

The Granting of Legal Standing to Foreign Nationals in Filing Judicial Review in Indonesia

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ABSTRACT

Foreign nationals do not have the right to submit a judicial review in Indonesia. This is based on Article 51 paragraph (1) letter (a) of Law Number 24 Year 2003 concerning the Constitutional Court and Article 31 A paragraph (2) letter (a) of Law Number 3 Year 2009 concerning the Supreme Court which only recognizes individual Indonesian nationals. This raises the question: Why can't foreign nationals in Indonesia file a judicial review? What is the legal standing of foreign nationals in filing a judicial review in Indonesia? This paper was made using the law library study method with a legislative study approach, case approach, concept approach and comparative approach. The limitation on filing the judicial review is based on the provisions in Article 28J paragraph (1) and (2) of the 1945 Constitution of the Republic of Indonesia, merely to guarantee recognition and respect for the rights and freedoms of others. Indeed in Article 28D of the 1945 Constitution of the Republic of Indonesia paragraph (1) it is stated whereas Everybody has the right to recognition, guarantees, protection, and legal certainty which is just and equal before the law. However, how about the application for foreign nationals? So does, when compared with international practices regarding the practice of judicial review in other countries for foreign nationals. Results of the study show that the limitation of foreign nationals in filing judicial reviews in Indonesia is an effort to protect, maintaining morals, security and order of the Indonesian state from interference by foreign countries. Therefore, the mentioned limitation on foreign nationals is an effort to safeguard and protect the sovereignty of the Republic of Indonesia. However, if these human rights do not threaten Indonesia's morals, order, security and sovereignty, therefore, these human rights must be fulfilled, protected, recognized and respected.

Keywords: *foreign nationals, legal standing, judicial review*

1. INTRODUCTION

Judicial Review is an authority to assess or review whether a statutory legislation is in accordance with or contradictory to higher regulations, and whether a particular authority has the right to issue a certain regulation and whether the regulation is contradictory to Human Rights and/or Citizens' Rights [1]. In the Indonesian constitutional system, institutions authorized to conduct judicial reviews are the Constitutional Court and the Supreme Court. The Constitutional Court examines the Law towards the 1945 Constitution of the Republic of Indonesia and the Supreme Court who examines the regulations under the Law towards the Law.

Parties who have legal standing in filing the judicial review to the Constitutional Court are regulated in Article 51 paragraph (1) letter (a) of Law Number 24 Year 2003 concerning the Constitutional Court, namely *individual*

Indonesian nationals. Whereas the legal standing in filing judicial review to the Supreme Court is regulated in Article 31A paragraph (2) letter (a) of Law Number 3 Year 2009 concerning the Second Amendment to Law Number 14 Year 1985 concerning the Supreme Court, namely: (a). *individual Indonesian nationals*. However, it should be noted that not all Indonesian nationals can file the judicial reviews, instead Indonesian nationals who consider their rights violated by the enactment of laws and regulations in Indonesia;

The author has conducted research in the Constitutional Court and the Supreme Court of the Republic of Indonesia, then it was found that there has been a judicial review filed by foreign nationals in the Constitutional Court on behalf of Aqbasi Chika a Nigerian national, which is registered under Case Number 137/PUU-XII/2014 [2]; Popa Nicole a woman, a Romanian national, registered under Case Number 73/PUU-VIII/2010 [3]; Myuran Sukumaran, Andrew Chan and Scott Anthony Rush, Australian nationals; registered under Case Number 2-3/PUU-V/2007

[4]. In its Decree the Constitutional Court stated that the petition for judicial review submitted by the petitioners of foreign nationals was not acceptable. While the research in the Supreme Court, the author did not find any national foreigners submit the application for judicial review.

The main consideration of the Constitutional Court of the Republic of Indonesia for not possibly accepting applications for judicial review or judicial review filed by those foreign nationals due to law in Indonesian, namely article 51 paragraph (1) letter (a) of Law Number 24 Year 2003 concerning the Constitutional Court [5], and Article 31A paragraph (2) letter (a) of Law Number 3 Year 2009 concerning the second amendment to Law Number 14 Year 1985 [6] concerning the Supreme Court does not give the legal standing to foreign national applicants in submitting a judicial review in Indonesia. In other words Indonesia's legal system does not provide access to foreign nationals to file judicial reviews to the Constitutional Court and the Supreme Court of the Republic of Indonesia. From this research, it is known that there are several Constitutional Courts in the world accepting applications for judicial review by foreign nationals, such as in the Czech Republic [7], Mongolia and the Federal Republic of Germany [8].

