

Constitutional Rights in Indonesia

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Abstract

The constitution is fundamental to the life of the modern state as a major foothold in state governance. Includes the guarantee of constitutional rights of citizens. The Constitution is the basis of state organizers to be implemented, so that the state is obliged to guarantee the fulfillment of citizens' constitutional rights. Human rights have become an important part of the modern constitution. This study will describe how human rights guarantees become part of constitutional rights in Indonesia.

Keywords: Human Rights, Constitutional Rights

Introduction

The tension between humans in building order of sociality is evident in the relationship between human (people), law and power. Beginning at a *pactum unionis* to create a peaceful atmosphere to limit the human nature that lives in *bellum omnium contra omnes* (Hobbes, 2017: 4) cosmology. To ensure the survival of peace, a *pactum subjectionis* gives legitimacy to a person for power. Power that is interpreted as the highest authority in the state furthermore argues that the state as an organization that undertakes the task of realizing the ideals of its citizens have the sovereignty to prevent, through the formation of the law and punish the efforts that hamper the achievement of the goal. According to Aristotle, the purpose of the state is a good life, so that political society emerges because there are respectable acts (Aristotle's, 1998).

The Republic of Indonesia was born as a manifestation of the human struggle for the independence of the archipelago over the oppression of other people. The formulation of the system, structure and mechanisms of state administration is set forth in a Constitution of the State which was established on August 18, 1945. After the resignation of Soeharto from the presidency on 21 May 1998, the reform movement has also brought the history of the Indonesian state administration to the amendment of the Constitution of the Republic of Indonesia 1945. To date, four addendums have been made, so that changes and additions to the structure and substance of the constitution are expected to enable the

implementation of a more democratic, transparent and highly accountable state. One of the fundamental substances is the inclusion of a special chapter on the recognition of human rights set forth in the Second Amendment of 2000. This arrangement not only complements the previously granted constitutional rights guaranteed but also meets the elements of the 1945 Constitution as a modern constitution.

In the concept of a constitutional state, the constitution is a form of codification of the highest agreement between human beings who intend to be together (social contract) to be bound in a country. The Constitution is not only a guideline in the system of state administration, regulates the authority and obligations of the government, and is a guarantee of the protection of the basic rights of the citizens (constitutional rights), but also has become the highest legal source in the applicable legal system.

Constitutional Rights of Indonesian Citizens

The 1945 Constitution, after experiencing changes, not only provide a guarantee of constitutional rights for citizens. In the Second Amendment of 2000, the 1945 Constitution has also included in a special chapter on human rights so that the right arrangement consists of citizens' rights and basic human rights. Thus, residents with the status of citizens obtain these constitutional rights not only as rights as citizens but also as inherent human rights. Conversely, for people who live in Indonesia but do not have Indonesian citizenship, their constitutional rights are limited to inherent human rights and they therefore cannot claim rights that apply exclusively to citizens. All human beings insofar as he is in the territory of Indonesian sovereignty are recognized as having human rights and the state has an obligation to protect, promote, uphold and fulfill human rights. Jimly Asshiddiqie (2007) provides clarity between the two rights:

.... There is a citizen's constitutional right that is not or does not belong to the definition of human rights. For example, the right of every citizen to occupy a position in government is "the citizen's constitutional rights" but does not apply to any non-citizen. Therefore, not all "the citizen's rights" are "the human rights", but it can be said that all "the human rights" are also at the same time "the citizen's rights."

Theoretically, human rights are understood as human rights because of their nature as human beings, not because they are given by anyone, neither other people nor the government, nor are they based on applicable law. These natural rights are inherent and cannot be transferred or eliminated. While the rights of a citizen are owned because of a person's status as a citizen according to positive law of a country and are given based on lineage (*ius sanguis*), place of birth (*ius soli*) or

naturalization process. This right can be released by citizens and may also be revoked by the state.

