

Constitutional Complaint as Strengthening Constitutionalism in Indonesia

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ABSTRACT

The inclusion of human rights in the constitution gives a new status for these rights to become constitutional rights. The guarantee of human rights in the constitution has not been in line with legal efforts to protect these rights. Mechanisms constitutional review in Indonesia only accommodates the testing effort constitutionality of Law (judicial review), whereas there are still many objects of state action that can harm the constitutional rights of citizens, but they do not have any resolution because they have not been provided for by Indonesian positive law. This study aims to identify how the interrelationship between guaranteeing human rights in the constitution and strengthening constitutionalism due to the inclusion of human rights in the constitution, how the concept of constitutional complaints in various countries is, and how relevant is it to be applied in Indonesia. This research describes the material that exists in historical, comparative and reconstruction (modification) aspects as an effort to make the concept relevant to be applied in Indonesia. This research shows that human rights and the constitution have a reciprocal relationship (reciprocal), various concepts in other countries have a lot of relevance to Indonesia, and there are several technical-procedural concepts and juridical arrangements that are relevant to be applied in Indonesia. So, it is necessary to regulate constitutional complaints as a legal measure to protect the constitutional rights of citizens which have been guaranteed by the constitution and increase the value of the constitutionalism of citizens in Indonesia.

KEYWORDS

Constitutionalism; human rights; constitutional complaints

INTRODUCTION

In the Indonesian state, the constitution is a legal document accompanying the journey of Indonesian independence. Which in part, the journey of the Indonesian constitution has experienced ups and downs. In the context of constitutional supremacy, Indonesia's experience shows a shift in parliamentary supremacy to constitutional supremacy, which shows the strengthening of Indonesian constitutionalism. Supremacy of the parliamentary institution, in this case the People's Consultative Assembly of the Republic of Indonesia, experienced a shift during the Amendment to the 1945 Constitution. Apart from strengthening the constitution and constitutionalism through amendments, strengthening human rights guarantees is also a major focus. Setting human rights comprehensive into the constitution to enshrine human rights acquire new status as the constitutional rights of citizens.

However, the guarantee made by the constitution in terms of quality protection of constitutional rights has not been running as it should be. The loading of 27 human rights

materials into the 1945 Constitution was not accompanied by a strengthening of these human rights protection mechanisms. The constitutional protection mechanism for the constitutional rights of citizens can only be passed by way of reviewing the legislation. Meanwhile, the constitutionality review of the actions of state officials and court decisions has not been regulated in a formal juridical manner. Whereas it should be, guaranteeing human rights contained in the constitution must be accompanied by strengthening the protection mechanism through the provision of legal remedies to take such protection.

Therefore, a conception is needed to accommodate the mechanism for protecting human rights in the constitution, so that there is no constitutional waste. In depth, it is necessary to discuss; first, how is the relationship between the constitution and human rights; second, to what extent the concept of a constitutional complaint can be a mechanism to strengthen the rights of citizens as stated in the constitution; third, how the conceptualization of the constitutional complaint mechanism (constitutional complaint) that can be applied to the law of the country of Indonesia

RESULTS AND DISCUSSION

Constitution and Human Rights

The state as a tool is often identified with the ark. The state is an ark that is used to go to the port of welfare. The meaning of the state as an ark is contained in the word "government", which comes from government (in English), government (in French), all of which come from the word kubernan (Greek) which means to pilot a ship (Huda, 2014). In essence, according to Soehino, the state is a platform for the nation to achieve the ideals and goals of the nation (Satriawan and Komariah, 2018).

In essence, the state has basic rules as the basis of life and basic agreements for the life of the nation and state, which is commonly referred to as the constitution. In simple terms Brian Thompson defines the constitution as " ... a document which contains the rules for the operation of an organization ". The constitution is defined as a document that contains the rules for running an organization (Thompson, 1997). Ivo D. Duchacek explained, "identify the sources, purposes, uses and restrains of public power" (Duchacek, 1987). The constitution, in the context of the state in the constitutional structure, determines the composition and position of state organs, regulates relations between state organs, and regulates relations between state organs and citizens.

Based on the social contract theory, it is impossible to achieve the rights of every human being individually, but must be done together. So a social agreement is made that contains what is the common goal, the boundaries of individual rights, and who is responsible for achieving these goals and carrying out the agreement that has been made with its limits. The agreement is manifested in the form of a constitution as the supreme law of the land (Suseno, 1999). Therefore, the legitimacy of the constitution is from the people, because the basis for the existence of a constitution is a general agreement or agreement (consensus) among the majority of people. State organizations are needed so that their common interests can be protected or promoted through the establishment and use of a mechanism called the state. The key word is consensus or general agreement. If the general agreement collapses, then the legitimacy of the power of the country in question will also collapse, and in turn a revolution can occur (Ashidiqie, 2005). The enactment of the constitution as a binding basic law based on the highest power or the principle of sovereignty adopted in a country. If the country adheres to the idea of people's sovereignty, then the source of its constitutional legitimacy is the people. This is what experts call ' constituent power ', which is an authority that is both outside and above the

system it regulates. Therefore, in democratic countries, it is the people who are considered to determine the enactment of a constitution (Ashidiqie, 2004).