Therefore in this paper, emphasizing that limitations on foreign nationals in filing the judicial review constitute limitations on human rights, human rights which are restricted in relation to foreign nationals' judicial review are the right to obtain justice, the right to be recognized before the law and the equal treatment before the law. Restrictions on human rights in Indonesia are necessary, but not all human rights must be restricted, there are certain human rights that are privileged so that its implementation cannot be limited. As stated in the 1945 Constitution of the Republic of Indonesia, Article 28I paragraph (1) it is named the right to live, the right not to be tortured, the right of freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted on the basis of a retroactive law, is the human rights that cannot be reduced under any circumstances and conditions. According to the authors as long as these human rights do not threaten morals, order, security and state sovereignty, therefore these human rights must be fulfilled, protected, respected and recognized in law enforcement including the rights of foreign nationals in filing a judicial review.

1.1. Formulation of the Problem

The formulation of the problem raised in this paper are as follows: *first*, why in Indonesia foreign nationals cannot file a judicial review? *Second*, how is the legal standing of foreign nationals in filing a judicial review in Indonesia?

1.2 The Research Methods

This research uses a qualitative analysis method by analyzing primary and secondary sources that have been obtained during the research. This research is a law library study research. The material examined is primary legal material, namely the 1945 Constitution of the Republic of Indonesia, Law Number 24 Year 2003 Amendment to Law Number 8 Year 2011 concerning the Constitutional Court, Law Number 3 Year 2009 concerning the Second Amendments to Laws Number 14 Year 1985 concerning the Supreme Court; Law Number 39 Year 1999 concerning the Human Rights; Law Number 12 Year 2005 concerning Ratification of the International Convention on Civil and Political Rights; Decree of the Constitutional Court Number 137/PUU-XII/2014; Decree of the Constitutional Court Number 73/PUU-VIII/2010 and Decree of the Constitutional Court Number 2-3/PUU-V/2007. In addition to the secondary data, this research is also supported by data from interviews with sources to support data from secondary sources such as books, magazine articles, and journals.

1.3. Our Contribution

This research is expected to be an input for the development of knowledge, especially in the field of state law and to provide a legal position for foreign citizens in submitting a judicial review in Indonesia and this research is expected to be a thought input to legal practitioners both for the formation of law and the parties who wish submit a judicial review in the Constitutional Court and the Supreme Court of the Republic of Indonesia.

1.4. Paper Structure

This research is organized as follows. Section 1 introduces an introduction that includes Formulation of the Problem, The Research Methods, Our Contribution, and Paper Structure. Part 2 Discussion consisting of Concepts of Human Rights and Limitation on Human Rights in Indonesia, Provide a legal position for foreign nations in submitting a judicial review in Indonesia. Section 3 Conclusion, which concludes this research and presents directions for future research.

2. DISCUSSION

2.1. Concepts of Human Rights and Limitation on Human Rights in Indonesia

Speaking of the concept of Human Rights, it needs to be assessed from the concept of humans as individuals having personal rights (personal rights) which then turn into human rights [9]. In fact, the term of Human Rights develops as a result of historical products, where there are

many terms such as human rights or basic rights, natural rights, basic human rights and freedoms and the basic rights and obligations of citizens. Then in the XVIII Century, there was a shift in the concept, that Natural Rights then had a secular, rational, universal, individual, democratic and radical nature. In the XIX century the term of Human Rights emerged and finally in the XX century, the term Fundamental Rights emerged, and this concept transformed natural rights into Positive Legal Rights [10]. Then there are two types of rights namely, legal rights and natural human rights. Legal rights are defined as the rights of a person in his/her capacity as a legal subject that is legally stipulated in applicable law. Whereas natural rights are human rights naturally. Legal rights is more emphasized on formal legal aspects, whereas natural rights emphasize more on the natural aspect of humans, namely rights that are inseparable from the dimensions of humanity.

Jack Donnelly and Maurice Cranston said, human rights are rights that humans have solely because they are human. Humanity has it not because it is given to it by society or based on positive law, but solely based on its dignity as a human being [11]. Jan Materson, a member of the United Nations Human Rights Commission, formulated the notion of human rights as rights inherently inherent in humans themselves, and without that rights humans cannot live as humans

The above understanding provides an understanding that although each person is born with different skin color, gender, language, culture and nationality, s/he still has these rights. This is the universal nature of these rights, other than being universal, those rights cannot also be revoked (*inalienable*). This means that no matter how bad a person has experienced or how cruelly someone treated, he will not stop being human and therefore continue to have these rights or in other words, those rights are inherent on him as a human being [12].

John Locke, put forward a postulate of thought that all individuals are endowed by the nature the inherent right to live, freedom and ownership, which is their own and cannot be revoked or taken by the state. Through social contracts, the protection is left to the state. based on this theory, the existence of pre-positive individual rights has gained legitimacy [13].