Based on this understanding, the constitutional rights of citizens guaranteed in the 1945 Constitution of the Republic of Indonesia can be described as follows:

1. Article 27 paragraph (1): All citizens shall be equal before the law and government and shall uphold such law and government with no exception ". Thus, only Indonesian citizens are eligible to be appointed in state and state (government) posts, including the army and police, through a defined electoral system.
2. Article 27 paragraph (2): every citizen shall have the right to work and a decent living for humanity. Article 27 paragraph (3): every citizen shall have the right and obligation to participate in the defense of the state.
3. Article 28: freedom of association and assembly, expulsion of thought with oral and written and so on is established by law.
4. In Chapter XA, contains the articles on Human Rights. All provisions in the Human Rights chapter are the constitutional rights of citizens. A description of the substance of Human Rights will be outlined in the next section.
5. Article 29 Paragraph (2): The State guarantees the freedom of every citizen to embrace his or her own religion and to worship according to his religion and belief.
6. Article 30 paragraph (1): every citizen shall have the right and obligation to participate in the defense and security of the state.
7. Article 31 paragraph (1): every citizen shall have the right to education. Paragraph (2): Every citizen is obliged to follow basic education and the government shall be obliged to finance it.
8. Article 32 Paragraph (1): The State guarantees the freedom of the community in maintaining and developing its cultural values. Paragraph (2): The State respects and maintains the regional language as a national cultural treasure.
9. Article 34 Paragraph (1): The poor and the abandoned children are kept by the state. Paragraph (2): The State develops a social security system for all people and empowers a weak and incapable society in accordance with human dignity. Paragraph (3): The State is responsible for the provision of appropriate health service facilities and public service facilities.

Constitutional rights can also be viewed in a reciprocal manner with the constitutional obligations of the State. Any constitutional obligation of the State referred to in the 1945 Constitution, concludes the existence of a constitutional right as a part which cannot be separated from it or inherent in the obligations of that

State. If traced, then under the 1945 Constitution, the obligations and responsibilities of the state against the people of Indonesia are:

1. protecting the whole nation, promoting the common prosperity, the intellectual life of the nation, participating in the implementation of world order, and the establishment of social justice for all the people of Indonesia (Preamble to the 1945 Constitution, paragraph IV)
2. to organize a state based on the rule of law (Article 1, paragraph 3)
3. recognize and respect the special regional government units and indigenous peoples' customary units and their traditional rights (Art 18B)
4. protect, promote, uphold and fulfill human rights (Art. 28I, para. 4).
5. to guarantee the freedom of every citizen to embrace his or her own religion and to worship according to his religion and belief (Article 29, verse 2)
6. defend, protect, and maintain the integrity and sovereignty of the state through the national army (Article 30, paragraph 3).
7. to maintain the security and public order in charge of protecting, protecting, serving the community, and enforcing the law through the state police (Article 30, paragraph 4).
8. finance basic education (Article 31, paragraph 2)
9. to undertake and organize a national education system, which promotes faith and piety and noble character in order to educate the nation (Article 31, paragraph 3)
10. prioritize education budgets at least twenty percent of the state budget of income and expenditure as well as from regional budgets and expenditures to meet the needs of national education (Article 31, paragraph 4).
11. advancing science and technology by upholding the values of religion and national unity for the advancement of civilization and the welfare of mankind (Art. 31, verse 5)
12. promote the national culture of Indonesia in the midst of world civilization by guaranteeing the freedom of society in maintaining and developing its cultural values (Article 32, paragraph 1).
13. respect and preserve local languages as national cultural treasures (Article 32, paragraph 2).
14. use the earth and water and natural resources for the greatest prosperity of the people (Article 33, paragraph 3).
15. care for the poor and abandoned children (Article 34, paragraph 1)
16. develop social security system for all people and empower weak and incapable society according to human dignity (Article 34, paragraph 2)
17. provide health care facilities and appropriate public service facilities (Article 34, paragraph 3).