In historical experience, there has been a dialectical discourse on the supremacy of the constitution. Especially in the context of parliamentary supremacy shift was considered to be the first there, towards the supremacy of the constitution. Britain as a pioneer of parliamentary supremacy has become the main reference for discussions on parliamentary sovereignty (Kritzer, 1971). According to AV Dicey, the supremacy of parliament has two fundamental characteristics, namely the legislative power of parliament's first unlimited (unlimited legislative authority of parliament) and there is no legislative authority counterpoint (the absence of any competing legislative power) (Dicey, 1971). And parliamentary supremacy was again given a theoretical justification in Blackstone's natural law (Dicey, 1971).

But Blackstone's teachings run with sharp criticism, theoretically by John Austin making a deep correction of parliamentary supremacy. And in the level of practice occurred when the drafting of the Septennial Act of 1716 on the extension of the term of office of members of parliament, by Priestley. Shifting parliamentary supremacy to constitutional supremacy is also driven by internal factors Britain, where the research yes Tom Ginsburg found in England has occurred crisis of legitimacy of the constitution (Ginsburg, 2003). And externally it is influenced by the relationship between the UK and the European Union, in which Britain must comply with European Union law which has an impact on the emergence of a constitution made by the British Parliament (Act of Parliament) into ordinary statutes and constitutional statutes (Palguna, 2013). Although the Laws LJ said that supremacy parliament has not changed, but most do not understand the parliamentary supremacy is no longer which is described Dicey (Palguna, 2013).

In the context of the Indonesian state, constitutional amendments have had a significant impact on shifting parliamentary supremacy to constitutional supremacy, in this case the supremacy of the MPR to the supremacy of the 1945 Constitution. Article 1 paragraph 2 of the 1945 Constitution, which previously read, "Sovereignty is in the hands of the people and is carried out entirely by the Assembly. People's Consultation ", was changed to, "Sovereignty is in the hands of the people and is exercised according to the Basic Law ". Within the framework of the constitutional thinking, as the incarnation of all the people and the full implementation of the people's sovereignty, the MPR has enormous, even unlimited power. So that the MPR has the authority to determine the constitution and the outline of the state's direction. However, when the amendment occurred, the fundamental shift from parliamentary supremacy to constitutional supremacy was very obvious.

In the Oxford Dictionary of Law, the word constitution is defined as the rules and practices that determine the composition and functions of the organ of the central local government in a state and regulate the relationship between individual and the state (Oxford University Press, 2002). So the substance or content contained in the constitution is (i) state organs and their composition and functions, (ii) practices in state administration activities, and (iii) relations between state organs and citizens (Asshiddiqie, 2010). One of which includes regulations on Human Rights.

Constitutional rights in the constitution cannot be separated from the tradition of western thought or doctrine regarding individual rights (Henkin, 1999). In western legal doctrine, individual rights are conceptualized as natural rights , in which the doctrine of natural rights is the doctrine of natural law (Basu, 2003). And of the doctrine of natural rights is, World War II evolved into the rights of human rights, by definition as a minimum that very individual must have against the state or other public authority by virtue of his being a member of the human family, irrespective of any other consideration (Basu, 2003).

Meanwhile, the shift of scientific rights which became known as human rights became constitutional rights, namely when these rights are guaranteed by the constitution, which can be fully enforced through courts. John Locke through common law describes the growth of human rights in "the liberties of Englishmen". According to Locke, in a state of nature (in the state of nature) man is governed by natural law (law of nature). However, for the sake of a better situation he and other human beings entered into a social contract to form a political society to preserve their life, freedom and property. The government was formed with restrictions on power, with the guarantee that it would protect human rights. Law-making institutions (laws) are limited by natural law. If the law made is contrary to natural law or violates the natural rights of community members, then the law is invalid (Locke, 1960).

In Sir William Blackstone's view, natural rights are that human actions or actions are subject to natural laws and that no man-made law can be considered valid (valid) if it is contrary to natural law. He also said that, "common law is in fact the secondary law of nature with principles that are fixed and unchangeable, according to natural law and in natural conditions, humans have natural rights which Blackstone says are absolute rights (Palguna, 2013).

In the course of world history, after World War II, more and more countries have included human rights into their constitutions. The designer of the Constitution (constitutional drafting) countries after World War II focused on two main issues, namely the first idea of the affirmation of human rights as an individual autonomous territory restrictions which should not be violated by the state; second, the establishment of a constitutional court as a special court to safeguard and protect these human rights (Palguna, 2013).

