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CONSTITUTIONAL COMPLAINT AND CONSTITUTIONAL QUESTION (STUDY OF THE URGENCY OF CITIZENS CONSTITUTIONAL RIGHTS)

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Abstract

The Constitutional Court of Indonesia as a judicial institution is expected to ensure the fulfillment of the constitutional rights of citizens through its authority. But there is still a weakness in the Constitutional Court, namely by the absence of constitutional complaint and constitutional question authority, so that many citizens are not fulfilled their constitutional rights. This research will explore and analyze how exactly the concept of constitutional complaint and the concept of constitutional question and formulate its urgency to the fulfillment of the constitutional rights of citizens. This research is a type of normative juridical research with a statutory and conceptual approach. The result of the discussion in this study is that constitutional complaint is a mechanism to resolve violations of the constitutional rights of citizens that are not regulated in the law and its urgency provides an opportunity for citizens to challenge judicial decisions, bilateral and multilateral agreements until the enactment of conventions that are considered to violate the constitutional rights of citizens. While constitutional question is a constitutional testing mechanism whose application is submitted by a judge of the general court when the judge doubts the constitutionality of a law that will be applied in a particular case that he is dealing with and the urgency of giving respect, protection, and fulfillment of the constitutional rights of citizens with judges not forced to apply the applicable law to a case that according to his belief that the law is unpassed. It is contrary to the constitution or indecision of its constitutionality.

Keywords: *Constitutional Court: Constitutional Complaint; Constitutional Question; Constitutional Rights of Citizens*

INTRODUCTION

The reform movement, which gained widespread support from all components of the nation, successfully forced President Suharto to resign from office on May 21, 1998. The cessation of President Suharto amid an economic and monetary crisis severely burdened Indonesian people's lives early at the

beginning of the reform era in Indonesia.[1] At the beginning of the reform era, developed and popular in the community, there are demands for reform that are urged by various components of the nation, namely:[2] amendments to the Constitution; elimination of the doctrine of dual military functions; the enforcement of the rule of law, respect for human rights, and the eradication of corruption, collusion and nepotism; decentralization and fair relations between the center and the region; freedom of the press; and create a democratic life.

Based on constitutional changes during the reform period, the idea of establishing a Constitutional Court in Indonesia is strengthening. The peak occurred in 2002 when the idea of the establishment of the Constitutional Court was included in the constitutional changes carried out by the MPR as formulated in the provisions of Article 24 paragraph (2) of the Constitution in the third amendment.[3] In Article 24 paragraph (2) of the Constitutional Amendment established by the Indonesian Parliament on November 9, 2001, adding a new judicial authority, namely the Constitutional Court.

In the history of statehood, Indonesia is the 78th country to form the Constitutional Court and at the same time as the first country in the world to form this institution in the 21st century.[4] Furthermore, on August 13, 2003, it was agreed that the constitutional judges would be the birthday of the Constitutional Court in Indonesia. On that basis, the polemic of statehood has not been resolved constitutionally. The authority and obligations of the Constitutional Court as formulated in the Third Amendment of the Constitution and refer to the theory and practice regarding the Constitutional Court in various countries, it is known that the Constitutional Court has 4 main functions, namely: *the guardian of the constitution,*[5] *the sole interpreter of the constitution,*[6] *the guardian of democracy,*[7] and *the protector of citizen's constitutional rights and*

[1] Majelis Permusyawaratan Rakyat Republik Indonesia. (2002). *Panduan Pemasyarakatan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan Ketetapan Majelis Pemusyawaratan Rakyat Republik Indonesia*, Jakarta: Sekretariat Jendral MPR RI, p. 5.

[2] *Ibid*, p. 6.

[3] Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi. (2010) *Profil Mahkamah Konstitusi Republik Indonesia*, Cetakan Pertama, Jakarta, hlm. 3.

[4] *Ibid*, p. 4

[5] Abdul Mukthie Fadjar. (2010), *Mahkamah Konstitusi Sebagai Pengawal Dan Penafsir Konstitusi: Masalah dan Tantangan*, Malang: Trans Publishing, p. 1.

[6] Ach Rubaei. (2017), *Putusan Ultra Petita Mahkamah Konstitusi: Perspektif Filosofis, Teoritis, dan Yuridis*, Yogyakarta: LaksBang, p. 82.

