

LEGAL POLITICS OF HUMAN RIGHTS ABOUT FREEDOM OF RELIGION AND BELIEF IN INDONESIA

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Abstract

Freedom of religion and belief is one form of human rights that must be respected, protected and fulfilled. He is guaranteed in various international human rights documents as well as in the Indonesian constitution and various legal materials that exist. Although it still leaves a fundamental problem, for example, there is no specific law regarding this matter. Legal Politics of Human rights are meaningful as to how the state respects, protects and fulfils human rights regarding the freedom of religion and belief. Assessing the legal politics of human rights, must begin with understanding the philosophy of the concept of freedom that exists, assessing legal material available in terms of legal politics, and how the implementation of political human rights law is implemented. Without forgetting an important element of how the community engages in the issue of freedom of religion and belief.

Keywords: human rights, legal politics, freedom of religion and belief.

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I. Introduction

Indonesia is a legal state. As a legal state, Indonesia regulates a variety of basic things, fundamentally as a nation in the constitution. One of the basic points is about human rights. The basic rights that everyone has since birth.¹ Freedom of religion in a human rights perspective has a complex position. Often seen as a facilitator for the benefit of human protection as a social being, it allows humans to develop their own intellectual and moral personality, determine attitudes towards natural and supernatural forces and form relationships with fellow beings.²

In the framework of constitutionality, religious freedom has an important position. A large number of human activities are protected by articles on religious freedom, freedom of expression, and political freedom. Religious freedom emerges as a basic human right in national and international instruments before the development of a systematic concept of protection for civil and political rights.³ Religious freedom emerged as the most fundamental human rights in national and international political instruments, long before the development of thinking about systematic protection for civil and political rights.⁴

From the point of view of constitutionalism, reforms that took place in 1998 can be seen as an effort to organize three things related to constitutionalism, namely the protection of human rights, democracy and law enforcement. Only with a democratic political system can the people have the opportunity to jointly determine the direction of the state and determine the ways that must be taken to solve common problems as a nation. One of the main characteristics of the rule of law is the recognition of human rights. This is at the same time characteristic of a democratic country. Human rights will be seen in the constitution and laws and regulations below.

Freedom of religion finds the heart of the main problem when dealing with state entities. In the current context, a number of issues concerning religious freedom have emerged, ranging from religion-based violence, banning certain teachings, to criminalizing those who are deemed heretical in their religious activities.⁵

¹ Winner Agustinus Siregar and Iin Karita Sakharina, Human Rights Protection Policy in Freedom Violations of Religion and Belief, Research on Humanities and Social Sciences, Vol. 9 No. 4, 2019, p. 67

² Idfhal Kasim in Adi Sulistiyono, *Kebebasan Beragama dalam Bingkai Hukum* (Religious Freedom in the Frame of Law), paper, 2008.

³ Winner Agustinus Siregar and Iin Karita Sakharina, 2019, *Op.Cit.*

⁴ Idfhal Kasim in Adi Sulistiyono, 2008, *Op.Cit.*

⁵ Idfhal Kasim in Adi Sulistiyono, 2008, *Ibid.*

Recognition of the existence of freedom in religion in the constitution is contained in Article 29 Paragraph 2 of the Constitution of the Republic of Indonesia.¹ This article contains several important phrases such as guaranteeing the state, independence, each resident, embracing their respective religions, worshiping, according to religion, and their beliefs. See some basic elements, guarantees the state of the independence of each population to embrace religion, to worship according to their religion and beliefs. The meaning of the state guarantees, state guarantees, interpretations of the word independence, embraces each religion and the meaning of the word trust.

The general view of human rights to date may still vary. But the recognition of the existence of human rights, everyone acknowledges it. Problems occur when the level of implementation of acceptance is at the state level and how citizens accept it in their daily lives. It is difficult to imagine how human rights can be thought or become an agenda for countries that are at war because of political differences, ethnic differences, religious differences, or because of struggles over economic resources and political power, or even countries that are threatened as failed states: countries fail due to conflict which is protracted and prolonged. Every human being from his birth has free and basic rights. The formation of a state and the implementation of the power of a country must not reduce the meaning or meaning of freedom and human rights. Therefore, protection and respect for human rights is a very important pillar in every country which is called a rule of law.