The inclusion of human rights in a written constitution means that giving the right status is a constitutional right. The Constitution is the basic law and the fundamental law, the constitutional right to indirectly acquire the legitimacy of the status of a fundamental right. Thus, any state action that is contrary or inconsistent with the constitutional rights of the things that had to be cancelled by the court due to conflicting or inconsistent with the nature of the constitution as the basic law (Basa, 2003). The bottom line in this case, potential protective guaranteed by the Constitution for the constitutional rights is the protection of the budget by state action and not to abuse by another individual (Tribe, 1985).

Hestu Cipto Handoyo argued that the constitution was actually formed to limit power, so that it was not applied arbitrarily. Which in essence is to uphold human rights and the rights of citizens in order to avoid government abuses that can harm the rights of citizens (Handoyo, 2003). The inclusion of human rights in the constitution of a country has an important meaning in order to create a balance between administering power in the state and protecting the basic rights of citizens (Soemantri, 1992). Although in practice the use of the terms "human rights" with a universal and broad spectrum and "constitutional rights" with a domestic and positive spectrum have differences, their function, substance and structure are similar (Gardbaum, 2003). Both function as limiting government power and protecting the basic rights of citizens (Palguna, 2013). Substantially, both contain basic rights such as civil and political rights, economic, social and cultural rights. And structurally there is a distinction between derogable and non-derogable rights (Gardbaum, 2003).

Apart from that, constitutional rights also have the following characteristics: first, constitutional rights have a fundamental character, because they are guaranteed by and become part of a written constitution which is fundamental law. Second, constitutional

rights must be respected by all branches of state power, so no single organ may contradict or violate constitutional rights. Third, if there is a violation of these rights, it must be declared null and void by the court. Fourth, the protection provided by the constitution is protection against state actions or violations by the state, not against other individual acts or violations. Fifth, constitutional rights as rights that have a fundamental nature, in the last analysis, constitute a limitation on state power (Palguna, 2013).

In the history of the inclusion of human rights in the Indonesian constitution, there has been a deep and long debate. During the New Order in 1966, the content of human rights in the 1945 Constitution was considered vague. However, with the change in government regime and the agenda for the Amendment of the 1945 Constitution, the guarantee of human rights has entered a new phase. The loading of human rights is specifically carried out in Chapter XA, Article 28A to 28J of the 1945 Constitution which includes 27 materials. An effort accommodative of previous settings contained in Bill about Human Rights. Because the loading of human rights in a country's constitution depends on the political configuration in power (Mahfud MD, 1998)

The State Welfare State Indonesia, as stated in the preamble to the 1945 Constitution, must protect and guarantee the rights of citizens. The characteristic of the Welfare State is that there is constitutional protection, in the sense that the constitution in addition to guaranteeing individual rights, must also determine the procedural way to obtain protection of the guaranteed rights (Marbun, 2009). Because, guaranteeing the rights of citizens without a protection mechanism or protection measures is futile. As Thomas Paine said, something that is called a constitution but does not appear in practice means nothing at all.

One objective measure to assess incarnate - whether or not the recognition and guarantee of constitutional rights is whether there is a legal mechanism to protect the constitutional rights in intent. This is done concretely through protection mechanisms, both through court channels and outside court channels. The forms of protection of constitutional rights through court mechanisms include; (a) protection of constitutional rights through constitutional courts (b) through state administrative or administrative courts (c) through ordinary courts, and (d) through ad hoc human rights courts (Palguna, 2013).

In this case, it can be said that constitutional complaint is also a form of guarantee for these fundamental rights. Through these mechanism, Brazilian Constitution Court will intensify the protection of constitutional rights while providing an emphasis regarding the position in the constitution. With the authority of the constitutional court to adjudicate cases of constitutional complaints is a guarantee that constitutional rights will be strictly obeyed in practice (Palguna, 2013).

In essence, human rights are not rights conferred by the state. Human rights are the natural rights of humans, which recognition and guarantor are carried out by the state by way of manifesting them in the constitution. In a democratic country, human rights and the constitution are closely related, because both have a reciprocal relationship. The inclusion of human rights in the constitution will strengthen the position and guarantee of human rights. And the existence of human rights material in the constitution will increase the value of constitutionalism of the constitution itself.

The constitution in the perspective of social contract theory is a document of agreement between communities to achieve common goals. So, when guaranteeing human rights is included in the constitution, what should be done next is to provide a constitutional procedure to protect these rights, one of which is a constitutional complaint.

Constitutional Complaint as a Mechanism for Strengthening Citizen Rights in the Constitution

In countries in the world, *constitutional complaint* is a fundamental need. The Constitutional Court that first implemented *constitutional complaint* was the Federal Constitutional Court of Germany (*Bundesverfassungsgerichts*). Article 93 paragraph (1) item 42 *Grundgesetz Bundesrepublik Deutschland* (19th amendment, January 29, 1969) grants constitutional authority to the Federal Constitutional Court of Germany to handle and adjudicate cases of constitutional complaints by individuals, on the grounds that their human rights are citizens or one of them. the human rights thereof, as stipulated in certain articles in the constitution, have been violated by government officials (Marzuki, 2004).

