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Enforcement of constitutional rights through constitutional complaint as an embodiment of the law state

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Abstract

Indonesia is a constitutional state which is based on the constitution as the Constitution of the State. The constitution must take precedence and all actions or regulations originating from authorities delegated by the constitution must not conflict with the constitutional rights of citizens and the constitution itself. The data in this study used secondary data from various sources of literature such as books, laws, literature, and journals. One of the principles of a rule of law is government based on law, which ensures that every state activity has a clear legal basis. The mechanism for reviewing legal regulations, especially constitutional review, prevents actions or decisions that violate the constitutional rights of citizens. Constitutional review is a concept that emerged as a result of the development of modern ideas about a system of government based on a rule of law, separation of powers, and the protection and promotion of human rights. Constitutional review is a legal umbrella to protect citizens from actions or regulations that violate their fundamental rights.

Keywords: The rule of law, constitutional rights, human rights, constitutional complaints.

1. Introduction

The state as the home of citizens gather to become a community living together in an area and the government must be able to protect the human rights of its citizens. Therefore, the State must be able to guarantee the protection of human rights through the power of its government. This is in line with the concept of a rule of law state which has been explained above through government power, the state must protect the basic rights of citizens.

Jimly Asshiddiqie believes that one of the elements that absolutely must exist in a legal state is the fulfillment of fundamental human rights (Asshiddiqie, 2010). As reinforced by the opinion of Friedrich Julius Stahl, one of the elements possessed by a rule of law is the fulfillment of basic human rights (basic rights/fundamental rights) or Human Rights (HAM). According to John Locke, human rights are rights God directly gives as something natural/inherent. It can be explained that no single form of power can offend or negate a person's human rights, so a person's human rights must be maintained, protected, and upheld by anyone without exception. The state that exercises power must also protect and respect the human rights of its citizens.

Indonesia, as a legal state, has implemented protection and respect for the human rights of its citizens. Where safety and respect for human rights are implemented in the Constitution or the 1945 Constitution, it can be concluded that Indonesia's understanding of human rights is an inherent right (dignity) in humans as a gift given by God Almighty. Therefore, the State guarantees the legitimacy of human rights in the 1945 Constitution, called the constitutional rights of citizens. Indonesia is a constitutional constitutional state. This means that implementing aspects of Indonesian constitutional law is based on the constitution as the State Basic Law. The Constitution, as the main basic law and the representative result of the will of all the people, must be implemented seriously in every aspect of national and state life. Therefore, the principle that arises is that the actions, deeds and/or regulations of all authorities delegated by the constitution must not conflict with the constitutional rights of citizens and the

constitution itself. In other words, the constitution must take precedence, and the intent or will of the people must take precedence over its representatives. And all legal products under the Constitution may not conflict with the Constitution.

From the explanation above, all forms of action by power holders must pay attention to the constitutional rights of citizens contained in the constitution. If these constitutional rights are violated or even ignored by the enactment of a legal product issued by the State apparatus or other aspects that conflict with constitutional rights, is there a legal mechanism to guarantee constitutional rights? Because these constitutional rights are not just limited to written recognition in a document, but there must be concrete protection that is able to guarantee and protect the basic rights of citizens.

In line with Indonesia's constitutional journey, problems were found in guaranteeing the constitutional rights of citizens. The Indonesian Constitution, namely the 1945 Constitution, does not yet contain matters related to guaranteeing the maximum constitutional rights of citizens. Matters related to constitutional violations contained in legal products can be submitted for judicial review of the constitution. Apart from that, violations of constitutional rights in the form of decisions can be filed with the State Administrative Court (PTUN).

A very important problem arises in efforts to protect the constitutional rights of citizens, namely what constitutes a constitutional violation that is not based on the enactment of a law or decision? Is there any effort that can be taken in seeking justice in the realization of the rule of law? The concept of Rule of Law requires the role of an independent and impartial judiciary to provide decisions on all legal cases that occur in a country (Ibrahim, 2007). From this it is explained that the judiciary as a legal instrument in ensuring justice must be able to resolve all legal problems that occur in society.