Human Rights as Constitutional Rights

The debate over whether or not the constitution of the state of Indonesia contains in particular the rules on human rights coloring the session of the Indonesian Independence Investigation Board (BPUPKI). There is a difference of opinion among the founding fathers regarding the basic philosophy of human rights. Soekarno and Soepomo believed that human rights were rooted in individualism and liberalism, thus contradicting the nature of mutual cooperation and kinship adopted by the Indonesian people. In the minutes of the trial BPUPKI shows the existence of Sukarno's rejection of the proposed regulation of human rights in the 1945 Constitution by stating:

"Dear Sirs. We want social justice. Why should *grondwet* write that human beings not only have the right to vote independence, conduct trials and meet, if for example there is no such *sociale rechtvaardigheid*? Why should we make a *grondwet*, what is the use of *grondwet* if it cannot fill the stomach of people who want to die of hunger? *Grondwet* containing the *droit de l'homme et du citoyen*, cannot eliminate the hunger of the poor who are about to die of hunger. Therefore, if we really want to base our country on kinship, help, understanding *gotong royong* and social justice, leave every thought, every individualism and liberalism thereof" (Arinanto, 2005:8).

The same thing was also made by Soepomo with the statement:

"... in the Constitution we cannot include articles that are not based on kinship, although in fact we are eager to include ... if we do so, in fact the Constitution is basically based on the nature of the individual, Constitution contrary to its construction ... " (Mahfud MD, 2006: 190).

Differences of views put forward Moh. Hatta and M. Yamin who want the inclusion of human rights in the 1945 Constitution. Moh. Hatta states:

"It is good in one of the articles, for example a chapter concerning a citizen, also mentioned beside the rights that have been given to him for example every citizen should not be afraid to issue his voice. What needs to be mentioned here the right to assemble and convene or co-ordinate and so on ... these dependents need to keep the state from becoming a power state ... " (Mahfud MD, 2006: 190).

This debate ultimately results in a compromise with the limited loading of human rights provisions to citizens with a partial emphasis on their implementation under the rule of law.

The international political turmoil during Indonesian independence was marked by the end of World War II and the establishment of the United Nations. The Charter of the United Nations has reaffirmed the beliefs of nations on the basic rights of human beings, of the dignity and worth of a human being. On that basis, the United Nations declared the Universal Declaration on Human Rights on

December 10, 1948. The Declaration was intended as a common standard of achievement for all peoples and all nations.

Some parties divide human rights into rights groups. That is civil and political rights on the one hand, and economic, social and cultural rights on the other hand. Aside from part of the cold war influence between Western liberalism and Eastern socialist groups, this grouping is also the impact of a separate international treaty as a normative international law for the Universal Declaration of Human Rights. Principles relating to civil and political rights are normalized through the International Covenant on Civil and Political Rights (ICCPR), while on the economic and social rights of the International Covenant on Economic, Social and Cultural Rights (ICESCR). This normative of human rights is important given that the declaration has no legally binding force to bind countries. Furthermore, the ICCPR and ICESCR may only apply if the state declares a consent to be bound of the treaty.

Another categorization was also done by Karel Vasak, a French lawyer, who described human rights in three generations. This categorization was not meant to distinguish or scale priorities between one right and another. This categorization is more a historical record of human rights development. The first generation is a picture of an era of revolution that demands freedom (*Liberte*) in the seventeenth and eighteenth centuries. These first-generation rights are often identified to represent civil and political rights with an emphasis on "freedom from" or individual freedom to self-determination, so it also connotes as "negative rights" which means a lack of compulsive intervention hands of others, including the government.

The second generation of rights wants the state to provide economic, social and cultural fulfillment. This equality (*Egalite*) is generally defined as "right to" as a form of social equality and the state must be actively involved in preparing and implementing the program in the fulfillment of those rights. The third generation is characterized by demands for the right of solidarity or common rights as a manifestation of the concept of brotherhood (*Fraternite*) which is generally fought by developing countries in order to create an economic order and international law that can guarantee the rights to development, peace, natural resources, environment and right of common heritage of mankind (Pusham UII, 2008:15-17).