[7] Mahfud MD. (2014), *Politik Hukum di Indonesia*, Jakarta: Rajawali Pers, p. 348.

the protector of human rights.[8]

The establishment of the Constitutional Court is a tangible entity of the change in Indonesia's state system, which aims to create a balance and strict control between state institutions. Theoretically, the above context relates to the triassic politica teachings of Montesquieu which remind state power should be prevented from being centered on one hand or institution. The concept of triassic politica that expressly separates state power into 3 powers, namely executive power, legislative power and judicial power. In Indonesia the triassic politica teaching is not fully adopted. As stated by Bagir Manan that the triassic politica teachings there is a principle of checks and balances which means in relations between state institutions can test each other or correct their performance in accordance with the scope of power that has been determined and regulated in the constitution. Separation and division of power are divided into three powers to exercise state power, namely executive, legislative and judicial influence each other.

It became a problem when the Constitutional Court was more than a decade old, that there were many constitutional rights of citizens that were neglected by the state organizers. Violations of citizens' constitutional rights in the provisions of the laws and regulations can be resolved through judicial review mechanisms. For actions or decisions of state organizers that violate constitutional rights, ordinary judicial mechanisms are used, especially against violations that occur due to abuse of authority and erroneous interpretation, for example through criminal justice, civil, or state governance. The issue is also about the provisions of the settlement of violations of the constitutional rights of citizens that are not regulated in the Law, generally known as the constitutional complaint mechanism and about one of the mechanisms that can be applied to maintain constitutional supremacy with a proposal model that is still hotly debated, namely about constitutional questions when examined both in terms of political reality and legal implementation.

To answer the above problems and to be more directed at this writing, the formulation of the right problem is: First, what is the concept of constitutional complaint and what is the urgency to the constitutional rights of citizens? And second, what is the concept of constitutional ques-

[8] Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi. (2009), *Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan Undang-Undang Republik Indonesia Nomor 24 Tahun 2003 tentang Mahkamah Konstitusi*, Cetakan Kesembilan, Jakarta, p. vi.

tion and what is the urgency of the constitutional rights of citizens? The purpose of writing in this paper is: First, to seek, to analyze the concept of constitutional complaint and formulate its urgency to the constitutional rights of citizens and Second, to seek, analyze the concept of constitutional questions and then formulate their urgency to the constitutional rights of citizens.

METHOD

This research is normative juridical research that uses a statutory approach and conceptual approach. The approach of legislation is done by tracing the primary legal material of the type of secondary data, namely laws and regulations related to the issues studied. The conceptual approach is done by tracing secondary legal materials from secondary data types and basing on theories, doctrines and views that develop in legal science, especially on the practice studied. Data collection techniques are carried out by library study methods by utilizing libraries as a means to collect secondary legal materials and are done by utilizing online media to collect primary legal materials. Once the data is collected it is then classified for further analysis using a quaatative analacidal taknik. After analysis, the conclusion is then made using deductive thinking methods.

ANALYSIS AND DISCUSSION

Concept of Constitutional Complaint

In its history constitutional complaint began in 1803, a prominent case in the U.S. Supreme Court has become a landmark case that gave birth to the idea of constitutional testing in the world. The case became known as "Marbury vs. Madison". At that time, William Marbury filed a lawsuit with the U.S. Supreme Court to force the Supreme Court to issue a 'writ of mandamus' as determined by Section 13 of the Judiciary Act of 1789 under the circumstances of the change of American leadership led by President Thomas Jefferson. The Supreme Court at that time continued to prosecute the case that provided legal standing, both for the applicant and the object tested.[9]

The Supreme Court ultimately did not grant the lawsuit, but the Supreme Court has delivered a ruling that is a milestone of constitutional testing. The Supreme Court held that the 'writ of mandamus' as prescribed by Section 13 of the Judiciary Act of 1789 is contrary to Article III section 2 of the United States Con-

[9] Klucka, J. (1997), "Suitable Rights for Constitutional Complaint", *Paper on Workshop of The Functioning of the Constitutional Court of the Republic of Latvia*. Riga, (3) 4: 3.

stitution.[10] The Marbury versus Madison case provides an example of the conflicting norms of the law versus the constitution. It was a new thing at the time. The judiciary usually only handles civil and criminal cases conventionally and does not address the issue of norms. It's no surprise, then, that the Marbury vs. Madison case has become what Erwin Chemerinsky calls "*the single most important decision in American Constitutional Law*".

In the late 19th century, George Jelinek, a prominent Austrian jurist began to give the idea of adding constitutional testing authority to the Supreme Court. This idea was realized in 1867 where the Austrian Supreme Court gained new authority to handle juridical disputes related to the protection of the political rights of individual citizens *vis-à-vis* dealing with government. It was not until 1920 that the idea of constitutional supremacy made Hans Kelsen, professor of the University of Vienna, finally realize the separation of judicial powers between the Supreme Court through the presence of the Constitutional Court. Since then, a special court is known as the sole perpetrator of constitutional review activities named "*Verfassungsgerichtshoft*".

