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## **The Ius Constituendum of an Equitable Dispute Resolution Mechanism for Constitutional Complaints**

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### **Abstract**

The settlement of constitutional complaint disputes represents a legal mechanism that may be undertaken by a branch of judicial power, such as the Constitutional Court (Mahkamah Konstitusi). This mechanism is intended to ensure the upholding of the law and the protection of citizens' constitutional rights. This mechanism has long been implemented in several countries—such as South Korea, Germany, and Thailand. However, in Indonesia, no legal framework currently governs constitutional complaints. The absence of such regulation has resulted in the lack of a legal mechanism for resolving cases involving violations of constitutional rights. This article examines two key aspects: first, the theory and practice of constitutional complaint dispute resolution, and second, the *ius constituendum* regarding constitutional complaint resolution in Indonesia. The study highlights the necessity of comprehensive regulation to ensure legal certainty and justice within the Indonesian legal system. The research adopts a normative juridical method, using statutory, case-based, conceptual, and comparative approaches.

**Keywords:** *Ius Constituendum*, Constitutional Complaint, Constitutional Rights.

### **Introduction**

Since the establishment of the Constitutional Court of the Republic of Indonesia (hereinafter referred to as the Constitutional Court) in 2003 until the time of writing this article, it can be observed that neither Article 24C of the 1945 Constitution of the Republic of Indonesia (hereinafter referred to as the 1945 Constitution) nor Article 10 of Law Number 24 of 2003 concerning the Constitutional Court, as amended by Law Number 8 of 2011, Law Number 4 of 2014 concerning the Stipulation of Government Regulation in Lieu of Law Number 1 of 2013 concerning the Second Amendment to Law Number 24 of 2003 into Law, and Law Number 7 of 2020 concerning the Third Amendment to Law Number 24 of 2003 concerning

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the Constitutional Court (hereinafter referred to as the Constitutional Court Law), provide any authority to the Constitutional Court to adjudicate constitutional complaints. (Chakim, 2019)

Specifically, Article 24C of the 1945 Constitution and Article 10 of the Constitutional Court Law stipulate that the Constitutional Court has the authority to adjudicate at the first and final instance, with decisions that are final and binding, in relation to: (i) judicial review of laws against the Constitution; (ii) disputes over authority between state institutions whose powers are granted by the Constitution; (iii) dissolution of political parties; and (iv) disputes concerning the results of general elections. In addition to these powers, the Constitutional Court is also obligated to examine, hear, and decide on the House of Representatives' opinion regarding alleged legal violations committed by the President and/or Vice President, as stipulated in Article 24C paragraph (2) of the Third Amendment to the 1945 Constitution, which states: "The Constitutional Court shall render a decision on the opinion of the House of Representatives concerning alleged violations by the President and/or Vice President in accordance with the Constitution." (Karamysheva, 2020)

Neither the 1945 Constitution nor the Constitutional Court Law currently provides for the authority of the Constitutional Court to adjudicate constitutional complaints. Nevertheless, a considerable number of cases arising in Indonesia pertain to violations of the constitutional rights of citizens, for which the constitutional complaint mechanism could serve as an appropriate legal remedy. (Stojadinovic, 2019)

Several cases of violations of constitutional rights in various regions include:

1. A number of students and activists were arrested during demonstrations opposing the revision of the Corruption Eradication Commission Law (KPK Law) and the Draft Criminal Code (RKUHP). These arrests were made without clear justification and were often accompanied by violence by security personnel. Such actions are deemed unconstitutional as they violate Article 28E paragraph (3) of the 1945 Constitution, which guarantees the right of every person to assemble, associate, and express opinions.
2. Another case involves the forced eviction of residents in various parts of Indonesia, such as the eviction in Kampung Pulo, Jakarta. These evictions were often carried out without due legal process, without consultation with affected residents, and without providing adequate compensation. Such actions constitute a violation of Article 28H paragraph (1) of the 1945 Constitution, which guarantees the right to a place of residence and to a decent standard of living.
3. The government blocked internet access during mass protests in Papua and West Papua. This action is considered unconstitutional as it violates Article 28F of the 1945 Constitution, which guarantees the right of citizens to communicate and obtain information. The internet shutdown was viewed as an attempt to restrict the freedom of information and suppress democratic space.
4. Another case concerns the appropriation of customary land for development or natural resource exploitation purposes without the involvement of indigenous communities, constituting a violation of constitutional rights.

5. The mining project development in the customary territory of the Anak Dalam Tribe in Jambi violates Article 18B paragraph (2) of the 1945 Constitution, which recognizes and respects the rights of indigenous peoples.
6. The actions of state authorities who dispersed citizens expressing opinions in academic settings also violate constitutional rights. Such conduct contravenes Article 28E of the 1945 Constitution and Article 18 paragraph (1) of Law Number 9 of 1998 concerning the Freedom to Express Opinions in Public. These actions may amount to criminal offenses committed by any person who, by means of violence or threats of violence, obstructs a citizen's right to express opinions publicly.

In light of the cases mentioned above, the author is of the view that the Constitutional Court (Mahkamah Konstitusi or MK) should be vested with the authority to adjudicate constitutional complaints and that such authority ought to be regulated under the Constitutional Court Law (UUMK) through an amendment that substantively provides for the settlement of disputes arising from constitutional complaints.

Every legal product enacted by the executive, legislative, or judicial branches of government should, in principle, be subject to constitutional review. This is intended to ensure that the legal instruments produced by these state organs are not misapplied or deviated from their constitutional purpose, thereby safeguarding the constitutional rights of citizens (Bauw, 2025). Before a constitutional complaint mechanism existed, in practice, only statutes enacted by the legislature were subject to constitutional review. The authority to review laws against the 1945 Constitution (UD 1945) implies the judicial scrutiny of legal norms produced through the political processes within the House of Representatives (DPR).