If in a country human rights are neglected or deliberately violated, the country concerned cannot be called a law state in the real sense.² Freedom of Religion and Belief is one of the rights that is categorized as a fundamental right. One of the four basic freedoms recognized in various international and national instruments. Human rights have a separate chapter in the 1945 Constitution of the Republic of Indonesia. The chapter on human rights is then detailed in various laws and regulations, including Human Rights Law, Human Rights Courts Law, etc.

Indonesia is a legal state, not a state of power. It contains the notion of recognition of the principle of rule of law and constitution, the adoption of the principle of separation and limitation of power according to the constitutional system stipulated in the Constitution, the existence of human rights guarantees in the Constitution, the existence of free and impartial principles of justice guaranteeing the equality of every citizen in the law, and guaranteeing justice for everyone including the abuse of authority by those in power. The issue of Freedom of Religion and Belief is not new in Indonesia, there are many lists of accompanying cases. Since 2005, Amnesty International recorded at least 106 individuals who were tried and sentenced using the Blasphemy Law. They mostly come from religious minorities or express religious beliefs that are deemed deviant from the teachings of officially recognized religions. The National Human Rights Commission submitted a three-month report of the Special Rapporteur on Freedom of Religion or Belief. The report was sourced from data on complaints of alleged violations of Freedom of Religion or Belief received by the National Human Rights Commission during April-June 2016.

The National Human Rights Commission delivered the results of a special report on Freedom of Religion and Belief from the period January-March 2017. As a result, cases related to religious freedom increased, there were 11 new cases. The Freedom of Religion and Belief case did not decrease and instead increased. There were 11 new events reported to the National Human Rights Commission.³ This paper aims to explain how the politics of human rights law about freedom of religion and belief in Indonesia in three aspects, how is the terminology of freedom, the context of state legal policy or legal politics, and state obligations or human rights law politics.

II. Research Method

This study uses a type of normative research, a legal research conducted by examining library materials or other secondary legal materials. By using a conceptual approach and descriptive analysis.

¹ Article 29 paragraph (2) of the 1945 Constitution of the Republic of Indonesia: The State guarantees the independence of each resident to embrace his own religion and to worship according to his religion and his beliefs

² Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme Indonesia* (Indonesian Constitution and Constitutionalism), Sinar Grafika, Jakarta, 2010, p. 131-132.

³ See <https://news.detik.com/berita/d-3483206/komnas-ham-kasus-terkait-kebebasan-beragama-meningkat>

III. Results and Discussion

The Relationship between the Concept of Individual Freedom and Existential Freedom with the Elements of Freedom of Religion and Belief.

New debates and differences arise, when the need arises to realize the dream of freedom in society. At some point, the idea of freedom is considered to destroy another idea of freedom; to another degree the various definitions of freedom, then say goodbye. This is only limited to political morals, not to mention impinging on the discussion of political practice.¹ Life free from the threat of uncertainty, fear, aggression, poverty and injustice, is everyone's hopes. Being free, is the highest goal of all the struggles of thought and ideology in various parts of the world. Karl Marx said, a person's freedom is a prerequisite for the freedom of others.

Everyone has the right to freedom of religion or belief, includes freedom to change his religion or belief. So, we have the right to profess our religion freely and to change it, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance. As such the freedom to manifest a religion or belief can be limited, so long as the limitation is prescribed by law; necessary and proportionate; and pursues a legitimate aim, namely the interests of public safety; the protection of public order, health or morals; or the protection of the rights and freedoms of others.² Freedom of religion for everyone is one of the human rights principles that cannot be revoked for any reason (non-derogable right). Based on these human rights principles, a person is free to embrace or not embrace a religion, free to move to become a follower of another religion of the original religion. Similarly, freedom in understanding and performing rituals of a religious teaching. The practice of such freedom makes it possible to bring out different interpretations of religious teachings in the same religion. Similar differences also arise in relation to area, scope, and what is meant by religious freedom. However, in general, Muslims in this country can accept human rights principles, including religious freedom.

