

CHAPTER IV

FINDINGS AND DISCUSSIONS

A. Some Cases on Constitutional Complaint Issues

According to KC. Wheare, “Constitution is the whole system of government of a country, the collection of rules which establish and regulate or govern the government”.¹ The Constitution has a biggest role to determine the state goals. The state goals shall be giving the common good for all aspect (economic, social, cultural), and also the important thing is the protection of the human rights of citizens in every single state. In the Preamble of the 1945 Constitution (*staatsfundamentalnorm*) has also stated the spirit to give the common good by the state for the poeple of the Republic of Indonesia, and Article 28 of the 1945 Constitution explains the human rights of citizens. The Constitutional Court also has the role as the guardian of constitution, and one of the sub-domain of the constitution is consist of the human rights. Indirectly, the Constitutional Court has a duty as the guardian of constitutional rights of citizens to make a stable and haromny of life which is constituted in the 1945 Constitution.²

By then, if there is a violation of the constitutional rights of citizens there must be a mechanism on how to settle or enforce the law on the violation of human rights of citizens. Commonly, in several countries applied the

¹ KC. Wheare, 1969, *Modern Constitution*, Oxford, Oxford University Press, p.150

² See Syara Nurhayati, 2015, “Mahkamah Konstitusi sebagai Positif Legislature dalam Pengujian Undang-undang terhadap Undang-undang Dasar 1945”, *JOM Fakultas Hukum*, Vol.2, No.2, p.13

mechanism of constitutional complaint as the legal instrument to protect the basic rights of citizens as mandated by the 1945 Constitution.

The 1945 Constitution has separated the Indonesian governmental power into three branches, they are legislative power, executive power, and judicial power. Legislative power is the state organ which consist of the House of Representative (DPR), and the Regional Representative Council (DPD) which have authority in law-making, budgeting, and supervising.³ Executive power is the state organ which has authority to run the law in accordance with the 1945 Constitution. Executive organ is the President as chief of the executive power (*bestuur*) in narrow meaning. Article 4 of the 1945 Constitution states that The President has authority to run the governmental power based on the Constitution. The President has authority to run the government based on the law as mandated by the 1945 Constitution.⁴ Judicial Power is a state organ which has authority to enforce the law and to perceive justice.⁵ The Judicial power consist of the Constitutional Court and the Supreme Court, both are equal with different authorities.⁶ The function of the seperation of power is to avoid the absolute power that tends to abuse of power. Lord Acton said “*power tends to corrupt,*

³ See Ni'matul Huda, 2012, *Hukum Tata Negara Indonesia: Edisi Revisi*, Jakarta, Rajawali Pers, pp.174-195, also see the 1945 Constitution Article 20 on the authority of the House of Representative and see Article 22D on the authority of the Regional Council of Poepole.

⁴ See Kuntjoro Purbopranoto, 1981, *Perkembangan Hukum Administrasi Negara Indonesia*, Bandung, Binacipta, p.1

⁵ See the Judicial Power Act, 2009 (UU Kekuasaan Kehakiman No.48 Tahun 2009) Section 1 Point 1.

⁶ See Article 24A and 24C of the 1945 Constitution

absolute power corrupt absolutely".⁷ One of the abuse of power can be the violation of human rights conducted by the state apparatus.

Every state organ has its authority as mandated by the 1945 Constitution and regulated further through the Acts.⁸ All authorities have limited power to run the state duties. This is a part of concept of constitutional democracy. In fact, in some cases the government (Legislative, Executive, and Judicial) tends to violate the principle.⁹ The abuse of power can arise because of the lack of checks and balances system among the state organs. As a result, the fundamental rights of citizens are violated. However, to some cases, there is no legal mechanism to bring the cases to Courts. Based on the data for the Constitutional Court from 2004 to 2010, there are 106 cases received¹⁰ that violated the constitutional rights of citizens that can be categorized as the constitutional complaint, and the the Constitutional Court has decided 30 cases.¹¹

There are some cases that can be highlighted, for example, constitutional dispute ruling No.016/PUU-I/2003 on the cancelation of the decision of Supreme Court on Judicial Review, 061/PUU-11/2004 on the cancelation of the Judicial Review of Supreme Court that the decision was considered as inconsistent or contradictory each other, ruling No. 004/PUU-

⁷ As quoted by Brian Martin, 1990, "Power Tends to Corrupt", *Philosophy and Social Action Journal*, No. 16, Vol. 3, p.3

⁸ See the Hierarchy of Legislation, 2011 (Undang-undang Nomor 12 tahun 2011 tentang Pembentukan Peraturan Perundang-undangan) Section 7

⁹ See SF. Marbun and Mahfud, 2006, *Pokok-pokok Hukum Administrasi Negara*, Yogyakarta, Liberty, p.8

¹⁰ See Hamdan Zulva, 2010, "Pengaduan Konstitusional (Constitutional Complaint) dalam Sistem Peradilan di Indonesia", *Jurnal Sekretariat Negara RI*, No.16, p.54

¹¹ See Palguna, 2013, *op.cit.* pp.701-719

III/2005 on the bribery within Supreme Court in its ruling, ruling No. 013/PUU-III/2005 on the deviation of the legal norm of acts by the Supreme Court Judges, ruling No. 018/PUU-III/2005 on the miss interpretation of acts by the Supreme Court Judges, ruling No. 025/PUU-III/2005 on the contradiction of the Supreme Court decisions, ruling No. 007/PUU-IV/2006 on the uncertainty of the investigation process before the general court and bribery within, ruling No. 030/PUU-IV/2006 on the authority to license the advertisement, ruling No. 20/PUU-V/2007 on the Contract-making in mining sector without the permit of the House of Representative (DPR), etc.

Substantially, those cases can be categorized as constitutional complaint. The problems, if the miss-conduct of government that caused the violation of human rights, the implementation of acts by the judges was wrongful, the general court decision was contradict each other. The cases that brought to the Constitutional Court through judicial review of acts, the petitioners used this mechanism because the constitutional complaint mechanism is not available.¹² Juridically, the Constitutional Court rejected (*niet onvankelijk verklaard*) the petitions, because the Constitutional Court has definitive authority, are:

- 1) Review law against the Constitution;
- 2) Dissolution of political party;
- 3) Disputes regarding state institution's authority;

¹² See Hamdan Zulva, 2011, "Constitutional Complaint dan Constitutional Question dan Perlindungan Hak-hak Konstitusional Warga Negara", *Jurnal Media Hukum*, Vol.19, No.1, p.161

- 4) Disputes regarding the General Election's result; and
- 5) Oblige 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).

