

CONSTITUTIONAL COMPLAINT AND THE PROTECTION OF CITIZENS THE CONSTITUTIONAL RIGHTS

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Abstract

Constitutional complaint is one of important issues to be dealt with by several countries issues adopting constitutional court in their national legal system and the Federal Constitutional Court Germany (*Bundesverfassungsgericht*) is considered by expert as one of the most advance mechanism among countries in dealing with the issue. Generally speaking, constitutional complaint can be described as a complaint or lawsuit filed by an individual citizen who deems his or her constitutional right (s) has been violates by act or omission of public institution or public official. Mostly, such a complaint can only be filed if there is no other legal remedy available or all legal remedies available have been exhausted. The Constitutional Court of The Republic of Indonesia however is not entrusted with authority to hear constitutional complaint case notwithstanding the fact that statistical data on judicial review cases filed by many petitioners before the Court were substantially constitutional complaint issues. It means that, empirically giving the Court to hear constitutional complaint case is necessarily pivotal and theoretically, the Court has the very foundation to be entrusted with such authority. Considering the complex mechanism to amend the Constitution of 1945, which exhaustively describe the court's authorities, this article offers the lawmaker a theoretical insight to give the Court a limited authority to hear constitutional complaint case by the way of amending the law on Constitutional Court.

Keywords: Constitutional Complaint, Constitutional Court and Constitutional Rights

I. INTRODUCTION

A. Background

The term of “constitutional complaint” applied in this paper refers to a legal remedy which takes the form of a complaint or lawsuit filed by an individual citizen who deems his or her constitutional right (s) has been violated by act or omission of public institution or public official. Generally such complaint may only be filed if all available legal remedies have been exhausted. It means that there is no legal remedies for the issue.¹ In many countries the authority to deal with the issue is in the hand of a constitutional court.

Meanwhile, constitutional rights are rights derived from human right concepts which are stated into and become part of the constitution.² Once such human rights have been adopted into and become a part of a constitution, the rights bind all branches state power divisions.³ Therefore, a breach to constitutional rights means a breach to the constitution and the rights holder must be given legal remedies to maintain his or her rights, which are guaranteed by the constitution. Constitutional complaints are one of such legal remedies.

The history of constitutional complaints begins and is directly related to and even a logical consequence of, “negara hukum” (here in after referred to as “constitutional state”) perspective.⁴ In brief, the theoretical construction is

¹ See The Federal Constitutional Court, “Constitutional Complaint” in <http://www.bundesverfassungsgericht.de/en/organization/verfassungsbeschwerde.html>, 4/24/2006, p. 2. See also Raymond Youngs, *English, French & German Comparative Law*, Second Edition, Routledge-Cavendish, London-New York, 2007, p. 48-49; Raymond Youngs, *Sourcebook on German Law*, Second Edition, Cavendish Publishing Ltd., London-Sydney-Portland, 2002, p. 91; Victor Ferreres Comella, “Is The European Model of Constitutional Review In Crisis?”, paper presented for the 12th Annual Conference on ‘the Individual Vs. the State’, Central European University, Budapest, June 18-19, 2004, p.3. David P. Currie, *The Constitution of the Federal Republic of Germany*, the University of Chicago Press, Chicago and London, 1994, p. 27.

² According to Baker, the history of the constitution is the history of initiatives to human rights acknowledgment and respect. Thus, such human rights are not solely related to constitutions but also incorporated into the constitutions. See Ernest Baker, *Reflection on Government*, Oxford University Press: Oxford, 1958, p. 30-31.

³ See further Durga Das Basu, *Human Rights in Constitutional Law*, Wadhwa and Company: New Delhi-Nagpur-Agra, specifically, 2003, p. 48-78 and p. 107-135.

⁴ There are three terminologies translated into “negara hukum” (in Indonesian) or “constitutional state”, i.e. *Rechtsstaat*, *Etat de droit*, *Rule of Law*. Even though such three terms are generally accepted as having an identical meaning, theoretically they have differences. According to Michel Rosenfeld, the term of *Etat de droit* (French) is a literal translation of the term of *Rechtsstaat* (German), which is more appropriately translated into *Etat légal*. In other words, the term of *Rechtsstaat* (German) will be more appropriate if it is translated into state rule through law (English) or *Etat légal* (France). Meanwhile, the term of *Etat légalis* more appropriately translated into state rule through democratically enacted law in English. Even though the terms of *Rechtsstaat* and *Etat légal* collectively refer to “a system of laws made by legislator”, only the term of *Etat légal* requires that legislators making such laws are elected democratically. In the meantime, the term of Rule of Law lies between *Rechtsstaat* and *Etat de droit*, i.e. covering laws made by legislators. However, such laws do not necessarily always take a form of a series of constitutional requirements which have legal force. Therefore, the Rule of Law does not depend on laws (as reflected in the term of *Rechtsstaat*) or written constitutions having legal force (as reflected in the term of *Etat de droit*). See Michel Rosenfeld, “Constitutional Adjudication in Europe and the United States: paradoxes and contrasts” in Georg Nolte (Ed.), *European dan US Constitutionalism*, Cambridge University Press, Cambridge-New York-Melbourne-Madrid-Cape Town-Singapore-São Paulo, 2005, pp. 204, 208, and 209.

explained as follows. The first characteristic of a modern constitutional state is constitutionalism,⁵ which means that state administration is based on and (therefore) may not contradict with constitutions. Therefore, constitution must be actually applied or complied with in practice, instead of merely playing an aspirational role it is. In order to secure strict compliance and performance of constitution in practice, the idea to establish a constitutional court emerges.