In judicial practice in Indonesia, the facts show that cases submitted to the Indonesian Constitutional Court were found to violate the constitutional rights of citizens who are competent in constitutional complaints, while all legal efforts taken by the complainant were unacceptable (*niet onvankelijk verklaard*) or were withdrawn by complainant before the judicial process is carried out due to the unavailability of authority/competence to try the case at the Constitutional Court. Even in all existing judicial institutions. For example, the Joint Decree (SKB) regarding the issue of the Ahmadiyah sect was issued by three ministries which is a follow-up to Law No.1/PNPS/1965 which has pros and cons that live in society. Those from the opposing community stated that the SKB violated the constitutional rights granted in Article 29 of the 1945 Constitution concerning freedom of religion. Where they argue that everyone has the right to hold the beliefs they believe in so that other people must respect the beliefs held by them. Likewise, those who are pro argue that Muslims must be protected by the state from groups and elements that insult Islam as a religion that is developing in society. The case will then be submitted to the Constitutional Court. Likewise, those who are pro argue that Muslims must be protected by the state from groups and elements that insult Islam as a religion that is developing in society. The case will then be submitted to the Constitutional Court. Likewise, those who are pro argue that Muslims must be protected by the state from groups and elements that insult Islam as a religion that is developing in society. The case will then be submitted to the Constitutional Court.

Mahfud MD is of the opinion that the three Ministers' SKB regarding the ban on the Ahmadiyah Congregation cannot be challenged at the Constitutional Court, Supreme Court or State Administrative Court (PTUN), as written in his book *Constitution and Law in Controversy Issues* (Mahmud MD, 2010). Mahfud MD stated that this case could be resolved through the constitutional complaint procedure. However, currently, the problem is that this authority is outside the authority of the Constitutional Court and even outside other judicial institutions, which can be concluded that this authority is not yet within the competence of one of the judicial

institutions in Indonesia. Mahfud MD also proposed that this authority be given to the Constitutional Court because of the problem of violations of constitutional rights (Mahmud MD, 2010).

In addition to the legal issues above, what about the settlement of constitutional complaints related to the contents of the Articles; 34 of the Constitution which states that the poor and neglected children are cared for by the State. Can those who live neglected be able to file a constitutional complaint? If linked to the goal of democracy in the social welfare of citizens, the state does not guarantee the fate of abandoned children and the poor so that society does not obtain prosperity in the administration of the State due to the actions of power holders who do not pay attention to their rights. Is there a legal solution to accommodate their weak aspirations?

2. Methods

The research method is an operational framework in which facts are placed in such a way that their meaning can be seen more clearly (Ngani, 2012). Legal research is a process of discovering legal rules, legal principles and legal doctrines in order to answer the legal issues faced (Marzuki, 2006). Research methods are ways of thinking and acting that are well prepared to conduct and achieve a research objective, so that it is impossible for research to formulate, find, analyze or solve problems in research without research methods. The type of research used in this research is normative legal research or library research. Soekanto & Mamudji (2003), normative legal research examines law conceptualized as applicable norms or rules. The applicable legal norms are in the form of written positive legal norms formed by statutory institutions (constitutional laws), codifications, laws, government regulations, and so on (Muhammad, 2004).

3. Results and Discussion

Constitutional Complaint in Guaranteeing Constitutional Rights in the Concept of the Rule of Law

The rule of law is a concept in the state that guarantees and protects the constitutional rights of its citizens. This emphasizes that in the course of a country's constitutional administration, power holders must pay attention to the constitutional rights of their citizens. The question that is quite significant is how a country protects the constitutional rights of its citizens if there has been a violation of the constitutional rights of its citizens. One effort that can be taken in dealing with violations of constitutional rights that occur is a constitutional complaint.