Actually, there are so many cases that can be part of constitutional complaint issues, for example, government policy on forced eviction home recently. The legal reason is, first, based on Housing Act (Undang-Undang No.1 tahun 2011 tentang Perumahan dan Kawasan Pemukiman) Section 50 (1) and (2) that everyone has the right to have a home.¹³ There are many cases happened in Jakarta. Many residents said that they were given little warning or given confusing messages before their homes were razed, and most said that public officials provided them with short time to collect their belongings and abandon their homes. Almost without exception, residents explained that they received either no compensation at all, or such little compensation that it did not adequately cover the losses.

¹³ The protection of human rights on the right to have a home is regulated in Article 28H and further regulation is in Human Rights Act, 1999 (Undang-undang No. 39 tahun 1999) Section 40, and also see the ICESCR Act (Ratifikasi Undang-undang International Covenant on Economic, Social, and Cultural Rights No.11 tahun 2005) Article 11 (1) that The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international cooperation based on free consent.

The evictees also gave detail the problems that they have faced as a consequence of their eviction. As significant numbers found themselves homeless and destitute. Women and migrants related to the impediments raised to their ability to earn a livelihood for themselves, and parents and children describe the disruption caused to children's access to schooling.¹⁴

Another case is Pollycarpus's case. After undergoing a long criminal justice process, ultimately through the cassation of the Supreme Court is released. But the Attorney filed *herziening* or judicial review to the Supreme Court, and finally polly is been punished again. Finally, Poly filed a Constitutional Review to the Constitutional Court towards Article 23 paragraph (1) of Act 4 of 2004 on Judicial Power. The end of story of this test was rejected.¹⁵ For the last is Bibit Chandra's case, the Constitutional Court won the case to Bibit Chandra that Article 32 on Corruption Act against the 1945 Constitution Article 28D (1).

The absence of constitutional protection will give the potential of the emergence of a legal loophole in the form of emptiness in the rule of law or legal mechanism that can lead to violations of fundamental rights either a product of legislation, executive actions, and judicial decision that injure the basic rights of citizens who have granted by the Constitution (*staatsfundamentalnorm*). In a modern democratic state, there must be crucial

¹⁴ The condemned communities: forced evictions in Jakarta, reported by the human rights watch see <https://www.hrw.org/report/2006/09/05/condemned-communities/forced-evictions-jakarta>, viewed on March 4th, 2016 at 04.00 pm.

¹⁵ See the Constitutional Court Ruling Number 16/PUU-VI/2008 on August 15th, 2008.

point in the consolidation of the development of country. Moreover, in Indonesia, the country which is in a period of transition and still looking for a better model of the ideal state administration. So that violations of fundamental rights still has the potential to occur in the life of the nation based on the cases happened without any legal mechanism for the people to protect their basic rights.¹⁶

Rejection of the Constitutional Court to some cases on constitutional issue shows that Indonesia has no enough legal mechanism to protect the constitutional rights of citizens. The protection of constitutional rights has been granted in the *grundnorm* of Indonesia (Pancasila) in fifth principle, that is social justice for all of the people of Indonesia. It is also by Article 28D (1) of the 1945 Constitution that states “every person shall have the right of recognition, guarantee, protection and certainty before a just law, and of equal treatment before the law”. There are 3 (three) phrases that can be highlighted, namely: recognition, guarantee, and protection which shall be given by the state. Lacking of maximum protection of constitutional rights has brought about the loss of social and economic justice for people. Constitutionally, the right of people have to be protected because it is a part of the goals of the state. The inherent of people is highest law, *salus populi suprema lex*.

In preventing the violation of the constitutional rights, there shall be a legal mechanism that can provide the needs of people to defend their rights

¹⁶ See Zaka Firma Aditya, 2014, “Kewenangan Mahkamah Konstitusi dalam Menyelesaikan Perkara Constitutional Complaint Berdasarkan Undang-undang Dasar Tahun 1945”, *UNNES Law Journal*, Vol.3, No.1, p.39

as mandated by the Constitution, such as a constitutional complaint. There shall be more potential cases happen due to wrong regulations and policies made by government.¹⁷

B. The Protection of the Constitutional Rights as the Core of Democracy

The constitutional rights of the people is a fundamental right guaranteed by the Constitution. In the Constitution, rights or basic rights is one of the important part of being a decisive part of the Constitution. Constitutional rights of citizens of Indonesia has been granted by the 1945 Constitution, especially in Article 28 to 28J of the Constitution. Human rights itself guaranteed by the International Law in several convention and international law, such as UDHR (Universal Declaration of Human Rights) and ICCPR (International Convention on Civil and Political Rights) as ratified by Indonesian Government enter into ICCPR Act, 2005 (UU No.11 Tahun 2005).¹⁸

Constitutional protection of right and freedom of citizens is interesting but also complex question that takes a central position in most democratic states. The statement had to be qualified, as even most majoritarians would have to agree that certain political liberties (regarded as

¹⁷ See The Hierarchy of Legislation, 2011 (Undang-undang Peraturan Pembentukan Perundang-undangan) Section 7 (1)

¹⁸ We can analyze the statement based the 1945 Constitution Article 28A until 28J on the human rights, also explain further more in Human Rights Act on basic rights, also in International view human rights also is the main point for general Principle of law recognized by civilized nations. ICCPR Act of Indonesia also explain the basic rights that shall be protected by the state.

a prerequisite for public autonomy) are necessary to ensure popular sovereignty, i.e. the democratic process, and therefore, in its widest sense, democracy itself. As we have seen, personal liberties (a prerequisite for private autonomy or personal development), on the other hand, are still widely regarded as subverting the principle of pure democracy. According to Habermas, so far, no one has succeeded in satisfactorily reconciling private and public autonomy at a fundamental conceptual level, as if evident if we consider the tensions between ideas of human rights and popular sovereignty.¹⁹

