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### RESEARCH ARTICLE

## THE URGENCY OF CONSTITUTIONAL COMPLAINT AS AN INSTRUMENT IN PROTECTING THE CONSTITUTIONAL RIGHTS OF CITIZENS.

Suardi, Alfian, and Eva Fachria.  
 Politeknik Negeri Media Kreatif.

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### Abstract

This research aims to find out the way the Constitutional Court protects the constitutional rights of citizens without the authority of Constitutional Complaint and also to know the legal remedies for citizens to submit their constitutional rights relating to the use of Constitutional Complaint. This research was carried out in the Constitutional Court of the Republic of Indonesia, the research method used by the authors to achieve the objectives among others is literature research by collecting data in the form of required documents and field research through direct interview techniques to obtain data which is then described descriptively. The results of this study indicate that the form of protection of the Constitutional Court against Citizens only refers to what is explained by the Constitution, in this case is the Constitution, in which the Constitutional Court does not have the authority to adjudicate legal applications in the form of Constitutional Complaint, so there is no room for citizens State to protect its constitutional rights through legal efforts of Constitutional Complaint.

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### Introduction:-

The 1945 Constitution of the Republic of Indonesia is the State constitution as the constitutional foundation of the Indonesian nation which is the basic law for each law under it. Therefore, in a country that adheres to constitutionalism there is not a single behavior of State administrators and communities that are not based on the constitution.<sup>1</sup>

The Constitution occupies the highest order of laws and regulations in the State. In the context of State institutions, the constitution means the highest understanding that stipulates, among others, the holder of the highest sovereignty, the structure of the State, the form of the State, the form of government, legislative power, judicial power and various State institutions and the rights of the people.<sup>2</sup>

<sup>1</sup> Majelis Permusyawaratan Rakyat Republik Indonesia, *Empat Pilar Kehidupan Berbangsa dan Bernegara* (Jakarta: Sekretariat Jenderal MPR RI, 2012), p. 7.

<sup>2</sup> *Ibid.*, p. 117

**Corresponding Author:-Suardi.**

Address:-Politeknik Negeri Media Kreatif, Makassar, Indonesia.

The Constitution in the history of its development has brought recognition of the existence of a people's government. The constitution is a legitimate text of the understanding of popular sovereignty. The manuscript is a social contract that binds every citizen in building the understanding of people's sovereignty.<sup>3</sup>

The Constitution has been amended four times. One of the results of the third amendment, was the birth of the Constitutional Court (MK) as a state institution that has authority in the field of justice at the level of the Supreme Court. The authority of the Constitutional Court is regulated in Article 24 c paragraphs 1 and 2 of the 1945 Constitution which read: The Constitutional Court has the authority to hear at the first and final level whose decision is final to examine the law against the Constitution, decide on the dispute over the authority of state institutions whose authority is granted by The Constitution, decides the dissolution of political parties, and disputes concerning the results of the general election. Then the Constitutional Court is also obliged to give a decision on the opinion of the People's Legislative Assembly regarding alleged violations by the President and / or Vice President according to the Constitution. The authority given to the Constitutional Court has argued that the Constitutional Court is a super body institution. However, by Harjono, this was denied by arguing that the presence of the Constitutional Court as a new institution was not enough to be understood partially, but it must be understood as a strengthening of constitutionalism in the 1945 Constitution. The essence of constitutionalism is that every state power must have a limit of authority. In addition, the presence of the Constitutional Court serves as a guardian of the constitution or guardian of the constitution. But the strengthening of the foundations of constitutionalism seemed half-hearted. At the level of reality, the Constitutional Court is a supreme constitutional mecca in which every constitutional problem of the people, the Constitutional Court is the place of "the complaint" However, the persecution of constitutional violations of citizens is often neglected or neglected. This does not mean that the Constitutional Court is reluctant to accept and resolve the issue, but because it is not yet explicit about the rules that mention the issue of constitutional violations that are born from government policies that are less responsive. As a result, the basic rights of citizens are taken away. Not only government products that have the potential or have violated human rights, but also court decisions and administrative products are often contrary to the conception of the 1945 Constitution or the philosophy of Pancasila. In several countries that have constitutional courts like the Constitutional Court, such problems are called Constitutional Complaint and this is the authority of the Constitutional Court in their respective countries. As an example of a case after the issuance of a Joint Decree (SKB) concerning the Freezing of the Ahmadiyah Indonesian Community (JAI). Attorney General Hendarman Supandji said if JAI or other community groups did not agree with this SKB, please file a lawsuit with the Constitutional Court. Even though the Constitutional Court through Mahfud MD stated that the Constitutional Court did not have the competence to assess this because it had not entered the domain like Constitutional Complaint. As a former constitutional judge, Mahfud MD also stated that he often found concrete problems in violating the constitutional rights of citizens, but there was no legal settlement channel because there was no judicial institution that had the competence to resolve it based on the constitution and law. From the brief explanation above, a problem arises, where are the justice seekers for Indonesian citizens when faced with problems like the above? Reflecting on the problem, it is very urgent to add or expand the authority of the Constitutional Court in the form of deciding on Constitutional Complaint as a form of strengthening the basic rights of constitutionalism and realizing constitutional supremacy.