The most famous case in Germany related to constitutional complaints is when Muslims in Germany object to the prohibition against the slaughter of animals. Then, these residents do pe n gaduan the basis of the policy reasons contrary to the freedom to practice religion which is a human right in the constitution. And the German Constitutional Court granted it on the grounds that freedom of religion is regulated in the constitution and the prohibition on slaughtering animals is only regulated under the constitution. And the citizens used more *constitutional complaints* to defend their constitutional rights in a concrete manner (Guyanie, 2013).

Theoretically, I Dewa Gede Palguna outlines three (3) possible causes of a problem and there is no settlement with certainty, such as: (i) Citizens considers constitutional rights are harmed by the actions of public officials who are born of a mistake to interpret the intention of the legislation or public officials take no action that should be done in accordance with instructions of laws, while it is not available to remedy which can be taken , (ii) w arga countries consider that their constitutional rights have been impaired by MPR decree or the Assembly is still valid (iii) Citizens deems that his constitutional rights have been impaired by the enactment of statutory regulations under the law.

Similarly, the constitutionality of laws (*Judicial Review*), the constitutionality of actions (omissions) of public officials that led to the violation of constitutional rights and also departed from the basic ideas are the same, namely the assertion at the same time guarantees that the constitutional right it is a fundamental right, so that the offense (actions of public officials) constitute a violation of the constitution (Palguna, 2013). In Islamic view, human rights are not only recognized, but also fully protected. Therefore, in this connection there are two very important principles, namely the principle of recognition of human rights and the principle of protection of these rights (Azahary, 2010). Jimly Asshiddiqie argues that one of the absolute elements of a rule of law is the fulfillment of human rights (Asshiddiqie, 2006).

Testing the constitutionality of laws (*judicial review*) and the constitutionality of the act or omission or constitutional complaints (*constitutional complaint*). If the examination is aimed at the act of the legislature's branch of power, then the test is carried out by a court which, in a legal concept, is called a *judicial review*. If the examination is aimed at acts or negligence of the executive or judicial branch of power, then the constitutional review is carried out by the court which, in a legal concept, is called a *constitutional complaint*.

According to Mahfud MD, *constitutional complaint* is the filing of a case to the Constitutional Court for violations of constitutional rights for which there is no legal instrument to bring it to court or is no longer available on top of the legal settlement (judiciary) (Mahfud MD, 2010). Then I Dewa Gede Palguna stated that *constitutional complaint* is a form of legal effort to protect the constitutional rights of citizens in the constitutional system of many citizens of the world today whose authority to judge them is given to the Constitutional Court (Setiawan, 2017).

According to Jimly Asshiddiqie, there are three legal norms that can be tested (*norm control mechanism*), namely: (1) the decision normative contains and is the setting (*Regeling*), (2) the decision normative contains and is fixing the administrator (*beschikking*), (3) the decision normative containing and nature of judgment (*judgment*) which is commonly called the verdict (*vonnis*) (Asshiddiqie, 2010). This is what is conceptually called *constitutional complaint* the object of complaint. And according to Maria Farida, in terms of to whom a norm is aimed, then legal norms are divided into two, namely general and individual legal norms (Indrati, 2007).

Further, conceptual norm testing can be done on, *the first* decision, according to Paul E Lotulung as quoted by Ni'matul Huda, the reason for the cancellation of the decision (*beschikking*) is based on two things, First, *illegal external* include: (1) without authority and (2) errors in form or procedural errors. The two *illegal internals* include: (1) contrary to laws or other legal regulations, and (2) abuse of power (Krisnandar, 2010). From the reasons for the cancellation of the *beschikking*, there was not a single reason to cancel the government's decision because it violated the constitutional rights of citizens. And what is meant by *illegal external* also does not include violating constitutional rights because the basis for its issuance does not come from the 1945 Constitution (Guyanie, 2013). *Second*, the regulations are regulation (*Regeling*), *constitutional complaint* is realized through the constitutionality of the norm carried out by the Constitutional Court while testing the legality of norms (*judicial review on the legality of regulation*). conducted by the Supreme Court. *Thirdly*, against the verdict (*vonnis*) or court actions, in this context must be the look that the Supreme Court legal product that will be in mortar should be preceded with a remedy which has been provided by the rule of law. The Constitutional Court is not a court case, but rather examines the constitutionality of legal products oriented to the 1945 Constitution (Bross, 2008).

The implementation of *constitutional complaint* in other countries has various variations. In South Africa, it is regulated in *Article 17 of the Rule of Constitutional Court* and *Article 167 paragraph (6) of the South African Constitution*. Which states that in the national laws and regulations the Constitutional Court must accommodate individual interests in the context of seeking justice by submitting a petition to the Constitutional Court after passing all existing courts (Asshiddiqie, 2006). The application is filed with a written statement, and if there are parties who object to it, they can also submit a counter petition which in essence rejects the petition of the applicant.

