

CHAPTER I

INTRODUCTION

A. Background

There are few cases which cannot be resolved by existing legal mechanism. For example, the case of the Joint Decree between Ministry of Religion, Head of Public Prosecutor, and Ministry of Internal Affairs No.3 of 2008 about the Ahmadiyah movement in Indonesia. The joint decree cannot be sued. If it is brought to the Constitutional Court, the Court only review laws based on the Constitution. If it is brought to the Supreme Court through a judicial review of the joint decree, the Supreme Court does not have authority, because it is not part of the hierarchy of legislation. Furthermore, if it is sued to the Administrative Court is also not appropriate, because the joint decree is not a concrete, individual, and final decree. In the other hand, the existing legal mechanism cannot settle the problem.¹

The Constitutional Court in its development is not only just as the guardian of the constitution, but also as the guardian of the constitutional rights and the guardian of the ideology. Constitutional complaint becomes relevant to be implemented in Indonesia, because Indonesia applies the rule of law² and democracy concept which is stated in the 1945 Constitution Article 1 paragraph (3). One of the objects of rule of law

¹ Moh. Mahfud MD, 2009, *Konstitusi dan Hukum dalam Kontroversi Isu*, Jakarta, RajaGrafindo Persada, p.287

² See the 1945 Constitution Article 1 point (3)

concept is the protection of the rights of citizens in the state. But in Indonesia, the mechanism of the protection of the constitutional rights of citizens through coconstitutional complaint is not regulated yet by the law. The law only regulates limitedly for the mechanism of the constitutional rights violated by the office of public administration.

The protection of the constitutional rights is a condition that cannot be derogated by the law. So it is not exaggerating if the Constitutional Court through its authority to adjudicate the matters related to the Constitution. The Constitutional Court has made the Constitution being a living document that gives shape and direction for political power in a country and not only became a symbolic legal collection of sentences. In addition, the Constitutional Court has given a major contribution, not only for the creation of the living constitution, but also for democracy itself.³

There is one thing that remains unclear in the Constitutional Court, namely the absence of constitutional complaint mechanism. In modern democratic state, the constitutional complaint is a legal effort to maintain legally dignity of human beings who should not be contested in order to secure from the actions of state power. Constitutional complaint mechanism is one of the tool for the protection of human rights.

³ See Donald Harowitz, 2006, "Constitutional Courts: A Primer for Decision Makers", *Journal of Democracy*, Vol.17, No.4, p.126.

The Constitutional Complaint provides assurance that the processes in determining the administration decision, making laws, and judicial decision will not violate the constitutional rights. If there is no mechanism of constitutional complaint, then will be a lack of Indonesia's legitimacy as a modern democratic state in the absence of the community's efforts to question the treatment of authorities indicated that violates their fundamental rights which is guaranteed by the 1945 Constitution. Conceptually, Indonesia requires the Constitution Complaint mechanism to protect the constitutional rights of its people that have been adapted to conditions in Indonesia.⁴ According to Edy Suandi Hamid⁵, guaranteeing constitutional rights of citizens currently only limited when the fundamental rights of the people it 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. Having this, the constitutional rights shall be given to the citizens in Indonesia in way to avoid the violations of human rights. But, the violation of the constitutional right is not only from the act, but also it can be from the legislation under the act.⁶

⁴ See Vino Devanta Anjas Krisdanar, 2010, "Menggagas Constitutional Complaint Dalam Memproteksi Hak Konstitusional Masyarakat Mengenai Kehidupan dan Kebebasan Beragama Di Indonesia", *Jurnal Hukum*, Vol. 7, no. 3, p.187.

⁵ See Edy Suani Hamid, 2010, in his seminar on Constitutional Complaint sebagai Jaminan Konstitusional Warga Negara dalam Rangka Supremasi Konstitusi, <http://www.uji.ac.id/content/view/939/257/>, viewed on March 29th, 2015, at 11.33 pm.

⁶ Palguna, 2006, "Yang "terlepas " Dari Kewenangan Mahkamah Konstitusi RI: Pengaduan Konstitusional (Constitutional Complaint)", *Lex Journalica*, Vol.3, No.3, p.128.

B. Research Question

1. What is the urgency of constitutional complaint that has to be implemented in the Constitutional Court of Indonesia?
2. How is the ideal concept on constitutional complaint that can be practiced in the Constitutional Court?

C. Objective of Research

The objective of the research is to study the urgency of the constitutional complaint in protecting the constitutional rights of citizens.

D. Benefit of Research

The benefits of research, are:

1. Theoretical Benefit

This research will provide the understanding to the state organs, in such Legislative, Executive, and Judicial. This research will open the view of the important thing of the protection of human rights,

2. Practical Benefit

This research will contribute to the society or NGO's to become self-protection legally on human rights to conduct their rights.