This concept of constitutional testing then evolved into a number of forms of application using constitutional-based testing authority such as costitutional complaints. This concept is noted introduced in Article 144 of the Austrian Constitution of 1929 which states that individuals can file a lawsuit against the authority of the government which is considered to violate the basic rights (Grundrechte) of the person concerned.11 Following later, constitutional complaints also became part of the authority of the German Constitutional Court contained in Article 93 letter 4a Basic Law 1949.

In South Korea, it has long applied constitutional complaints as one of the powers of its constitutional court. This authority is granted under Article 68 paragraphs (1) and (2) of the Constitutional Court Act of Korea which states:[12] (1) *Any person who claims that his basic right which is guaranteed by the Constitution has been violated by an exercise or non-exercise of governmental power may file a constitutional complaint, except the judgments of the ordinary courts, with the*

[10] Jimly Asshiddiqie. (2005), *Model-Model Pengujian Konstitutional di Berbagai Negara*, Jakarta: KonPress, p. 37.

[11] Jimly Asshiddiqie dan Ahmad Syahrizal (2006), *Peradilan Konstitusi di Sepuluh Negara*, Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi Republik Indonesia, p. 61.

[12] I Dewa Gede Palguna. (2018), *Mahkamah Konstitusi: Dasar Pemikiran, Kewenangan, dan Perbandingan Dengan Negara Lain*, Jakarta: KonPress, p. 295.

Constitutional Court: Provided, That if any relief process is provided by other laws, no one may file a constitutional complaint without having exhausted all such processes; dan (2) *If the motion made under Article 41 (1) for adjudication on constitutionality of statutes is rejected, the party may file a constitutional complaint with the Constitutional Court. In this case, the party may not repeatedly move to request for adjudication on the constitutionality of statutes for the same reason in the procedure of the case concerned.*

No fewer than 18,473 constitutional complaint cases have been examined by the Constitutional Court of Korea. One well-known constitutional complaint case is when citizens complained of discriminatory treatment by the government in the form of awarding extra points to war veterans in all types of Civil Service Selection Tests and Tests as much as 3-5. The Constitutional Court of Korea ruled that all arrangements regarding the provision of extra value to veterans are discriminatory and unconstitutional because they conflict with Article 11 of the Korean Constitution on equal rights and Article 25 on equality of the right to an opportunity in government.13

In another case was a constitutional complaint submission by Dong-A Ilbo, a monthly magazine owner, to the Constitutional Court of Korea. Dong filed a constitutional complaint due to an order from the general court to issue a public apology for the defamation case he made with the addition of compensation payments. The Constitutional Court of Korea, in this case, ruled that coercion to publicly apologize violated the freedom of belief and the right to personal dignity guaranteed by Article 19 of the Constitution. According to Gavin Healy14 this case is quite important, because it is the first case in the Constitutional Court of Korea to directly cite the International Covenant on Civil and Political Rights (ICCPR). Some other countries that have constitutional courts, also have constitutional complaint authority, namely Austria, South Africa, Azerbaijan, Croatia, Spain, and others.

Urgency of Constitutional Complaints on The Constitutional Rights of Citizens

The discussion of changes to the Indonesian Constitution has emerged a proposed constitutional complaint as one of

[13] *http://english.ccourt.go.kr/home/english/decisions/mgr_decision _list.jsp*, accessed June 10, 2021.

[14] I Dewa Gede Palguna, *Loc. cit*.

the authority of the Constitutional Court as stated by I Dewa Gede Palguna in the Plenary Meeting of the Ad Hoc Committee of the MPR RI in 1999. The proposal was not approved with various considerations, among others because the main purpose of the establishment of the Constitutional Court was as a judicial review of the law against the Indonesian Constitution, thus avoiding the buildup of cases, as in the practice of the German Constitutional Court was avoided.[15]

Indonesia's constitutional changes divide the judicial powers into two judicial institutions, namely the Supreme Court and the Constitutional Court. The Supreme Court, in addition to having the authority as a court of cassation level from the judiciary under it, is also authorized to test the constitutionality (legality) of laws under the law. On the other hand, the Constitutional Court is granted limited authority only to test the law against the Constitution. Thus, there is a division of authority to test the laws and regulations (constitutional review or legal review) between the Constitutional Court and the Supreme Court. This division of testing authority should also be applied in matters of constitutional complaint.16 That is, if there is a policy of a state organ that violates the constitutional rights of citizens guaranteed by the Indonesian Constitution, the constitutional complaint is submitted to the Constitutional Court as a judicial review case. If, the point lies in government policies that violate the rights of citizens who are guaranteed by law or there are acts of unlawful violation, can be investigated through a general trial that boils down to the Supreme Court.

