

CHAPTER II

LITERATURE REVIEW

A. Constitutional Court

Constitutional Court under Article 24C of the 1945 Constitution *juncto* Article 10 of Law No. 24 of 2003 on the Constitutional Court, the Court has 4 (four) authority and 1 (one) obligation as a function of guarding the constitution, among others: (1) test the law against the Constitution (judicial review), (2) Disputes regarding state institution's authority), (3) political party's dissolution), and (4) Disputes regarding the General Election's result); and shall give a decision on the opinion of the House that the President and / or Vice President has violated the law in the form of treason, corruption, bribery, other criminal acts, or misconduct, and / or the opinion that the President and / or Vice President is no longer eligible as President and / or Vice President (impeachment).¹

Constitutional Court with all the series of 4 (four) authorities and one (1) its current duty, should the Constitutional Court has been able to function for guarding the constitution including on basic rights or fundamental rights of each people of Indonesia, guaranteeing of the implementation of the constitutional rights of Indonesian citizens are very

¹ Pan Muhammad Faiz, "Menabur Benih Constitutional Complaint", <http://jurnalhukum.blogspot.com/2006/09/constitutional-complaint-dan-hak-asasi.html>, viewed on March 29th, 2015, at 11.33 pm.

important.² Violations of the constitutional rights of the people who submitted to the Constitutional Court, cannot be processed at all, because the legal instruments is not available.

The protection of the constitutional rights is now confined to the fundamental rights of the people when it is tangible in the Act. In fact, the violation of the constitutional rights of our society that are not embodied in the Act, amounts to much more. By providing a means for the public to denounce the violations of human rights, then the future of Indonesian society can also create a more mature and awareness to defend himself before the law when their basic rights were violated.

B. Constitutional Complaint

Constitutional complaint is a complaint of citizens to the Constitutional Court because it gets the treatment from the government as opposed to the 1945 Constitution. According to the I Dewa Gede Palguna³, the Constitutional Complaint or lawsuit filed by individual citizens to the Constitutional Court against the artificial or omission of a public institution that resulted in the violation of rights or freedoms or the fundamental citizens concerned. At its base, such complaints can only be accepted by the

² I Dewa Gede Palguna, 2013, *Pengaduan Konstitusional (Constitutional Complaint): Upaya Hukum terhadap Pelanggaran Hak-hak Konstitusional Warga Negara*, Jakarta, Sinar Grafika, pp.248-249.

³ I Dewa Gede Palguna, 2006, *op.cit.* p. 131-132.

Constitutional Court when all available avenues for resolution through the judicial process on this issue has no more exhausted.

Another definition of the constitutional complaint, is: “A constitutional complaint is a legal remedy by which a constitutional complainant in proceedings before the Constitutional Court claims a violation of human rights or fundamental freedoms. A constitutional complaint cannot be lodged due to the erroneous application of substantive or procedural law or due to an erroneously established state of the facts in proceedings before courts”.⁴ In many countries, this authority is the principal authority of the Constitutional Court. However, in Indonesia, the Constitutional Court does not have this authority.

The 1945 Constitution explicitly states that Indonesia applies the rule of law (*Rechtsstaats*) concept. According to Friedrich Julius Stahl, one of the element of the rule of law is the fulfilment of basic human rights of citizens.⁵ In one of the requirements of the application of the rule of law as mentioned above, it is necessary to ensure the protection of constitutional rights of the people as the embodiment of the implementation of the democratic elements in the Constitution. Thus, the state needs a mechanism which is more effective and proper for the constitutional rights protection, and this is a necessity of the formation of the Constitutional Court of the

⁴ See In accordance with the first paragraph of Article 50 of the above-mentioned Act.. <http://www.us-rs.si/en/applications/applications-3460/>, viewed on June 13th, 2015 at 08.09 pm. Accessed on March 28th, 2015, at 10.33 am.

⁵ Pan, *op.cit.*

Republic of Indonesia in 2003 as an organ authorized to oversee the Constitution.⁶

C. Constitutional Right

The constitutional rights of the people is a fundamental right guaranteed by the Constitution of society. In the Constitution, rights or basic rights is one of the important part of being a decisive part of the Constitution of matter itself. According to JG Steenbeek as quoted by Sri Soemantri revealed that, in generally, the Constitution contains three main points, namely: the guarantee of the rights of man and citizen, the enactment of a state government structure that is fundamental, and restriction constitutional duty of a country that is fundamental.⁷ According to Miriam Budiardjo, in every provisions of the Constitution, there are some elements that has to be available:⁸

1. Organization of the country;
2. Human Rights Protection;
3. The procedure to amend the Constitution (amendment);
4. There are times when loading prohibition to alter certain properties of the Constitution.

⁶ Wasis Susetio, *Membangun Demokrasi Melalui Constitutional Complaint*, <http://www.esaunggul.ac.id/index.php?mib=prodi&sid=17&nav=artikel.detail&id=33&title=Membangun%20Demokrasi%20Melalui%20Constitutional%20Complaint>. Accessed on March 29th, 2015, at 11.10 am.

⁷ Sri Soemantri, 2006, *Prosedur dan Sistem Perubahan Konstitusi*, Bandung, PT Alumni, p. 59.

⁸ Miriam Budiardjo, 2008, *Dasar-Dasar Ilmu Politik, Edisi Revisi: Cetakan Pertama*, Jakarta, PT Gramedia Pustaka Utama, p. 177-178.

5. The supreme of law which binds for all citizens and state institutions without exception.