As shown above, Ronald Dworkin has already attempted to bridge this conceptual gap between the notions of rights and popular sovereignty, by declaring certain rights necessary to enhance democracy (i.e. only the protection of rights will enable citizens to participate in popular government). Dworkin, however, does not envisage all conceivable personal liberties to be deserving of special protection, as he does not intend the absurd claim that every constraint on majoritarian power [i.e. personal liberties] improves democracy.²⁰

The existence of the state in the conception of rule of law has two sides which cannot be separated between one another. Because the state is implementing the rule of law concept cannot be separated as well between state conduct and government authority to run the state. The rule of law

¹⁹ See Cornelia Schneider, 2000, "The Constitutional Protection of Rights in Dworkin's and Habermas' Theories of Democracy", *UCL Jurisprudence Review*, pp.115-116

²⁰ *Ibid.*

concept implemented is to gain the the ideal state based on the goodness of people. Because the goodness of people can manage, maintain, and protect the state and people.²¹

The judicial defense of the private person's constitutional rights and freedoms is an essential element of the constitutional organ of a person's rights and freedoms. Constitutional rights has been regulated in Article 28 on Human Rights of the 1945 Constitution.

Actually, there are many theories argue that the human rights and popular sovereignty seem in irreconcilable competition. This statement had to be qualified, as even most majoritarians would have to agree that certain political liberties (regarded as a prerequisite for public autonomy) are necessary to ensure popular sovereignty, i.e. the democratic process, and therefore, in its widest sense, democracy itself. As we have seen, personal liberties (a prerequisite for private autonomy or personal development), on the other hand, are still widely regarded as subverting the principle of pure democracy.²²

The rule of law concept in Indonesia has been declaired in Article 1 (3) of the 1945 Constitution. According to Jimly Asshiddiqie, "Indonesia was expected by the founding fathers as a rule of law state (*Rechtsstaat*)"²³, also deals with the concept of 'nomocracy' derived from the words 'nomos' and

²¹ See Fauzan Khairazi, 2015, "Implementasi Demokrasi dan Hak Asasi Manusia di Indonesia", *Jurnal Inovatif*, Vol.VIII, No.1, pp.72-73

²² Cornelia Schneider, *op.cit.*, pp.115-116

²³ Jimly Asshiddiqie, 2009, *Menuju Negara Hukum Yang Demokratis*, Jakarta, PT Bhuana Ilmu Populer Kelompok Gramedia, p.395

'cratos'. 'Nomos' means the norm, whereas 'Cratos' is power. There can be meant that the nomocracy is the power of government has to be ruled in the norm or law. Therefore, nomocracy is closely related to the idea of the rule of law or legal principles as supreme power.²⁴ Actually, the rule of law concept is almost different with the *rechstaat* concept. Indirectly, the rule of law concept is from *anglo saxon*, and the *rechstaat* concept is from european continental. Both of them implemented in Indonesia, because the characteristic of both theory adopted in indonesian legal system. According to Julius Stahl, *rechstaat* concept meaning consist of:²⁵

- 1) The protection of human rights

There is a constitutional protection of human rights by fair-law-process. The establishment of state and government shall not derogate the core of fundamental rights. So, if the state cannot give the fairness to people and fail to settle the violation of human rights, the state cannot be called as the rule of law state or *rechtstaat*.

- 2) Separation of power

The separation of powers within state organs by implemting the concept of separation of powers vertically or horizontally. The separation of powers is for avoiding the

²⁴ See Jimly Asshiddiqie, 2011, "Gagasan Negara Hukum Indonesia", *unpublished*, p.1

²⁵ Bahder Johan Nasution, 2011, *Negara Hukum dan Hak Asasi Manusia*, Bandung, Mandar Maju, p.1

government from absolute power that tends to abuse of power.

3) Government based on the law

The government in running its authority has several regulations that has to be obeyed as the guidance to conduct state needs or policy.

4) Administrative Court

Even though administrative court is a part of general court that shall be free from intervention and impartial, it still has to be explained explicitly. In every *rechstaat* there shall be transparency for all people if the government (executive) committed miss-conduct in decision-making.

While, according to AV. Dicey, the Rule of Law concept consist of²⁶:

1) Supremacy of law;

The existence of normative and empirical recognition of the principle of the rule of law, that all the problems solved by the law as the supreme guideline. Normative recognition of the rule of law embodied in the establishment of norms hierarchically culminating in the supremacy of the

²⁶ See AV. Dicey, 2015, *Introduction to the study of the law and the constitution*, Charleston, Bibliolife, pp.251-266

Constitution. While empirically manifest in the behavior of the government and society on how to act and solve their problems, the law shall be the guideline to solve it.

2) Equality before the law;

Everyone is equal before the law. There is no discriminative act for everyone, except for those who shall fulfill for public interest.

3) Due process of law;

Any government action must be based on the laws and regulations in valid and written forms. Legislation should be prior and precede the act. Thus, any administrative act (*droit administratifs*) should be based on rules. For making the bureaucracy is not too rigid, then recognized the principle of *frijsermessen*.²⁷

The core of democracy state is the state implementation the constitutional state guided by the strong constitution. The clear Constitution (*lex certa*) is the Constitution implementing the constitutionalism. It means give the detail of state organs (legislative, executive, and judiciary) with checks and balances system, with giving the protection, guarantee, and respect the human rights. On the other hand, the Constitution is a document

²⁷ *Ibid.*

which limiting the state power and giving the protection of human rights.²⁸

The meaning of constitutional rights is the right guaranteed by the Constitution then shall be protected by the state in state conduct. Based on Article 27 of the 1945 Constitution states that all citizens shall be equal before the law and the government and shall be required to respect the law and the government, with no exceptions. In relation with the constitutional rights, the Indonesian Constitutional Court has interpreted by the Constitutional Court on the loss of constitutional rights as regulated by the Constitutional Court Act, 2003 (UU MK No. 24 tahun 2003) Section 51 (1), the Constitutional Court has 5 (five) requirements, as follows:

- 1) Constitutional rights loss from the petitioner;
- 2) Constitutional rights loss came from the act;
- 3) Specific constitutional rights loss or can be assumed potentially will loss the rights;
- 4) Causality principle (*causal verband*) from the act to the rights; and
- 5) Possibility after the Constitutional Court granted the petition will not loss anymore.