From 2003 to mid-2010, the Constitutional Court received quite a number of applications for legal testing that was substantially a constitutional complaint.17 However, as stated above, the authority of the Constitutional Court is determined limitatively in the Indonesian Constitution without mentioning the authority of constitutional complaints, so many of these applications are declared "unacceptable" (niet ontvankelijk verklaard) on the grounds that the Constitutional Court is not authorized to try them.18 Various constitutional issues related to the implementation of the law,

[15] *Ibid.*

[16] Jimly Asshiddiqie. (2014), *Konstitusi Dan Konstitusionalisme Indonesia*, Jakarta: Sinar Grafika, p. 201.

[17] Hamdan Zoelva. (2012), "Constitutional Complaint dan Constititional Question Dan Perlindungan Hak-Hak Konstitusional Warga Negara", *Jurnal Media Hukum*, (1) 1: 162.

[18] *Ibid*. 163.

government policies that violate constitutional rights, conflicting general judicial decisions, alleged irregularities in law enforcement to government negligence in the preparation of the Presidential Election Permanent Voter List are some of the Cases of Testing the Law in the Constitutional Court which is substantially more towards constitutional complaints.

In the implementation of the Constitutional Court, the cases use legal testing as an entrance for its examination. In fact, in 2010 there was a case regarding the Revocation of the Circular Letter of the Presidium of the Ampera Cabinet Number SE.06 / Pres.Kab / 6/1967 dated June 28, 1967 on the Issue of China19 submitted by a member of the House of Representatives which is substantially a constitutional complaint. The case was declared indible by the Constitutional Court. Of the many types of such cases, it shows that up to eight years the Constitutional Court was formed, cases containing elements of constitutional complaints still come to the Constitutional Court. This situation occurs because there is no other mechanism or path that can be taken by justice seekers or citizens who are violated by their constitutional rights, so that the applicants use the entrance of the testing of the law so that the matter can be tried by the Constitutional Court.

Quite a number of Constitutional Court rulings in resolving such cases, sometimes extend the interpretation of Constitutional Court rulings that are not only limited to declaring a law contrary to the Basic Law, but by declaring contrary to the basic law conditionally or contrary to exceptions. It is called conditionally unconstitutional or conditional contravention of the constitution.20 Looking at the actual conditions and developments of cases filed and examined in the Constitutional Court, many jurists recommend that the Constitutional Court also be given the authority to adjudicate constitutional complaints, in order to be an effective means of controlling power, both at the state and community levels.21 Constitutional complaints are concrete means of protecting the human rights of citizens guaranteed by the constitution. With constitutional complaints, society obtains instruments to defend its right to power. With the authority to decide a case in the first and last level (final and binding), the Constitutional Court can quickly restore human rights violations

[19] Putusan Mahkamah Konstitusi Nomor 24/PUU-VIII/2010.

[20] Putusan Mahkamah Konstitusi Nomor 147/PUU-VII/2009.

[21] I Dewa Gede Palguna, *Op. cit.* p. 297.

that occur.22

It is inevitable that there are pros and cons of academics, regarding the discourse of including constitutional complaints into the authority of the Constitutional Court, because such authority is not found in the Indonesian Constitution explicitly. Some experts argue that the granting of authority to adjudicate constitutional complaints to the Constitutional Court does not have to be through changes to the Indonesian Constitution. This is enough to be done through the revision of the constitutional court law, by including explicit arrangements on it, so that the obligation of the state to protect the human rights of its citizens can be realized. This opinion has the drawback, due to the issue of insufficient legitimacy, because the constitution does not explicitly give such authority to the Constitutional Court. Other experts argue23 that the Constitutional Court can only adjudicate constitutional complaints through explicit arrangements in indonesia's constitution so that it can only be done through changes to the constitution.

The practice in the Constitutional Court in examining and adjudicating cases testing laws that are substantially constitutional complaints, many applications are granted by the Constitutional Court using the model of conditional constitutional rulings.24 For example, in the case of the application of Machicha Mochtar who had struggled to get the status of his son named Muhammad Iqbal Ramadhan as a son of Moerdiono. Even Machicha had pleaded for the legalization of the marriage through the Religious Court to obtain his son's status, but all the results were nil. Therefore, Machicha Mochtar applied for the testing of Article 2 paragraph (2) and pasa 43 paragraph (1) of Law No. 1 of 1974 concerning the main purpose that his son obtain status as a child of Moerdiono (deceased) namely by pleading that the child outside of marriage that is not recorded to have a civil relationship with his biological father. Article 43 paragraph (1) originally stipulated that the child outside of marriage only has a civil relationship with his mother.

