitution.

institutions, the absence of a constitutional mechanism that can protect the constitutional right of Indonesian citizens is tantamount to negating an essential element in implementing the system of constitutional government. Therefore, adopting a constitutional complaint mechanism is imperative to strengthen the implementation of the constitutional government system, particularly in providing full protection of citizen's constitutional rights.

The need for establishing a constitutional complaint mechanism in Indonesia can also be seen in many cases lodged with the Constitutional Court that have similar characteristics to constitutional complaint cases.²⁸ The Court Registration Division, without any trial, rejected most of those cases because the applications were assessed to be beyond the Constitutional Court's jurisdiction.²⁹ However, there were also several cases examined by the constitutional justices through court hearings, even though these cases, in substance, were constitutional complaint cases. This practice frequently occurs when petitioners modify a constitutional complaint application so that it becomes a case of constitutional review or dispute between state institutions. These cases can be categorised as 'pseudo-constitutional complaint'. As a result, many legal arguments constructed by the applicants use concrete cases, whereas the doctrine held by the Constitutional Court in reviewing the constitutionality of laws is abstract.

Furthermore, some of Constitutional Justices delivered dissenting opinions in a constitutional review case where they argued that constitutional complaint cases should be examined and decided by the Constitutional Court. Justice Siahaan wrote, 'Therefore, there are reasons to assess from the angle of individual constitutional complaint that actually has a sufficient legal basis based on the

²⁸ Applications and letters received by the Court Registrar in 2005 or two years after the Court establishment showed that there were at least 48 petitions that had similar characteristics of constitutional complaint cases. This amount was equivalent to three times of judicial review applications in the same year. In its development, there have been approximately 106 petitions regarding constitutional complaint applications in 2010. See Pan Mohamad Faiz, 'Menabur Benih Constitutional Complaint' [Sowing the Seeds of Constitutional Complaint] <<http://panmohamadfaiz.com/2006/02/28/constitutional-complaint>>; and Hamdan Zoelva, above n 23, 54.

²⁹ In this context, Palguna suggested several case examples, such as Constitutional Court Case Number 016/PUU-I/2003 concerning the cancellation of Supreme Court decision on Reconsideration (*Peninjauan Kembali*); Constitutional Court Case Number 007/PUU-IV/2006 concerning the uncertainty of court process in an ordinary court and the allegations of bribery; Constitutional Court Case Number 030/PUU-IV/2006 concerning the authority to issue broadcasting licenses; and Constitutional Court Case Number 1/SKLN-VI/2008 concerning the findings of violations in local elections. See Palguna, *Pengaduan Konstitusional...*, *op. cit.*, p. 4.

principles contained in the 1945 Constitution.³⁰ Thus, if Indonesia has a strong commitment to implementing the principles of constitutional government, a constitutional complaint mechanism is very appropriate for protecting the fundamental rights and freedoms guaranteed by the Constitution. There are few alternative measures that afford such protection, as detailed below.

First, the most ideal way to adopt the constitutional complaint is to amend the Constitution by explicitly adding a constitutional complaint mechanism as one of the Constitutional Court's jurisdiction. In this manner, constitutional and political legitimacy would be achieved by giving the constitutional complaint mechanism the highest place in the constitutional system in Indonesia. In this context, Indonesian can learn from the Turkish Constitutional Court. Turkey amended their Constitution in 2010 to incorporate constitutional complaint as the newest jurisdiction of the Turkish Constitutional Court. As a result, they began receiving individual applications on 23 September 2012.³¹

Second, the establishment of constitutional complaint mechanism can be conducted by revising the Constitutional Court Law through a legislative review process. Legislators could expand the meaning of constitutionality of laws that are not only limited to laws made by the DPR, but also to the entire laws, regulations, actions and decisions made by public authorities and state institutions.³²

Third, if the first and second measures are too difficult, the Constitutional Court can make a constitutional interpretation by building a legal construction where a constitutional complaint is a part of the constitutional review system.³³ Thus, the Constitutional Court would have the power to hear and examine constitutional complaint cases, although it would lack legitimacy. In addition, the Court would be sharply criticised for practicing excessive judicial activism.

Furthermore, if the constitutional complaint is to be adopted into the system of fundamental rights protection in Indonesia, the improvement of

³⁰ See Constitutional Court Decision No. 001/PUU-IV/2006, reviewing the Supreme Court's Decision No. 01 PK/Pilkada/2005 concerning Regional Head Election in Depok (*Judicial Review on Depok Election* (2006) case).