In the 1945 Constitution (*grondwet*), Indonesia implements the system of democracy, which is stated in Article 1 Paragraph (2), “sovereignty is in the hands of the people and is implemented according to the

²⁸ See Abdul Mukhtie Fadjar, 2007, *Hukum Konstitusi dan Mahkamah Konstitusi*, Jakarta, Setjend dan Kepaniteraan MK-RI, p.35

Constitution”.²⁹ The Article means that Indonesia is strongly declared as a democracy state. Its interpretation is in line with the view of Abraham Lincoln “*Democracy is the government from the people, by the people and for the people*”.³⁰ By implementing the democracy system, Indonesia basically has the obligation to protect the human rights as the basic principle of democracy state. The protection of human rights in democracy state is a *conditio sine qua non* (must).

By the legal norm of Article 1 Paragraph (2) of the IC describes that the 1945 Constitution (*grondwet*) implements the constitutional democracy. The meaning of the constitutional democracy is the limited states of government authority in running its power to the state and should be based on the norms of the 1945 Constitution.³¹ The characteristic of constitutionalism shall be composing, are:

1. Separation of power or distribution of power with checks and balances system; and
2. Giving the authority to the Constitutional Court in settling the case of Constitutional Complaint.³²

Actually, the Constitutional Court established for guiding the government for more democratic with checks and balances system among state organs, guiding supremacy of law, and protecting the constitutional

²⁹ See Article 1 Paragraph (2) of the 1945 Constitution

³⁰ See Septi and Nanik, 2009, *Politik Ketatanegaraan*, Yogyakarta, LabHukum, p.36

³¹ See Laica Marzuki, 2010, “Konstitusi dan Konstitusionalisme”, *Jurnal Konstitusi*, Vol.7, No.4, p.4

³² *ibid.* p.5

rights of citizens. Beside that, the Constitutional Court has duty to settle the problems of norms which are considered against constitution.³³ Adnan Buyung Nasution explained that to manifest the constitutional government, there are several scopes that cannot be taken by the government, as follows³⁴:

1. Broadening political participation;
2. Vesting legislative power in the people's representatives;
3. Rejection of authoritarianism;
4. Commitment to external liberty;
5. Commitment to internal liberty;
6. Commitment to universal principles of good governance;
7. Establishment of a multy-party system;
8. Making the goverment accountable to the people's representatives; and
9. Acceptance of the principle of free elections.

Therefore, the function of the Constitutional Court is to review the law against the Constitution, and as the social control including the state organs decision. While, constitutional review is the product of modern government system based-rule of law, and the spirit of separation of power and the protection of constitutional rights. The mechanism of constitutional review (CR) as proposed by Hans Kelsen has several duties. One of CR spirit,

³³ Jazim Hamidi and Mustafa Latif, "Constitutional Question (Antara Realitas Politik dan Implementasi Hukumnya), *Jurnal Konstitusi*, Vol.7, No.1, p.31

³⁴ See Adnan Buyung Nasution, 1992, *The Aspiration for Constitutional Government: A Socio-legal Study of the Indonesian Konstituante 1956-1959*, Jakarta, Pustaka Sinar Harapan, pp.15-27

is guiding the democracy process within state organs.³⁵ The main duty of the Constitutional Court is to protect and avoid the violation of human rights committed by state organs.³⁶ The protection of the constitutional rights is a *condition sine qua non* (must) by the 1945 Constitution mandated to the Constitutional Court through Article 24C and Constitutional Court Act, 2003, Section 10 (1) to protect the rights of citizens.

C. The Constitutional Complaint as the Legal Effort to Protect Human Rights

Human rights is a fundamental right of every human being as a gift of God Almighty the inviolability of its existence. Such rights have inborn and inherent in human beings as creatures of God. Every human being has the same degree and dignity. In the past, people have yet to recognize the existence of other human degrees, which causes suppression of human beings with one another. The most concrete example can be seen in the occupation of one nation to another nation. Indonesia occupied with a very inhumanly by the oppressive colonialism with, and affected the nation.

If pursuant to Act No. 39 of 1999 on Human Rights, it is stated that human rights is a set of rights attached to nature and human existence as a creature of God Almighty and it is His grace that must be respected, upheld

³⁵ See Hans Kelsen translated by Anders Wedberg, 1945, *General Theory of Law and State*, Massachussets, Cambridge University Press, p.157

³⁶ See I Dewa Gede Palguna, 2010, "Constitutional Question: Latar Belakang dan Praktik di negara Lain serta Kemungkinan Penerapannya di Indonesia", *Jurnal Hukum*, Vol.17, No.1, p.3

and protected by state law, government, and everyone for the respect and protection of human dignity.

The principle of the recognition and protection of human rights, is part of the principle of legal protection. The term of human rights in Indonesia, often associated with the term of natural rights, basic human rights. Natural rights, human rights, fundamental rights, *gronrechten*, *mensenrechten*, *rechten van den mens* and *fundamental rechten* by Philip M Hadjon, in the right, contained the existence of a claim. The definition of human rights based on the provisions of Article 1 point 1 of Law No. 39 of 1999 on Human Rights and Law No. 26 of 2000 on Human Rights Court is a set of rights attached to nature and human existence as a creature of God the Almighty and is His grace that must be respected, upheld and protected by the state, law, government and every person, for the respect and protection of the dignity and human dignity.³⁷ The protection of human rights shall be obviously guaranteed by the state organs in law-making, judicial decision, and policy from government. Those will not suffer the constitutional rights of citizens. But, some question will arise if how they (Legislative, Executive, and Judiciary) suffer the constitutional rights of citizens by their authority or power.