The main constitutional court's function is constitutional review, which includes both the constitutionality of legal norms as well as the constitutionality of actions or deeds. The constitutional review has two main tasks. First, maintaining the proper democratic process in a mutually intervening relationship between the legislative, executive, and judicial body. In other words, it means to prevent the seizure of power by one branch of state power at the expense of the others st. Second, protecting citizens' personal rights or lives against offenses committed by any branch of state powers.⁶

Therefore, it is understandable why Brown and Wise state that the idea to establish a Constitutional Court is an attempt to uphold the principles of rule of law and to provide maximum protection for democracy and human rights of citizens.⁷ Derived from this perspective, the constitutional court is granted an authority to decide a constitutional complaint case, as a part of the implementation of Constitutional Court's functions, i.e. to carry out a constitutional review. The objective is to provide maximum protection not only for the citizens' constitutional rights, but also for the democracy.

B. Questions

1. How the constitutional complaint mechanism applied at the Constitutional Court of Germany?
2. How the constitutional complaint mechanism should be applied in Indonesian legal system?

⁵ For further details on the characteristics of a constitutional state see, among others, Barry M. Hager, *The Rule of Law. A Lexicon for Policy Makers*, the Mansfield Center for Pacific Affairs, 2000.

⁶ H. Hausmaninger, *The Austrian Legal System*, Manzsche Verlags- und Universitätsbuchhandlung: Wien, 2003, p. 139. About the development of idea on this constitutional review, see, among others, Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara*, Second Edition, Jakarta:Konpres, 2005,p.1-47.

⁷ Trevor L. Brown & Charles R. Wise, "Constitutional Courts and Legislative-Executive Relations: The Case of Ukraine", *Polittical Science Quarterly*, Vol. 119, No. 1, 1994, p. 155.

II. DISCUSSION

A. Constitutional Complaints in Germany

This paper attempts to offer a possibility of applying the constitutional complaint mechanism in Indonesian legal system by granting an authority to decide constitutional complaint case to the Constitutional Court. However, there is problem as the 1945 Constitution has set out the Constitutional Court's authority in a limited manner in Article 24C paragraph (1) and (2). Thus, the available constitutional procedure to grant an authority to the Constitutional Court to decide constitutional complaint cases should be by amendment to the 1945 Constitution, particularly Article 24C. The final chapter of this paper tries to offer an alternative, i.e.a legal theoretical construction which may be used as the basis to grant such authority to the Constitutional Court without amending, and even remaining to rely on, Article 24C paragraph (1) of the 1945 Constitution.

Hence, it becomes important to review other countries' practices as references. However, this paper will only emphasize on the constitutional complaint practice in the Federal Republic of Germany, which is in this case, the Constitutional Court of the Federal Republic of Germany (*Bundesverfassungsgericht*, hereinafter referred to as the Constitutional Court of Germany), as a comparative reference. There are several reasons to choose Germany as the comparison.

First, a constitutional complaint is a part of a constitutional review, in which Indonesia and Germany adopt the same model.⁸ Even though these two countries apply the same model, the Constitutional Court does not have an authority to adjudicate constitutional complaint cases. Second, in the context at legal tradition, Indonesia and Germany are in the same legal tradition,

⁸ In general, there are two models constitutional review, i.e. the American model (American Model of Constitutional Review) and the European model (European Model of Constitutional Review). In the meantime, this European Model is divided into several variations, i.e. the Austrian or Continental Model, Kelsenian Model, German Model, dan France Model. A further explanation on the difference between those two constitutional review models can be seen in Mauro Cappelletti, 1989, *The Judicial Process in Comparative Perspective*, Clarendon Press: Oxford; Vicki Jackson & Mark Tushnet, 2006, *Comparative Constitutional Law*, Second Edition, Foundation Press: New York; Herman Schwartz, 2000, *The Struggle for Constitutional Justice in Post-Communist Europe*, the University of Chicago Press: Chicago and London; Jimly Asshiddiqie, *Model-model Pengujian Konstitusional di Berbagai Negara*, Second Edition, Konpres: Jakarta. According to Autheman and Henderson, Indonesia and Germany adopt the same model, see Violaine Autheman & Keith Henderson, "Constitutional Courts: The Contribution of Constitutional Review to Judicial Independence and Democratic Processes from a Global and Regional Comparative Perspective", *Rule of Law White Paper Series*, IFES, White Paper #4, Constitutional Courts, 2005, p. 8.

i.e. civil law.⁹ In the civil law tradition, codifications play a significant role as legal sources¹⁰ and the highest codification is constitution.¹¹ Therefore, the legal tradition means an in-depth attitude on (among others) how to ideally apply laws¹². Therefore, it shall be relevant to know why two countries sharing the same legal tradition and who have the same institution in enforcing the constitution, i.e. the constitutional court; but, the authority granted to such institution in order to enforce the constitution is significantly different. Moreover, the difference lies on the fundamental factor, i.e. a part of legal initiatives to protect citizens' constitutional rights. The protection of such rights are rights is a significant substance of every constitution.¹³

Third, Germany is one of the countries referred to when the idea to establish constitutional court was discussed in the meetings of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly. One of the reasons to choose Germany as a reference was due to the fact that Germany is one of countries who has the most advanced and established constitutional court system than other countries, even though it is not the oldest.¹⁴ Therefore, a real exchange of ideas or at least experiences among Germany's constitutional court judges and the 1945 Constitution amendment legislators, i.e. members of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly, may

⁹ Here, the term of "legal tradition" is distinguished to the term "legal system". The "legal system" term refers to the understanding of the legal system working as a set of institutions, procedures, and rules of law. Meanwhile, the "legal tradition" term refers to the definition of a set of deeply embedded attitudes, which are historically about the nature of law, role of law in the society and government, how should the organization and operation of a legal system, as well as how the law is established or should be established, applied, studied, and taught. Thus, the "legal tradition" term is broader than the "legal system" term. In the same legal tradition, it is very likely that there are different legal systems. For further discussion, see John Henry Merryman, *The Civil Law Tradition*, Stanford University Press, Stanford-California, 1985, p. 1-5. Also see Linda Picard Wood (Ed.), *Merriam-Webster's Dictionary of Law*, Merriam-Webster Inc., Springfield-Massachusetts, 1996, p. 543.