According to the author, as an institution entrusted with the judicial review of legal norms for their constitutionality, the Constitutional Court plays a crucial role in ensuring legal certainty by rendering binding decisions on the validity of legal norms (Lubis, 2025). This role is of great significance, as every decision of the Constitutional Court serves as a source of law governing national life. Through its broad powers, the Constitutional Court functions as the guardian of the Constitution, ensuring that every state policy and institutional act remains within the bounds of the 1945 Constitution, thereby delivering justice and protecting human rights, including the constitutional rights of citizens.

A constitutional complaint constitutes a legal instrument used to protect the constitutional rights of citizens against actions or omissions by authorities, including those within the legislative, executive, and judicial branches. In various jurisdictions such as Germany, South Korea, and Thailand, the constitutional complaint mechanism has been implemented and has proven to be relatively effective in ensuring constitutional justice and upholding constitutional supremacy. This article aims to analyze the *ius constituendum* in developing a fair and equitable regulatory framework governing the constitutional complaint mechanism.

Implementing constitutional complaints varies across jurisdictions, both in terms of substantive content and procedural mechanisms. One example is Germany, where the constitutional complaint is known as *Verfassungsbeschwerde* (Online, 2008). Under this

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system, any citizen who believes that their constitutional rights have been violated by a public authority may file a constitutional complaint with the Federal Constitutional Court. However, such complaints are admissible only after all other legal remedies have been exhausted, making the Verfassungsbeschwerde a remedy of last resort.

In South Korea, under the Constitution of the First Republic (1948–1960), judicial review was carried out by two distinct state organs vested with judicial authority. The Supreme Court reviewed regulations issued by the executive, while the Constitutional Committee—later reconstituted as the Constitutional Court of Korea (hereinafter referred to as the Korean Constitutional Court)—was vested with full authority to examine, adjudicate, and decide cases involving constitutional violations (Ahmad, 2006).

Another example can be seen in the Constitutional Court of Thailand (hereinafter referred to as the Thai Constitutional Court), where the Ombudsman plays a significant role within the constitutional review system. If the Ombudsman receives a complaint from an individual or group alleging that a statute or government action contravenes the Constitution, the Ombudsman may refer the matter to the Constitutional Court or to the Administrative Court. This process affords the public an avenue to challenge state actions that potentially infringe upon their constitutional rights. Accordingly, the system of constitutional review, facilitated through both the courts and the Ombudsman, establishes a mechanism of checks and balances aimed at safeguarding fundamental rights and preserving the integrity of the Constitution (Asshiddiqie, 2012).

In the United States Supreme Court decision in *Marbury v. Madison*, 1 Cranch 137 (1803) (Wiryanto, 2019). According to Mirza Satria Buana, President John Adams nominated William Marbury as a Supreme Court Justice. However, his letter of appointment was not delivered before Adams left office, and the incoming President, Thomas Jefferson, refused to honor the appointment, resulting in Marbury's failure to be inaugurated. In response to this failure, William Marbury initiated litigation against the government's policy. The *Marbury v. Madison* case became the first judicial review case in the United States. In its legal reasoning, the Court affirmed that William Marbury had the right to be appointed as a justice; however, it also held that the provision of the Judiciary Act that authorized such appointments was unconstitutional, as it contravened the U.S. Constitution (Buana, 2023). This case, according to the author, constitutes a constitutional violation committed by the government against a citizen who fundamentally had the right and equal opportunity to be appointed as a justice of the Supreme Court.

In contrast, in Indonesia, the mechanism for resolving constitutional complaints is not explicitly regulated either in the 1945 Constitution (Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, hereinafter referred to as the 1945 Constitution) or in the Constitutional Court Law (Undang-Undang Mahkamah Konstitusi or UUMK). Nevertheless, the Constitution implicitly affirms the obligation of the State to provide constitutional protection for its citizens. Based on this implicit meaning, any citizen who believes that their constitutional rights have been violated by the actions of public officials or state organs may seek justice through a constitutional complaint mechanism, which may be lodged with an authorized institution such

as the Constitutional Court, provided that the Court is granted jurisdiction to hear such matters. After exhausting other legal remedies, the Constitutional Court would serve as the final recourse. Amending the Constitutional Court Law would provide a legal guarantee that all actions taken by the government or public officials must be grounded in law and justice, thereby preventing legal uncertainty for citizens. Within the context of constitutional complaints, the principle of legal certainty becomes crucial, as it relates to the protection of citizens' constitutional rights, which are often infringed upon by acts or policies of public authorities.

According to the author, the Constitutional Court's authority as provided in Article 24C of the 1945 Constitution does not yet explicitly reflect a guarantee or protection of the constitutional rights of Indonesian citizens. For example, the Constitutional Court's authority to conduct judicial review of statutes against the Constitution is still limited and does not extend to the adjudication of individual or group rights violations, as it only applies to norms of general application. Judicial review functions when a statute is alleged to be contrary to the Constitution, and the Court may invalidate such statute. Therefore, in order to prevent a legal vacuum in numerous cases involving constitutional rights violations, it is imperative that the Constitutional Court be granted jurisdiction to hear constitutional complaints through an amendment to the Constitutional Court Law. A constitutional complaint is a legal remedy that provides an avenue for citizens to seek protection of their constitutional rights in cases where such rights are violated by state acts, policies, omissions, or by the actions or inactions of state officials.

The absence of legal provisions concerning the settlement of constitutional complaints not only hampers the protection of citizens' constitutional rights but also risks undermining the rule of law, which is the foundation of the Indonesian State—particularly the principles of legal certainty and justice. This legal vacuum reveals a weakness in Indonesia's legal system, thereby necessitating specific rules and mechanisms for handling constitutional complaints following the principles of legal certainty and justice. It must be emphasized that the mechanism for filing a constitutional complaint should be available only after all other legal remedies have been exhausted. For instance, the complaint must have first been pursued through administrative courts such as the State Administrative Court (Pengadilan Tata Usaha Negara) or non-judicial avenues such as the Indonesian Ombudsman (Ombudsman RI), and yet has failed to resolve the constitutional rights violation. Hence, a constitutional complaint filed with the Constitutional Court would be the remedy of last resort for individuals seeking justice after all other legal and non-legal remedies have been pursued and exhausted.