Ubi jus ibi remedium means where the law exist, there shall be a remedy as the legal effort to protect their rights.³⁸ Constitutional complaint is

³⁷ Philipus M. Hadjon, 1987, *Perlindungan hukum bagi rakyat Indonesia (suatu studi tentang Prinsip-prinsipnya, penanganannya oleh Pengadilan dalam lingkungan Peradilan Umum dan pembentukan peradilan administrasi*, Surabaya, Bina Ilmu, pp.33-34

³⁸ AV. Dicey, *op.cit.*, p.262

one of the form of implementation of constitutional democracy, namely the control of the people against state organs to restore the constitutional rights guaranteed by the constitution. Jonathan Riley describes democracy-constitutional as a game involving complex two-stage political decision making. The first phase is the phase constitutional or higher track and the second phase is the phase post-constitutional or lower track.³⁹ It means that the higher track is the consensus among politician inside the state organ to give the ideal concept to protect the rights of citizens. While, lower track means that the role of the people who feel still unjust because of the framers of constitution by the politician or state organs.⁴⁰ With Riley's theory can take the opportunity one of the problem solver or legal mechanism for the people if they suffer from the violation of constitutional rights can be sued to the Constitutional Court through the Constitutional Complaint.

The function of constitutional complaint is in principle of the effective protection of fundamental rights by giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions. According to the European perspective, constitutional complaint is characterised by four factors. Firstly, they provide a judicial remedy against violations of constitutional rights. Secondly, they lead to separate proceeding which are concerned only with the constitutionality of the act in question and not with any other legal issues connected with the same case. Thirdly they

³⁹ See John Ferejohn, et.al, 2001, *Constitutional Culture and Democratic Rule*, United Kingdom, Cambridge University Press., p.147

⁴⁰ *Ibid.*

can be lodged by the person adversely affected by the act in question. In the last the court which decides the constitutional complaint has the power to restore to the victim his or her rights.⁴¹ The constitutional complaint in European State is very open for the freedom and democracy of people.

Giving remedy to the individuals in case of violation of their rights by administrative or judicial decisions is the main justification for introducing constitutional complaint in European perspective.⁴² The mechanism of constitutional complaint can be proceeded after all the judicial mechanism (under Supreme Court) is gone through or exhausted. One of the duty of Supreme Court is judicial review under act. This review is the legislation under act against law.⁴³

Originally, the Constitutional Court has no historically to settle the Constitutional Complaint as proposed by the founding-father Hans Kelsen. The modern concept of constitutional judiciary, based on the ideas of Hans Kelsen and normatively portrayed in the Constitution of Austria in 1920, played a large role in shaping the contemporary physiognomy of the constitutional complaint. Accordingly the constitutional jurisdiction, like

⁴¹ See Ayse Özkan Duvan, 2013, "Possible Effects of the Constitutional Complaint Mechanism on Human Rights Practices", *Annales XLV*, No.62, p.30

⁴² *Ibid.*, p.31

⁴³ See the Hierarchy of Legislation, 2012 (UU 12 of 2011) Section 8 states that *Jenis Peraturan Perundang-undangan selain sebagaimana dimaksud dalam Pasal 7 ayat (1) mencakup peraturan yang ditetapkan oleh Majelis Permusyawaratan Rakyat, Dewan Perwakilan Rakyat, Dewan Perwakilan Daerah, Mahkamah Agung, Mahkamah Konstitusi, Badan Pemeriksa Keuangan, Komisi Yudisial, Bank Indonesia, Menteri, badan, lembaga, atau komisi yang setingkat yang dibentuk dengan Undang-Undang atau Pemerintah atas perintah Undang-Undang, Dewan Perwakilan Rakyat Daerah Provinsi, Gubernur, Dewan Perwakilan Rakyat Daerah Kabupaten/Kota, Bupati/Walikota, Kepala Desa atau yang setingkat.*, also see the Supreme Court Act, 2009 (UU 3 of 2009) Section 31A (1)

judicial review, is of a kind that makes the constitution effectively considered “law” in its own specific legal signification. Not only is the regime of democracy constitutionalized, but it is also “jurisdictionalized”.⁴⁴

In case of judicial review in Indonesia, constitutional complaint case were mostly rejected by the Constitutional Court. That’s why constitutional complaint is the proper one as the legal mechanism to protect the constitutional rights and avoid the badness of abuse of power from the government (wide meaning) that can injure the rights of citizens. This is in line with the islamic legal maxim *مقدم المفسد دفع المصالح جلب على* means that rejecting the badness one or harmfulness is the priority than accepting the goodness one. By then, if the constitutional complaint applied, the people will not suffer more injury caused by the government (wide meaning) on the constitutional rights. This is in line also with another islamic legal maxim *د جلبو المفسد دفع د المصالح* means after rejecting the badness one then will create the goodness one.

Constitutional complaint is a last effort for people in seeking justice after all the effort provided has passed (exhausted). It should be noted that the law, a man wants legal certainty and justice. Nevertheless, it must be recognized that the legal certainty and then justice shall be achieved through law enforcement that can only be achieved and maintained dynamically in a fair legal process.⁴⁵

⁴⁴ Ayse Özkan Duvan, *op.cit.* p.33

⁴⁵ Abdul Latif, 2010, “Jaminan UUD 1945 dalam Proses Hukum yang Adil”, *Jurnal Konstitusi*, Vol.7, No.1, p.52

In the operation, the law can (or cannot) earn the trust of the people will give legal certainty to life together. The consequence is, the law itself must have some credibility, and credibility can only be had, if law enforcement is able to demonstrate a consistent flow performance. Implementation of the inconsistent law cannot going to make people want to rely on it as the norm that regulates life together. The consistency in the implementation of the law will create potentially the legal certainty.⁴⁶

Dieter C.Umbach said that a Constitutional Court must safeguard the basic human rights or become a referee or arbitrator, who ensure that all parties concerned comply with the rules in the state. As an example of "judicial restrictions private" or abuse of power from Judiciary can totally inadequate in cases where the court was forced to secure the rights of Parliament or minorities in conjunction with executive. The judges must obtain compromises the right between judicial activism and judicial restrictions and never forget that the purpose of the Constitutional Court on the protection of freedom, democracy, and the constitution.⁴⁷ The people who injured their constitutional rights as the basic rights which comes from God Almighty will never forget what injurefid feel like. This is in line with the latin maxim *Hodi Mihi Craas Tibi* means that unjust thing touched the deep heart of people will be remembered endlessly.