This division of rights has in fact been heavily criticized primarily because it has reinforced the notion that there is a categorization of human rights. The differences then affect the fulfillment or enforcement process. In fact, suggesting the distinction between the generation of rights creates an illusion that some rights are more important than others. The debate over the conception of rights is also contrary to the Vienna Declaration and Action Plan 1993 (Vienna Declaration and Program of Action) which has also been accepted as a norm of international human rights law. In the fifth paragraph the declaration states that:

All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing, and with the same emphasis ...

Similarly, to accommodate the anxieties of poor and developing countries, as Vasak identifies them as the rights of generations of solidarity, the Vienna Declaration and the 1993 Action Program have stated in point 10 that: "The World Conference on Human Rights reaffirms the right to development, as established in the Universal Declaration on the Right to Development and as integral part of fundamental human rights."

Although human rights adhere to universal principles that are indivisible, interdependent and interrelated but still granted the possibility of restrictions that may be made but on condition stipulated by law, to ensure the recognition and respect for the rights and freedoms of others and to fulfill fair demands according to moral judgment, religious values, security and public order in a democratic society. This restriction provision is an adoption of the Universal Declaration of Human Rights, especially Article 29 paragraph (2) which reads:

In the exercise of his rights and freedoms, everyone shall be subject to the sole discretion of the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

In the international Covenant Bill of Rights, some restriction clauses are used. Further explanations of this limitation include the American Association for the International Commission of Jurists in 1985 compiled in a document entitled "Siracusa Principles, on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights." The restriction is between another is:

- a. prescribed by law / conformity with the law,
- b. in a democratic society,
- c. public order (public order / order public),
- d. public health,
- e. public morals,
- f. national security and public safety,
- g. rights and freedoms of others and the rights and reputations of others,
- h. the interests of private lives of parties)
- i. restrictions on public trial.

Universalist theory which refers to the conception of Natural Law holds that human rights are universal, so that the rights are owned by individuals regardless of the values or culture owned by a society or that exist in a country. According to John Locke (1690):

Men being, ..., by nature, all free, equal, and independent, no one can be put out of this estate, and subjected to the power of another, without his own consent. The only way whereby any one divests himself of his natural liberty, and by the way of joining a union into a society for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any, that is not of it.

Human rights do not require recognition from any authority, such as a particular state or authority. But it is not easy to impose the concept on various traditions, cultures and religions (cultural relativism). Especially the judgment that Universal Declaration on Human Rights is influenced and shaped by Western culture because its founders are winners of World War II and abstained from the Eastern bloc countries.

Nevertheless, the set of agreed of natural rights set forth in the Universal Declaration has become the basis for the subsequent international human rights instruments. Including the basis of reference and affect the national legal system. When Indonesia was in a political situation that led to the formation of the United Republic of Indonesia (RIS) in 1949, the Constitution of RIS 1949 and the 1950 Constitution adopted most of the recognition of human rights contained in the Universal Declaration of Human Rights (DUHAM).

After the first General Election of 1955, the Constituent Assembly established under Article 134 of the 1950 Constitution convened to draft a permanent Constitution. The debate on human rights conceptions has sprung up and drafting committees report that there are 88 human rights issue formulas including debates to determine which are classified as civil rights and which are human rights, deleted or combined rights, and procedural decision-making. However, the debate reported by the drafting committee at the Constituent Assembly of 19 August 1958 became meaningless due to the issuance of Presidential Decree No. 150 of 5 July 1959 on the Decree of the President of the Republic of Indonesia Commander-in-Chief of the Army on Return to the 1945 Constitution.

After failing to refine the human rights formula in the state constitution, the beginning of the New Order government was colored by a desire to re-create a more complete human rights recognition. At the general assembly of the Provisional People's Consultative Assembly (MPRS), it was finally decided by MPRS Decree Number XIV / MPRS / 1966 which ordered the formation of an ad hoc committee, among others, the compilation of the details of human rights. The draft of the Charter of Human Rights and the Rights and Responsibilities of Citizens has been successfully formulated by the ad hoc committee but has not been successfully ratified as a determination. The fate of the Charter ended after the formation of the MPR in the result of the 1971 general election. V / MPR / 1973 on Review of Products in the Form of the Provisional People's Consultative Assembly of the Republic of Indonesia. declare that MPRS Decree No.XIV / MPRS / 1966 is void and revoked.