The Federal Constitutional Court of Germany has the authority of *constitutional complaint*, which is regulated in *Section 90 paragraph 1 and paragraph 2 of the Law on Federal Constitutional Court Germany*. Which is submitted by an individual citizen if there is a constitutional right which is violated by a state official. Complaints can only be filed when the legal remedies have run out. This is excluded if the losses suffered by residents are heavy losses. In addition, the government can also act as an applicant when the government or government organization feels that they are being harmed by the issuance of federal laws or state regulations that violate the German Federal Constitution. From 7 September 1951 to 31 December 2016, there were 212,827 requests and 209,374 applications had been completed.

In Hungary, authority of *constitutional complaint* set in *Article 1 The Competence of the Constitutional Court Act of the Constitutional Court*. A request for *constitutional complaint* can be filed by certified parties, such as state lawyers / prosecutors, social organizations that have legal status within 60 days from the time the violation is discovered. *constitutional complaint* can be submitted directly or indirectly to the Court, if the filing is made indirectly then it must pass all the usual legal remedies so that no other

legal remedy is available (*after all judicial remedy has been exhausted*). From January 2014 to December 2015, there were 413 applications.

The Constitutional Court of South Korea has the authority to make *constitutional complaints*. Regulated in *Article 111 paragraph 1 Republic of Korea's Constitution of 1948 with Amendment through 1987*. Complaints can be filed by an individual if there are constitutional rights that are violated as a result of the issuance of a law or direct action by the state apparatus and the legal remedies that have been taken have run out. The submission of a complaint is made within 90 working days after the constitutional loss has occurred. And in *Article 69 Constitutional Court Act of Korea Republic*, for complaints against the court decision that rejected the request because it is not a general judicial authority and the authority of the Constitutional Court is 30 days. In November 2015 there were 27,501 applications, in December 2015 there were 27,661 applications, in April 2016 there were 28,250 applications.

In the context of the Indonesian state, Abdul Hakim Garuda Nusantara is of the opinion that judicial power in Indonesia adheres to a *bifurcation system*, where judicial power is divided into two branches, namely ordinary justice culminating in the Supreme Court and constitutional court run by the Constitutional Court (Fatkurohman, 2010). So that the authority of the Constitutional Court to test a judicial review decision through a *constitutional complaint* test would damage the relations between the two branches of judicial power which are equal. In essence, the Constitutional Court does not have the authority to test *constitutional complaint* on the decision of the reconsideration (Guyanie, 2013).

Even though there are many countries, the authority for *constitutional complaint* is the authority of the constitutional court. However, in Indonesia, the 1945 Constitution does not explicitly authorize citizen complaints to the Constitutional Court (Zoelva, 2012). In the absence of legal remedies to resolve issues of constitutional rights that are violated as a result of the issuance of decisions by bodies, judicial decisions, or laws, this creates legal uncertainty and injustice. Therefore, to guarantee the constitutional rights of citizens and provide protection, a technical-procedural conception and regulatory legal umbrella are needed to adopt a constitutional complaint mechanism.

With the constitutional complaint mechanism (*constitutional complaint*) will impact constitutionalism strengthening of Indonesian citizens. Where, if there is a problem of violation of constitutional rights, citizens will always take constitutional channels through the courts instead of taking unconstitutional efforts such as seeking justice on the streets which in the end will have a bad impact on government stability. And by providing constitutional complaints legal remedies will also give strong confidence to the state that the state will always guarantee and protect human rights in the state.

Conceptualization of Constitutional Complaint in Indonesia

In the constitutional state of Indonesia, the authority to examine and adjudicate constitutional complaints has not yet been regulated. The debate on the authority of the *Constitutional Complaint* in the Indonesian Constitutional Court during the Constitutional Amendment at the 41st Plenary Meeting of the BP MPR in 1999 experienced a warm discourse, the term used at that time was "a lawsuit based on the Constitution". However, this proposal was discontinued due to two reasons, namely: *First*, there was a concern that if the implementation of *constitutional complaint* was given to the Constitutional Court, there would be a buildup of cases. *Second*, because it is still a novelty and in fear occurred tumpang tindih superimposed on the scope of the general judicial authority (Plaituka, 2016).

As Ni'matul Huda said that the authority of the Court does not need to be supplemented by *constitutional complaint* because the Court has handled quite a number of cases, especially the settlement of disputes over regional heads. As a result, several decisions have decreased in quality (Nugroho, 2015). However, Sulardi stated that many issues of justice remain unresolved, and do not have a judicial settlement path (Nugroho, 2015). And departing from the assumption that law is a political product, it is possible that law does not accommodate the values of justice. And of course the people's resistance to the law will be very strong, because the mouth of the legal product is society. And the result of the negligence of public officials in making decisions is the violation of the constitutional rights of citizens. Therefore, protecting human rights by means of *constitutional complaint* has a major impact on strengthening citizen constitutionalism and substantive justice that citizens must find in the constitutional court should not be ruled out just for technical-procedural reasons.