The Constitutional Court granted Machicha Mochtar's application,[25] stating that the provisions of Article 43 paragraph (1) of the Marriage Act, contrary to the

[22] Hamdan Zoelva, *Loc cit.*

[23] Sri Soemantri. (2006), *Prosedur dan Sistem Perubahan Konstitusi*, Bandung: Alumni, p. 59.

[24] Hamdan Zoelva, *Op. cit.* 163.

[25] Putusan Mahkamah Konstitusi Nomor 46/PUU-VIII/2010.

1945 NRI Constitution and declared to have no legal force apply as long as it means eliminating civil relations with men that can be proven based on science and technology and / or other evidence according to the law turned out to have a blood relationship with his father. That is, with the verdict as long as it can be proven that the child is Moerdiono's son, then based on the law in addition to having a civil relationship with his mother (Machicha Mochtar) also has a civil relationship with his biological father (Moerdiono). The formality of the case is a test of the law, but substantially a constitutional complaint.26 Many similar cases were decided and granted by the Constitutional Court using a conditional constitutional model.

To accommodate the adjudication of constitutional complaints do not have to change the Constitution of Indonesia or change the Law of the Constitutional Court. This can be done through the development of constitutional court decisions through the expansion of interpretation of the authority to test the law that has been in the Indonesian Constitution. The Constitutional Court can make dynamic and broad interpretations of the constitutional rights and legal standing of the plaintiffs. This view is acceptable if the interpretation of the constitution, not only adheres to the formal legality of the original intent aspect of the constitutional provisions (backward looking) but a view that relates to the needs of practice and political expediency in the present and future (forward looking).27 The addition of constitutional complaint authority through the revision of the Constitutional Court Law can pose constitutional problems, because the Indonesian Constitution gives limitative authority to the Constitutional Court. Likewise, the addition of the authority to change the Indonesian Constitution is something that is very difficult to do, both due to political factors and very severe constitutional requirements.

Concept of Constitutional Question

Constitutional question is basically one of the mechanisms to protect the constitutional rights of citizens that has been widely applied in various countries. Constitutional question can be interpreted as a constitutional testing mechanism whose application is submitted by a judge of the general court (ordinary court) while the judge concerned doubts the constitutionality of a law to be applied in concrete cases

[26] Hamdan Zoelva, *Loc cit.*

[27] I Dewa Gede Palguna, *Op. cit.* p. 299.

that are being handled.[28] The constitutional question is also termed, "*The constitutionality of law upon the request of the court*".[29] Constitutional question applications from the general court to the Constitutional Court generally also use the terminology of submission (*judicial referral of constitutional question or referral from a court*).[30]

Historically constitutional question can not be separated from the establishment of the Constitutional Court in Austria. The constitutional question was the first question proposed by Hans Kelsen regarding the authority of the Austrian Constitutional Court. According to him, the authority is designed so that the general court can participate in maintaining the highest position of the constitution that may not be obeyed by the executive branch. Kelsen said, "this would both extend the court protection of the constitution to the executive acts and also anchor the court in process of concrete review. I proposed that courts, individual, and/or a special constitutional ombudsman should have the right to refer matter to the constitutional court."31

Through the submission of constitutional questions, this will result in the delay of the entire litigation process in the general judiciary until the issuance of a final and binding ruling from the Constitutional Court.32 With the temporary suspension of the matter, there is time for further thought of the truth of the matter being examined.33 After the constitutional judge decides the constitutional question, the Constitutional Court will return the case to the general judicial judge who requested it. Furthermore, the general court examines the case taking into account the opinions or rulings issued by the Constitutional Court.34 If the law or provisions of the law in question are declared constitutional by the Constitutional Court, then the court may proceed with its litigation process. Conversely, if declared unconstitutional then of course the court cannot apply the

[28] Nur Hidayat Sardini. (2016), *60 Tahun Jimly Asshiddiqie: Sosok, Kiprah, Dan Pemikiran*, Jakarta: Yayasan Pustaka Obor Indonesia, p. 365.

[29] Firmansyah Arifin dan Juliyus Wardi. (2002), *Merambah Jalan Pembentukan Mahkamah Konstitusi di Indonesia*, Jakarta: Konsorsium Reformasi Hukum Nasional, p. 9.

[30] Jimly Asshiddiqie dan Ahmad Syahrizal, *Loc. cit.*

[31] Alec Stone Sweet. (1992), *The Birth of Judicial Politics in France; The Constitutional Council Comparative Perspective*, New York: Oxford University Press, p. 229.

[32] *Ibid*, p. 100.