Values and concepts of human rights that grow in various countries in the world, which are then accepted by various nations are developed, formulated and used as a universal guideline by the world community to protect each person/group with all basic human rights attached to them [14].

Jimly Asshiddiqie said the nature of human rights apart from being as fundamental right possessed by humanity was also a right that constitutionally must be respected, protected, even fulfilled by the State in view of the formulation of Article 28I paragraph (4) of the 1945 Constitution of the Republic of Indonesia which states, "Protection, promotion, enforcement and fulfillment of

human rights are the responsibility of the state, especially the government, and in this case it is obligatory to be regulated in national legislation as affirmed in Article 28I paragraph (5) of the 1945 Constitution of the Republic of Indonesia which stated "To enforce and protect the human rights in accordance with the principles of a democratic state law, therefore the implementation of human rights is guaranteed, regulated, and set forth in legislation" [15].

The statement that human rights as basic rights possessed by humanity is also a right that must be respected, protected and fulfilled when related to foreign nationals, respectively Aqbasi Chika Nigerian, Popa Nicolea Romanian national, whereas Myuran Sukumaran, Andrew Chan and Scott Anthony Rush are Australian nationals, and then filed the judicial reviews to the Constitutional Court, has led to the problem of limitation of human rights, i.e. the legal standing for judicial review in the Constitutional Court as well as the Supreme Court in the Republic of Indonesia. However, it is necessary to explain in advance the principle of limitations on human rights and the legal standing in filing a judicial review to the Constitutional Court and the Supreme Court of the Republic of Indonesia.

The views and attitudes of the Indonesian people regarding the human rights are rooted from religious teachings, universal moral values, and the noble values of the nation's culture, and are based on the Pancasila and the 1945 Constitution of the Republic of Indonesia. The historical approach and the human rights substance which then set forth in the Charter of Human Rights in Tap XVII/MPR/1998 on Human Rights, it is stated that the Indonesian people are aware of and recognize that every individual is the part of the community and vice versa, the community consists of individuals who have basic rights and live in an environment which is the source of power for their lives. Therefore, every individual in addition to having human rights also carries the obligation and responsibility to respect the rights of other individuals, the public order, as well as the preservation and improvement of the quality of their environment.

In essence, the Indonesian people are aware of, recognize, and guarantee and respect the human rights of others as well as an obligation. Therefore, human rights and human obligations are inherent in humans as individuals, family members, community members, members of a nation, and citizens and members of the community of nations. (Lukman Hakim Saefuddin, Former Member of the Ad Hoc Committee I Workers' Body of the Indonesian People's Consultative Assembly, 2007).

Starting from Tap XVII/MPR/1998 concerning Human Rights, then in 1999 it was born the Law No. 39 Year 1999 concerning Human Rights. The law also states that its substances are in harmony and in line with Tap XVII/MPR/1998. Article 73 Chapter VI concerning limitations and prohibitions in Law Number 39 Year 1999

[16] stated that the rights and freedoms stipulated in this law can only be limited by and based on the law, merely to guarantee the recognition and respect for human rights and other people's basic freedoms, decency, public order, and national interests. The elucidation of Article 73 states that the limitation referred to in this article does not apply to human rights which cannot be reduced or limited in any circumstances and conditions (*non derogable rights*).

Furthermore, the limitation provisions are regulated in Article 28J of the 1945 Constitution of the Republic of Indonesia [17] paragraph (1) states: Every person is obliged to respect the human rights of others in the orderly life of the society, nation and state. Then paragraph (2) states: In exercising their rights and freedoms, every person is obliged to subject to the limitations stipulated by Law with the sole purpose of guaranteeing the recognition and respect on the rights and freedoms of others and to fulfill just demands according to consideration of moral, religious values, security and public order in a democratic society.

Regarding the setting forth of Article 28J is actually in line with the spirit that underlies Tap XVII Year 1998 and Law Number 39 Year 1999 that human rights adhered by this nation are human rights which are not as free without limit, but are allowed to be limited to the extent that the limitations are stipulated by law.

In principle, the terms and conditions of the limitation on human rights is *the First*, to guarantee recognition and respect on the rights and freedoms of others and *the Second*, to meet fair demands in accordance with moral considerations of religious values, security, and public order. (Opinion of the Indonesian Parliament, 2007 in the Constitutional Court Decision Number 2-3/PUU-V/2007: 250).