Theoretically, the need for a constitutional complaint mechanism can be seen from the main function of the constitutional court in conducting a *constitutional review*. There are two main tasks, namely, *first* to maintain the functioning of democratic processes in the interplay between state institutions. In essence, this first task is the task of realizing the operation of the principle of mutual supervision and balance (*checks and balances*). *Second*, protecting the rights of citizens to live from violations committed by one of the branches of state power.

Reviewing the constitutionality of the law is not sufficient, because it only answers the problem of the contradiction of the law against the constitution. In fact, violations of constitutional rights can still occur even if there is no law that is contrary to the constitution. For example, caused by actions or negligence of public officials. In fact, as said by Jan Klucka, constitutional restructuring must be carried out with the guarantee of creating legal measures through judicial mechanisms (*judicial remedies*). One of which is to give constitutional complaint authority to the constitutional court (Palguna, 2013). Because as mentioned by Ewa Letowska, even countries with democratic systems and legal systems that have worked well still need a constitutional complaint mechanism. Because constitutional complaints are a mechanism to control power. Meanwhile, in authoritarian countries, the existence of constitutional complaints has its own meaning because of the strong urge to uphold the principles of constitutionalism along with the birth of a new democratic regime. In order to achieve stability and security and protection from the erratic actions of politicians and state officials (Letowska, 1997).

In empiric, in Indonesia case *constitutional complaint* is based on the search results Pan Mohamad Faiz in 2005, there are 48 letters or applications received by the Registrar of the Court. Meanwhile, according to Nilwan et al, 30 petitions were containing *constitutional complaint* since the Court's establishment until December 2010 (Zen, 2016). Among several cases that can be categorized as a *constitutional complaint* issue, namely: (i) violations of human rights due to the issuance of the Governor of East Java Decree Number 188/94 / KTPS / 013/2011 concerning the Prohibition of Activities of the Indonesian Ahmadiyya Community (JAI) in the province (ii) the decision to review the case of the murder of human rights activist Munir Said Thalib with the convict Pollycarpus (iii) case number 16 / PUU-I / 2003 submitted by Main bin Rinan regarding the examination of Article 67 of the Supreme Court Law regarding the examination of the Supreme Court Reconsideration Decision contrary to the 1945 Constitution (iv) the issuance of Circular No. 560 / SE-59 / DISNAKER / XI / 2015 regarding the issue of a planned national strike on 24-27 November 2015 (Fajarwati, 2016). Setiawan opinion,

there is also a case of *constitutional complaint* that was won by the petitioner, in case 102 / PUU-VII / 2009 regarding the DPT issue which was deemed problematic and detrimental to the rights of the applicant Refly Harun and Maheswara in Law Number 42 of 2008 concerning the General Election of President and Deputy President. According to I Dewa Gede Palguna, there is a tendency for cases that go to the Constitutional Court to be *constitutional complaint* cases, but because there are no suggestions, the petitioners wrap them up through the *Judicial Review* method.

The technical conceptualization of constitutional complaint procedural (*constitutional complaint*) is a need and aspiration (*ius constituendum*). In this case, there are several technical concepts of constitutional complaint procedural that can be used as reference material. *First*, the object of the petition for constitutional complaints is in the form of laws or regulations (*regeling*), decisions or actions (negligence) of state officials, and court decisions that have been *inkracht van gewijsde* which are contrary to the constitution. *Second*, those who can become applicants are every person or every Indonesian citizen or community organization (*not government organization*). *Third*, the legal standing of the petition is a constitutional right that is directly or has an actual impact harmed by the action (object of the petition). *To four*, the registration request has two alternative, wherein if the object of the petition still has other legal remedies that the case should be taken up other efforts exhausted (*exhausted*). However, if there is no effort or other solution, it can be submitted directly to the Constitutional Court. *To five*, registration time (expiration) the request is a maximum of 90 days since it is known the applicant's constitutional rights are violated (if there is no other legal remedy) and no later than 30 days from the decision *inkracht waw gewijsde* the last legal effort to the cause. *To six*, registration and examination case is conducted separately between the *Judicial Review* (formal and material testing Act) with the constitutional complaint (*constitutional complaint*). *Seventh*, the format for filing an application must describe; (i) a clear and precise description of the violation caused by the object of the petition (ii) a description of the constitutional rights of citizens which is actually in the field (iii) a clear description of how the object of the petition is detrimental to the constitutional rights of citizens. *Eighth*, which may be the defendant is an institution and / or state officials issued a request object (except the Supreme Court on the object *vonnis* court) *All nine*, the decision on the constitutional court are *final* and *binding*. However, technically the court can give (i) a decision that cancels a statutory regulation that is contrary to the constitution (ii) an order to cancel a decision or action in the object of the petition (iii) an order to commit an act if the object of the petition is an act of negligence (no do something) (iv) an order to *annul a* court verdict.