[33] Isrok. (2010), "Constitutional Question (Menyoal Konstitusionalitas Pasal tentang Pengemis KUHP Pasal 504 ayat (1) dan (2)", *Jurnal Hukum dan Pembangunan*, (1) 3: 116.

[34] Benny Kabur Harman. (2013), *Mempertimbangkan Mahkamah Konstitusi*, Jakarta: Kepustakaan Populer Gramedia, p. 90.

law or provisions of the law in question.[35]

Submission of constitutional questions by general judicial judges can only be done when the judge examines and adjudicates cases.[36] A general judicial judge cannot file a constitutional question for laws that are not used in the cases they handle. If a judge wishes to apply for a legal test when he is not in a case, then the judge applies for a constitutional question with his position as an Indonesian citizen and renounces his or her judge's status. Of course, the legal standing and constitutional rights deemed violated against the judge must be relevant to the application.37 In the tradition that prevails and develops in some countries today, the Constitutional Court's decision on constitutional questions will be disseminated to all ordinary judges. Because, the constitutional court's decision will be used as an anchor or handle in resolving other concrete cases that are being handled by the judges.38 With regard to declaring the constitutionality of a product of law, the Constitutional Court can be said to "monopolize" the authority to determine the constitutionality of a law in order to prevent legal uncertainty. If every judge in the court is authorized to test the constitutionality of a law, there will certainly be legal uncertainty in society. Because, the perception of every judge of a provision in the law must not be the same.39 Therefore, in the construction of concrete norm control the final decision remains at the top of the pyramid of constitutional court authority.40

The constitutional court in constitutional question only decides the constitutionality of the law and not decides its own concrete case.41 In this constitutional question method, a law is not duji in the abstract sense, but rather looks directly at the enactability of a law in certain concrete events.42 Germany's Constitutional Court cited:43 "An Administrative Court deems the tuition fees provided for in a Land Act to be unconstitutional and refers the actions brought against the fee notifications to the Federal Constitutional Court. The Federal Constitutional Court only decides on the

35 Nur Hidayat Sardini, *Op. cit*, p. 357.
36 Firmansyah Arifin dan Juliyus Wardi, *Op. cit*, p. 357.
37 Firmansyah Arifin, et. al. (2004), *Hukum dan Kuasa Konstitusi*, Jakarta: Konsorsium Reformasi Hukum Nasional, p. 174.
38 *Ibid*, p. 100.
39 Benny Kabur Harman, *Op. cit*, p. 89.
40 Jimly Asshiddiqie dan Ahmad Syahrizal, *Op. cit*, p. 61.
41 Jazim Hamidi dan Mustafa Lutfi. (2010), "Constitutional Question: Antara Realitas Politik dan Implementasi Hukumnya", *Jurnal Konstitusi*, (7) 2: 39.
42 Jimly Asshiddiqie dan Ahmad Syahrizal, *Op. cit*, p. 100.
43 *Ibid*.

constitutionality of the provisions submitted. Afterwards, the administrative Court completes the proceedings, taking into account the Federal Constitutional Court's decision."

The application of concrete review to concrete matters does not conflict with the principle of separation of powers. The refusal of judges to implement a law because it casts doubt on the constitutionality of the law is a completely different understanding of the issue of judicial interference over legislative power. Leon Duguit, for example, views the following:44 "It has long been dogma that no court could a plea of unconstitutional and refuses to apply a formal statute even where they considered it unconstitutional…The principle of separation of powers leads to entirely different solution. A court which refuses to apply a statute on the ground of unconstitutionality does not interfere with the exercise of legislative powers. It does suspend its application. The law remains untouched…it is simply because the judicial power is distinct from and independently equal to the two other it cannot be forced to apply the statutes in deems unconstitutional."

In implementatively sometimes there are legal problems that must be resolved first before breaking the subject of dispute (bodemgeschil). For example, in the case of theft, one of the elements that the allegedly stolen goods are partly or wholly the property of others, then the element of ownership is prae-judiciil geschil that must be decided first. Likewise, lawsuits in civil cases, there are times when the subject of a new dispute can be decided after a criminal judge's ruling stating the guilt of a defendant who is a defendant.45 If it is associated with constitutional questions, then this mechanism is present to solve legal problems that must be resolved first. In this case, the constitutionality of a law is used, before breaking the subject of dispute in the case it is handled.

Also in the implementative constitutional question process is able to build a dialogical relationship between the Constitutional Court and the judges of the general judiciary. It aims to maintain the supremacy of the constitution, administrative justice, and human rights protection. In the Italian Corte Costitutionale guidebook, there are interesting things related to the

[44] *Ibid*, p. 227.