The concept of *ius constituendum* refers to the law that aspires to be enacted in the future based on society's evolving needs and aspirations. In the context of constitutional complaints, *ius constituendum* serves as a normative guide in designing a legal framework capable of providing more effective and equitable protection of constitutional rights. A constitutional complaint is distinct from other legal mechanisms in that it focuses directly on the protection of individual rights as guaranteed by the Constitution.

In light of the foregoing discussion regarding the absence of an explicit legal framework for constitutional complaints (constitutional complaint) in Indonesia, and the necessity of such a mechanism to ensure the protection of constitutional rights, the following legal issues arise

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and warrant further examination. First, how do theory and practice concerning the resolution of constitutional complaints operate in various jurisdictions? This question seeks to explore the comparative legal frameworks adopted by other countries that have recognized constitutional complaints as a legal remedy for citizens whose fundamental rights have been violated by state actions or omissions. Second, what is the legal policy (*politik hukum*) of *ius constituendum* in the resolution of constitutional complaints in Indonesia? This inquiry aims to assess the prospective legal development that Indonesia ought to pursue in order to establish a coherent and effective mechanism for constitutional complaints, grounded in the principles of legal certainty, justice, and the rule of law. These questions are essential for evaluating the prospects of constitutional reform in Indonesia and ensuring that the legal system is responsive to the evolving needs of constitutional protection for its citizens.

### **Literature Review**

The theoretical foundation of constitutional complaints is deeply rooted in the doctrine of constitutionalism, which posits that the legitimacy of government power is derived from and limited by the Constitution. This concept aligns with the theory of constitutional supremacy, where the Constitution stands as the highest legal norm. As expounded by legal scholars such as Hans Kelsen, the Constitution is the *Grundnorm*, a foundational norm from which all subordinate laws derive their validity. Within this framework, the development of constitutional complaint mechanisms is viewed as a necessary procedural safeguard for ensuring that legislative, executive, or judicial actions do not violate individual rights enshrined in the Constitution.

In Germany, the doctrine of *Verfassungsbeschwerde* has been institutionalized since the post-war period, functioning as a powerful judicial tool for individuals to challenge state actions that infringe upon their basic rights. This mechanism reflects the broader principle of individual constitutional justice, which prioritizes access to constitutional courts for state institutions and private citizens. Scholarly discussions, including those by Kommers and Miller, have underscored the effectiveness of the German Federal Constitutional Court in enforcing constitutional norms and fostering democratic legitimacy (Kommers & Miller, 2012). The *Verfassungsbeschwerde* models how constitutional complaints can be embedded within a legal system as both a right and a remedy.

In Asia, the Republic of Korea has developed its own version of constitutional complaints, particularly through transforming its Constitutional Committee into the current Constitutional Court of Korea. As noted by Kim, this institutional shift reflects a growing recognition of the need for a constitutional adjudication mechanism that is responsive to individual grievances (Kim, 2020). The Korean model emphasizes both institutional and procedural independence, granting citizens direct access to the Court, especially in matters involving fundamental rights. The comparative significance of Korea lies in how it blends civil law traditions with human rights-based constitutionalism.

Thailand provides another example of how constitutional complaints can be operationalized, albeit through a hybrid mechanism involving the Office of the Ombudsman.

As analyzed in the work of Harding and Leyland, the Thai Constitutional Court receives referrals from the Ombudsman when laws or governmental actions potentially violate constitutional provisions (Harding & Leyland, 2011). This reflects a different institutional design, where the complaint mechanism is mediated through an independent oversight body. Despite differences in structure, the Thai model reinforces the principle of state accountability to citizens.

In the Indonesian context, the absence of a formal constitutional complaint mechanism reflects a significant normative and institutional gap in the protection of constitutional rights. While Article 24C of the 1945 Constitution authorizes the Constitutional Court to conduct judicial review, its scope remains limited to reviewing laws enacted by the legislature. Scholars such as Jimly Asshiddiqie have long argued that the judiciary's role should be expanded to accommodate constitutional complaints, particularly to address administrative actions and omissions that infringe individual rights. This highlights a growing discourse on the need to develop a more responsive and inclusive constitutional adjudication system. (Sujono, 2022)

The concept of *ius constituendum*, which refers to the ideal law intended to be established in the future, is increasingly relevant in the Indonesian legal landscape. Within the scope of constitutional complaint discourse, *ius constituendum* serves as a normative aspiration guiding the reform of the Constitutional Court Law. Legal theorists suggest that recognizing constitutional complaints within the Indonesian legal system would harmonize Indonesia with international constitutional practices and fulfill the constitutional mandate of protecting citizens' fundamental rights. Therefore, the evolution of a constitutional complaint mechanism represents both a theoretical imperative and a practical necessity in advancing Indonesia's commitment to the rule of law and constitutional justice.

## **Research Method**

This legal research adopts a normative juridical method, grounded in doctrinal legal scholarship that analyzes the law both as it exists (*ius constitutum*) and as it ought to be (*ius constituendum*), particularly in relation to the absence of a constitutional complaint mechanism in Indonesia. The study relies on primary and secondary legal materials, including constitutional provisions, statutes, jurisprudence, academic literature, and comparative legal doctrines (Negara, 2023). Several approaches are employed: first, the statutory approach, by examining the 1945 Constitution of the Republic of Indonesia and the Constitutional Court Law as the normative basis of the Court's powers; second, the case approach, by analyzing empirical instances of constitutional rights violations in Indonesia to identify legal gaps; third, the conceptual approach, to elaborate on foundational doctrines such as constitutionalism, the rule of law, and legal certainty; and fourth, the comparative approach, to assess the design and implementation of constitutional complaint mechanisms in other jurisdictions such as Germany, South Korea, and Thailand.