There are at least two different views within the Muslim community in Indonesia. This can be seen in the case of the Ahmadiyah that happened some time ago. This case then recurred at a similar event in Sampang Madura. How the differences regarding religious freedom, why, and what underlies these differences, is an interesting problem examined in the midst of the incessant promotion of human rights in Indonesia. The Muslim community tends to be different in looking at and putting human rights in their Islamic perspective. It was determined by his perspective on the essence of the teachings between legal-formal forms in sharia construction, and the essential (substantive) functions of the teachings. The legal perspective, according to its character, is exclusive in that the right (truth) is clear and that the single share cannot be matched and juxtaposed with vanity. While the essential function of the teachings is inclusive it places universal human nobleness as an essential value of teaching that is compatible with the cultural experiences of many nations throughout history.

In accordance with its character, the first point of view hardly gives room for tolerance so that it can often trigger various conflicts between various groups of society, especially related to religious freedom and pluralism. While the second perspective is often accused of lacking or not having commitment to absolute truth, and accused of being hypocritical or leaving Islam. Such a problem relates to how we perceive the Islam's (godliness) as a form of the results of social interaction in a historical space which on the one hand continues to change and develop or on the other hand as a "social destiny" that is finished and completed.

In this connection, the response of the Muslim community to the enforcement and promotion of human rights can be traced. How the Muslim community views the issue of human rights and puts it as part of religious and piety, or outside of the issue is put in place as a form of response or form of participation in human rights. This is part of an effort to find patterns of participation and response patterns so that a model of enlightenment can be developed. In the aforementioned relationship, it can be seen that there are at least three ways of looking at Islamic relations and human rights, especially related to the freedom of religion and belief. These three perspectives can be seen from the description.³ First, rejecting all forms of religious freedom carried out by the

¹ Coen Husain Pontoh, *Paradoks Kebebasan Individu* (Paradox of Individual Freedom), Harian IndoPROGRESS, 22 July 2007

² Kadarudin, *Pembatasan Hak Kebebasan Beragama dan Berkeyakinan di Indonesia yang Kian Terlupakan* (Restrictions on the Right to Freedom of Religion and Belief in Indonesia that are increasingly Forgotten), Jurnal Keadilan Sosial, 3rd Edition 2013, Indonesian Legal Resource Centre, Jakarta, p. 23

³ Abdul Munir Mulkhan, *Kebebasan Beragama, Mungkinkah? Antara Fakta atau Takdir Sosial* (Freedom of Religion, Is It Possible? Between Facts or Social Destiny), Jurnal Hak Asasi Manusia, National Human Rights Commission, Vol. 8 Year

human rights commission on the grounds that it is an intervention of the secular and anti-religious Western nations that replace sharia with humanism. Secondly, accepting the principle of human rights based religious freedom, but limited to only those who moved from their previous religion to become Muslim. Third, accepting freedom of religion in human rights because of religion or non-religion is the conscious choice of everyone who is given by God to all humanity. Substantively humanitarian values in human rights are parallel with the essential values of Islamic teachings (sharia). In terms of freedom of religion, among the various concepts of freedom that exist, there are two types of freedom that have a relationship with the freedom of religion. This section will explain what is the relationship between the concepts of individual freedom and individual freedom with the elements of freedom of religion and belief.

Individual freedom can be grouped into several meanings, including freedom vs. arbitrariness, physical freedom, juridical freedom, psychological freedom, moral freedom, existential freedom. If it concerns individual freedom means freedom and also arbitrariness, physical freedom, juridical freedom, psychological freedom, moral freedom, and existential freedom.¹ John Stuart Mill classifies freedom in several ways.² First, freedom which covers the realm of inner power, the consciousness that demands freedom of conscience in the broadest sense, namely Freedom in thinking and feeling, absolute freedom of opinion and sentiment for everything practical or speculative, scientific, moral or theological. Freedom to express and announce their opinions. Second is freedom that is related to individual power and the third is freedom which is related to others. From the three categories of freedom of John S. Mill individual freedom experienced by someone implies the existence of an accountability, because basically individuals cannot be separated from their social relations. An accountability exists when the action taken has something to do with or relate to another person, while matters relating to the person are absolutely free. This is described by Mill that even though the state has power over its people, the freedom of the people as individuals who have the freedom to express their opinions cannot be prevented by the power of the government.