⁴⁶ *Ibid.*, p.51

⁴⁷ Hamdan Zulva, *loc.cit.*, p.53

D. Comparative Survey on Constitutional Complaint in Some Countries

Constitutional complaints are complaints of citizens to the Constitutional Court for treated (policy or no policy) of the state organs, in this case the government; institution representatives of the people, nor the Supreme Court, which contradicts with the Constitution. Constitutional complaint can be brought only after all legal remedies gone through the institutions of other countries (exhausted).⁴⁸ In many countries, this authority is one of the authority in the Constitutional Court. However, in Indonesia, the Constitution 1945 does not expressly authorize the constitutional complaint or complaints of citizens to the Court Constitution, whereas the Constitutional Court is part of Judicial Power based on the 1945 Constitution which has the function to law-enforcement and give justice.⁴⁹

There are some countries that apply the constitutional complaint mechanism, such as Germany, South Korea, Turkey, Hungaria, etc. But the author will take 3 (three) countries as a reference to become a role model of constitutional complaint in Indonesia.

1) Germany

The most important procedure to protect the basic rights through legal effort before the court. The important mechanism that applied by the

⁴⁸ *Ibid.*, p.51

⁴⁹ Because the 1945 Constitution has give wide meaning for the Judicial organ to undergo its authority without any intervension and shall be law-enforcing and giving justice, also the 1945 Constitution only gives 4 authority and 1 obligation. For example in Article 24C (1) Constitutional Court only settle the law against constitution, state organ authority dispute that given its authority by Constitution, poltical party dissolution, general election dispute, and article 24C (2) CC shall give the answer on the petition of House of Representative whether Preseident/Vice President comited a miss-conduct.

Germany is the constitutional complaint (“*Verfassungsbeschwerde*”), which may be filed by any person alleging that one of his basic rights or one of his rights enumerated in Article 93 (1) No 4a Basic Law (e.g. the right to vote, Article 38 Basic Law) has been infringed by public authority. This may be the judiciary, the executive or the legislative power. Furthermore, judicial review over the legislature can be attained by the abstract regulation control brought before the Court by several political institutions, including the governments of the *Länder*, and the specific regulation control, which must be brought before the Federal Constitutional Court by a regular court which is convinced that a law adopted by the parliament (*Bundestag* or parliament of a *Land* –“*Landtag*”) is not in conformity with the Basic Law.⁵⁰ The Court can even declare unconstitutional an amendment of the Basic Law which has been adopted by two thirds of the Members of the *Bundestag* and two thirds of the votes of the *Bundesrat* if Article 79 (3) Basic Law, the so called “eternity clause” (“*Ewigkeitskausel*”) is affected. But in this case a very strict interpretation is needed.⁵¹ That way is kind of the seriousness of the democratic state with rule of law to run and serve the people as the holder of sovereignty.

⁵⁰ The procedure for the petitioner given by the FCCA, the legal consequences after decision of FCC will take several conditions, that can be accepted then *null* and *void* the law or public authority decision, or judiciary decision see See Rudolf Streinz, 2014, “The Role of the German Federal Constitutional Court Law and Politics”, *Ritsumeikan Law Review*, No.31, pp.98-99

⁵¹ *Ibid.*

Constitutional complaint (*Bundesverfassungsgerichts*) has been implemented since a long ago. Exactly regulated in the Germany Basic Law 1949 Article 93 (4a) which constitutes that:

“On complaint of unconstitutionality which may be entered by any person who claims that one of his basic right or one of his rights under paragraph (4) of Article 20 (4) or under Article 33, 38, 101, or 104 has been violated by public authority”

Article 91:

“Municipalities and associations of municipalities may lodge a constitutional complaint on the ground that a Federal or Land law infringes the provisions of Article 28 of the Basic Law. A constitutional complaint may not be lodged with the Federal Constitutional Court if a complaint against violation of the right to self-government may be lodged with the constitutional court of the Land in accordance with Land law”.

The legal effort to restore the basic right violated by public authority shall fulfill the legal mechanism in general court. By then, the petition of constitutional complaint can be accepted by the Federal Constitutional Court after exhausted. Nevertheless, it can be brought aside if there is a serious injury of the violation of constitutional rights of citizens.⁵²

Individual complaint can be filed to the Constitutional Court by the person or organization to claim that there is a violation of constitutional rights. So, the petitioner can speak up on the judicial review before the Constitutional Court because of Act violated the rights. The individual complaint also can be addressed to the constitutional court caused by the

⁵² See Jimly Asshiddiqie and Ahmad Syahrizal, 2012, *Peradilan Konstitusi di 10 Negara*, Jakarta, Sinar Grafika, p.72

public authority offense, and *incrach* of Supreme Court as well can be filed if the decision is against the constitution.⁵³ With the individual complaint (constitutional complaint) method, that has given the gate to all people that can make a petition to constitutional court in his right. That mechanism can be called as “extra ordinary remedy open to citizen with which he may challenge public interference in basic constitutional rights”.⁵⁴

From the establishment of the Federal Constitutional Court until 1990, at least 141.023⁵⁵ cases on individual complaint was in the Constitutional Court. By means, individual court is very openly accepted by the Germanian and has the name for “Court of Common Man”.⁵⁶ When the justices make decision with their interpretation, the consequences is to command the state organs to execute the Constitutional Court decision. The Constitutional Court decision indirectly will affect the policy to government, means that the decision has meaning in controlling the state organs to protect the poeple in their rights with the Constitutional Court decision final and binding (*res judicata*).⁵⁷

The Federal Constitutional Court consists of two panels (Senates), independent of each other (therefore also called “twin court” “*Zwillingsgericht*”). Each of them comprises eight members and is headed by the President and the Vice-President. The First Senate shall be competent for

⁵³ *Ibid.* p.73

⁵⁴ *Ibid.*

⁵⁵ Hamdan Zulva, 2011, *loc.cit.* p.51

⁵⁶ Christine Landfried, 1995, *Germany in the Global Expansion of Judicial Power*, New York and London, University Press, p.308

⁵⁷ See Article 28, 82 (1), 95 (III), Federal Constitutional Court Act.

legal review proceedings in which a legal provision is claimed to be largely incompatible with basic rights as well as for most constitutional complaints (therefore also called “*Grundrechtssenat*”, Senate for the Basic Rights). The Second Senate shall be competent for matters of governmental structure and for legal review proceedings and constitutional complaints not assigned to the First Panel (therefore also called “*Staatsrechtssenat*”, Senate or State Law).⁵⁸ So, the justices within the FCC (Federal Constitutional Court) works effectively and efficiently in guiding the Basic Law of German in such protecting the constitutional rights of citizens granted by their Basic Law.