[45] Maruarar Siahaan. (2004), *Renungan Akhir Tahun Menegakkan Konstitusionalisme dan "Rule of Law"*, Jakarta: Konstitusi Press, p. 110.

constitutional question mechanism that states:46 "this dialog between the Constitutional Court and the thousand of ordinary judges, which represent the greater part of constitutional jurisprudence, is made possible by the system of incidental review of law."

Including many countries that have implemented constitutional question mechanisms, especially countries that adhere to the constitutionality testing of the rule of law through constitutional courts, such as Austria, Belgium, Germany, Italy, Luxembourg, South Korea, and Spain.47 This was confirmed by Victor Ferreres Comella by stating:48 "there are basically two avenues by which the court can be reached in order to trigger constitutional review of legislation, 'constitutional challenges' and 'constitution*al questions' (concrete review)*."

Urgency of Constitutional Question on The Constitutional Rights of Citizens

Indonesia has made constitutional review as a mechanism to protect constitutional rights. It must be recognized that the presence of this constitutional review mechanism has contributed to the strengthening and health of the state system and national law. In the past, many laws resulting from the formation by the government and parliament were only used as a kind of "rubber stamp" without being able to be overturned, even though the contents were considered strong in violation of the Indonesian Constitution. Changes to the law that have been problematic in the past can only be made through legislative reviews that are in practice heavily influenced by the government.49

The many constitutional review efforts in the Constitutional Court show that the awareness of constitutionality of citizens in the achievement of a democratic state is progressing. The Constitutional Court released that since the establishment of the institution on August 13, 2003 to December 31, 2017, a total of 1,717 constitutional review cases have been handled with the number of laws tested as many as 563 types. Of the 1,085 rulings issued by the Constitutional Court on these cases, the application granted as many as 244 cases, the rejected application as many as 378 cases, the ap-

[46] Jimly Asshiddiqie dan Ahmad Syahrizal, *Op. cit*, p. 101.

[47] Victor Ferreres Comella. (2004), "The European Model of Constitutional Review of Legislation: Toward decentralization?", *International Journal of Constitutional Law*, (2) 3: 465.

[48] *Ibid.*

[49] Mahfud MD. et. al. (2010), *Constitutional Question: Alternatif Baru Pencari Keadilan Konstitusional*, Malang: Universitas Brawijaya Press, p. 10.

plication that was not accepted as many as 328 cases, the application that was withdrawn as many as 108 cases, the application that was declared dead as many as 20 cases, and the application that was declared not part of the authority of the Constitutional Court as many as 7 cases.[50] Regardless of the constitutional court's decisions that are in accordance with the expectations and wishes of the applicant, the reality of testing the law reflects the importance of the existence of a constitutional review mechanism in the implementation of judicial power based on the Indonesian Constitution.[51]

The problem in the constitutional review mechanism in Indonesia, namely the restrictions on legal standing for applicants. One of the reasons on which a law is based can be tested in the Constitutional Court if it harms the constitutional rights of citizens. Article 51 paragraph (1) of the Constitutional Court Act essentially states that those who can be petitioners in the testing of laws against the Constitution are those whose constitutional rights and/or authority are harmed by the enactment of a law. With this restriction of constitutional court authority can have implications for the optimization of the function of the Constitutional Court in an effort to realize a constitutional democracy. Restrictions on legal standing that can apply as described above certainly raise the possibility for many laws that conflict with the constitutional rights of citizens as individuals, both to civil rights and political rights related to freedom and democratization. Thus, it becomes very important and fundamental for the justice seekers when there is a constitutional case that is not the authority of the Constitutional Court.52 Furthermore, since it is not the authority of the Constitutional Court to try him, there are not a few applications that must ultimately be declared "unacceptable" (niet ontvankelijk verklard).53

Against the unregulated constitutional question mechanism in the Constitutional Court shows that the constitutional testing system in Indonesia still has inequality because it is only able to reach the testing of the law in the abstract (abstract norm review). As a result, the constitutional testing space in Indonesia became narrow. The absence of

[50] Mahkamah Konstitusi Republik Indonesia. *Rekapitulasi Perkara Pengujian Undang-Undang*. Available from: *http://www.mahkamahkonstitusi.go.id/index.php?page=web.RekapPUU*, [accessed June 10, 2021].

[51] Iriyanto Baso Ence. (2008), *Negara Hukum dan Hak Uji Konstitusionalitas Mahkamah Konstitusi: Telaah Terhadap Kewenangan Mahkamah Konstitusi*, Bandung: Alumni, p. 139.

[52] *Ibid*, p. 384.