The analysis in this study is conducted through qualitative normative analysis, involving interpretation (hermeneutics) of legal texts and critical evaluation of legal doctrines and comparative experiences. Legal provisions are examined in light of constitutional theory

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to determine their adequacy in protecting citizens' constitutional rights. Case studies of violations are analyzed to illustrate the urgency and necessity of a constitutional complaint mechanism as a remedy of last resort. Through comparative analysis, the study evaluates the institutional design, procedural requirements, and substantive criteria of constitutional complaints in selected jurisdictions to formulate normative recommendations for Indonesia. The objective of this analytical framework is to assess the compatibility of foreign models with the Indonesian constitutional system and to construct a theoretical foundation for future legal reform in alignment with the principles of constitutional justice, human rights protection, and the supremacy of the Constitution

### **Result**

#### **Theoretical and Practical Approaches to the Resolution of Constitutional Complaint Disputes in Comparative Jurisdictions**

The Authority to Adjudicate Cases Involving Constitutional Rights Violations of Citizens is Commonly Referred to as the Authority to Hear Constitutional Complaints. According to Moh. Mahfud MD, a constitutional complaint refers to the submission of a case to the Constitutional Court based on the violation of constitutional rights for which no specific legal instrument exists, or for which no further legal or judicial remedies are available (MD, 2010b).

Victor Ferreres Comella defines a constitutional complaint as one of the principal powers of constitutional courts to protect the fundamental rights of citizens. It is defined as a complaint lodged with a constitutional court by individuals who believe that public authorities have violated their fundamental or constitutional rights. Thus, a constitutional complaint constitutes one of the core functions of constitutional courts in safeguarding the basic rights of citizens. It is a legal action filed with the constitutional Court by individuals whose constitutional or fundamental rights have been infringed upon by acts or omissions of public authorities (Wanta & Pondaag, 2023).

According to Tanja Karakamisheva, as cited in a journal article by Meirina Fajarwati, a constitutional complaint represents a legal instrument designed to ensure the protection of citizens' rights. A constitutional complaint may only be filed after all available legal remedies have been exhausted; hence, it functions as an extraordinary legal remedy of last resort for citizens whose constitutional rights have been violated (Fajarwati & Subroto, 2016).

Hamdan Zoelva explains that a constitutional complaint refers to a complaint submitted by a citizen to the Constitutional Court on the basis of government conduct that contravenes the Constitution (the 1945 Constitution of the Republic of Indonesia) (Zoelva, 2010). This definition implies that any act by the government directed at a citizen that violates the Constitution should be resolved through the mechanism of constitutional complaint before the Constitutional Court.

Ahmad Syahrizal similarly posits that a constitutional complaint is a formal mechanism through which individuals or communities may challenge alleged violations of constitutional



rights before the constitutional judiciary (Ahmad, 2006). Thus, any citizen who feels they have been subjected to unconstitutional actions may file a complaint pursuant to the established procedures.

Gerhard Dannemann, as cited in a constitutional law journal article by Tanto Lailam et al., characterizes constitutional complaints by four key elements: First, it serves as a legal mechanism to restore constitutional rights that acts of public authorities have infringed; Second, the adjudication system focuses on the constitutional validity of the challenged act, rather than on other legal issues surrounding the same dispute (thus distinguishing between constitutional review and constitutional complaint); Third, the complaint must be filed by a party whose constitutional rights have been directly harmed by the state action or omission; Fourth, it is the constitutional Court that holds the jurisdiction to decide and restore the constitutional rights of the complainant (Lailam et al., 2022).

According to Hamdan Zoelva, constitutional complaint refers to complaints brought before the Constitutional Court by citizens who are subject to actions (or inactions) by the State—be it the executive, legislative, or judiciary—contrary to the Constitution. Such complaints may only be filed after all legal remedies available through other state institutions have been exhausted. In several countries, this authority constitutes one of the principal functions of constitutional courts (Subiyanto, 2011).

As stated by I Dewa Gede Palguna in the work of Agsel Awanisa et al., a constitutional complaint is a legal action filed by an individual (citizen) before the constitutional Court against an act or omission by a public institution or authority that has resulted in the violation of the individual's constitutional rights. Such a complaint will generally be considered admissible only if all available legal remedies have been exhausted (Awanisa et al., 2021).

According to the present author, constitutional complaints arise from the acts or omissions of public officials that infringe upon constitutional rights. Constitutional protection is widely recognized across jurisdictions, as constitutional rights constitute fundamental or basic rights aligned with international human rights standards. Therefore, it is highly relevant and appropriate for the Indonesian legal system to empower the Constitutional Court to adjudicate constitutional complaints. Such authority is consistent with the foundational purpose of establishing the Constitutional Court, namely to protect and uphold the Constitution—including the constitutional rights of all Indonesian citizens.

Comparative Overview of Constitutional Complaint Mechanisms in Selected Jurisdictions: South Korea, Germany, Thailand, and Indonesia:

## **1. The Practice in Germany**

Constitutional complaints in Germany are governed by Article 93 of the German Basic Law (Grundgesetz), which grants individuals the right to file a complaint with the Federal Constitutional Court of Germany (Bundesverfassungsgericht or BVerfG) when their constitutional rights are violated. The Federal Constitutional Court, which was established alongside the adoption of the Basic Law in 1949, is seated in Karlsruhe—a city often referred to as the legal capital of Germany due to its hosting of major judicial institutions.

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The authority conferred upon the BVerfG is extensive, rendering it a prominent model for countries seeking to establish constitutional adjudication bodies (Awanisa et al., 2021).

The BVerfG has earned a distinguished reputation among legal scholars worldwide due to its significant role in upholding the supremacy of the Constitution. Since its inception in 1951, the Court has received approximately 240,251 constitutional complaint cases (accounting for around 98% of its total caseload), averaging roughly 6,000 cases annually. However, the success rate—i.e., the rate of complaints that are upheld—is approximately 2% of the total number of decisions rendered across all types of disputes. In 2020, the BVerfG issued several landmark rulings, including Case No. 2 BvR 2835/17 concerning global surveillance, Case No. 2 BvR 859/15 regarding the prohibition on wearing the hijab during legal traineeship, and the decision in the European Central Bank's Asset Purchase Program case. These decisions illustrate the Court's pivotal role in protecting citizens from judicial or governmental actions that infringe upon fundamental rights (Lailam, 2022).