In Ahmad Syahrizal's view, constitutional complaint is a constitutional complaint mechanism for every citizen or community who wishes to question alleged violations of constitutional rights to the constitutional court (Syahrizal, 2006). In this case the constitutional complaint is based on the concept of constitutional review (constitutional review). The concept of constitutional review is a concept that was born as a result of the development of modern ideas about government systems which are based on the ideas of the rule of law, the principle of separation of powers and the protection and promotion of human rights (Palguna, 2013). Constitutional review is a legal umbrella to protect citizens for acts and regulations implemented that offend citizens' fundamental rights.

Therefore, constitutional review is carried out in two forms of legal action, namely Judicial Review and Constitutional Complaint. Judicial Review and Constitutional Complaint cannot be fundamentally differentiated because both of these things start from the same theory, namely the theory of the function or task of constitutional review (Asshiddiqie, 2006), which in this connection is a legal means of achieving the ideals of a rule of law. These two legal

remedies are based on how to protect citizens' constitutional rights against actions carried out by branches of state power.

If the constitutional review carried out is related to examining legislative legal products, namely laws, then the legal remedy for constitutional review is judicial review. On the other hand, if constitutional review is carried out on executive, legislative or judicial actions, the legal remedy that can be taken is a constitutional complaint. From the above understanding, it can be concluded that in achieving the goal of a rule of law, one of the requirements is the fulfillment of human rights. This is supported by the opinion of Jimly Asshiddiqie who states that one of the elements that absolutely must exist in a rule of law is the fulfillment of basic human rights. *Constitutional complaints* is a legal remedy that can be taken if citizens feel that their constitutional rights have been violated by the actions of state power holders. There are 2 (two) important meanings of the constitutional complaint mechanism in its application to guarantee and protect citizens' constitutional rights, namely:

Constitutional Complaints as a theoretical need in the implementation of the rule of law

Constitutional complaint As a theoretical requirement, it is intended that constitutional complaints need to be regulated in positive law as an effort to provide maximum protection for the constitutional rights of citizens. From this explanation, it can be concluded that the consequences of Indonesia as a rule of law state that protects the constitutional rights of its citizens indicate changes to the 1945 Constitution which shows that all the conditions inherent in the characteristics of a rule of law state must be met constitutionally and implemented or actualized in practice (Asshiddiqie, 2006). This is because it is a characteristic of a legal state that fulfills the protection and guarantee of citizens' human rights, where these rights are written into the constitution and become part of the constitution.

In theory *separation of power* (separation of powers) there are 3 (three) state powers, namely executive, legislative and judicial. These three branches of state power hold duties and authorities regulated in the Constitution. Therefore, things that are not permitted by the Constitution or things that deviate from the Constitution are unconstitutional acts carried out by holders of state power. The Constitution regulates the provisions of citizens' rights, namely the constitutional rights of citizens. As a consequence, state power holders must consider the constitutional rights of citizens in carrying out actions in administering the state. This is intended to realize the concept of the rule of law in state administration. Therefore, if the holder of power carries out an action based on the power under his authority without paying attention to the constitutional rights of citizens, it is an unconstitutional action.

In current state practice, the legal mechanisms that exist to protect the constitutional rights of citizens from unconstitutional actions of state power holders are limited to judicial review. The mechanism for judicial review in protecting the constitutional rights of citizens only protects these rights from acts of legislative power. Therefore, in general, there has not been a complete protection of constitutional rights for the actions of state power holders.

Therefore, constitutional complaints are very much needed in facing challenges in protecting the constitutional rights of citizens in today's state practices. This is what is implicitly stated in the 1945 Constitution, that in protecting the rights of its citizens, legally if it is linked to the teachings of *ius cunctuendum*, constitutional complaint is the legal mechanism that the Indonesian people aspire to in protecting their constitutional rights. Referring to the preamble of the fourth paragraph of the 1945 Constitution, namely "then than that to form an Indonesian state government that protects the entire Indonesian nation and all of Indonesia's bloodshed....", this indicates the existence of legal provisions that protect the Indonesian people or citizens from actions that harm citizens' constitutional rights country.