### Research Questions

In connection with this background of thinking, the main issues that will be discussed are as follows:

1. How does the Constitutional Court protect the constitutional rights of citizens without the authority of Constitutional Complaint?
2. How do legal remedies for citizens submit their constitutional rights related to the use of Constitutional Complaint?

### Research Methods:-

The research location that the writer chose in collecting data to support this research is the Constitutional Court of the Republic of Indonesia. The author chooses the Constitutional Court of the Republic of Indonesia as a place of research because the author considers that the institution received many requests for Constitutional Complaint.

The type of research used by the author is normative research, Peter Mahmud Marzuki explained that normative legal research is a process to find a rule of law, legal principles, as well as legal doctrines to answer the legal problems faced.<sup>4</sup>

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<sup>3</sup> *Ibid.*

Furthermore, this type of normative legal research is carried out by collecting legal materials both primary, secondary and / or tertiary, in order to obtain answers or solutions to the problems of constitutional rights of citizens regarding the authority of the Constitutional Court against the application of Constitutional Complaint.

## Results and Discussion:-

### Protection of the constitutional rights of citizens by the Constitutional Court

Citizens are constitutive elements of a country. Judging from the perspective of the social covenant theory that underlies the existence of modern democracy, the citizens who form the State, by carrying out social agreements contain provisions that must be carried out and their implementation by the State. On the one hand, the social agreement gives legitimacy to the state administrators, but on the other hand it also provides restrictions on the power of state administration. It is this conception of the limitation of power that develops into an understanding of constitutionalism. The social agreement which is an agreement of all citizens is realized in the constitution as the highest law. By itself the constitutional material must always reflect the understanding of constitutionalism or limitation of power, both in procedural and substantive terms. In terms of procedural, the limitation of power is the determination of democratic mechanisms in the administration of the State as a consequence of the recognition of the people's sovereignty principle.

While from the substantive side, the constitution determines what must be done in the administration of citizens and as humans. Without these rights, the people will lose their sovereignty so that their position as citizens has no meaning at all. Therefore, the guarantee provisions on the protection of human rights as a human being and constitutional rights as citizens are one material content of the constitution.<sup>5</sup>

The guarantee of constitutional rights in the 1945 Constitution followed by the provisions on protection, promotion, enforcement and fulfillment are the responsibility of the State, especially the government. It must be carried out, both in the form of legislation and policies, as well as the actions of state officials. Every legal product, policy and action of the State organizer is in the framework of protecting, advancing, asserting, and fulfilling the constitutional rights of citizens. Along with that, if there are legal products, policies and actions of state administrators that contradict or impair the constitutional rights of citizens, then citizens can submit applications or lawsuits through available mechanisms. Therefore, in accordance with the principles of the State, there must be a legal mechanism, both in the form of legislation and lawsuit, which will be decided by the judiciary of the judiciary. Thus, the guarantee of constitutional rights in the 1945 Constitution has made citizens a very meaningful status. Being a citizen means getting constitutional protection and can carry out the role of citizens who are crucial in the life of a democratic nation and state.<sup>6</sup>

In the Third Amendment to the 1945 Constitution, Article 24 paragraph (2) stated: "Judicial power is carried out by a Supreme Court and the judiciary under it in the general court environment, religious court environment, military court environment, State administrative court environment, and by a Constitutional Court." In Article 24C it is determined:

1. The Constitutional Court has the authority to adjudicate at the first and final level whose decisions are final to examine the law against the Constitution, decide disputes over the state institutions whose authority is granted by the Constitution, decide the dissolution of political parties and decide disputes concerning the results of the election general.
2. The Constitutional Court must provide a decision on the opinion of the People's Legislative Assembly regarding alleged violations by the President and / or Vice-President in accordance with the Constitution.
3. The constitutional court has nine constitutional judges appointed by the President, submitted by three Supreme Court members, three by the House of Representatives, and three by the President.
4. The Chairperson and Deputy Chairperson of the Constitutional Court are elected from and by constitutional judges.