The BVerfG's jurisprudence, particularly its landmark decisions, has served as a valuable reference point for constitutional courts in other jurisdictions, including those within both the Continental European legal tradition and the Anglo-American legal system. Thus, it may be stated that the Federal Constitutional Court of Germany stands as an authoritative model for establishing constitutional courts worldwide, due to its strong institutional powers and independence in safeguarding constitutional supremacy.

In the Indonesian context, the Constitutional Court, established in 2003, also plays a vital role in protecting and upholding the Constitution. Comprising nine justices appointed respectively by the Supreme Court, the House of Representatives, and the President, the Court is generally perceived by the public as comprising individuals of statesmanship and constitutional insight, capable of rendering wise and just decisions. Nevertheless, as is common with all judicial institutions, certain decisions of the Court have sparked public controversy—an inevitable occurrence in any system where judicial rulings may not satisfy all parties involved.

## **2. The Practice in South Korea**

The Constitutional Court of South Korea possesses jurisdiction over constitutional complaints, functioning as a mechanism to protect the fundamental rights of citizens against unconstitutional acts or legislation enacted by the government. According to the South Korean Constitution, during the First Republic (1948–1960), judicial review was exercised by two distinct state organs, each exercising judicial authority: the Supreme Court reviewed executive regulations, while the Constitutional Committee held full authority to examine, adjudicate, and decide on matters involving constitutional violations (Ahmad, 2006).

According to the present author, several key distinctions may be drawn between the Constitutional Court of the Republic of Indonesia and the Constitutional Court of South Korea. First, the Constitutional Court of Indonesia (hereinafter referred to as the MK) exercises powers as provided under Article 24C of the 1945 Constitution and Article 10 of the Constitutional Court Law (Undang-Undang Mahkamah Konstitusi or UUMK), which

include the authority to conduct judicial review of statutes against the 1945 Constitution, resolve disputes over authority between state organs, adjudicate electoral disputes, and decide on allegations of legal violations by the President or Vice President. However, the MK does not possess the authority to adjudicate constitutional complaints, meaning that individuals who believe their constitutional rights have been violated must seek legal remedies through other avenues first.

In contrast, the Constitutional Court of South Korea enjoys broader jurisdiction, including the authority to receive and adjudicate constitutional complaints filed by citizens whose rights have allegedly been infringed upon by governmental actions. Second, while the appointment of constitutional justices in Indonesia involves three state institutions—the President, the House of Representatives (DPR), and the Supreme Court (Mahkamah Agung)—each nominating three justices, the appointment process in South Korea similarly involves three branches of government but follows a more structured and balanced procedure designed to safeguard the independence and neutrality of the Court.

Third, the institutional structure of the Constitutional Court in Indonesia is entirely separate from the Supreme Court, while the Constitutional Court of South Korea is endowed with a wider scope of authority, including the explicit mandate to protect human rights. Most notably, the fundamental difference between the two institutions lies in the jurisdiction over constitutional complaints. South Korea grants its Constitutional Court a more extensive role in safeguarding the constitutional rights of its citizens, whereas the Indonesian Constitutional Court does not possess such authority.

Regarding the historical development and evolution of the constitutional adjudication body in South Korea, it is noteworthy that the transformation from the Constitutional Committee to the Constitutional Court occurred by the Sixth Republic (1988–2005). Following a long reform process, the Constitutional Court of South Korea was ultimately granted an equal institutional standing alongside other state organs. Its powers are clearly defined under the South Korean Constitution. Pursuant to Article 111(1) of the 1987 Constitution of South Korea, the Constitutional Court shall have jurisdiction to (Ahmad, 2006):

- a. adjudicating the constitutionality of a law upon a court's request;
- b. impeachment;
- c. ruling on the dissolution of unconstitutional political parties;
- d. resolving disputes over authority between state institutions;
- e. deciding individual petitions.

In conducting the judicial review of the constitutionality of a statute, the Constitutional Court of the Republic of Korea (hereinafter "the Korean Constitutional Court") employs several mechanisms. First, ordinary courts may refer a case to the Korean Constitutional Court on the grounds that the case involves an issue related to constitutionality. Such referral may be made based on the parties' agreement or on the judge's initiative presiding over the case. Second, suppose the Court within whose jurisdiction the case is being heard refuses to refer the matter to the Korean Constitutional Court. In that case, the parties may directly file a petition for constitutional review with the Korean Constitutional Court. However, the

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parties are prohibited from relying on arguments identical to those previously presented in the court (Ahmad, 2006).

It may be explained that in South Korea, the mechanism for judicial review of constitutionality can be conducted through two primary channels: through ordinary courts or directly to the Korean Constitutional Court. First, ordinary courts may refer a case to the Korean Constitutional Court if, during trial proceedings, an issue concerning the constitutionality of a legal norm arises. Such referral can be made based on the parties' consensus or on the judge's initiative handling the case. This demonstrates that the legal system in South Korea provides room for judges to play an active role in ensuring compliance with the Constitution. Second, if the Court within its jurisdiction refuses to refer the case to the Korean Constitutional Court, the parties still have the opportunity to directly submit a petition for constitutional review to the Korean Constitutional Court. However, there is a restriction prohibiting the parties from using the same arguments previously presented in the Court. This provision aims to prevent abuse of legal processes and to ensure that the judicial review of constitutionality is conducted objectively and effectively. With this mechanism in place, the Korean Constitutional Court serves as the guardian of constitutional supremacy, ensuring that the laws in force do not conflict with the constitutional principles underpinning the country's legal system.