³¹ See Burhan Üstün, "Protection of Human Rights by the Turkish Constitutional Court", a paper presented at the *International Conference on the Role of Constitutional Justice in Protecting the Values of the Rule of Law*, the Constitutional Court of the Republic of Moldova, Chişinău, 8 September 2014.

³² See Palguna, *Pengaduan Konstitusional...*, *op. cit.*

³³ See Faiz, *op. cit.*

the institutional structure of the Constitutional Court is a must. Additionally, limitations placed on constitutional complaint cases that can be examined by the Constitutional Court should be regulated. The experiences of other countries show that most cases examined by the constitutional courts have been constitutional complaints.

For instance, the Federal Constitutional Court of Germany received 200,482 (98%) constitutional complaints since 1951. This means that they receive around 5,000 constitutional complaint cases each year. This is only 2.5% of all constitutional complaint cases granted by the Federal Constitutional Court of Germany. In 2013, the Federal Constitutional Court of Germany received 6,238 constitutional complaint cases, but only 91 cases (1.46%) were granted.³⁴ Moreover, the Constitutional Court of South Korea received 26,006 constitutional complaint cases since it was founded in 1988. In other words, the Constitutional Court of South Korea receives about 1,000 constitutional complaint cases annually.³⁵ A similar condition is also faced by the Constitutional Court of the Russian Federation. The Court received more than 20,000 cases which more than 90% of those cases are related to constitutional complaints of its citizens.³⁶ Additionally, the Constitutional Court of Turkey received more than 45,000 individual application cases since constitutional complaint was implemented on 23 September 2012. The backlog is tremendously high. At the time of writing, the numbers of pending cases are roughly 20,000.³⁷ More than 85% of constitutional complaint cases handled by the Constitutional Court of Turkey are related to right to fair trial.³⁸

In contrast, the Indonesian Constitutional Court only received 1,708 cases over the past twelve years. In addition, 52% of the total cases handled by the Indonesian Constitutional Court were related to disputes over election results, both

³⁴ See The Federal Constitutional Court of Germany, *Annual Statistics 2013*, http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2013.pdf?__blob=publicationFile&v=1, accessed 10 March 2016.

³⁵ See The Constitutional Court of Korea, *Caseload Statistics*, [www.http://english.ccourt.go.kr/cckhome/eng/index.do](http://english.ccourt.go.kr/cckhome/eng/index.do), accessed 10 March 2016.

³⁶ Kleandrov, *op. cit.*, p. 222.

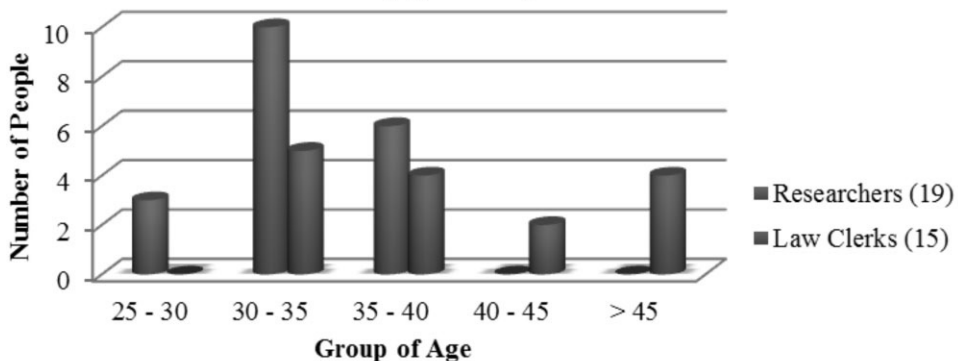
³⁷ See The Constitutional Court of Turkey, *Individual Application Statistics*, <http://anayasa.gov.tr/en/inlinepages/IndividualApplication/Statistics.html>, accessed 10 March 2016.

³⁸ Zühtü Arslan, "Constitutional Complaint as an Instrument for Protecting Basic Rights: The Case of Turkey" in M. Guntur Hamzah et al. (eds), *Proceeding of International Symposium on Constitutional Complaint*, the Constitutional Court of the Republic of Indonesia, 2015, pp. 174-175.

at the national and the regional level.³⁹ Although the Indonesian Constitutional Court received fewer cases than other constitutional courts, the Court still felt overwhelmed in resolving those cases. Therefore, several prerequisites must be considered if a constitutional complaint mechanism is to be adapted to the Indonesian Constitutional Court.