In the event that there is a debate on the perspective, the most ideal is to make changes to the limits of the authority of the Constitutional Court in the 1945 Constitution, and / or at least make an *open-ended* arrangement so that it is possible to grant authority through law. However, even though the amendments have not been carried out, I Dewa Gede Palguna said there are several alternatives, namely: (a) through the *legislative interpretation*, namely the authentic interpretation or official interpretation made by a number of legislators on a number of definitions in the law, in this case regarding the law. - Law of the Constitutional Court. And (b) through *judicial interpretation*, in this way the Constitutional Court of the Republic of Indonesia does not change the 1945 Constitution but only interprets the provisions, especially those regulating the authority of the Court and more specifically regulating the authority of the Indonesian Constitutional Court in examining laws against the 1945 Constitution. systematically and theologically by sticking to the principles of constitutional interpretation (Palguna, 2013).

CONCLUSION

Human rights are not rights granted by the state. Human rights are the *natural rights of humans*, which recognition and guarantor are carried out by the state by way of manifesting them in the constitution. In a democratic country, human rights and the constitution are closely related, because both have a reciprocal relationship. The inclusion of human rights in the constitution will strengthen the position and guarantee of human rights. And the existence of human rights material in the constitution will increase the value of constitutionalism of the constitution itself.

Constitutional complaint mechanism (*constitutional complaint*) will impact constitutionalism strengthening of Indonesian citizens. Where, if there is a violation of constitutional rights problems, citizens will always take constitutional channels through the courts instead of taking unconstitutional measures such as seeking justice on the streets which in the end will have a bad impact on government stability. And by providing legal remedies for constitutional complaints it will also give strong confidence to the state that the state will always guarantee and protect human rights in the state.

Conceptually, the implementation of the constitutional complaint mechanism, there are several research objects that can be constructed, namely; (i) object of petition (ii) qualification of the applicant (iii) alternative registration of constitutional complaints (iv) time of registration of petition (v) separation of cases (vi) form of court decision. Meanwhile, in terms of paying regulatory law, there are several thoughts, namely; (i) the regulation in the 1945 Constitution (ii) through the *legislative interpretation* and (iii) through the *judicial interpretation*.

REFERENCES

- Ashidiqie, Jimly. (2004). *Konstitusi dan Konstitusionalisme Indonesia*. Jakarta: Mahkamah Konstitusi RI dan Pusat Studi Hukum Tata Negara Fakultas Hukum UI.
- Ashidiqie, Jimly. (2005). *Konstitusi Bernegara: Praksis Kenegaraan Bermartabat dan Demokratis*. Cetakan Kedua. Malang: Setara Press.
- Ashidiqie, Jimly. (2006). *Pengantar Ilmu Hukum Tata Negara*. Jakarta: Sekretariat Jendral Mahkamah Konstitusi.
- Ashidiqie, Jimly. (2006). *Peradilan Konstitusi di Sepuluh Negara*. Jakarta: Sekretariat Jendral Mahkamah Konstitusi.
- Ashidiqie, Jimly. (2010). *Hukum Acara Pengujian Undang-Undang*. Jakarta: Sinar Grafika.
- Ashidiqie, Jimly. (2010). *Konstitusi Ekonomi*. Jakarta: PT Kompas Media Nusantara.
- Ashidiqie, Jimly. (2010). *Model-model Pengujian Konstitusional Berbagai Negara*. Jakarta: Sinar Grafika.
- Asshiddiqie, Jimly. *Demokrasi dan Hak Asasi Manusia*. Materi pada Sudium General pada acara The 1st National Coverence Corporate Forum for Community Development. Jakarta.
- Azhary, Muhammad Tahir. (2010). *Negara Hukum: Suatu Studi tentang Prinsip-prinsipnya Dilihat dari Segi Hukum Islam. Implementasinya pada Periode Negara Madinah dan Masa Kini*. cet.ke 4. Jakarta:Kencana.
- Basu, Durga Das. (2003). *Human Rights in Constitutional Law*. New Dehli: Wadha and Company
- Bross, Siegfried. (2008). *Hukum Konstitusi Republik Federal Jerman: Beberapa Putusan Terpilih*. Jakarta: Hanns Seidel Foundation Indonesia.