### **3. The Practice in Thailand**

The Constitutional Court of Thailand (hereinafter referred to as the "Thai Constitutional Court") and the Ombudsman play significant roles within the constitutional review system in Thailand. When the Ombudsman receives complaints from individuals or groups who believe they have been harmed by laws or government actions deemed inconsistent with the Constitution, the Ombudsman may bring the matter before the Constitutional Court or the Administrative Court. This process provides a forum for the public to challenge state actions that potentially violate constitutional rights. Accordingly, the constitutional review system, through the roles of the courts and the Ombudsman, establishes a system of checks and balances aimed at protecting fundamental rights and maintaining the integrity of the Constitution (Asshiddiqie, 2012).

### **4. The Practice in Indonesia**

In Indonesia, as of the time this writing, the Constitutional Court (hereinafter "the Constitutional Court" or "the Court") does not yet possess the authority to adjudicate constitutional complaints. Consequently, many such petitions are declared "inadmissible" (*niet ontvankelijk verklaard* / NO) on the grounds that the Court lacks jurisdiction, even though, on substantive grounds, it is evident that constitutional rights of citizens have been violated (Sakinah & Wijayanti, 2024).

According to the author, in the ongoing debate regarding whether the Constitutional Court has the authority to resolve constitutional complaint disputes, it is necessary to examine state institutions involved in the protection of citizens' constitutional rights. The constitutional rights enshrined in the 1945 Constitution of the Republic of Indonesia (UUD 1945) ought

to constitute fundamental rights that these institutions must protect. The consideration for establishing a state institution authorized to safeguard constitutional rights is important, as these rights are obligations the State must protect.

By its designation, the Constitutional Court is the Court tasked with upholding the Constitution; accordingly, it should have the authority to adjudicate disputes arising from constitutional complaints. Although neither the 1945 Constitution nor the Constitutional Court Law (UUMK) currently grants the Court authority to handle constitutional complaints, this legal gap needs to be addressed by granting such authority to the Constitutional Court under Article 10 of the UUMK.

It is important to emphasize that the mechanism for resolving constitutional complaint disputes should only be employed when existing legal procedures—such as those before the Administrative Court (Pengadilan Tata Usaha Negara, PTUN) or the Ombudsman—are unable to resolve violations of constitutional rights, or when no further legal remedies remain available. Therefore, constitutional complaints represent the last resort (*ultima ratio*) for the public to seek justice, after exhausting all other available legal remedies, before bringing the matter to the Constitutional Court.

### **The Legal-Political Framework (*Ius Constituendum*) for Resolving Constitutional Complaint Disputes in Indonesia**

In conducting judicial review of laws (judicial review), the Constitutional Court (hereinafter "the Court") must observe ten (10) limiting principles that must not be violated. However, in practice, there have been numerous breaches of these limits by the Court, such as issuing *ultra petita* decisions (rulings beyond what was requested by the petitioner) based on the premise that judges must not dismiss a case, adjudicating matters concerning themselves, publicly expressing opinions about cases under examination, as well as several other violations of these limiting principles. The ten (10) limiting principles are as follows (MD, 2010a):

1. In performing judicial review, the Court must not issue rulings of a regulatory nature, as the authority to regulate laws lies with the legislature. The Court's authority is limited to declaring a legislative product unconstitutional, accompanied by a statement that it has no binding legal force;
2. The Court must not issue *ultra petita* decisions (decisions beyond what is requested by the petitioner), since such decisions fall within the legislative domain related to legislative review;
3. The Court must not rely on statutes (laws) as the basis for annulling other statutes. The foundational reference in constitutional review is the Constitution itself;
4. The Court must not interfere with matters delegated by the Constitution to the legislature for regulation;
5. In rendering decisions, the Court must not base its ruling on theories that are not clearly embraced by the Constitution, as there are many diverse theories. The primary basis must be the 1945 Constitution (UUD 1945);
6. In conducting judicial review, the Court must not violate the *nemo iudex in causa sua* principle, meaning it must not adjudicate matters concerning itself;

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7. Judges of the Court must not speak or express opinions publicly regarding concrete cases currently under examination by the Court, at any time and in any place;
8. Judges of the Court must not solicit cases by encouraging any party to file lawsuits or petitions before the Court;
9. Judges of the Court must not proactively offer themselves as mediators in political disputes between state institutions or among political bodies, as such conduct is political rather than legalistic;
10. The Court must not issue opinions on the existence, merits, or demerits of the 1945 Constitution, nor on whether the current Constitution should be amended or retained. The Court's role strictly safeguards and implements the existing and effective 1945 Constitution.

According to the author, the ten (10) limiting principles in judicial review of laws are necessary to safeguard the independence, integrity, and accountability of the Constitutional Court (hereinafter "the Court") in carrying out its duties as the guardian, interpreter, and protector of the Constitution. These limits ensure that the Court does not abuse its authority, such as issuing rulings beyond the scope of the petition (*ultra petita*) or adjudicating matters concerning itself, which could potentially give rise to conflicts of interest. Equally important, these limiting principles serve to maintain public trust in the Court by ensuring that every decision is always made based on principles of law and justice without undue influence from any particular party. These limits are also crucial to prevent actions or statements that could undermine the Court's neutrality, such as discussing cases under examination in the public sphere. By adhering to these limiting principles, the Court is ensured to uphold the rule of law, especially in judicial review, preserve its authority, and continue to be a trusted institution in safeguarding the Constitution and justice in Indonesia.

Regarding the mechanism for filing petitions for cases to be resolved by the Court through constitutional complaints, the author observes that the process is fundamentally similar to filing other cases submitted to the Court. The submission does not require legal representation or counsel for cases categorized as constitutional complaints. Thus, citizens who wish to file a constitutional complaint may directly approach the Court to assert the constitutional rights they feel have been violated. Such legal recourse undertaken by citizens ultimately fosters constitutional awareness and understanding among the public. Every citizen submitting a petition to the Court will not encounter difficulties even without legal counsel, as the Constitution fundamentally represents the people's voice and always proceeds according to the will of the people. Therefore, every case submitted to the Court will be examined to determine if it meets the formal requirements under the Court's procedural law and falls within the scope of constitutional complaint disputes; if so, the case may proceed to the trial phase.