¹⁰ Linda Picard Wood, *ibid*. Mauro Cappelletti refers to it as the supremacy of statutory law, as an adversary of the *stare decisis* doctrine in the common law tradition. See further Mauro Cappelletti, *op.cit.*, pp. 137-141.

¹¹ Even though if it is observed from its function, the term of "constitution" has the same meaning with the term of "canon", i.e. equally playing a role as a fundamental law of a country, but they actually have a difference. The constitution is not always written in a codification (so, it may not be referred to as a canon). The constitution is written in documentation, such as in England. Therefore, the grouping of constitutions into a "written constitution" and "unwritten constitution" shall be understood within the meaning that the "written constitution" refers to the codified fundamental constitution, while the "unwritten constitution" refers to the (solely) document fundamental constitution. Therefore, the argument of K.C. Wheare is appropriate in terms of the England constitution, i.e. "The truth about Britain can be stated not by saying that she has an unwritten Constitution but by saying rather that she has not written Constitution". See K.C. Wheare, *Modern Constitutions*, Oxford University Press, Oxford-London-New York, 1966, p. 14.

¹² John Henry Merryman, *loc.cit.*

¹³ One of the constitution meanings is "...the body of rules which directly or indirectly affect the distribution of the sovereign power in the State. It is ... the collection of principles according to which the powers of the Government, the rights of the governed and the relations between the two are adjusted". See A. Appadorai, *The Substance of Politics*, Fifth Impression, Oxford Indian Paperback, Manzar Khan-Oxford University Press: New Delhi, 2005, p. 247.

¹⁴ Together with constitutional judges of South Korea and Thailand) to a hearing on articles draft regarding the Constitutional Court of the RI. See the Minutes of Session of the Ad Hoc I Committee of the Working Body of the People's Consultative Assembly, especially from May to July 2000.

take place. However, when a final draft of the Constitutional Court's authorities is agreed upon by the Plenary Session of the People's Consultative Assembly, such authority to try constitutional complaint cases is not included into the Constitutional Court's authority, as observed in Article 24C paragraph (1) of the recent 1945 Constitution.

The authority of the German Constitutional Court to try constitutional complaint cases (in German, such cases are referred to as *Verfassungsbeschwerde*) is a part of its most widest authorities,¹⁵ either directly granted by the Federal Constitution (*Grundgesetz*, generally abbreviated as GG) or Law on the Constitutional Court of the Federal Republic of Germany (*Bundesverfassungsgerichtsgesetz*, commonly abbreviated as *BVerfGG* in German).¹⁶ It ensures that all parties, specifically state administrators, expressly comply with the constitution and implement it in the practice. In other words, a characteristic of Germany as a democratic constitutional state is explained not only theoretically but also in practice – in this case, the constitutionalism characteristic.¹⁷

The German Constitutional Court consists of two panels and each panel has eight judges [Article 2 paragraph (1) and (2) of the *BVerfGG*]. Each panel has its own authority or competence. The First Panel is authorized to examine laws constitutional reviews and constitutional complaint cases, other than constitutional complaints regulated in Article 91¹⁸ and complaints within the domain of general election laws. Meanwhile, the Second Panel is authorized to

¹⁵ It is said as wide as it includes all problems on the GG implementation and interpretation. Thus, it is stated that the Constitutional Court of Germany has an exclusive authority to all proceedings, which are directly included to the compliance issue with the Federal Constitution (GG). See David P. Currie, *op.cit.* p. 27. See also Dieter Blumenwitz, "The Federal Constitutional Court of Germany and Foreign Affairs. An Introduction for the American Reader to the Court Decision of July 31, 1973" in Frederick W. Hess (Ed.), *German Unity, Documentation and Commentaries on the Basic Treaty*, East Europe Monograph 4, Park College, Governmental Research Bureau: Kansas City-Missouri, p. 11.

¹⁶ As the authority of the Constitutional Court of Germany is significantly wide and diverse, the procedural law to implement each authority is highly diverse. Up to recently, there have been 15 (fifteen) procedural laws in the Constitutional Court of Germany, see Helmut Steinberger, "Constitutional Jurisdiction in the Federal Republic of Germany", in the *Journal of Constitutional and Parliamentary Studies*, Vol. XVII Nos. 1-2 (January-June, 1983), p. 5.

¹⁷ Therefore, many experts in Germany currently assess that, following the acceptance of GG (German Constitution) after the World War II, Germany is no longer suitable to be referred to as *Rechtsstaat*, which is a 19th century legacy term. It will be more appropriate if Germany is referred to as the follower of the *Verfassungsstaat* ("a country regulated under the constitutions") principle. Karpen provides the following meaning: "a state which means to organize politics and evaluate goals by applying, executing the constitution", see Ulrich Karpen, (Ed.), 1988, *The Constitution of the Federal Republic of Germany*, Nomos Verlagsgesellschaft: Baden-Baden, p. 169 and p. 173. Therefore, the classic *Rechtsstaat* principle (from the 19th century) rejects the judicial review idea in a modern form, i.e. including basic rights into the scope, see Christian Boulanger, "Europeanization Europeanisation through Judicial Activism? CEE Constitutional Courts' Legitimacy and the Return to Europe", *paper presented for a workshop in the European University Institute in Florence* on 28-29 November 2003, p. 22. Also see Georg Nolte (Ed.), *op.cit.*, p. 204-205.