First, the organisational structure of the Indonesian Constitutional Court should be strengthened, particularly by increasing the number of skilled and experienced constitutional researchers and law clerks in order to support the constitutional justices in examining cases and making decisions. At the time of writing, the Indonesian Constitutional Court only has 19 researchers and 15 law clerks whose their average age is 36 years. With the current organisational structure, the Court will definitely face difficulty in handling constitutional complaint cases. Therefore, in the future, the structure and various programs of the Indonesian Constitutional Court should focus more on the management of case settlement as its primary function.

Figure 2
Statistics of Researchers and Law Clerks in
the Indonesian Constitutional Court
(April 2016)



Source: Human Resources and Finance Bureau of the Indonesian Constitutional Court

³⁹ See The Constitutional Court of Indonesia, *Case Recapitulation*, www.mahkamahkonstitusi.go.id, accessed 10 March 2016.

In this context, Indonesia can learn from Turkey's experiences. The 2010 Turkish constitutional amendment introduced the individual complaint system and restructured the Constitutional Court organisation. For instance, before the Constitutional amendment, they only had 11 Constitutional Justices and 20 Rapporteur Judges assisting the Court. After the amendment, the number increased to 17 Constitutional Justices, 77 Rapporteur Judges and 25 Assistant Rapporteur Judges. Previously, the Court exercised constitutional review in plenary session, but now two Sections were established for the purpose of handling constitutional complaint. In addition, three Commissions were also established under each section and the administrative bureau was strengthened.⁴⁰

Second, the Constitutional Court should be given an authority of the dismissal process conducted by a panel of justices, not by registrars or administrative officers, to sort out whether a case can be examined further in court hearings or should be dismissed directly. This filtering mechanism is needed to ensure the Constitutional Court handles caseloads properly.

Third, the Constitutional Court should make clear boundaries regarding constitutional complaint cases that can be examined. Some of the main limitations are: (1) the applicant must be an individual who directly suffered from the loss of their constitutional rights; (2) the application can only be submitted after it has exhausted all available legal remedies; (3) there must be a time limit for applying a constitutional complaint case after a court judgment, actions or decisions made by public authorities or state institutions which violate the constitutional rights of the applicant.

In the context of Indonesia, which has a vast territory lacking adequate access to transportation, information and communication, the time limit for applying a constitutional complaint case should be regulated for at least three months starting from the exhaustion of legal remedies. The comparison concerning the time limit for constitutional complaint submission in various countries can be seen in the following figure.

⁴⁰ Email from Mucahit Aydin (A Rapporteur Judge of the Constitutional Court of Turkey) to Pan Mohamad Faiz Kusuma Wijaya, 6 October 2015.

Figure 3

Table of Comparison on Constitutional Complaint Application

Country	Time Limit	Legal Basis
Austria	six weeks	Article 82 of the Constitutional Court Law
Croatia	30 days	Article 64 of the Constitutional Court Law
Hungary	60 days	Article 28 of the Constitutional Court Law
Germany	one month	Article 93(1) of the Federal Constitutional Court Law
South Korea	90 days	Article 68(1) of the Constitutional Court Law
Spain	30 days	Article 44(2) of the Constitutional Court Law
Turkey	30 days	Article 47 of the Constitutional Court Law

Source: Compiled by the author

B. Constitutional Question

In addition to constitutional complaint, another jurisdiction that might be adopted by the Indonesian Constitutional Court is the constitutional question. It is a mechanism that allows ordinary judges to review the constitutionality of laws or regulations being used to decide cases in ordinary courts. If judges are unsure or doubtful about the constitutionality of laws or regulations being used for examining their cases, they may delay the examination and question the Constitutional Court. In this matter, the Constitutional Court will only decide the constitutionality of the law or regulation in question. The ordinary judges will then determine the case based on the Constitutional Court's decision.⁴¹ While this mechanism has not been recognised in the Indonesian constitutional

⁴¹ Victor Ferreres Comella, "The European Model of Constitutional Review of Legislation: Toward decentralization?", *International Journal of Constitutional Law*, Volume 2, Issue 3, July 2004, p. 465.

adjudication system, in many countries, such as Austria, Belgium, Germany, Italy, Luxemburg, South Korea and Spain, the constitutional question has been implemented.⁴²

In Indonesia, litigants in ordinary courts file applications for constitutional review to the Constitutional Court by themselves without any assistance or coordination from the ordinary courts. For instance, this practice occurred in the *Leste Majeste* (2006) case. Eggi Sudjana, a political activist, who is also a popular lawyer, was charged, based on Article 134, Article 136 bis and Article 137 of the Indonesian Criminal Code, with insulting the president, known as the *Leste Majeste*. On his initiative, Sudjana lodged a constitutional review application with the Constitutional Court against those articles. The Constitutional Court annulled the articles as they proved to be contrary to the Constitution.⁴³

Although the Court annulled it, the ordinary court still sentenced him to three months in prison and probation for six months.⁴⁴ The legal reason given by the ordinary court was that the action committed by Sudjana occurred before the Constitutional Court declared its decision. According to the judges who decided the case, the effect of Constitutional Court's decision was not retroactive and only applied prospectively. In addition, the Supreme Court strengthened the lower court's decision.⁴⁵ Based on this case, the decision of the ordinary court or the Supreme Court would be different if the ordinary court held authority, or at least had an initiative, to apply a constitutional question to the Constitutional Court. Thus, the constitutional rights of citizens would be protected.