According to Harjono, the Constitutional Court's (hereinafter "the Court") authority can generally be divided into principal powers and additional powers. The principal powers include (1) the judicial review of the constitutionality of laws against the Constitution; (2) deciding complaints filed by the public regarding violations of their constitutional rights, commonly known as constitutional complaints; and (3) resolving jurisdictional disputes between state

institutions. Meanwhile, the powers beyond these are accessory or supplementary and may vary from country to country (Thalib, 2006).

Based on the above theory, the author explains that the Court has several principal authorities stipulated in the 1945 Constitution and additional authorities. First, the Court has authority as provided under Article 24C of the 1945 Constitution and Article 10 of the Constitutional Court Law (UUMK), aimed at ensuring that laws do not violate constitutional principles. Second, the Court is authorized to handle the resolution of constitutional complaint disputes, which are complaints from the public who feel that certain laws or policies have violated their constitutional rights, a mandate that may be reinforced by amendments to the UUMK and the 1945 Constitution if deemed necessary in the future.

The author believes that an independent and free judiciary plays a vital role in upholding the supremacy of law. There is a need for a judicial institution capable of carrying out the duties, functions, and authorities mandated by the 1945 Constitution to safeguard the Constitution, and that institution is the Constitutional Court. Therefore, the Court is expected to protect citizens' constitutional rights so that everyone can obtain legal protection, human rights protection, and guaranteed constitutional rights. As a key actor within the judiciary, the Court holds an important position as it is considered the proper institution to resolve unconstitutional cases in its capacity as the guardian of the Constitution.

Before establishing the Court, all matters concerning constitutional violations were resolved by ordinary courts. Every citizen could file lawsuits or petitions to the courts regarding violations of their constitutional rights caused by acts of the authorities or public officials. The cases brought before the courts were not limited to matters typically resolved within ordinary judicial forums but also included cases of constitutional rights violations. Consequently, this resulted in decisions of low quality, which failed to provide a sense of justice to citizens.

Furthermore, based on the author's observations, many decisions that have obtained permanent legal force are not implemented in accordance with the Court's rulings, reflecting the poor quality of law enforcement officials in Indonesia. Thus, citizens continually seek judicial institutions with authority to resolve violations of constitutional rights, aiming to ensure that citizens' constitutional rights are fully guaranteed and protected.

In accordance with the definition provided by Mahfud MD, a constitutional complaint is a submission of a case to the Constitutional Court (hereinafter "the Court") concerning violations of constitutional rights for which no legal instruments exist to litigate or no further legal/judicial remedies are available (MD, 2010a). Based on Mahfud MD's opinion, every citizen (individual) who feels that a decision of a public official has infringed upon their constitutional rights may file a lawsuit or petition for a constitutional complaint.

However, the author reiterates that the mechanism for resolving constitutional complaint disputes can only be utilized when all legal instruments, tools, or remedies for a particular matter have been exhausted, or when all judicial processes have been undertaken but have yet to provide results or justice for the party alleging the unconstitutional act. Correlating Mahfud MD's view with the prevailing legal paradigm, it is appropriate that the constitutional

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complaint mechanism be explicitly incorporated as one of the Constitutional Court's authorities in one of the articles or clauses of the Constitutional Court Law (UUMK).

Hamdan Zoelva's view is not significantly different, defining constitutional complaint as a citizen's complaint to the Constitutional Court due to treatment by the government that contradicts the Constitution (the 1945 Constitution) (Subiyanto, 2011). Accordingly, every citizen is permitted to use the constitutional complaint mechanism if it is regulated by law when they feel government actions have violated their constitutional rights. Therefore, if provisions concerning constitutional complaints are explicitly regulated in the UUMK, every citizen can directly submit cases that harm their constitutional rights to the Court. According to Ahmad Syahrizal, a constitutional complaint is a constitutional grievance mechanism for every citizen or member of society who wishes to question alleged violations of constitutional rights before the constitutional Court (Ahmad, 2006).

Based on these various opinions, the understanding of constitutional complaints is generally similar and contains meanings that do not differ significantly. Relating this to the current legal paradigm, where there remain many cases of constitutional violations against citizens, while available legal regulations have yet to protect constitutional rights adequately, the appropriate step is to utilize the constitutional complaint mechanism. This view implies that the constitutional complaint mechanism can be used by citizens who receive treatment from holders of power that violates their constitutional rights, and it should be submitted to the Court authorized to resolve any cases considered unconstitutional.

As the author has explained in the previous section, the Constitutional Court (hereinafter "the Court"), as one of the judicial authorities, possesses four (4) principal powers and one (1) obligation. However, none of these explicitly regulate the Court's authority to resolve constitutional complaint cases, but implicitly, if the Constitution is carefully examined and properly interpreted through extensive scholarly understanding, the authority concerning constitutional rights is already embedded in the Constitution. The legal steps taken by the Court demonstrate that the Constitution, which has long been positioned as the highest constitutional foundation, has yet to accommodate and fully protect the constitutional issues of citizens. Therefore, this legal breakthrough serves as an initial step indicating that the Indonesian nation must still reform and improve every aspect of its constitutional order.

This rationale serves as a reference that Indonesian legal provisions need to explicitly incorporate regulations concerning constitutional complaints and expand the Court's powers (for instance, by amending the Constitutional Court Law – UUMK) by including a specific article or clause regarding the authority to resolve constitutional complaints. Alternatively, a fifth amendment to the 1945 Constitution could be considered, with one of the changes being the inclusion of the Court's authority under Article 24C of the 1945 Constitution to resolve constitutional complaints.

Suppose this instrument clearly becomes one of the Court's authorities. In that case, it can be anticipated that the Court will handle many applications for constitutional complaints, as numerous legacies of public policies are considered to have infringed upon the basic rights of Indonesian citizens. This requires not only thorough preparation but also support from



various national stakeholders. Therefore, as a limitation, the author suggests that applications for resolving constitutional complaints should only be examined when all available legal remedies have been exhausted.