Furthermore, regarding Article 51 paragraph (1) letter (a) of Law Number 24 Year 2003, concerning the Constitutional Court, said that the person who is entitled to file the judicial review to the Constitutional Court should be **Individual Indonesian Nationals** and Article 31A paragraph (2) letter (a) of Law Number 3 of 2009 concerning the second amendment to Law Number 14 Year 1985 concerning the Supreme Court, states that those entitled to file the judicial review to the Supreme Court of the Republic of Indonesia are **Individual Indonesian Nationals**. Individual Indonesian Nationals who consider that human rights impaired by the laws and regulations applicable in Indonesia. Therefore, the foreign nationals are not entitled to file the judicial review in Indonesia whereas their human rights were violated by Indonesian laws and regulations.

The Elucidation of Article 51 paragraph (1) letter (a) of Law Number 24 Year 2003 concerning the Constitutional Court stipulates that what is meant by constitutional rights are the rights regulated in the 1945 Constitution of the Republic of Indonesia. If it refers to the Constitution of the

Republic of Indonesia Year 1945 therefore shown that the rights regulated in the 1945 Constitution of the Republic of Indonesia are not only citizens' rights but also Human Rights. Human Rights are owned by every human being, regardless of their nationality. When referring to human rights, the 1945 Constitution of the Republic of Indonesia uses the word everyone, not every citizen, while for citizens rights the words of every citizen, each citizen, all citizens, and all the people.

Thus there have been restrictions on the human rights of foreign nationals to fight for the right to justice and the right to be recognized as individuals before the law and equal treatment before the law in fighting for their rights as humans before the Constitutional Court and the Supreme Court of the Republic of Indonesia.

The author has conducted research at the House of People's Representatives Council of the Republic of Indonesia to seek legal reasoning or fundamental reasons behind parties acting as petitioners in filing the judicial review in the Constitutional Court and the Supreme Court of the Republic of Indonesia through Academic Paper, the bills and as well the Minutes of the relevant Meetings, discussion of laws concerning the Constitutional Court and the Supreme Court of the Republic of Indonesia.

Then in the academic paper or the bill on the Constitutional Court, that the parties acting as petitioners in filing a judicial review to the Constitutional Court, among others are stated as follows:

- a. National Ombudsman who act for and on behalf of :
Individuals, indigenous communities, or legal entities which interests in it;
- b. State institutions that have an interest in it;
- c. People's Representatives Council (DPR)

The three points above then go through the process of discussing the Bill on the Constitutional Court of the Republic of Indonesia, at the House of People's Representatives Council of the Republic of Indonesia so that the changes become, i.e.:

- a. Individual Indonesian citizens;
- b. The unity of indigenuous law communities as long as they are still alive and in accordance with the development of the community and the principles of the Unitary State Republic of Indonesia as stipulated in the law;
- c. Public and private legal entities;
- d. State institutions;

Whereas in the academic paper as well as the bill of the Supreme Court, it is not mentioned the parties who are the petitioners in filing a judicial review to the Supreme Court, but later in the discussion process at the House of People's Representatives Council of the Republic of Indonesia are added new parties acting as petitioners in filing a judicial review to the Supreme Court of the Republic of Indonesia, namely:

- a. Individual Indonesian citizens;

- b. Unity of the legal community as long as it is still alive and in accordance with the development of society and the principles of the Unitary State of the Republic of Indonesia as stipulated in the law; or
- c. Public legal entity or private legal entity;

Results of this study is found that the drafters of the Constitutional Court and the Supreme Court designed the initial parties acting as petitioners to file judicial reviews in Indonesia as "Individuals" while individual Indonesian nationals were only present during the deliberation process at the House of Representatives. The reason for the addition of individuals into individual Indonesian nationals was not directly mentioned in the minutes of the discussion of the Constitutional Court and the Supreme Court but the message that researchers could get, because the law established by the People's Representatives Council and the Government of the Republic of Indonesia was intended for Indonesian nationals, therefore, only individual Indonesian nationals are entitled to submit judicial review petitions to the Constitutional Court and the Supreme Court.

Individual Indonesian nationals who are entitled to submit the judicial review to the Supreme Court and the Constitutional Court while foreign nationals are not allowed so that there are limitations on human rights against foreign citizens as mentioned in Article 51 paragraph 1 letter (a) of Law Number 24 Year 2003 concerning The Constitutional Court and Article 31A paragraph 2 letter (a) of Law Number 03 Year 2009 concerning the Supreme Court, constitutes legal politics designed in order that the law within the Indonesian state is safeguarded, and protected from threats of Indonesian nationals and the mentioned limitation is intended to safeguard and protect the morals, security and order of the nation and state of Indonesia, thus the limitation is an effort to protect and preserve the sovereignty of the Republic of Indonesia.