¹⁸ Article 91 of the *BVerfGG* regulates constitutional complaints submitted by the commune or association of commune (will be further described in the next description).

examine cases of human rights eliminations, political party's unconstitutionality, complaints on judgments of the *Bundestag* related to the legality of a general election or filling or vacancy of a deputy title at the *Bundestag*, impeachment of a Federal President by *Bundestag* or *Bundesrat*, GG interpretation in case of a dispute on a scope of rights and obligations of the highest Federal organization or other relevant parties, whose rights are granted by GG or rules of procedure of the highest Federal organization, disagreement on rights and obligations of the Federation and States (*Länder*) – particularly the implementation of a Federal law by States and Federal supervision as regulated in Article 93 paragraph (1) (3) and Article paragraph (4) second sentence of the GG, other disputes involving public laws – between the Federation and States, inter-States or in a State (unless there is a remedy regarding other court's authority implementation), impeachment of a Federal and State judge (in case there is a doubt whether a public international law is an integral part of the Federal law and such provision directly causes individual rights and obligations – if a verdict on such issue is filed to a court), cases on an application of a law as a Federal law, and constitutional complaint regulated in Article 91 of the *BVerfGG*, and complaints within the domain of a law on general election [Article 14 paragraph (1) and (2) of the *BVerfGG*].¹⁹ Those two Panels will appoint several chambers, which consist of three justices and such justices have a one-year tenure. This chamber's composition may only be maintained for three years in a maximum [Article 15a paragraph (1) of the *BVerfGG*].

At first, GG does not explicitly set out the German Constitutional Court's authority to decide constitutional complaints cases. The authority is just expressly granted later, as stated in Article 93 paragraph (1) of the recent GG. Article 93 paragraph (1) of the GG states in a complete text, as follows:²⁰

The Federal Constitutional Court decides:

1. *on the interpretation of this Constitution in the event of disputes concerning the extent of the rights and duties of a highest federal body or other*

¹⁹ As each Panel has its own authority, and the justices selected for a Panel may not be transferred to another Panel, Born refers the Constitutional Court of Germany as a "twin court". However, the verdict taken by each Panel shall be effective as a verdict of the Constitutional Court of Germany, instead of the Panel's decision. See Sigrid Born (ed.), *Law on the Federal Constitutional Court* (translated by Martin Fry), Inter Nations: Bonn, 1996, p. 26.

²⁰ Quoted from Axel Tschentscher, *The Basic Law (Grundgesetz)*, Jurisprudencia Verlag, Würzburg, 2002, p. 72.

- parties concerned who have been vested with rights of their own by this Constitution or by rules of procedure of a highest federal body;*
2. *in case of differences of opinion or doubts on the formal and material compatibility of federal law or State law with this Constitution, or on the compatibility of State law with other federal law, at the request of the Government, of a State government, or of one third of the House of Representatives [Bundestag] members;*
 - 2a. *in case of differences of opinion on the compatibility of federal law with Article 72 II, at the request of the Senate [Bundesrat], of a State government, or of a State parliament;²¹*
 3. *in case of differences of opinion on the rights and duties of the Federation and the States [Länder], particularly in the execution of federal law by the States [Länder] and in the exercise of federal supervision;*
 4. *on other disputes involving public law, between the Federation and the States [Länder], between different States [Länder] or within a State [Land], unless recourse to another court exists;*
 - 4a. *on complaints of unconstitutionality, being filed by any person claiming that one of his basic rights or one of his rights under Article 20 IV or under Article 33, 38, 101, 103 or 104 has been violated by public authority;²²*
 - 4b. *on complaints of unconstitutionality filed by communes or associations of communes on the ground that their right to self-government under Article 28 has been violated by a statute other than a State statute open to complaint to the respective State constitutional court;²³*
 5. *in other cases provided for in this Constitution.*

The authority of the German Constitutional Court to decide constitutional complaint cases is described in Article 93 paragraph (1) number 4a and 4b of the GG above.²⁴ From these provisions, it seems that the subjects who can file a complaint to the German Constitutional Court are:

- 1) *individuals if the rights violated by a public authority is human rights or rights set out in Article 20IV or Article 33, 38, 101, 103, or 104 of the GG;*
- 2) *commune or commune associations if their right to self-government under Article 28 of the GG is violated by a law other than the laws of the state, which is open to a complaint be submitted to the state's constitutional court.²⁵*

²¹ Provisions in this Paragraph (1) 2.a are included into the 42nd Amendment (27th October 1994).

²² This paragraph is included into the 19th Amendment (29th January 1969).

²³ This paragraph is included into the 19th Amendment (29th January 1969).

²⁴ This provision is reconfirmed in Article 13 number 8a of the Law on Federal Constitutional Court (BVerfGG).

²⁵ In Germany, each State (Länder) also has a constitutional court, except the State of Schleswig-Holstein and Mecklenburg-Vorpommern. In the latter states, issues related to the constitution are submitted to the Constitutional Court of Germany; see Raymond Youngs, *English, French... op.cit.*, p. 46. Even, according to the history, the state constitutional court was first established (c.q. the constitutional court of Bavaria) than

Further provision, which is also a part of the procedural law on constitutional complaints, is regulated in the *BVerfGG*, Article 90 to Article 95.²⁶ Article 90 of the *BVerfGG* states that:

- (1) Any person who claims that one of his basic rights or one of his rights under Articles 20 (4), 33, 38, 101, 103 and 104 of the Basic Law has been violated by public authority may lodge a constitutional complaint with the Federal Constitutional Court.
- (2) If a legal action against the violation is admissible, the constitutional complaint may not be lodged until all remedies have been exhausted. However, the Federal Constitutional Court may decide immediately on a constitutional complaint lodged before all remedies have been exhausted if it is of general relevance or if recourse to other courts first would entail a serious and unavoidable disadvantage for the complainant.
- (3) The right to lodge a constitutional complaint with the constitutional court of the Land in accordance with the provision of the Land constitution shall remain unaffected.

Under the provisions of Article 90 of the *BVerfGG*, it can be concluded that a new constitutional complaint may be basically filed if there is no other remedy or all existing legal remedies have been exhausted. However, such provision can be ruled out. It means that the Constitutional Court of Germany can immediately rule on a constitutional complaint case despite all available remedies have not been taken, provided that the complaint “contains general relevance”²⁷, or if an early settlement via other court will cause a serious and inevitable loss to the complainant. Constitutional complaints submitted to the Constitutional Court of Germany do not affect the complainant’s right to file a constitutional complaint to the State constitutional court in accordance with the constitution of the relevant State.

the Federal Constitutional Court or the Constitutional Court of Germany (*Bundesverfassungsgericht*). The Constitutional Court of Germany was only established following the acceptance of Herrenchiemsee Proposals, which contain suggestions on the draft of the Federal Constitution of Germany as the result of a conference held at the Chiemsee lake (August 1948, and therefore referred to as the Herrenchiemsee Conference), and considering suggestions from Prof. Hans Nawiasky who cooperated with Prof. Hans Kelsen. Such conference was joined by states under the Allies and initiated by the Governor of Bavaria State, Minister-President Hans Ehard; see further in Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press: Durham and London, 1989, p. 7-8.