Constitutional Complaint as an Empiricist in the Implementation of the Rule of Law



The constitutional complaint mechanism as an empirical need is that in reality there are many facts which substantially constitute violations of constitutional rights, but these violations cannot be resolved because the constitutional complaint mechanism is not yet available. The absence of an authorized legal mechanism to examine and adjudicate these cases, especially the Constitutional Court as the guardian of the constitution, has resulted in many problems of violations of constitutional rights, which substantially constitute constitutional complaints, resulting in the failure to implement maximum protection of citizens' constitutional rights.

This indicates that the Constitutional Court failed to uphold the protection of citizens' constitutional rights. The Constitutional Court seems to allow violations of constitutional rights to occur. This is due to the lack of authority of the Constitutional Court to handle violations of constitutional rights which are within the competence of constitutional complaints. Failure to uphold the constitutional rights of citizens shows the characteristics of a constitutional state that guarantees the rule of law is not implemented. Therefore, the concept of a rule of law is sheer nonsense.

The public wants a legal umbrella that can protect them from the actions of state power holders in administering the State. Holders of state power may carry out actions that injure the constitutional rights of citizens. The state as a public servant should be able to serve every legal problem faced by citizens. One of the principles of a rule of law is government based on law. This means that every state administration must have a clear legal basis so that it does not give rise to errors in the interpretation of a legal product. With the existence of a mechanism for reviewing legal regulations that culminates in the constitution, actions or decisions by state administrators that violate the constitutional rights of citizens can be prevented. However, this still allows for actions or decisions by state administrators that violate the constitutional rights of citizens.

This can happen for at least several reasons, namely (Mahfud MD, 2010): First, State administrators as holders of certain powers have the opportunity to abuse their power, either intentionally or through negligence. Second, there are many legal provisions which in their implementation require interpretation and adjustment to the real conditions of the implementing apparatus. The interpretation made by the authorities could be wrong and result in violations of citizens' constitutional rights. Third, one of the characteristics of a modern state is a welfare state which gives the government freedom of action to improve the welfare of the people. Usually these actions are intended to increase economic development which often results in violations of citizens' constitutional rights.

Therefore, people who are in a weak position in the practice of statehood must have their citizens' constitutional rights protected, which requires legal action as a protector in guaranteeing their constitutional rights. This is also based on Article 1 paragraph (2) of the 1945 Constitution which states that Indonesia is based on popular sovereignty, where the people are the holders of power regulated by the 1945 Constitution. Because their position as citizens constitutionally must be protected by the state through legal policies.

Constitutional complaints must be implemented in the legal system in Indonesia, especially as this authority must become the competence of the Constitutional Court to examine and adjudicate these cases. This is because the Constitutional Court is tasked with overseeing the implementation of the Constitution in the administration of the State as an enforcer of the implementation of the concept of the rule of law. Therefore, the political law of constitutional complaint acts as a tool to assess and criticize and test the constitutionality of whether a law made and the actions of state power holders are in accordance with the nation's ideals, namely a just and prosperous society based on the 1945 Constitution and Pancasila.

4. Conclusion

From the presentation and analysis of constitutional complaints in an effort to uphold the constitutional rights of citizens as a legal mechanism as an embodiment of the rule of law, it can be understood that constitutional rights are rights granted and guaranteed by the constitution to citizens. Therefore, this right must not be violated by anyone, including holders of state power, as a characteristic of a democratic rule of law that upholds the human rights of citizens. *Constitutional complaint* applied in the legal system in Indonesia, every product issued by the holder of power, whether executive, legislative or judicial, can be subjected to constitutionality testing in realizing the concept of the rule of law in Indonesia. It is hoped that this legal product will still be in the corridor of upholding the constitutional rights of citizens. Constitutional complaints must be implemented in the legal system in Indonesia, especially as this authority must become the competence of the Constitutional Court to examine and adjudicate these cases. This is because the Constitutional Court is tasked with overseeing the implementation of the Constitution in the administration of the State as an enforcer of the implementation of the concept of the rule of law.

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