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<sup>4</sup> Peter Mahmud Marzuki. 2009, *Penelitian Hukum*, Jakarta: Kencana Prenada Media Group, p. 35.

<sup>42</sup> Janedjri M. Gaffar, *Demokrasi Konstitusional Praktik Ketatanegaraan Indonesia Setelah Perubahan UUD 1945*, (Jakarta: Konstitusi Press, 2012), p. 190.

<sup>6</sup> *Ibid.*, p. 197.

5. The constitutional judge must have integrity and personality that is not reprehensible, fair, statesman who controls the constitution and constitution, and does not concurrently serve as a State official.
6. Appointment and dismissal of constitutional judges, procedural law and other provisions concerning the Constitutional Court in accordance with the Law

In such circumstances, even though a law norm does not conflict with the constitution, so that the actions of public officials based on the norms of the law should not harm a person's constitutional rights, be detrimental to one's constitutional rights because they are interpreted incorrectly. In such cases it can be the object of testing the constitutionality of legal norms and the object of testing the constitutionality of actions. However, the misinterpretation of the law norm is not the only cause of the birth of a constitutional complaint. Constitutional auditing can also occur as a result of not regulating a matter in the law or because public officials fail to implement the norms of the law so that it becomes the cause of violation of one's constitutional rights.<sup>7</sup>

#### **The authority of the Constitutional Court in adjudicating the case of citizens who submit their constitutional rights through a constitutional Complaint.**

The idea of forming a constitutional court was born out of the need to implement a constitutional testing idea. Meanwhile, one of the tasks of constitutional testing is to protect every individual citizen from abuse of power by State an institution which harms the fundamental rights of these individuals guaranteed by the constitution. It has also been explained that constitutional rights are part of the constitution so that constitutional rights are part of the constitution so that constitutional rights also have a role as a limitation on state power. Constitutional complaints are one manifestation of the protection of constitutional rights through a judicial mechanism in which the court referred to here is a court that is specifically given the function to carry out constitutional review which in this case is a constitutional court. All States that adopt a constitutional complaints mechanism and institutionalize their constitutional testing centrally, namely by establishing a constitutional court, must give the authority to adjudicate the case of constitutional complaints to the constitutional court. In other words, based on all of the above, it can be said that constitutional complaints as a protection mechanism for citizens' constitutional rights are clearly inseparable from the nature of the existence of a constitutional court as an institution that is deliberately designed to carry out the function of constitutional review. In fact, as stated by Gerhard Dannemann, of all legal protection mechanisms for constitutional rights, constitutional complaints are the most powerful mechanism. What is meant by Dannemann is that, as one of the mechanisms for protecting the constitutional rights of citizens, constitutional complaints are stronger than the constitutionality of laws, both in the form of abstract judicial review and testing of laws. Act concretely (concrete judicial review). This is because in individual constitutional complaints citizens can directly bring the problem of violations of their constitutional rights to the constitutional court, while in other mechanisms (both in the abstract judicial review and the concrete judicial review access to the constitutional court can only be done indirectly.

Based on the above description it is clear that the authority of the constitutional court to try a constitutional complaint case is something inherent in the constitutional court's function to carry out constitutional testing. However, this is not the mechanism carried out by the Constitutional Court of the Republic of Indonesia, through P4TIK (Case Study and Study Center, Management of Information and Communication Technology) of the Constitutional Court of the Republic of Indonesia, according to what was said in the interview / interview on Tuesday, November 7, 2015 at The Library Room of the Constitutional Court of the Republic of Indonesia that, how legal remedies for citizens to submit their constitutional rights related to the use of Constitutional Complaint ?, Obviously the Constitutional Court cannot follow up when there are citizens who apply for violations of constitutional rights of citizens by using Constitutional Complaint because it is clearly not the competence of the Constitutional Court of the Republic of Indonesia, in accordance with the duties and functions mandated by the Constitution against the Constitutional Court of the Republic of Indonesia, so when there is an application that enters the Constitutional Court and has a Constitute The National Complaint clearly will be rejected, and there is no reason / or path that can be taken by the Petitioner to maintain his petition in order to be prosecuted, it is all because in Indonesia there is no rule in the Constitution which regulates the authority of the Constitutional Court to try petition Constitutional Complaint law. However, according to some experts from central and eastern European