²⁶ All quotes of the *BVerfGG* articles in this paper are taken from Sigrid Born (ed.), 1996, *Law on the Federal Constitutional Court* (translated by Martin Fry), Inter Nationes: Bonn.

²⁷ *BVerfGG* does not further explain on the meaning of this “of general relevance”. Nevertheless, in a conversation between the Author and Prof. Sigrid Broß, a constitutional judge of the Second Panel, at Karlsruhe on 10th April 2008, it is said that one of the indications is such complaint does not only relate to the complainant’s individual interests, but also many people’s interests.

The reason submitted in the constitutional complaint must explain the alleged breached rights or act or omission of an institution or official alleged to commit such breach. Such provision is regulated in Article 92 of *BVerfGG* which states that:

The reason for the complaint shall specify the right which is claimed to have been violated and the act or omission of the organ or authority by which the complainant claims to have been harmed.

Furthermore, Article 93 of the *BVerfGG* regulates in detailed on the constitutional complaint filing deadline against a decree and a law or an act committed by an authorized official and legal consequences related to such deadline. Article 93 of the *BVerfGG* shall state in complete as follows:

- (1) A constitutional complaint shall be lodged and substantiated within one month. This time-limit shall commence with the service or informal notification of the complete decision, if this is to be effected ex officio in accordance with the relevant procedural provisions. In other instances, the time-limit shall commence when the decision is proclaimed or, if it is not to be proclaimed, when it is otherwise communicated to the complainant; if the complainant does not receive a copy of the complete decision, the time-limit pursuant to the first sentence above shall be suspended by the complainant requesting, either in writing or by making a statement recorded at the court office, a copy of the complete decision. The suspension shall continue until the complete decision is served on the complainant by the court or ex officio or by a party to the proceedings.
- (2) *If a complainant was unable to comply with this time-limit through no fault of his own, he shall on request be granted **restitutio in integrum**.²⁸ This request shall be made within two weeks of the hindrance's disappearance. The reasons for the request shall be substantiated when making the request or during the request proceedings. The omitted legal action must be carried out within the time-limit for the request; if this is done the complainant may be granted a reversal without need for a formal request. The request shall be invalid if made later than one year after the expiry of the time-limit. The fault of the complainant's attorney shall be seen as equal to that of the complainant himself.*

²⁸ Recovery to the initial condition (Yan Pramudya Puspa, *Kamus Hukum Bahasa Belanda, Indonesia, Inggris, Complete Edition, Aneka Ilmu*: Semarang, 1977, p. 733).

- (3) If the complaint is directed against a law or some sovereign act against which legal action is not admissible, the complaint may be lodged only within one year of the law entering into force or the sovereign act being announced.
- (4) If a law has entered into force before 1 April 1951, a constitutional complaint may be lodged until 1 April 1952.

There are some important things to note from the provisions of Article 93 of the *BVerfGG* above. First, there is a different constitutional complaint filing deadline between a complaint against a decree and a complaint against a law or an act of a competent official, in which a legal action does not apply to or cannot be acceptable to such official.

Regarding a constitutional complaint against a decree, the deadline is one month since a complete informal notice on such decree is issued, provided that the decree is applicable *ex officio* in accordance with the applicable procedures. If the decree is announced, the period starts since the announcement of the decree. Meanwhile, if the decree is not announced, the period commences when it is notified to the complainant. If the complainant does not receive a full copy of the decree, the one-month period is suspended at the request of the complainant for a complete copy of the decree. Such request may be made in written form or making a statement recorded at the court registry. The suspension will remain effective until the complete copy of such decree is handed over to the complainant by the court or *ex officio* by a party to the proceedings.

Regarding a constitutional complaint against a law or an act of an authorized official, in which a legal remedy does not apply or cannot be acceptable, a period for filing a complaint is one year since the law comes into force, or the act of the official is announced.

Second, in the case of a constitutional complaint against a decision, if the complainant is unable to comply with the prescribed period due to his non-fault, he, at his request, should be given “the restoration to his original state” (*restitutio in integrum*). A demand of recovery to the original state must be made within two weeks since the completion of the nuisance and the reason for filing the request must be presented at the time of making the request or

during the examination of the request. The request is not valid if it is made more than one year after the expiration of the period. Meanwhile, in order to organize a constitutional complaint filed by the city government (municipalities) or association of municipalities,²⁹ Article 91 of the *BVerfGG* states:

Municipalities and association of municipalities may lodge a constitutional complaint on the ground that a Federal or Land law infringes the provisions of Article 28 of the Basic Law.³⁰ A constitutional complaint may not be lodged with the Federal Constitutional Court if a complaint against violation of the right to self-government may be lodged with the constitutional court of the Land in accordance with Land law.

If it is observed carefully, the provisions of Article 91 of the *BVerfGG* above imply that the constitutional complaint on a commune right to govern independently is not to be made to the Constitutional Court of Germany. Instead, it can be submitted to the State constitutional court where it is possible according to the laws of the State. In this case, it means that the State constitutional court should take precedence. In other words, only if, according to State laws, such issue is not an authority of the State constitutional court, it will be submitted to the Constitutional Court of Germany.