The constitutional question mechanism offers several advantages for the constitutional adjudication system in Indonesia. First, the constitutional question can strengthen the protection, respect and fulfilment of constitutional rights of citizens. Thus, if there are citizens who lack awareness or the ability to defend

⁴² Ibid.

⁴³ Constitutional Court Decision No. 013-022/PUU-IV/2006, reviewing Law No. 8 of 1981 on Indonesian Criminal Code. See also Naomita Royan, "Increasing Press Freedom in Indonesia: the Abolition of the Lese Majeste and 'Hate-Sowing' Provisions", *Australian Journal of Asian Law*, Volume 10, Issue 2, 2009, pp. 290-311.

⁴⁴ Hukum Online, "Eggy Divonis 3 Bulan Penjara [Eggy was sentenced to three months in prison]", 22 February 2007, <http://www.hukumonline.com/berita/baca/hol16258/eggy-divonis-3-bulan-penjara>, accessed 15 March 2016.

⁴⁵ Hukum Online, "Eggy Sudjana Ajukan PK Perkara Penghinaan Presiden [Eggy Sudjana filed a reconsideration of case for insulting the insulting the President]", 2 July 2010, <http://www.hukumonline.com/berita/baca/lt4c2d0148deb5e/eggy-sudjana-ajukan-pk-perkara-penghinaan-presiden>, accessed 15 March 2016.

their constitutional rights, they will still receive the minimum protection of constitutional rights without having to actively apply for a constitutional review case to the Constitutional Court.

Nonetheless, the submission of the constitutional question to the Constitutional Court remains highly dependent on the initiative and willingness of ordinary judges. Second, ordinary judges will no longer be forced to use the applicable laws or regulations in examining a case if they doubt that it has potential conflict with the Constitution. Third, the presence of the constitutional question will help to achieve a common understanding among ordinary judges of the importance in upholding the principles of the constitutionality of laws and regulations. If the mechanism of the constitutional question is adopted in Indonesia, the ordinary judges could be more critical of the constitutionality of laws and regulations.⁴⁶

Four options exist for the adoption of the constitutional question by the constitutional adjudication system in Indonesia. First, the best way to expand the Constitutional Court's jurisdiction is by adding the constitutional question as an additional power to the Court through a constitutional amendment. The main advantage in using this method is that there will be a strong constitutional basis for the Court to examine cases concerning constitutional questions. Second, the Constitutional Court Law could be revised by adding provisions that provide flexibility for ordinary judges to submit a constitutional complaint to the Constitutional Court. These provisions would be included in a specific chapter on constitutional review in the Constitutional Court Law, with an interpretation that the constitutional question is one of the constitutional review types provided by the Constitution.⁴⁷ Thus, the constitutional question would be part of constitutional adjudication under the Constitutional Court's jurisdiction.

Third, another option is to follow the mechanism adopted in the French system known as the *exception d'inconstitutionnalité*. In this system, if there

⁴⁶ See also I Dewa Gede Palguna, "Constitutional Question: Latar Belakang dan Praktik di Negara Lain serta Kemungkinan Penerapannya di Indonesia [Constitutional Question: Background and Practice in Other Countries and the Possibility of Its Implementation in Indonesia]", *Jurnal Hukum*, Volume 17, Number 1, January 2010, pp. 16-17.

⁴⁷ *Ibid* 16.

is a judge in lower courts who have questions on the constitutionality of laws, they can ask the Constitutional Court. However, the application should be sent to and examined first by the *Conseil d'État* or the *Cour de Cassation* prior to the submission to the Constitutional Council.⁴⁸ This system can also be applied in Indonesia without amending the Constitution or revising the Constitutional Court Law. According to the Constitutional Court Law, a state institution can apply for constitutional review.⁴⁹ The definition of state institutions here includes the Supreme Court.⁵⁰

Thus, if there is a constitutional question requested by ordinary judges in Indonesia, the application should be submitted to the Supreme Court. Using the constitutional review mechanism, the Supreme Court can lodge a constitutional question to the Constitutional Court. Nevertheless, this French system has a weakness if the Supreme Court does not follow up the request submitted by ordinary judges to the Constitutional Court. To prevent this deadlock, the Supreme Court has to create an internal regulation concerning the mechanism and procedure to request a constitutional question. This regulation provides assurance and certainty that the request will be submitted to the Constitutional Court if it meets the requirements. This guarantee is necessary so that ordinary judges will not hesitate or worry that the Supreme Court will dismiss their constitutional questions without adequate reasons.