2.2. Provide a Legal Position for Foreign Nationals in Submitting a Judicial Review in Indonesia.

Legal position can be interpreted broadly, namely access of individuals or groups / organizations in court as plaintiffs and petitioners [18] Not everyone can submit a petition for judicial review to the Constitutional Court or the Supreme Court and become an applicant. The existence of a legal interest is not enough to be the basis, based on the point d'interet point d'action adage, ie if there is a legal interest may file a lawsuit [19]. Legal status is a condition where a person or party is determined to meet the requirements and therefore has the right to submit a petition for judicial review in front of the Constitutional Court and the Supreme Court [20].

In the Black's Law Dictionary, commonly referred to as standing to sue, which is interpreted as, "the right of

parties to file lawsuits or seek law enforcement on the right of assignment" or in more detail referred to as follows; In order to stand in federal court, the plaintiff must demonstrate (1) that the act committed has caused injury to the plaintiff, and (2) that the interest to be protected is within the area of interest intended to be regulated by applicable legal or constitutional guarantees [21].

This legal status includes the formal requirements specified in the Law, and the material requirements, namely the loss of constitutional rights and / or authorities with the coming into effect of the law petitioned for review, as stipulated in Article 51 paragraph (1) of Law Number 24 Year 2003 Concerning The Constitutional Court and Article 31A of Act 3 of 2009 concerning the second amendment of Law Number 14 of 1985 concerning the Supreme Court [22].

The legal status of the Petitioner to submit a judicial review includes (individual Indonesian citizens, customary law communities, public and private legal entities and special state institutions of the Constitutional Court) who consider their constitutional rights and / or authorities granted by the 1945 Constitution of the Republic of Indonesia to be impaired by the enactment of a statutory regulation. So that foreign citizens (foreigners) do not have a legal position (legal standing) to act as the applicant in submitting a request for judicial review in Indonesia.

Restrictions of foreign nationals in filing judicial review in Indonesia gave birth to diverse opinions among legal practitioners. Parties who agree to the limitations or restrictions on foreign nationals in submitting the judicial review by karangengap as an attempt by the state to protect and protect the country's sovereignty by maintaining morals, security and state order from foreign intervention in the affairs of the Indonesian state.

The opinion expressed by state constitutional law expert Ni'matul Huda, agreed that there were limitations to the applicant in the judicial review. This is related to the rights and obligations of Indonesian citizens and foreign nationals, so that this distinction is considered normal. Although judicial review in some countries allows foreign citizens to enter the realm of constitutionality because they embrace understanding if national law and international law are contradictory then international law is won, whereas in Indonesia the understanding is adhered to vice versa. Thus, it is these two considerations that underlie He agreed to limitation in giving legal status to foreign citizens in submitting a judicial review in Indonesia [23].

While some parties who disagree with restrictions on foreign citizens in submitting the judicial review because they see that the state ignores the human rights principles contained in the 1945 Constitution of the Republic of Indonesia, which is also owned by the foreign citizen, Human rights values in question are the principle of equality before the law, applies to everyone regardless of

citizens. This is based on article 28D of the 1945 Constitution of the Republic of Indonesia paragraph (1), namely, Everyone has the right to recognition, guarantee, protection, and legal certainty that is fair and the same treatment before the law. With this basis, the position should be equal before the law applies to foreign nationals and Indonesian citizens are treated equally not only in the general court environment under the Supreme Court but also in the Constitutional Court [24].

The difference in views also came from the Constitutional Court Judges of the Republic of Indonesia where in the Constitutional Court Decision Number 2-3 / PUU-V / 2007, there were dissenting opinions, namely Constitutional Justices who agreed to provide legal standing for foreign citizens in judicial review were Judge Harjono, Judge Achmad Roestandi, Judge M. Laica Marzuki and Judge Maruarar Siahaan.

Constitutional Justice Harjono basically emphasized the recognition of human rights in Chapter XA of the 1945 Constitution of the Republic of Indonesia using the word "everyone", so that recognition of that right was given to everyone, including foreign citizens. Achmad Roestandi stated not based on the status of citizens but based on whether it contradicted the 1945 Constitution of the Republic of Indonesia or not. Maruarar Siahaan, and M. Laica Marzuki besides arguing that the word "everyone" in the Republic of Indonesia's Republic of Indonesia Constitution 1945 does not only include citizen rights, but also equal rights for everyone in the territory of the Republic of Indonesia [25]

Then the opinion differed from the Judge of the Constitutional Court Judge of the Republic of Indonesia who disagreed with regard to granting a position to foreign citizens in submitting a judicial review in Indonesia to put forward an argument that can be read in ruling number 2-3 / PUU-V / 2007, namely Article 51 paragraph (1) letter (a) of the Constitutional Court Law along with its very clear and clear explanation (*expressis verbis*) states that individuals are entitled to submit applications for judicial review of the 1945 Constitution of the Republic of Indonesia (which means that they have constitutional rights granted by the Act The 1945 Constitution of the Republic of Indonesia) only Indonesian Citizens, Foreign Citizens are not entitled. It is not possible for Foreign Citizens to question a law of the Republic of Indonesia.