- Dicey, A.V.. 1971. *An Introduction to the Study of the Law of the Constitution*. London: English Language Book Society and MacMillan.
- Duchacek, Ivo D. (1987). *Constitution/Constitutionalism*. Oxford: Blackwell.
- Fajarwati, Meirina. *Upaya Hukum untuk Melindungi Hak Konstitusional Warga Negara Melalui Mahkamah Konstitusi*. 2016. Jurnal Legislasi Indonesia. Volume 13 Nomor 03 September.
- Fatkurohman. et. al. (2010). *Memahami Keberadaan Mahkamah Konstitusi di Indonesia*. Bandung: PT Citra Aditya Bakti.
- Gardbaum, Stephen. (2003). *Human Rights as Internastional Constitutional Rights*. The European Journal of International Law. Volume 55. Nomor 5.
- Gardbaum, Stephen. (2003). *The Horizontal Effect of Constitutional Rights*. artikel dalam Michigan Law Review. Vol. 102.
- Ginsburg, Tom., (2003). *Judicial Review in New Democracies. Constitutional Courts in Asua Cases*. Cambridge: Cambridge University Press.
- Guyanien, Gugun El. (2013). *Urgensi Pengujian Contitutional Complaint oleh Mahkamah Konstitusi Republik Indonesia*. Jurnal Agama dan Hak Azazi Manusia. Vol. 3, No. 1.
- Handoyo, Hestu Cipto. (2003). *Hukum Tata Negara. Kewarganegaraan & Hak Asasi Manusia*. Yogyakarta: Universitas Atma Jaya.
- Huda, Ni'matul. (2014). *Ilmu Negara*. Jakarta: Rajawali Pers.
- Indrati, Maria Farida. (2007). *Ilmu Perundang-undangan I: Jenis, Fungsi dan Materi Muatan*. Yogyakarta: Kanisius.
- Krisnandar, Vito Devanta Anjas. (2010). *Menggagas Constitutional Complaint dalam Memproteksi Hak Konstitusional Masyarakat Mengenai Kehidupan dan Kebebasan Beragama di Indonesia*. Jurnal Konstitusi. Vol. 7, No 3.
- Kritzer, Herbert M. (1996). *Courts. Justice and Politics in England dalam Herbert Jacob. Courts. Law and Politics in Comparative Perspektif*. London: Yale University Press.
- Letowska, Ewa. (1997). *A Constitution of Possibilities. dalam East European Constitutional Review*. Spring. Vol. 6, No. 2.
- Locke, John. (1999). *Two Treatises of Civil Government*. London: J.M. Dent & Sons. Chapter VII. 1960
- Mahfud MD, Moh. (1998). *Politik Hukum di Indonesia*. Jakarta: LP3ES.
- Mahfud MD, Moh. (2010). *Konstitusi dan Hukum Dalam Kontroversi Isu*. Jakarta: Rajawali Perss.
- Marbun. (2009). *Pokok-pokok Hukum Administrasi Negara*. Yogyakarta: Liberty.
- Marzuki, HM Laica. (2004). *Pengaduan Konstitusional (Constitutional Complaint) Sebuah Gagasan Cita Hukum*. dalam Menjaga Denyut Konstitusi: Refleksi Satu Tahun Mahkamah Konstitusi. Jakarta: Konstitusi Press.
- Nugroho, Rahmat Muhajir. (2015). *Urgensi Pengaturan Perkara Constitutional Complaint dalam Kewenangan Mahkamah Konstitusi*. Laporan Penelitian DIPA Kopertis V Yogyakarta.
- Palguna, I Dewa Gede. (2013). *Pengaduan Konstitusional: Upaya Hukum Terhadap Pelanggaran Hak-hak Konstitusional Warga Negara*. Jakarta: Sinar Grafika.
- Plaituka, Solidaman Bertho. (2016). *Constitutional Complaint dalam Rangka Penegakan Hak Asasi Manusia di Republik Indonesia*. Jurnal Media Hukum. Vol. 23. No. 1.
- Satriawan., M.I, Siti Komariah. (2018). *Ilmu Negara*. Depok: Rajawali Pers.
- Setiawan, Heru. (2017). *Mempertimbangkan Constitutional Complaint sebagai Kewenangan Mahkamah Konstitusi*. Universitas Diponegoro. Jurnal Lex Jurnalica. Vol. 14. No. 1.
- Soemantri, Sri. (1992). *Bunga Rampai Hukum Tata Negara Indonesia*. Bandung: Alumni.



- Suseno, Franz Magnis. (1999). *Etika Politik: Prinsip-prinsip Moral Dasar Kenegaraan Modern*. Jakarta:PT Gramedia Pustaka Utama.
- Thompson, Brian. (1997). *Textbook of Constitutional and Administrative Law*. Ed. 3. London: Balestone Press Ltd.
- Tribe, Laurence H. (1985). *Constitutional Choices*. London: Harvard University Press.
- Zen, Nilwan Wize Ananda., et. al. (2016). *Jaminan Hak-hak Konstitusional Warga Negara dengan Implementasi Constitutional Complaint melalui Mahkamah Konstitusi di Negara Kesatuan Republik Indonesia (Studi Pelaksanaan di Korea Selatan)*. Diponegoro Law Riview. Volume 5 Nomor 2.
- Zoelva, Hamdan. (2012). *Constitutional complaint dan constitutional question dan Perlindungan Hak-Hak Konstitusional Warga Negara* . Jurnal Media Hukum. Vol. 9. No. 1.