Since the 1998 reform era, after experiencing a history of authoritarian and militaristic governance, human rights arrangements gained momentum and became the MPR Decree No. XVII/MPR/1998 on Human Rights, which was subsequently conveyed to Law No. 39 of 1999 on Human Rights. The Human Rights Act provides a normative understanding of human rights as:

A set of rights attached to the nature and existence of human beings as creatures of God Almighty and is a gift that must be respected, upheld and protected by the state, law, Government and every person for the honor and protection of human dignity and prestige.

The definition of human rights set forth in the human rights law is important as there is no universal boundary that can be used as a benchmark in providing a legal understanding of human rights. International Bill of Rights or international treaties in the field of human rights do not have a universally applicable definition of reference. Whereas the Human Rights Act provides restrictions that human rights are "a set of inherent rights", then normatively, especially in Indonesia, human rights are rights recognized and regulated in the Human Rights Act. The set of human rights is identified and classified as the right to life, family rights and continued descent, self-development rights, right to equity, privacy, security, welfare, and the rights of the child.

Although the original manuscript of the 1945 Constitution has conceived several principles of human rights as a "citizen right", the formation of the Human Rights Act is more a manifestation of the struggle of the reform movement based on the concept of human rights sourced from international law. Interestingly, when viewed from the year of its formation, the nomenclature of "human rights" was firstly adopted in the Human Rights Act compared to the constitution of the state of the 1945 Constitution of the Republic of Indonesia. The new human rights exist in the 1945 Constitution of the Republic of Indonesia after the second amendment in 2000. If dogmatically, the law should be based on the constitution as the highest source of law, then the Human Rights Act "precedes" the constitution regulates human rights. In fact, it may be judged a procedural anomaly, if the 1945 Constitution of the Republic of Indonesia was then drafted by adopting human rights sourced from the Human Rights Act.

The 1945 Constitution after the second amendment of 2000, ultimately specifies in Chapter XA the Rules of Human Rights. Furthermore, the substance of human rights regulated is as follows:

1. Every person shall have the right to live and have the right to survive and to live (Article 28A)
2. Every person shall have the right to form a family and to continue his offspring through a legitimate marriage (Article 28 B paragraph 1),

3. Every child has the right to survival, growth and development and is entitled to protection from violence and discrimination (Article 28 B of Section 2).
4. Every person shall have the right to develop himself / herself through the fulfillment of his or her basic needs, be entitled to education and benefit from science and technology, art and culture, to improve the quality of his life and for the welfare of mankind (Article 28C Paragraph 1)
5. Everyone shall have the right to promote himself / herself in the struggle for his / her rights collectively to develop his / her society, nation and country (Article 28C Paragraph 2).
6. Everyone is entitled to equitable recognition, guarantee, protection and legal certainty and equal treatment before the law (Article 28D Paragraph 1).
7. Everyone shall have the right to work and receive fair and reasonable remuneration and treatment in the employment relationship (Article 28D Paragraph 2).
8. Every citizen shall be entitled to equal opportunity in government (Article 28D Paragraph 3)
9. Everyone is entitled to citizenship (Article 28D Paragraph 4).
10. Everyone is free to embrace religion and worship according to his or her religion, choosing education and teaching, choosing a job, choosing citizenship, choosing a residence in the territory of the state and abandoning it and being entitled to return (Article 28E Paragraph 1)
11. Everyone shall have the right to freedom of belief, to express his thoughts and attitudes according to his conscience (Article 28E Paragraph 2)
12. Everyone shall have the right to freedom of association, assembly, and expression (Article 28E Paragraph 3)
13. Everyone shall have the right to communicate and obtain information to develop his / her personal and social environment, and shall have the right to seek, obtain, possess, store, process and convey information by using all available channels (Article 28F)
14. Everyone is entitled to personal, family, honor, dignity and property protection under his control, and is entitled to a sense of security and protection from the fear of doing or not acting in rights (Article 28G Paragraph 1)
15. Everyone shall have the right to be free from torture or degrading treatment of human dignity and entitled to obtain political asylum from other countries (Article 28G Paragraph 2)
16. Every person shall have the right to live a safe and prosperous life, to live and to obtain a healthy and healthy living environment and to be entitled to health services (Article 28H Paragraph 1)