Furthermore, the *BVerfGG* stipulates that each constitutional complaint application requires an acceptance (by the German Constitutional Court). It means the application must be declared first as admissible to be examined by the German Constitutional Court. The consent will be given if the Constitutional Court of Germany argues that the application may contain “a fundamental constitutional significance” or if the application contains an indicated enforcement of human rights and other rights set forth in the GG or the complainant will suffer grave disadvantage if the application is rejected for an examination [Article 93a paragraph (1) and (2) of the *BVerfGG*].³¹ Then, Article 93B of the *BVerfGG* confirms that the chamber may refuse to accept a constitutional complaint or accept it preceding a verdict in the cases described in Article 93c. Otherwise, the consent is decided by a Panel.

²⁹ GG uses the term of communes or association of communes; see *supra*, Article 93 paragraph (1) number 4b above.

³⁰ Article 28 of the GG as referred to in Article 91 of the *BVerfGG* is a provision regulating the commune's rights to govern its management.

³¹ However, the *BVerfGG* does not provide further explanation on what meant by the “fundamental constitutional meaning”.

Article 93c of the *BVerfGG* designated by Article 93B contains provisions on next steps to be taken by the chamber if the requirements as referred to in Article 93a and 93B above are met. In complete, Article 93c of the *BVerfGG* states:

- (1) *If the conditions of Article 93a (2) (b) above are fulfilled and the constitutional issue determining the judgment of the complaint has already been decided upon by the Federal Constitutional Court, the chamber may allow the complaint if it is clearly justified. This decision is equal to a decision by the panel. A decision stating, with the effect of Article 31 (2)³²above, that a law is incompatible with the Basic Law or with other Federal law shall be reserved for the panel.*
- (2) Articles 94 (2)-(3) and 95 (1)-(2) below shall apply to the above procedure.

Thus, according to the provisions of Article 93c of the *BVerfGG* above, if a constitutional complaint application has met the consent requirements set out in Article 93a paragraph (2) of the *BVerfGG* and constitutional issues which decide a decision on the complaint has been established by the Constitutional Court of Germany, the chamber may grant such complaint if it is totally reasonable. A decision taken by the chamber in this case shall be equated with the panel's decision. The chamber's decision which states that a law is incompatible with the GG or other Federal laws, in which the legal effects are stipulated in Article 31 paragraph (2) of the *BVerfGG*, will be submitted to the panel to decide.

Each chamber's decision always has to be taken unanimously (Article 93d paragraph (3) of the *BVerfGG*). Decisions taken under the provisions of Article 93B and Article 93c of the *BVerfGG* without going through any oral proceedings may not be filed for an objection. If a constitutional complaint application is not granted, such rejection does not require any reasons (Article 93d paragraph (1) of the *BVerfGG*). Provided that the panel has not decided, the chamber may take any decisions relevant to the examination of the constitutional complaint.

³² Article 31 paragraph (2) of the *BVerfGG* explains that the verdict of the Constitutional Court of Germany has a power as a law for cases of: misunderstanding or doubt on the formal and material compatibility between the Federal or State law and GG, or the compatibility of the State law and Federal law, in which the application is submitted by the Federal Government, or State Government, or one third of the *Bundestag* members (as regulated in Article 13 number (6) of the *BVerfGG*), compatibility between a Federal law and GG or compatibility of a State law and Federal law in which the application is submitted by a court (as regulated in Article 13 number (11) of the *BVerfGG*), doubt on whether a public international law is a part of the Federal law and whether it causes a right and obligation to an individual in which the application is submitted by a court (as regulated in Article 13 number (12) of the *BVerfGG*), disagreement on the continuity of a law as a Federal law (as regulated in Article 13 number (14) of the *BVerfGG*), constitutional complaints related to compatibility or incompatibility of a law and GG or a law stated as null and void.

A temporary injunction which delays the implementation of a law can be imposed, but it can only be done by the panel (Article 93d paragraph (2) of the *BVerfGG*). *BVerfGG* also decides that the state institution or element of government, whose act or omission is filed for a constitutional complaint, is given an opportunity to submit a statement within the prescribed period. It is stipulated in Article 94 which reads:

- (1) The Federal Constitutional Court shall give the Federal or Land constitutional organ whose act or omission is complained of in the constitutional complaint an opportunity to make a statement within a specified period.
- (2) If the act or omission was committed by a minister or a Federal or Land authority, the competent minister shall be given an opportunity to make a statement.
- (3) If the constitutional complaint is directed against a court decision, the Federal Constitutional Court shall also give the party in whose favour the decision was taken an opportunity to make a statement.
- (4) *If a complaint is lodged directly or indirectly against a law, Article 77³³ above shall apply mutatis mutandis.*
- (5) The constitutional organs named in paragraph 1, 2 and 4 above may join the proceedings. The Federal Constitutional Court may dispense with oral pleadings if they are not expected to advance the proceedings any further and if the constitutional organs which are entitled to make a statement and have joined the proceedings waive oral proceedings.

Lastly, the consequence of a constitutional court granting under the type and object of such complaint, is regulated in Article 95 of the *BVerfGG*, which states in complete as follows:

- (1) *If a constitutional complaint is upheld the decision shall state which provision of the Basic Law has been infringed by which act or omission. The Federal Constitutional Court may at the same time declare that any repetition of the act or omission against which the complaint was directed will infringe the Basic Law.³⁴*
- (2) If a complaint against a decision is upheld, the Federal Constitutional Court shall quash the decision and in cases pursuant to the first sentence

³³ Article 77 of the *BVerfGG* states that "The Federal Constitutional Court shall give the Bundestag, the Bundesrat, the Federal Government, and – in case of differences of opinion on the validity of Federal law – the Land governments, and – in case of differences of opinion on the validity of a rule of Land law – the Parliament and Government of the Land in which the rule was announced, an opportunity to make a statement within a specified period".

³⁴ This provision is quite similar to the *stare decisis* principle in common law tradition.

of Article 90 (2) above it shall refer the matter back to a competent court

- (3) If a complaint against law is upheld, the law shall be declared null and void. The same shall apply if a complaint pursuant to paragraph 2 above is upheld because the decision is based on an unconstitutional law. The provision of Article 79 above shall apply *mutatis mutandis*.