Literally, the word existence means arising, having an external being, sister (*existere*, Latin) causing standing. That is something that exists something that has actuality (existence), the existence of something that emphasizes what something is (whether the object is actually according to its true character), or the awareness that it exists and that it is a creature that acts, chooses, creates and expresses identity themselves in the process of acting and choosing responsibly.³ *Existenz* (Germany) is something that is the most valuable and most original in human beings, which is not objective at all, the possibility of always being open to new things concerning freedom which is the essence of human.⁴ However, from some of these understandings it is not enough to explain the real understanding of existence, because the word existence that is used by existentialists is always associated with the human context. That is the human who comes out of himself, exists, and gives birth to personal questions like who am I, where am I going? Why am I here?⁵

Existential freedom is total freedom that concerns all aspects of the human person and is not limited to just one aspect. This freedom encompasses all human existence. The term existence in meaning as used in the philosophy of existence by Soren Kierkegaard (1813-1855) to show how to be a typical human being, different from other creatures.⁶ Existential freedom is the highest form of freedom. Of course, humans do not have this freedom without freedom in another sense, especially free will, but existential freedom exceeds all other meanings. A person who is existentially free seems to have himself. People who are truly free to realize their existence creatively can realize the possibility with great independence and autonomy. Existential freedom is also an ethical context. Existential freedom is mainly found and expected in this ethical context.

In a human rights perspective, according to Groome,⁷ meaningful freedom as power or ability to act without coercion; absence of barriers or obstacles; power to choose. Furthermore, Groome divides basic freedoms into two categories, namely rights and personal protection; and rights and protection in the justice system. Personal rights groups and protections include: religious freedom; freedom of thought; freedom of expression; press freedom; freedom of association; freedom of movement; the right to personal life; right to

2012, p. 229-232

¹ K. Bertens, *Etika* (Ethics), Penerbit Gramedia Pustaka Utama Jakarta, 2002, p. 94-115

² John Stuart Mill, *Perihal Kebebasan* (On Liberty), Yayasan Obor Indonesia, Jakarta, 1996, p. 17

³ Tim Penulis Rosda, *Kamus Filsafat* (Dictionary of Philosophy), Rosda, Bandung.

⁴ Ali Mudhafir. *Kamus Istilah Filsafat* (Dictionary of Philosophy Terms), Yogyakarta Liberti. 1992, p. 58-59

⁵ Dian Ekawati, *Eksistensialisme* (Existentialism), Tarbawiyah, Vol. 12, No. 01, January – June 2015.

⁶ K. Bertens, *Etika –Seri Filsafat Atma Jaya* (Ethics - Atma Jaya Philosophy Series, PT Gramedia Pustaka Utama, Jakarta, 2002, p. 113

⁷ Siti Musdah Mulia, *Hak Asasi Manusia dan Kebebasan Beragama* (Human Rights and Religious Freedom), 2007, p. 4-5

gather; the right to associate; the right to education; and the right to participate in the government. From here it is known as the term four freedom (four freedoms) by F.D. Roosevelt, namely: freedom of expression, freedom of religion, freedom of desire and freedom from feelings of fear.

State Law Policy in the Implementation of Freedom of Religion and Belief in the Context of Formation and Renewal of Legal Materials including the Decision of the Constitutional Court

The legal politics are legal policies or official policy lines on the law that will be enforced both by making new laws and by replacing old laws, in order to achieve the objectives of the state.¹ Legal politics is defined as legal policy that will be or has been implemented by the government. This legal politics includes the making of law which has the essence of making and updating legal materials so that they can be adapted to the needs, and implementation of existing legal provisions, including the enforcement of the functions of institutions and the guidance of law enforcers.² In the view of Moh. Mahfud MD, the implementation of legal politics can be in the form of (i) Law making and renewal of legal materials that are considered foreign or not in accordance with the needs with the creation of the necessary laws; (ii) Implementation of existing legal provisions, including the affirmation of the institutions functions and the formation of law enforcement members.³