Looking at the differing views of practitioners and dissenting opinions between the Constitutional Justices of the Republic of Indonesia in the Constitutional Court Decision Number 2-3 / PUU-V / 2007 related to the legal position of foreign citizens in submitting a judicial review to the Constitutional Court and the Supreme Court as described above, then it can it was said that this issue was a conflict between two "different ideologies in the application of law namely human rights and state sovereignty. Human Rights because they are attached as an

effort to respect, respect, fulfill and protect the human rights inherent in every person as human beings, while the sovereignty of the State because it is related to maintaining and protecting national morals, order and security.

These two concepts namely human rights and state sovereignty are important, however, but which ones must be prioritized when there is a conflict between the two in the process of law enforcement and implementation in the Republic of Indonesia.

2.2.1. *The Foundation of human rights*

Conceptually, human rights are essentially the basic principles contained in one of the most fundamental pillars of the rule of law and should be possessed by all people without knowing their ethnicity, race or national status. Every person has the right to recognition, guarantees, protection and certainty of law that is fair and the equal treatment before the law. The right to a fair trial and the right to equality before the law. Then the principle of equality is the fundamental right of human rights because it puts forward the idea into a recognition that all people are born free and have equality in human rights. Equality requires equal recognition, where in the same situation must be treated equally, and also in different situations must be treated differently. The Discrimination Principle is an important part of the principle of equality. If everyone is equal, then there should be no discriminative treatment (other than affirmative action taken to achieve the equality). In contrast to the equality, discrimination is a gap of the difference in treatment from the treatment that should be the same/equal. as set forth in Law Number 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights which is one of the numerous international instruments that have been already ratified by the Republic of Indonesia and many countries in the world.

Whereas the adoption of human rights in the 1945 Constitution of the Republic of Indonesia as the highest legal standard (*basic norm*), has its own consequences, namely that human rights participate as benchmarks in assessing the constitutionality of laws which affect and involve human dignity in the territory of the State law. The ratification of the International Conference on Civil and Political Rights and several other international human rights instruments, causes an international obligation of Indonesia to be bound in providing protection for every person who is legally in its territory and to be recognized as a person before the law. Article 16 of the International Convention on Political Civil Rights formulates that, "Every person has the right to be recognized everywhere as a person before the law". The formulation of the word for everyone and everywhere makes it clear that a human being must be recognized as a person before the law, so that s/he has legal rights either in her/his country or in other countries [26].

Protection of human rights in Chapter XA of the 1945 Constitution, granted to "everyone" and the ratification of the International Covenant Civil Political Rights into Law Number 12 Year 2005, [27] Article 26 states that: "All persons are equal before the law and are entitled to equal legal protection, without any discrimination."

With reference to this, the law prohibits all discrimination and guarantees to all people with equal and effective protection against discrimination on any basis such as ethnicity, skin color, gender, language, religion, political views and so on, national or social origin, wealth, birth, or other status. In addition, there may not be discrimination against foreign national applicants guaranteed by Article 3 Paragraph (2) of Law Number 39 Year 1999 concerning Human Rights which states that everyone (not just Indonesian nationals) has the right to recognition, guarantee, protection and fair treatment and obtaining legal certainty and equal treatment before the law.

The positive obligation to protect certain rights implies that a state must not intentionally ignore rights and freedoms. Instead the state is assumed to have a positive obligation to actively protect and ensure the fulfillment of rights and freedoms. All of these are human rights values which have been recognized and set forth in various human rights instruments nationally and internationally.

2.2.2. *The Basis of State Sovereignty*

Then in the context of State sovereignty, it has three main aspects namely external, internal and territorial. The external aspect of sovereignty is the right for each country to freely determine its relationship with various other countries or groups without the restraints, pressure or supervision from other countries. The internal aspect of sovereignty is the exclusive right or authority of a country to determine the form of its institutions, the way they work and the right to make the laws they want and the actions to comply with them. The state has full jurisdiction to punish those who are inside the country's territory who violates the law. The territorial aspect of sovereignty means the full and exclusive power possessed by the state over the individuals and objects contained in such region.

2.2.3. *Existence of Human Rights in State Sovereignty*

Basically to ensure the protection, fulfillment, respect and respect for human rights, the state must reconstruct the perception of the concept of state sovereignty. Each state should be more moderate, in the sense that the concept of state sovereignty not only presents national interests on behalf of the state but also presents the interests of society on behalf of individuals. This is intended in order that the state does not arbitrarily in rule setting or policies implementation, so that ultimately makes the state ignore the interests of human rights. With the existence of

sovereignty, the state has a number of authorities to take various actions in the context of respecting and upholding human rights. The concept of state sovereignty in the protection of human rights is the responsibility of the State to protect people who are in an area and then provide protection for respect, fulfillment of human rights for anyone who lives in a certain area. Citizens are individually legal subjects bearing the rights and obligations of and from the state at once. Every citizen has human rights that must be recognized, respected, protected and facilitated and fulfilled by the State.