On the other hand, the existence of this constitutional complaint mechanism will foster legal awareness among the public to defend themselves before the law when their rights are violated. Furthermore, various policies affecting the public sphere and ordinary citizens will inherently become more sensitive to the protection and fulfillment of the basic or fundamental rights of every individual in society.

According to the author, the protection of citizens' constitutional rights cannot be carried out by only a few state actors, but must be implemented comprehensively with a strong commitment from all components of the State. Therefore, a progressive legal measure, a proper concept, and a sound legal foundation are necessary to formulate a legal provision that serves as a normative basis containing the mechanism for constitutional complaints (constitutional complaint).

The legal provisions codified into statutory regulations must not undermine the robust legal system, ensuring legal certainty is maintained. This constitutes a hope that the regulation concerning constitutional complaints can be incorporated into positive law in the form of legislation (an amendment to the Constitutional Court Law—UUMK), serving as a reference for citizens when filing lawsuits or petitions regarding violations of constitutional rights they have experienced.

With its authority, the Constitutional Court (hereinafter "the Court") is expected to safeguard the values and norms contained in the Constitution, given that the functions and duties of the Court are: (1) guardian of the Constitution; (2) the final interpreter of the Constitution; (3) guardian of democracy; (4) protector of citizens' constitutional rights; and (5) protector of human rights.

Finally, the author proposes that the *ius constituendum* in resolving constitutional complaint disputes in Indonesia requires several strategic steps to ensure effectiveness and justice. First, an amendment or addition to the articles in the Constitutional Court Law (UUMK) is necessary to explicitly regulate the complaint mechanism, including submission procedures, types of violations subject to complaint, and the scope of the Court's authority. The Court must prioritize the principle of legal certainty in every ruling, providing transparent and comprehensive legal reasoning.

Second, the State must provide supervisory mechanisms to ensure the effective implementation of the Court's decisions, including the imposition of sanctions against non-compliant parties. Third, as a preventive measure, the Court could be granted authority to provide legal advice to state institutions concerning policies or actions potentially infringing on citizens' constitutional rights. Fourth, the development of a technology-based system is required to facilitate complaint submission, monitoring, and real-time publication of decisions, thereby enhancing accessibility, accountability, and public trust in the Court.

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Fifth, as part of educational efforts, the Court should be mandated to raise public awareness about constitutional rights and complaint procedures by integrating constitutional education. Sixth, the Court may adopt restorative approaches in dispute resolution, alongside normative decisions, to promote solutions and repair the impact of violations on citizens.

These steps are expected to establish an effective, transparent, and responsive constitutional complaint dispute resolution system that meets citizens' legal needs in the interest of legal certainty and justice.

In the constitutional complaint mechanism in Indonesia, the main challenges in its regulation are:

1. Inadequate legal framework, as there is no specific regulation governing constitutional complaints.
2. Judicial capacity, referring to the potential additional workload for the Constitutional Court if this mechanism is adopted.
3. Public understanding remains limited regarding constitutional rights and the mechanisms for their protection.

Meanwhile, the opportunities to develop the constitutional complaint mechanism are significant, especially given the increasing public demand for protection of constitutional rights. A fair regulation governing constitutional complaints can be designed by considering several principles:

1. The principle of accessibility means the complaint submission process must be simple, affordable, and not burdensome.
2. The principle of substantive justice is where the Constitutional Court must ensure that the decisions rendered reflect substantive justice for all parties involved.
3. The principle of transparency and accountability requires that dispute resolution processes be conducted transparently and accountable.
4. The principle of constitutional rights protection mandates that the regulation guarantees the maximum protection of citizens' constitutional rights.

The author illustrates the constitutional complaint dispute resolution process at the Constitutional Court as follows:

1. Filing of complaint: A citizen who feels their constitutional rights have been violated files a complaint to the Constitutional Court, accompanied by supporting documents.
2. Preliminary examination: The Court reviews administrative completeness and whether the complaint meets the requirements to be processed.
3. Preliminary decision: The complaint is either accepted or rejected. If rejected, the process terminates with reasons provided by the Court. If accepted, the case proceeds to the next stage.
4. Preliminary hearing: The Court holds a session to hear initial arguments from the petitioner and related parties.
5. Legal argument discussion: All parties present detailed legal arguments before the Constitutional Court panel.

6. Judges' deliberation: The judges deliberate to assess whether a constitutional rights violation has occurred based on the Constitution (UUD 1945).
7. Final decision: The Court delivers the final ruling. If a violation is proven, the Court issues remedies or corrective measures. If not proven, the complaint is declared dismissed.

## **Conclusion**

Constitutional complaints are important for protecting citizens' constitutional rights when all other legal remedies have been exhausted. Practices in countries such as Germany and South Korea demonstrate that the authority of the Constitutional Court to handle constitutional complaints is crucial in maintaining constitutional supremacy. In Indonesia, the absence of regulation on this authority creates a legal vacuum that disadvantages the citizens. Therefore, a political-legal reformulation of *ius constituendum* is necessary through amendments to the 1945 Constitution (UUD 1945) and revisions to the Constitutional Court Law (UUMK) to grant the Constitutional Court the authority to handle constitutional complaints as the ultimate legal remedy for constitutional justice and the strengthening of the state constitutional system.

The *ius constituendum* regarding resolving constitutional complaint disputes in Indonesia requires several strategic steps to ensure effectiveness and a sense of justice. First, amendments or additions to articles in the UUMK are needed. Second, the State must provide supervisory mechanisms to ensure the effective implementation of Constitutional Court decisions, including imposing sanctions on non-compliant parties. Third, as a preventive measure, the Constitutional Court may be granted the authority to provide legal advice to state institutions. Fourth, the development of technology-based systems is required for real-time publication of decisions. Fifth, constitutional education should be integrated. Sixth, the Constitutional Court may adopt a restorative approach in resolving cases, in addition to normative decisions, to be transparent and responsive to citizens' legal needs in pursuit of legal certainty and justice.

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