<sup>7</sup> Dr. I Dewa Gede Palguna, S.H., M.H., *Pengaduan Konstitusional (Constitutional Complaint) Upaya Hukum terhadap Pelanggaran Hak-Hak Konstitusional Warga Negara*, (Jakarta: Sinar Grafika, 2013) p. 248.

countries, countries that are undergoing the process of transition from an authoritarian regime to a democratic regime have other arguments about granting the authority to adjudicate the case of constitutional complaints to the Constitutional Court. Said. The thing to be emphasized through the establishment of a separate and autonomous judiciary called the constitutional court is that the constitution really provides real protection both for democracy and for the rights of citizens. Constitutional Complaint is one concrete example of the realization of such protection. The granting of authority to adjudicate a constitutional complaint case to the constitutional court is considered to contribute to efforts to strengthen respect for human rights and fundamental freedoms in general and citizens in particular, intensify the protection of these rights and at the same time reinforce the constitutional rights and freedoms. Cases of Constitutional complaints are cases that come out or emerge from real cases. Thus, only if the constitutional court is given the authority to prosecute real cases born in such practices, can it be said that the rights and freedoms guaranteed by the constitution have enjoyed or occupy appropriate priorities.<sup>8</sup>

By looking at the opinions of the experts and the results of the research in this chapter, it is very clear I think that the Constitutional Complaint's legal effort is very appropriate to be applied in Indonesia, where it is the Constitutional Court of the Republic of Indonesia who has the duty or authority in following up or adjudicating a request for Constitutional Complaint by the Petitioner, as we all know that the Constitutional Court as the Guardian of Constitution or the Guardian of the Constitution has a very urgent role in the Indonesian constitutional system, namely one of which guarantees the Constitutional Rights of Citizens / Individual Rights to remain intact as appropriate and appropriate. Citing what was said by Mr. Palguna in his book entitled "Constitutional Complaint, Legal Efforts against Violations of Constitutional Rights of Citizens" that, from year to year the Petitioners who submitted their Requests and Constitutional Complaint were increasingly increasing, rather than accepted, but the application will clearly be rejected, it is also clarified by the P4TIK Agency (Case Study and Assessment Center, Management of Information and Communication Technology) of the Constitutional Court, in an interview, that it is impossible to try a case with Constitutional Complaint, because it has not been regulated in the Constitution / Constitution, therefore the Constitutional Court of the Republic of Indonesia can only provide Constitutional protection to Citizens, whose authority has been stated in the Constitution of the Republic of Indonesia, So to build an ideal Constitutional Court as the Constitutional Court is supposed to be, the Constitutional Court must have the authority as the Constitutional Guard must have, so that in its application in carrying out its duties as the Guardian of Constitution or the Constitutional Guards are not halfway, or the maximum application of constitutionalism that lives in the middle Indonesian society

For countries that are undergoing a transition process towards such democracy, constitutional complaints are seen not only as a guarantee of the protection of the constitutional rights of citizens against arbitrary acts of the authorities but also as an important means to build constitutional democracies based on respect for human rights human. In addition, as a special instrument for protecting one's constitutional rights, complaints of constitutionality give citizens a right to enter a legal dispute against the State, along with its apparatus. The importance of the authority to adjudicate the case of constitutional complaints is given to the constitutional court not solely due to the fact that citizens will dispute legally with the State, including ordinary courts as part of State power, but also because of the specific character of constitutional complaints as a form of supervision with respect to the State in relation to the subject who has the right to file a complaint, object of complaint, specific rules relating to the procedure of complaint and acceptance of the complaint.

### **Conclusion:-**

Based on the results of the research and discussion, the conclusions that the writer can draw are as follows: Constitutional Complaint is the protection of citizens' constitutional rights against arbitrary acts of the authorities but also as an important means for building constitutional democracy based on respect for human rights. In addition, as a special instrument for protecting the constitutional rights of a person, complaints of constitutionality give citizens a right to enter a legal dispute against the State, along with its apparatus. Thus, viewed from this point of view, the institutionalization of the Constitutional Court means institutionalizing the escort function towards individual and social values which are positively deposited in the constitution. If viewed from this point of view, the authority to

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<sup>45</sup> Anna Triningsih, P4TIK (Pusat Penelitian dan Pengkajian Perkara, Pengelolaan Teknologi Informasi dan Komunikasi) Mahkamah Konstitusi Republik Indonesia, when answer questions writer through interview /interview, 7th November 2015.

adjudicate a constitutional complaint case can be constructed as an inherent authority in the function carried out by the constitutional court.

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