So do, some of the States used as comparisons below have their respective sovereignty, but those States assume that State sovereignty does not only maintain state order and security but more than that the State provides protection, fulfillment and respect for human rights. The essence of a sovereign law state is a state which not only maintains the state order and security but provides recognition, protection, fulfillment and respect for human rights. If likened to a sovereign law state it is like biological parents for human rights.

Some countries that are used as a comparison in this research that accept and provide opportunities and provide legal standing to foreign nationals in filing judicial review in their country. The comparison of countries which provide legal standing to foreign nationals in filing the judicial review as follows [28]

Firstly, the Constitutional Court of the Federal Republic of Germany (*Bundesverfassungsgericht*) was formed in conjunction with the enactment of the Basic Law for the Federal Republic of Germany and given great authority covering all constitutional issues in the German state in maintaining its spirit of carrying out its functions as the guardian of the constitution and the sole interpreter of the constitution, as well as being the guardian of human rights [29]. In exercising this authority, the *Bundesverfassungsgericht* procedural law stipulates that about legal standing is not only provided to native German nationals, but foreign nationals can also be Petitioners in judicial review cases in the *Bundesverfassungsgericht*, the provisions are regulated in the Act on the Federal Constitutional Court, Chapter 15 Procedure in the case referred to in Article 13 no. 8a (Constitutional complaint), in Article 90 Section 1 [30]. The mentioned Act on the Federal Constitutional Court basically regulates that every person has the right to submit an application to the *Bundesverfassungsgericht* if s/he feels her/his basic rights are impaired by the enactment of a law, because basic rights are not only limited to native German nationals, but also become foreign nationals' rights.

Secondly, the Mongolian Constitutional Court (*Constitutional Tssets*) with constitutional authority in Mongolian constitution has been guaranteed in the provisions of Chapters V Article 64 to Article 67 of the Mongolian Constitution. As for Article 64 paragraph (1) states, "*The Constitutional Tssets (Court) of Mongolia shall be the competent organ with powers to exercise supreme*

supervision over the enforcement of the Constitution, to make a conclusion on the breach of its provisions, and to decide constitutional disputes, and is the guarantor for strict observance of the Constitution.” The Constitutional Tsets' authority is regulated in Article 66 paragraph (2) of the Mongolian Constitution, i.e. (1) examining the suitability of laws, decrees and decisions of the parliament and president including government decisions and international treaties signed by the government with the constitution; (2) examine the appropriateness of the national referendum, the decision of general election officials regarding the election of MPs and the presidential election with the constitution; (3) decide upon violations of the law by the president, chair and members of parliament, members of government, chair of the Supreme Court and Attorney General; and (4) The legal basis for replacing the president, parliamentary speaker and prime minister and recalling members of parliament [31]. In exercising this authority, the procedural law applicable in Constitutional Tsets stipulates that the legal standing for submitting an application to Constitutional Tsets is not only given to native Mongolians, but foreign nationals can also become applicants [32]. This provision is regulated in The law on Constitutional Court procedure, Article 16 regarding Submission of Petitions, Information and Requests to the Tsets, that, in principle, the Mongolian Constitutional Court gives legal status to each citizens to have the right to submit applications and information regarding violations of the Constitution; The President, Parliament, the Prime Minister, the Supreme Court and the Attorney General have the right to submit applications related to violations of the Constitution. Apart from Mongolians, foreign nationals and those who do not have citizenship who live legally in the territory of Mongolia have the right to submit applications and information to Constitutional Tsets.

Thirdly, the Constitutional Court of the Czech Republic as a fairly new Constitutional Court in the world after it was established on February 27, 1991 [33]. With constitutional authority and existence in the constitution. The Czech Republic, as guaranteed in the provisions of Part 2 of the Constitutional Court Articles 83 to Article 89 of the Czech Republic Constitution, also provides legal standing for foreign nationals even for individuals who are dual citizenship in the case of Submission of Petitions, as guaranteed in 182/1993 Sb. The Constitutional Court Act of 16 June 1993, Article 25a Section (2) (f), with the phrase, "citizenship or if applicable, multiple citizenships." Likewise is also emphasized in Article 125d Section (1) Submission of Petitions [34].