[53] Zoelva Hamdan, *Op. cit*, 262.

this mechanism can ultimately lead to the injury of the constitutional rights of citizens who are engaged in litigation in court. Because, there is no mechanism that can protect citizens who are involved in a litigation process in court from the threat of implementing laws that are considered contrary to the Indonesian Constitution.54 Therefore, the constitutional court's decision that is considered not to solve the real problem can be avoided by taking steps to anticipate and change the law of the event related to the constitutional question mechanism.55

And the existence of constitutional questions is inseparable from the principle of iura novit curia for judges in the general court,56 which is a principle that judges are considered to know all the laws so that the court should not refuse to examine and adjudicate a case.57 This principle is also affirmed in Law No. 48 of 2009 on the Power of Justice that courts are prohibited from refusing to examine, prosecute, and decide a case filed on the pretext that the law does not exist or is less clear, but rather obliged to examine and prosecute it. When it is associated with the context of the constitutional question, if the judge doubts the constitutionality of a legal basis used in the case he or she handles, then the judge cannot refuse to examine and adjudicate the case. The general judicial judge can use the constitutional question mechanism to resolve his doubts and finally determine which objective law should be applied in accordance with the subject matter of the case concerning the legal relationship of the parties to the case in concrete.58

At least, there are some important positive impacts that can be taken from the implementation of the constitutional question mechanism if it is to be adopted in the constitutional justice system in Indonesia:59 First, the acceptance of the constitutional question mechanism will further maximize the respect, protection, and fulfillment of the constitutional rights of citizens; Second, judges are not compelled to apply the law to a case that it believes is contrary to the constitution or doubts about its constitutionality; Third, for Indonesia which formally or legally does not adhere to the stare decisis principle or precedent principle, the presence of constitutional questions will

54 Nur Hidayat Sardini, *Op. cit*, p. 358.
55 Maruarar Siahaan, *Op. cit*, p. 110.
56 Firmansyah Arifin dan Juliyus Wardi, *Op. cit*, p. 177.
57 Yahya Harahap, (2015), *Hukum Acara Perdata: Tentang Gugatan, Persidangan, Penyitaan, Pembuktian, dan Putusan Pengadilan*, Jakarta: Sinar Grafika, p. 821.
58 *Ibid*.
59 Jazim Hamidi dan Mustafa Lutfi. *Op. cit*, 44 – 45.

help the formation of unity of views or understanding among judges outside the constitutional judges about the importance of upholding the principle of constitutionality of law not only in the process of its formation, but also in its application.60

In the ruling that was carried out by the Constitutional Court, there are sufficiently strong reasons to apply the constitutional question. Since its inception, there have been several requests for legal testing in the Constitutional Court stemming from concrete cases in the court that can actually be resolved through the constitutional question mechanism. However, the authority of the Constitutional Court is determined limitatively in the Indonesian Constitution ntanpa mentions the authority of constitutional questions, so many of the applications are declared "unacceptable" (niet ontvankelijk verklaard).61 For example, such conditions can be found in some cases testing laws on the grounds of constitutional harm suffered by petitioners as they are being tried in public courts and even some of them have been convicted under provisions they doubt their constitutionality.

CONCLUSION

Looking at the development of constitutional complaints in Germany and South Korea has given the idea that constitutional complaints are petitions that can be done by individuals or groups by postulating that constitutional rights guaranteed in the constitution have been violated by various legal products of public institutions and general judicial decisions. At the level of practice and urgency of constitutional complaints on the constitutional rights of citizens, constitutional complaints can provide opportunities for citizens to challenge judicial decisions, bilateral and multilateral agreements until the enactment of conventions that are considered to violate the constitutional rights of citizens.

The urgency of constitutional questions on the constitutional rights of citizens, namely: Acceptance of constitutional question mechanisms will further maximize respect, protection, and fulfillment of the constitutional rights of citizens; The judge is not compelled to apply the applicable law to a case which in his belief that the law is contrary to the constitution or doubting its constitutionality; And for Indonesia which

[60] A.M. Fatwa. (2009), *Potret Konstitusi Pasca Amandemen UUD 1945*, Jakarta: Kompas Media Nusantara, p. 22

[61] Nur Hidayat Sardini, *Op. cit*, p. 377.

formally or legally does not adhere to the stare decisis principle or precedent principle, the presence of constitutional questions will help the formation of unity of views or understanding among judges outside the constitutional judges about the importance of upholding the principle of constitutionality of law not only in the process of its formation, but also in its application.

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Nur Hidayat Sardini. (2016), *60 Tahun Jimly Asshiddiqie: Sosok, Kiprah, Dan Pemikiran*, Jakarta: Yayasan Pustaka Obor Indonesia.

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