The definition of legal politics according to Abdul Hakim Garuda Nusantara means legal policy. Abdul Hakim put forward the study of legal politics in the development of law, namely about the need to include the role of social groups in society in terms of how the law was formed, conceptualized applied and institutionalized in a political process that was in accordance with the initial ideals of a country.⁴ According to Abdul Hakim Garuda Nusantara, the legal politics of nation is defined as legal policies that are intended to be implemented nationally by a particular State government. The legal politics of nation can include: First; implementation of existing legal provisions consistently; Second; legal development which essentially is the renewal of existing legal provisions that are considered obsolete, and the creation of new legal provisions needed to meet the demands of developments that occur in society; Third; affirmation of the functions of law enforcement agencies and implementing members and fostering their members, and Fourth, increasing community legal awareness according to the perceptions of elite policy makers. The four factors explain the legal work area of the law which covers the territorial validity of legal politics and the process of renewal and law making.⁵ The legal renewal movement is an effort to reform both aimed at the development of theory as well as those that aim to realize the objectives of the law in everyday life.

According to the Meuwissen concept, the renewal movement was carried out both by theoretical law bearers and practical law bearers. Renewal by carrying out theoretical law aims to question and improve legal thinking. Whereas renewal by practical law bearers aims at presenting the use or benefits of law in everyday life through legal formation activities, legal discovery and legal assistance.⁶ Freedom of religion within the framework of human rights has a complex position, often regarded as a facilitator for the benefit of human protection, which enables humans to develop their intellectual and moral personalities, and establish relationships with fellow creatures.

In the framework of constitutionality, religious freedom has an important position. A large number of human activities are protected by articles on religious freedom, freedom of expression, and political freedom. Religious freedom appears as a basic human right in national and international instruments before the development of thinking about systematic protection for civil and political rights. Freedom of religion finds its common ground when dealing with state entities, one important question is what should be done by the state so that religious freedom is not persecuted. How the state manages, regulates, limits or prohibits acts that are contrary to religious freedom.

In the 1945 Constitution of the Republic of Indonesia, the right to religious freedom has become a discussion and discourse that has never stopped in Indonesia and even in the world. The debate in these discussions always leaves problems and homework. Including when the founding father debated the material of

¹ Moh. Mahfud MD, *Politik Hukum di Indonesia* (Legal Politics in Indonesia), revised edition, Jakarta, Rajawali Pers 2009, p. 1

² Moh. Mahfud MD, *Politik Hukum di Indonesia* (Legal Politics in Indonesia), Jakarta: LP3ES, 1998, p. 8.

³ Moh. Mahfud MD, 2009, *Op.Cit.*, p. 74

⁴ Abdul Hakim Garuda Nusantara, *Politik Hukum Indonesia* (Legal Politics of Indonesia), Jakarta: YLBHI, 1988, p. 27

⁵ M. Ilham F. Putuhena, *Jurnal RechtsVinding*, Media Pembinaan Hukum Nasional, Vol. 2 No. 3 Year 2013, p. 384

⁶ Bernard Arief Sidharta, *Refleksi tentang Struktur Ilmu Hukum* (Reflections on the Structure of Law), Mandar Maju, Bandung, 1999, p. 117

the 1945 Constitution in BPUPKI and agreed on Article 29 of the 1945 Constitution which reads “The state is based on divinity with the obligation to carry out Islamic law for its adherents”. This material was later changed by PPKI to “The State is based on Belief in the one and only God”.¹ The amendment to the draft regulation of the 1945 Constitution is once again a sign that the debate over the right to religious freedom is not over. In the same condition, after the fall of the Soeharto regime there was also a process of political liberalization which encouraged the revocation, alteration, and making of human rights dimensions, even the ratification of various international conventions on human rights which guaranteed the rights to freedom of religion and belief without discrimination. There are a number of legal documents that exist either because of national acceptance or because of the establishment and creation of legal material that has a relationship or correlation with the topic of freedom of religious belief.

These legal documents include (i) the Universal Declaration of Human Rights (UDHR) 1948, (ii) the International Covenant on Civil Rights and Political Rights 1966; Ratified by Law of the Republic of Indonesia Number 12 Year 2005 concerning Ratification of the International Covenant on Civil and Political Rights, (iv) 1945 Constitution of the Republic of Indonesia, (v) Law of the Republic of Indonesia Number 39 Year 1999 concerning Human Rights, (vi) Joint Regulation of the Minister of Religion and Minister of Internal Affairs Number 9 Year 2006 and Number 8 Year 2006 concerning Guidelines for Implementation of Duties of Regional Heads/Deputy Regional Heads in Maintaining Religious Harmony, Empowering Religious Harmony Forums, and the Establishment of a House of Worship.