In addition to the comparisons of some of the above countries there are also judicial practices, several decisions or regulations which give legal status to foreign citizens in judicial practices such as:

- Asakurav. City of Seattle, 265 US 332 (1924) concerning complaints Plaintiffs Japanese citizens pawnshop entrepreneurs, who live in Seattle, filed testing of city regulations that forbid foreigners from doing business in the pawnshop field, and only gave such permission to their citizens . The regulation invalidates the previous regulation, which gives Japanese citizens such licenses, based on international agreements between Japan and the United States.
- Cabell v. Chavez-Salido, 454 U.S. 432 (1982) concerns the examination of a non-citizen of Article 1031 (a) 0 Cal. Govt Ann, which requires that public officials or employees who are legally declared by peacekeepers, must be American citizens. Although the Supreme Court overturned the decision of the Court of First Instance which declared the regulation to be unconstitutional, the applicant's legal standing was not rejected.
- Salim Ahmed Hamdan v. Donald H. Rumsfeld, Secretary of Defense, 126 S.Ct. 2749, which concerns the legality of the Military Tribunal established by the Presidential Order to try the case of Guantanamo detainees, was submitted by Hamdan, a prisoner who was captured when the Americans invaded Afghanistan to attack the Taliban regime which is considered to help Al Qaeda along with other prisoners who were later detained in Guantanamo prison.
- According to the Dominica Constitution of 1978, it was stated that foreigners are "a person", within the purview of s.100 (a), and is titled to judicial review unders.103 (1), eventhough has been spread from entering the territory of the country [Application by Kareem, (1985) LRC (Const) 425 (428) (Dom)] (Durga Das Basu, footnote no. 62, p.69). [35]

Whereas from this research, it was found that there were three countries which recognized the legal standing of foreign citizens in submitting a judicial review namely, the Republic of Germany, Mongolia, the Czech Republic, which signaled the fulfillment of one of the foundations of a democratic rule of law namely equality before the law, as set out in each of the organic constitutions and laws. Then from the judicial practices and other regulations which the authors have stated above, give the legal status of foreign citizens in submitting a judicial review. The main question is why these countries provide a legal position for foreign citizens in submitting a judicial review in their country. The most appropriate answer is as a form of recognition, protection, fulfillment and respect for human rights. Likewise, the practice of justice in Indonesia which is under the environment of the Supreme Court, in this case the practice of criminal justice, civil and judicial governance of the State that provides access or opportunities for foreign citizens to have a trial or dispute in court if there are legal interests relating to citizens the stranger.

Based on universal human rights, the 1945 Constitution of the Republic of Indonesia along with other positive Indonesian laws, guarantees the protection and

implementation of human rights for everyone, both foreign nationals and citizens. The commitment of the Indonesian people to uphold human rights that must be fulfilled, protected, respected and enhanced in order to improve the dignity of humanity, including emphasizing the principle of non-discrimination because everyone is born with equal and equal dignity including before the law. And by observing the doctrine of "state protection against foreigners" or "state responsibility for injury to aliens". Then the Indonesian nation and state should provide legal status for foreign citizens in submitting a judicial review in the Republic of Indonesia.

3. CONCLUSIONS

Based on the description above, conclusions can be obtained, as follows:

1. Related to restrictions on foreign nationals in submitting applications for judicial review in Indonesia is a limitation on human rights guaranteed in the 1945 Constitution of the Republic of Indonesia. The limitation of human rights is based on the fact that foreign citizens are not allowed to question the laws and regulations. invitation valid in Indonesia. The restriction of foreign nationals in submitting a judicial review in Indonesia is an effort to protect and maintain the morale, security and order of the Republic of Indonesia. Therefore, the limitation of foreign citizens is an effort to protect and protect the sovereignty of the Republic of Indonesia.
2. Human rights are the main pillars of the rule of law so that all applicable regulations must recognize, guarantee, protect, fulfill and respect human rights, human rights see all people the same before the law and are entitled to the same legal protection, without any discrimination . The rule of law prohibits all discrimination and guarantees to all people the same protection and prohibits discrimination on any basis such as ethnicity, color, sex, language, religion, political views or national status or national or social origin, wealth, birth, or another status. The practice of judicial review in the Czech Republic and Germany, and then there are a number of decisions or regulations that provide such access in the judicial practices of other countries that give legal status to foreign citizens in filing a judicial review in their country. Judicial review in Indonesia should also be given an opportunity for foreign citizens residing in the territory of the Republic of Indonesia whose rights have been violated due to the enactment of laws and regulations in Indonesia, particularly human rights listed in Article 28I of the 1945 Constitution of the Republic of Indonesia. Of course this will not disturb the stability and sovereignty of the State, because human rights are the biological children of the rule of law. Thus the sovereign state of law is a country that gives respect, appreciation, protection and fulfillment of human rights, in submitting a judicial review in Indonesia.

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