According to all descriptions on constitutional complaints in Germany, the followings are several significant matters to be emphasized:

1. Constitutional complaint is a part of the constitutional review.
2. Constitutional complaint principally may only be filed if all available legal remedies have been exhausted. Certain cases may have been exempted for all legal remedies, i.e. if the German Constitutional Court finds that the complaint contains general relevance or if a requirement to take all legal remedies first will bring serious and inevitable losses to the complainant.
3. An individual may apply for a constitutional complaint related to a violation of human rights or rights specifically granted in the GG. Communes or associations of communes may also apply for such complaint related to violations of the communes' rights to govern themselves.
4. The object of complaints may be addressed to any act or omission committed by public officials (either at the Federal or State level), court verdicts, as well as constitutions.
5. If a constitutional complaint is granted, legal consequences will vary depending on the object of complaints:
 - if the complaint is submitted against act or omission of a public official, the German Constitutional Court will declare that the provisions of the GG are violated by such act or omission, and at the same time, it can also state that the repetition of similar acts or omissions constitutes a violation of the GG;
 - if a complaint is submitted against a court verdict, the German Constitutional Court will annul the verdict. Meanwhile, if the complaint is granted before all available legal remedies have been taken, the German Constitutional Court will hand over the issue to the court which is competent to hear it;
 - if the complaint is submitted against a law, the German Constitutional Court will declare the law as null and void. This applied also applies to constitutional complaints submitted against a court ruling, in which such ruling is taken based on the laws which are contrary to the GG.

B. Application of Constitutional Complaints in Indonesia

The discussion on a possibility to adopt or implement a constitutional complaint mechanism in the Indonesian legal system is relevant to be given serious attention for several reasons. First, under Article 1 (2) and (3) of the 1945 Constitution, it can be concluded that the fundamental idea, which underlies the 1945 Constitution and will be manifested in practice, is the idea that Indonesia is a constitutional democratic state. Therefore, it means that the 1945 Constitution will provide maximum protection to democracy and constitutional rights of citizens. Thus, the Constitutional Court was established. Meanwhile, constitutional complaints are part of legal initiative to provide maximum protection for the citizens' constitutional rights. However, it turns out that the Constitutional Court has no authority to decide constitutional complaints cases. Therefore, the aspiration to provide maximum protection has not been fully achieved.

Second, the lack of authority of Constitutional Court to adjudicate constitutional complaints will lead to the unavailability of judicial remedy through constitutional adjudication mechanism for violations of the citizens' human rights, in which such violations are not committed due to the unconstitutionality of the law norms but, they tends to occur due to actions or omissions of state institutions or public officials. Meanwhile, all legal remedies provided by the current system have been pursued by the complainant. One of its consequences is many applications submitted to the Constitutional Court, which are substantially constitutional complaints, are declared "inadmissible" (*niet ontvankelijk verklaard*) due the Constitutional Court is not competent to try them.³⁵

Third, according to the provisions of the constitution and applicable laws, namely Article 24C paragraph (1) of the 1945 Constitution in conjunction with

³⁵ According to the data of the Clerk of the Constitutional Court up to November 2009, there was at least 26 applications, which were substantially constitutional complaints. Thus, such applications were rejected or ruled "inadmissible" (*niet ontvankelijk verklaard*). Several applications which gained a wide coverage: Case Number 016/PUU-I/2003 (application on the revocation of the Judicial Review of the Supreme Court), Case Number 061/PUU-II/2004 (application on the revocation of two contradictory Judicial Review Verdicts of the Supreme Court), Case Number 004/PUU-III/2005 (an allegation of bribery in the verdict of the Supreme Court), Case Number 013/PUU-III/2005 (a violation of constitutional norms application), Case Number 018/PUU-III/2005 (wrong interpretation in the application of laws), Case Number 025/PUU-III/2006 (two contradictory Verdicts of the Supreme Court), Case Number 007/PUU-IV/2006 (uncertainty of the case proceeding at the common court and alleged bribery), Case Number 030/PUU-IV/2006 (an authority to issue a broadcasting permit), Case Number 20/PUU-V/2007 (a mining cooperation contract which does not include the approval from the People's House of Representative), Case Number 026/PUU-V/2007 (dispute on the winning party at the regional government head election), Case Number 1/SKLN-VI/2008 (a report on the findings of the regional government head election violation, which are not followed-up).

Article 10 of Law Number 24 of 2003 on the Constitutional Court (hereinafter referred to as the Constitutional Court Law), available legal remedies for citizens to defend their constitutional rights via the constitutional judicial proceedings in the Constitutional Court are solely through the judicial review mechanism. In other words, the current applicable system is assumed as if the violation of the citizens' constitutional rights can only take place if the legislatures (House of Representatives and the President) make a law, which apparently violates the citizens' constitutional rights. In fact, a violation of the citizens' constitutional rights does not only occur due to "erroneous" laws, but also because of acts or omissions of public officials. Such circumstances, based on empirical experience, is triggered by a symptom where people who consider that their constitutional rights have been violated apply for a judicial review. However, the norm tested does not contain any unconstitutional material, or they try other procedure, namely making a legal construction as if there has been a dispute on the authority of state institutions. They hope that this procedure will be able to restore the constitutional rights and/or authorities losses they have experienced.³⁶

Fourth, the lack of authority of the Constitutional Court of the Republic of Indonesia to adjudicate a constitutional complaint case and it is also contradictory the history of the constitutional court establishment. The Constitutional Court was established to uphold principles of a constitutional state (rule of law), as mentioned earlier, and also to provide maximum protection for the democracy and human rights of citizens.³⁷ The authority to try such constitutional complaint cases granted to a specific judicial body, i.e. the constitutional court, will contribute to the increased respect for the human rights and fundamental freedoms, intensified protection of these rights and reinforced constitutional degree. The protection of human rights will only have an appropriate priority if the specific judicial body, namely the constitutional court, carries out its constitutional review authority against real cases.³⁸

³⁶ Two examples of cases gaining a significantly close attention from the people were dispute on the Depok Mayor election (Verdict Number 002/SKLN-IV/2006) and dispute on the termination of the Bekasi Mayor (Verdict Number 004/SKLN-IV/2006).