There are also several Constitutional Court Decisions on the theme of religious freedom, including (i) Decision of the Constitutional Court Number 84/PUU-X/2012 concerning Judicial Review of Law No. 1/PNPS/1965 on Prevention of Religious Abuse and/or Blasphemy, (ii) Constitutional Court Decisions Number 97/PUU-XIV/2016 concerning Judicial Review of Law No. 23 Year 2006 in conjunction with Law No. 24 Year 2013 concerning Population Administration. In the constitutional level there are a number of articles that not only show the importance of religion and related aspects but also how religion and religious life are human rights, such as the right to freedom of religion and worship (Article 28E), and the right to freedom of belief, express thoughts and attitude, according to his conscience (Article 28E paragraph 2)

The culmination of recognition of human rights in the constitution closes with an authoritative and emphatic phrase in Article 28J paragraph 1 every person is obliged to respect the human rights of others in an orderly manner in society, nation and state. Freedom of religion as one of the foundations of the state is also recognized by the 1945 Constitution, namely Article 29 paragraph 1 of the state based on the supreme divinity and paragraph 2 the state guarantees the independence of each resident to believes their respective religion and worship according to their religion and that belief.

Recognition in the constitution would be enough to show that religion occupies an important position in the life of the state. That means that the national legal system requires to protect religion in this country. In addition to the context of the constitution, the regulation of the right to religious freedom is also regulated in Law No. 39 Year 1999 concerning Human Rights. In general, this Law contains recognition of human rights and basic human freedoms. In addition to acknowledging the existence of human rights, it also contains the obligations and responsibilities of the government, restrictions, women’s and children’s rights, national human rights commissions, community participation, human rights courts. Recognition of the existence of the right to religious freedom as Article 22 (1) Everyone is free to embrace their respective religion and to worship according to their religion and beliefs, and (2) The state guarantees the freedom of each person to embrace their religion and worship according to their religion and that belief.

It is also important to look at Article 4, that the right to life, the right not to be tortured, the right to personal freedom, mind and conscience, religious rights, the right not to be enslaved, the right to be recognized as a person and equality before the law, and the right not to be prosecuted Based on retroactive law, human rights cannot be reduced under any circumstances and by anyone. The constitutional mandate derived from the basic philosophy of the state is strengthened by various derivative instruments in the form of laws. Some laws that can be identified in their main framework are Law of the Republic of Indonesia No. 39 Year 1999 concerning Human Rights and Law of the Republic of Indonesia No. 12 Year 2005 concerning the Ratification of the International Covenant on Civil and Political Rights. Thus, is it ideal to implement the constitutional guarantee?. This is where the problematic point is. There are some tensions in implementing the constitutional guarantee. Very visible disparity between *das sollen* constitutional with a principle of government policies that

¹ Mustafa Kamal Pasha, *et.al.*, *Pancasila Dalam Tinjauan Historis, Yuridis, dan Filosofis* (Pancasila in Historical, Juridical, and Philosophical Reviews), Yogyakarta: Cipta Karsa Mandiri, 2000, p 15-24

are more specific, detailed, and concrete. The core issue of implementing the constitutional mandate of religious freedom can be grouped in three main clusters.

First, regulation incongruence. The central weak point in the incompatibility of guarantees of freedom of religion/belief is Law Number 1/PNPS/1965 concerning the Prevention of Abuse and/or Blasphemy of Religion. The law was used as the basis for the formation of several implementing regulations concerning the regulation of religious life, such as 1) Joint Regulation of the Minister of Religion and Minister of Internal Affairs Number 9 and Number 8 Year 2006 concerning Guidelines for Implementation of Duties of Regional Heads/Deputy Regional Heads in Maintenance of Religious Harmony, Forum Empowerment Religious Harmony, and the Establishment of Houses of Worship (Joint Ministerial Regulations), 2) Joint Decree of the Minister of Religion, Attorney General, and Minister of Internal Affairs Number 3 Year 2008, Number KEP-033/A/JA/6/2008, Number 199 Year 2008 concerning Warnings and Orders to Adherents, Members, and/or Management Members of the Indonesian Ahmadiyah Community (Jemaat Ahmadiyah Indonesia/JAI) and Citizens (Joint Decree of the Three Ministers), and 3) Several regulations at the regional level which are often the main triggers for several behaviours intolerance and crime of discrimination against religious minorities.