Fourth, the Constitutional Court can make a constitutional interpretation that the definition of state institutions in constitutional review system includes general courts, consisting of public courts, religious courts, military courts and administrative courts. Thus, the constitutional interpretation made by the Constitutional Court will become a key to introducing a constitutional question

⁴⁸ Federico Fabbrini, "Kelsen in Paris: France's Constitutional Reform and the Introduction of a *Posteriori* Constitutional Review of Legislation", *German Law Journal*, Volume 9, Number 10, 2008, p. 1306; Myriam Hunter-Henin, "Constitutional Developments and Human Rights in France: One Step Forward, Two Steps Back", *The International and Comparative Law Quarterly*, Volume 60, Issue 1, January 2011, p. 187.

⁴⁹ See Article 51(1)(d) of the Constitutional Court Law. There was a case filed by 31 Justices from the Supreme Court for reviewing the constitutionality of Judicial Commission's power for monitoring and supervising the behaviours of Justices both in the Supreme Court. See Constitutional Court Decision No. 005/PUU-IV/2006, reviewing Law No. 22 of 2004 on Judicial Commission (*Judicial Commission* (2006) case).

⁵⁰ The only thing prohibited for the Supreme Court according to the Constitutional Court Law is that they become a party to the dispute over the authorities of state institutions. See Article 65 of the Constitutional Court Law and Article 2(3) of the Constitutional Court Regulation No. 08 of 2006 on Guidelines for Litigation in Dispute on Constitutional Authorities between State Institutions.

mechanism that can be used by ordinary judges. In addition, the procedures and requirements will be similar to the process of constitutional review of laws, except the Court creates new court regulation concerning special procedures and requirements for a constitutional question.

The four options explained above offer alternatives for adopting the constitutional question into the constitutional adjudication system in Indonesia. However, there is also a serious challenge that has to be overcome before the constitutional question can be adopted. The length of time in deciding a constitutional question case by the Constitutional Court should be an important concern. In some countries that have implemented this mechanism, the length of time in deciding a constitutional question case has become an obstacle for the ordinary courts in making their final decision.

In this context, Comella compared constitutional court hearings concerning constitutional question cases in European countries. He found that the length of time in deciding a constitutional question case varies. Luxemburg can resolve a constitutional question case in just a few months; while in Austria and Belgium it may take up to one year. In addition, Italy takes one to two years for deciding a constitutional question case. Surprisingly, Germany and Spain has taken five to eight years to decide constitutional question cases.⁵¹ Thus, the time limit for deciding a constitutional question case must be regulated based on the ability of the Constitutional Court in handling a case, either in the Constitutional Court Law or the Constitutional Court Regulation.⁵²

III. CONCLUSION

This article has analysed current challenges faced by the Indonesian Constitutional Court due to its limited jurisdiction. Without constitutional complaint and constitutional question jurisdiction, the Court cannot optimally safeguard the Constitution, particularly in protecting fundamental rights of

⁵¹ Comella, "The European Model of Constitutional Review of Legislation: Toward decentralization?", *op. cit.*, p. 471.

⁵² Article 86 of the Constitutional Court Law authorises the Constitutional Court to regulate further any shortcoming or absence of procedural law to support the implementation of its duties and responsibilities.

citizens. Thus, some developments related to its jurisdiction should be improved. The constitutional complaint and the constitutional complaint mechanism need to be adapted to the Indonesian Constitutional Court.

The most ideal way to add these jurisdictions to the Constitutional Court is by amending the Constitution. Thus, when the Constitutional Court exercises the jurisdictions there will be a strong basis and constitutional legitimacy. The main problems that will be faced when the Constitutional Court adopts these new jurisdictions are the number of cases that will increase sharply and the time limit for deciding cases. Therefore, a filtering mechanism of constitutional complaint cases needs to be established. In addition, the institutional structure, human resources and decision-making process have to be strengthened. Otherwise, the Court will be overwhelmed in receiving cases concerning constitutional complaint and constitutional question.

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