17. Everyone shall have the right and privilege to have equal opportunities and benefits to achieve equality and justice (Article 28H Paragraph 2)
18. Everyone shall have the right to social security which enables his complete development as a dignified human being (Article 28H Paragraph 3)
19. Every person shall have the right of private property and such property shall not be arbitrarily taken over by anyone (Article 28H Paragraph 4)
20. The right to life, the right not to be tortured, the right of freedom of thought and conscience, the right of 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 retroactive law is a human right which cannot be reduced under any circumstances (Article 28I Paragraph 1)
21. Everyone has the right to be free from discriminatory treatment on any basis and entitled to protection against such discriminatory treatment (Article 28I Paragraph 2)
22. The cultural identity and rights of traditional societies are respected in harmony with the times and civilizations (Article 28I Paragraph 3)

In a special chapter on Human Rights, it is also expressly stipulated that the protection, promotion, enforcement, and fulfillment of human rights are the responsibility of the state, especially the government (Article 28I Paragraph 4). In order to uphold and protect human rights in accordance with the principles of a democratic constitutional state, the implementation of human rights is guaranteed, regulated, and enshrined in legislation (Article 28I Paragraph 5). The meaning contained in Article 28I Paragraph (5) also connotes that in the enforcement and protection of human rights must be carried out in the corridor of law so that the freedom contained therein cannot be interpreted to do as they please without obeying the applicable law or procedural conduct unconstitutional.

In addition, in the context of human rights enforcement, it also regulates the obligation of others to respect the human rights of others. Article 28J provides that:

- (1) Everyone shall respect the human rights of others in order life of society, nation, and state.
- (2) In exercising its rights and obligations, each person shall be subjected to restrictions stipulated by law solely to secure the recognition and respect of the rights and freedoms of others and to satisfy fair demands according to moral judgment, religious values, security and public order in a democratic society.

Historically it has been found that the Universal Declaration on Human Rights concepts use various constitutions of states as the basic ingredients in the preparation of declarations. On the contrary, the presence of the Universal Declaration which has been seen as "the general principles of law recognized by

civilized nations" (Shelton, 2013:193) has inspired various international regulations on human rights and influenced the constitution of various countries, including the 1945 Constitution of the Republic of Indonesia.

The important note is that the use of the term "human rights" in the Indonesian constitution means not only that the 1945 Constitution grants constitutional rights to citizens and foreigners, but the legal implications of the recognition of human rights have opened up justiciable spaces for citizens (even foreigners) which can transcend the limits of state sovereignty through the procedural of international law forums. Regulated in Article 7 Paragraph (1) of the Human Rights Law, that:

Everyone is entitled to use all national legal remedies and international forums for all violations of human rights guaranteed by Indonesian law and international human rights law that has been accepted by the Republic of Indonesia.

Conclusion

The constitutional rights of citizens have been guaranteed in the 1945 Constitution of the State of the Republic of Indonesia. Apart from being a special right for citizens, the constitution has also recognized various human rights and obligations. The main tasks to respect (to respect), protect (to protect), and fulfill (to fulfil) human rights are actually the responsibility of the state. However, everyone also has a responsibility to engage in human rights enforcement efforts and must recognize that one's human dignity needs recognition and protection in order for human existence to be honored. Since Indonesia is a legal state (*rechtsstaat*) then the recognition and protection must be done constitutionally and through procedural law to avoid anarchy and human rights violations. The 1948 Constitution in its opening has affirmed that: Since human rights have secured protection as a constitutional right of citizens, the legal system governing the administration of the state must also be capable of promote, protect, fulfill and enforce human rights. ***

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