2) South Korea

South Korea is a country that has long been implementing constitutional complaint as one of the authority of the Constitution Court. As a development of the constitutional text, the Constitutional Court Act provides for a direct access to the Constitutional Court, under the figure of a constitutional complaint. Therefore, any person may file a constitutional petition before the Court, when any of his/her constitutional protected rights has been violated by an action or omission –exercise or non-exercise– from the public power. The act is explicit stating that judgments of courts are not subject to the figure of constitutional complaint. The main nature of the institution is subsidiary, since it only operates when all of the other legal or judicial remedies are exhausted.⁵⁹ The petition based on violation of rights

⁵⁸ See Rudolf Streinz, *op.cit.*, p.97

⁵⁹ Rodrigo Gonzalez Quintero, 2010, “Judicial review in the Republic of Korea: an introduction”, *Revista De Derecho*, No.34, p.15

refers to those ones guaranteed by the Constitution The authority granted under Article 68 Paragraph (1) and (2) The Constitutional Court of Korea Act which states:

“(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 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”

“(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.”

Based on the data collected, not less than 11.679⁶⁰ cases on constitutional complaint issues examined by the Constitutional Court of Korea. The effects deriving from a decision upholding the constitutional complaint are noteworthy, since, via complaint, the Court may invalidate the law or legal provisions causing the right's transgression. Indeed, the decision could entail either revocation of governmental power that violates basic rights; or on the other hand, confirmation that the non-exercise of governmental power is unconstitutional, event in which the respondent must take new action according to the decision. Anyway, if the Court considers that the defendant's actionomission is due to unconstitutional laws or provisions, it may declare in the holding that the law or its provisions are unconstitutional. The decision of the Court binds all state and local organs. The complaint

⁶⁰ Hamdan Zulva, 2011, *loc.cit.*, p.52

based on the motion's denial for the unconstitutionality of a statute must be presented within fourteen days after said denial occurred. From there the procedure before the Court operates in the same way than the regular process of judicial review of legislation.⁶¹ Therefore, the protection of human rights exactly constitutional rights in South Korea given the strong protection from the state to the people. Because, there is a legal effort provided to defense their rights against state organs power.

So, South Korean Constitutional Court has settled the problems on the violation of constitutional rights effectively, because in some cases can be proceeded at least and has the decision that can restore the justice and the constitutional rights granted by the Korean Constitution. Based on South Korean Constitutional Court survey, Indonesia could implement constitutional complaint in settling the case on constitutional complaint issues. Because, Indonesian Constitutional Court has no authority to settle it, the 1945 Constitution definitively express the authority to the Constitutional Court has no constitutional complaint process.

3) Turkey

The Constitutional Court of Turkey (TCC) decided the case on constitutional complaint from 2012 to 2014 is about 165 cases⁶² and so many cases on constitutional complaint pending in the TCC. The institution of constitutional complaint was introduced into the Turkish legal system in 2010

⁶¹ *Ibid.*

⁶² See Zuhtu Arslan, 2014, "Constitutional Complaint in Turkey: A Cursory Analysis of Essential Decisions", *unpublished*, p.2

through a constitutional amendment. The Constitution and the Law on the Constitutional Court explicitly provide that all legal remedies must be exhausted before launching a constitutional complaint. The amended article 148 of the Constitution states that:

“everybody may apply to the Constitutional Court with an allegation that any of his or her constitutional basic rights and freedoms, within the scope of the European Convention of Human Rights, has been violated by public authority”

After amending the Turkey Constitution (TC), so many cases arised to become the constitutional complaint issues. Means that, the government of Turkey in running its duties still any the violation of constitutional rights. Turkey is part of democratic state, republic on the matter the President is elected through the general election, and rule of law state as well.⁶³

Actually, there are several cases solved by the TCC, such as Youtube and Twitter judgment. The case arised when the Turkish Government block the website without any judgment before the court. TCC decided that blocking of those site are the violation of freedom of expression in Turkey granted by the Constitution.⁶⁴ Another case is lawfulness of dentention that the TCC declaired in the serious crime shall not be custody for years to years. Because that is violated the right to personal liberty which is constituted by the Turkis Constitution.⁶⁵

⁶³ See the Constitution of the Republic of Turkey Article 1 and 2 which defines that Turkey is democratic state, republic, and rule of law with several ideologies become one.

⁶⁴ *Op.cit.* p.4

⁶⁵ *Ibid.* p.3

The practice of constitutional complaint in Turkey proved that it has been an effective means of protecting rights and liberties. The effective implementation of these judgments, through retrial of the cases, immediate release of detained applicants, removal of the ban on internet companies like Twitter, and payment of compensation by the state authorities, increased the public confidence in the institution of constitutional complaint.

Secondly, the enduring and sustainable success in constitutional complaint depends partly on the ability of the Court to operate an effective filter system and to set the standards for protecting rights in line with the case-law of the Strasbourg Court. As a matter of fact, in the above-mentioned judgments the principle guidance of the TCC has always been the jurisprudence of the Strasbourg Court. The Court has been doing its best to interpret the rights provisions of the Turkish Constitution in the light of the Convention and case law of the Strasbourg Court.

Thirdly, the violation judgments delivered by the TCC contributed to the increasing number of the applications. The expression of “becoming a victim of its own success” is also applicable to the TCC. We must continuously remind the principle of subsidiarity and convey the message that the TCC is not a super appeal court to resolve all kinds of legal problems. The future of the constitutional complaint depends on the effective functioning of legal system as a whole. The Court has started to adopt a right-based

approach. That means giving certain priority to individual rights and liberties vis a vis the state and its basic ideology.⁶⁶

The Turkish Constitution has regulated on the main important of the Constitution is to protect of human rights, but Indonesia until now has not implemented the mechanism of constitutional complaint, while it is very important to protect of the social value in the state. Lastly, the author would emphasize that the Constitutional Court in some countries is accomplished to run their duties as the guardian of constitution, and the interpreter of constitution. Moreover, in every democratic state mostly implement constitutional complaint mechanism, like no Indonesia still being an emerging democratic state which still needs the perfection of its system.