³⁷ Trevor L. Brown & Charles R. Wise, *op.cit.*, p. 155. See also John Ferejohn & Pasquale Pasquino, "Rule of Democracy and Rule of Law" in José María Maravall & Adam Przeworski, *Democracy and Rule of Law*, Cambridge University Press, 2003, p. 251.

³⁸ Jan Klucka, "Suitable Rights for Constitutional Complaint", paper presented for *Workshop on the Functioning of the Constitutional Court of the Republic of Latvia*, Riga, Latvia, 3-4 July, 1997.

However, since Article 24C paragraph (1) and (2) of the 1945 Constitution has limitedly prescribed the authority of the Constitutional Court, an additional authority will only be possible by amending the provisions of the 1945 Constitution. In fact, an amendment to the 1945 Constitution is not easy, as the proposed amendment should be submitted by at least 1/3 of the members of the People's Consultative Assembly in order to put into the People's Consultative Assembly's Session agenda. It must also be accompanied by a detailed.³⁹

In theory as well as in practice, as explained in the previous description, and as observed in Germany, the constitutional complaint is a part of the constitutional review material, especially the constitutionality of acts (or omissions) which may violate or damage citizens' constitutional rights. If it is related to the Article 24C paragraph (1) of the 1945 Constitution, the constitutional complaint, on a limited basis, can be incorporated into the constitutional review material. In fact, the current applicable constitutional review in Indonesia, based on the Law on Constitutional Court, is a part of the constitutional complaint procedure in Germany, i.e. the constitutional complaint against the constitutionality of laws.⁴⁰ It is said as limited because the complaint is limited to the acts or omissions of public officials (to the detriment of the citizens' constitutional rights) which derived from an erroneous interpretation the legal norms.

Concretely, the constitutional complaint application is still construed as a judicial review petition. However, in the substance, such petition does not question the constitutionality of norms, but it questions the constitutionality of public officials' acts (or omissions) due to a misinterpretation of the legal norms. As a consequence, the citizens' constitutional rights are violated. Therefore, a demand for relief by the applicant should be a demand for statement from the Constitutional Court that the acts or omissions of public officials are contrary to the constitution.

If the above legal construction is acceptable, the amendment is necessarily conducted on several articles of the Law on Constitutional Court, i.e.:

³⁹ Article 37 paragraph (1) and (2) of the 1945 Constitution

⁴⁰ See again Article 92 and Article 93 paragraph (3) of the *BVerfGG* quoted in the previous page.

1. Article 51 paragraph (1) which previously reads, “*Complainants are parties who consider their constitutional rights and/or authorities have been violated by the enactment of a law, namely ... etc.*” shall be modified/added, so it reads “*Complainants are parties who consider their constitutional rights and/or authorities have been violated by the enactment of a law **and/or acts or omissions of public officials due to an erroneous interpreting meaning of law**, namely ... etc.*”. Then, the Elaboration of this article may add an explanation on public officials, who are included court verdicts.
2. Article 51 paragraph (3), which previously reads, “*In the application as referred to in paragraph (2), the complainant must describe clearly that:*
 - a. *the drafting of the law does not comply with the requirements under the 1945 Constitution of the Republic of Indonesia; or*
 - b. *the substantial material in a paragraph, article, and/or part of the law is considered to be contrary to the 1945 Constitution of the Republic of Indonesia*”, shall add letter c which reads, “*c. the substantial material of a paragraph, article, and/or part of the law has mistakenly interpreted in such a way so as to cause, the complainant’s constitutional rights and/or authorities are damaged which are contradictory to the 1945 Constitution of the Republic of Indonesia.*”
3. Article 56 paragraph (3) shall be amended/added, i.e. previously read, “*(3) In the event the application is granted as referred to in paragraph (2), the Constitutional Court shall expressly state that the substantial material of the paragraph, article, and/or part of laws which is contrary to the 1945 Constitution of the Republic of Indonesia*” to becomes “*(3) In the event the application is granted as referred to in paragraph (2), the Constitutional Court shall expressly state that the substantial material of the paragraph, article, and/or part of laws which is contrary to the 1945 Constitution of the Republic of Indonesia or expressly declare that public officials have mistakenly interpreted the substance of the paragraph, article, and/or part of the law, which resulted in the damage of the complainant’s constitutional rights and/or authorities.*”
4. Article 57, which originally consists of three paragraphs, shall add one paragraph which reads, “*The verdict of the Constitutional Court shall state that public officials have mistakenly interpreted the substance of the paragraph, article, and/or part of the law, which the damage of the complainant’s constitutional rights and/or authorities. Thus, the act or omission of such public official, shall be contrary to the 1945 Constitution of the Republic of Indonesia*”.

III. CONCLUSION

In the future, considering the increasing constitutional awareness of citizens, there is no reasonable doubt to say that the need to adopt a constitutional complaint mechanism is no longer solely born to meet the theoretical demands, but it is born to fulfill the real demands of citizens. Hence, in long term, the People's Consultative Assembly as an institution which has the authority to amend the Constitution has to be seriously consider the need. Or, at least in the short term, there is a pressing demand for (House of Representative together with the President) to amend the Law on Constitutional Court in order to adopt a limited constitutional complaint mechanism as described above.

Taking into account the statistics data of constitutional review petitions submitted to the Constitutional Court until recently, the number of applications, which are substantially constitutional complaints, is significant. The data can be construed if the constitutional complaint mechanism may be adopted by the amendment on the Constitutional Court law, it will significantly reduce the number of judicial review petitions.

Politically speaking, these circumstances have a positive symbolic-political meaning. Therefore, it will further reduce the laws - which have been painstakingly drafted - stated to be contrary to the 1945 Constitution, even though there was not many petitions for judicial review were granted. Up to recently, the percentage of laws which are declared to be contrary to the 1945 Constitution by the Constitutional Court is relatively small.

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