E. Analysis on the Urgency of the Constitutional Complaint in Indonesia

Lex samper debit remedium, means that the law always give the remedy. The latin maxim or principle has a meaningful message that every person who feels injured can filed before the Court to restore their rights and justices. But, the principle cannot be implemented by the 1945 Constitution as the highest law in Indonesian. For about 106 cases within the Constitutional Court, and decided for about 30 cases, mostly rejected by the

⁶⁶ Zuhtu Arslan, 2015, "Comparative Perspective on Constitutional Complaint", *Proceeding International Symposium on Constitutional Complaint*, published by the Constitutional Court of the Republic of Indonesia, p.67

the Constitutional Court.⁶⁷ The number of cases in Indonesia describes that the urgency of the implementation of constitutional complaint in Indonesia.⁶⁸

Based on the Hierarchy of Legislation Act (HLA, 2011), Indonesia has several kinds of legislation, are:

- 1) The 1945 Constitution
- 2) General People's Assembly;
- 3) Act or Government Regulation-in-Lieu-of-Law;
- 4) Government Regulation;
- 5) Presidential Decree;
- 6) Province Local Regulation; and
- 7) Regent Local Regulation.⁶⁹

By having authority to enact law and regulation, the state organ can create the harmful or abuse of power if there is no checks and balances system inside (constitutional complaint). Based on some relevant cases in the previous, there were abuse of powers conducted by the state organs which violated the 1945 Constitution, exactly on constitutional rights of citizens. Actually, the implementation of constitutional complaint in Indonesia is a proper one because Indonesia is a *rechstaat*⁷⁰, and democratic state⁷¹ where

⁶⁷ Hamdan Zulva, 2011, *op.cit.*, p.161

⁶⁸ See Pollycarpus, Bibit Chandra cases and see, http://www.bbc.com/indonesia/berita_indonesia/2009/11/091125_mkkpk.shtml, viewd on March 15th, 2016 at 4.15 pm

⁶⁹ See the Section 7 (1) of the HLA 2011 states on the kinds of legislation and state organs has their rights to make regulation for maintin his duties.

⁷⁰ Article 1 (3) of the 1945 Constitution

⁷¹ Article 1 (2) of the 1945 Constitution

the human rights protection and government based on law are the main principle of *rechtstaat*.

Based on the case analysis, Indonesia shall implement constitutional complaint because the people have to perceive justice. The legal mechanism of the protection of human rights in Indonesia has not provided yet, particularly in the Constitutional Court. The Constitutional Court only has several authorities in its definitive authority. It means that the Constitutional Court cannot have wider authority.⁷²

There are many cases happen in Indonesia related to the constitutional complaint, it describes that the awareness of people to seek justice is open-minded, or mean that the people do social mobility vertically. This is due to the efforts of individuals or certain segments of society that had been felt to be under a certain level of average. Actually in social position shall has a position with the same level with other communities in the perspective of the respect of fundamental rights guaranteed by the constitution.⁷³ The cases happened and decided by the Constitutional Court means that the adjudication system in Indonesia still has a weakness in resolving the case of constitutional violation. But this is reasonable in the process of democratization that is being experienced by Indonesia. At least, the people in Indonesia are not afraid anymore to the government actions that are considered impaired his/her constitutional rights because the existing

⁷² See Article 24C (1) and (2) of the 1945 Constitution

⁷³ Vino Devanta Anjas Krisdhanar, *op.cit.*, p.201

procedures to protect the constitutional rights of the people. There could stem the onset of authoritarian of rule in Indonesia. Regardless of whether a complaint with the constitutional complaint mechanism is approved by the Court or not. The concern about the number of complaints must be resolved in line with the maturity of the public in understanding the Constitution not only in the conceptual level, but also now reaching toward the legal mechanism.⁷⁴

Eventhough Indonesia has Administrative Court which has the absolute competence to settle the case on administrative dispute to public authority, but it still has limited power only examine the decree of public officials which are individual, final, and concrete.⁷⁵ It is an expectation that the provisions of the constitutional complaint can be incorporated into a rule of law, as a reference for citizens to pursue a lawsuit or appeal on constitutional violations suffered. Therefore, the Court as an institution which serves as the guardian of the Constitution deserves to be given the authority (extension) again which has the authority to decide constitutional complaint, so as to resolve any problems of citizens that because of public official action unconstitutionally through the constitutional complaint mechanism.

⁷⁴ *ibid*

⁷⁵ See Administrative Court Act (Law Number 51 of 2009) Section 1 point 10 that the dispute arise between public authority with the citizens that feel causality of the decree of public authority.

Eventhough Indoneia has a Human Rights Court, but it is only to examine the serious crime happened in Indonesia.⁷⁶ Then HRC cannot proceed the dispute against the Constitution. This is why constitutional complaint is a proper one as the legal mechanism to settle the constitutional dispute between state and citizens. The ideal concept of constitutional complaint in Indonesia can be mandated to the Constitutional Court, because the Constitutional Court is the Court which has the authority to guide the living law in society as the supreme law of the nation. The Constitutional Court can be a place to people in filing the dispute towards the 1945 Constitution. The Constitutional Court has function to interpret the Constitution, then will decide whether the state organs (Executive, Legislative, Judicial) violated the constitutional rights or not. Without decreasing the duty of the Supreme Court authority, constitutional complaint can be launched after all within judicial system within Supreme Court effort passed or exhausted.⁷⁷ Indonesia legal system still respect the judicial system especially for the Supreme Court with their right to liberty of deciding the case without any intervension.

⁷⁶ See Human Right Court Act (Law Number 26 of 2000) Section 7 states the grave crime is consist of genocide, and crime against humanity. There is explanation and we can see at the Section 8 and 9.

⁷⁷ Hamdan Zulva, 2011, *loc.cit.* p.53