Second, the weak institutional support capacity of the state government. The constitutional guarantee affirmed by the 1945 Constitution and its derivative laws is ideally backed up by an institutional structure that strengthens the implementation of the constitutional mandate. However, the fact is that the government is problematizing the life of religion/belief in Indonesia through the establishment of institutions that actually negate the constitutional mandate and stimulate the occurrence of practices of intolerance and discrimination in the life of religion/belief of citizens.

Third, the weak performance of state government officials. State officials “behind the table” often do not perform to carry out an inclusive interpretation of the guarantee of freedom of religion/belief. Officials in the field often cannot (do not want to) protect the freedom of religion/belief. Even in very escalating chaos they are unable to use coercive instruments to provide human security for all adherents of religion and prevent the occurrence of intolerant and discriminatory practices for followers of certain religions/beliefs, especially minority groups.

The three weak points both partially and cumulatively, in the assumption of Setara Institute, are the main factors that stimulate the occurrence of various violations and even crimes against freedom of religion/belief. So that the situation of the life of religion/belief in the state of Pancasila is not conducive enough, in fact there is a phenomenon of increasing the practice of religious intolerance in the last five years.¹

Legal Politics of Human Rights in the Context of Protection Policy to Prevent and Overcome Violations in the matter of Freedom of Religion and Belief.

The Universal Declaration of Human Rights was received and announced by the UN General Assembly on 10 December 1948 through resolution 217 A (III). In Article 18 states that Everyone has the right to freedom of mind, conscience and religion; in this case, including the freedom to change religion or belief, with the freedom to express religion or belief by teaching it, doing it, worshiping and obeying it, both alone and together with others, publicly or alone. In addition to the declaration, there is also the International Covenant on Civil and Political Rights 1966 Enacted in Law of the Republic of Indonesia Number 12 Year 2005. Stipulated by General Assembly Resolution 2200 A (XXI) dated December 16, 1966, Open for the signing of Ratification and Accession. In Article 18 states that (1) Everyone has the right to freedom of thought, belief and religion. This right includes freedom to establish religion or belief in his own choice, and freedom, whether in a public or closed place, to practice his religion and beliefs in worship activities, obedience, experience, and teaching.

The legal politics of human rights in the aspect of respect is a policy that requires the state not to take steps that will result in individuals or groups failing to achieve or fulfil their rights. While fulfilment is the state must take legislative, administrative, budgetary, judicial or other measures to ensure the realization of fulfilment of rights. Whereas protection is how the state carries out policies to prevent and overcome intentional violations or omissions. The politics of human rights law in the reform era, which incidentally is the early era of democracy is also marked by the establishment and strengthening of human rights protection institutions, such as the strengthening of the National Human Rights Commission, the establishment of the Constitutional Court,

¹ Ismail Hasani and Bonar Tigor Naipospos (eds.), *Politik Diskriminasi Rezim Susilo Bambang Yudhoyono: Kondisi Kebebasan Beragama/Berkeyakinan di Indonesia 2011* (Politics of Discrimination of the Susilo Bambang Yudhoyono Regime: The Condition of Freedom of Religion/Belief in Indonesia 2011), Jakarta: Pustaka Masyarakat Setara, 2011.

National Commission on Violence Against Women, National Commission on Human Rights, and Witness and Victim Protection Agency.

The establishment and strengthening of these institutions are intended so that respect, protection and enforcement of human rights can be made stronger and better, especially preventing the state from repeating the mistake of committing human rights violations as happened in the previous era of power. Provisions regarding human rights guarantees in the constitution are only possible in democratic political systems, because democracy provides the basis and mechanism of power based on the principle of equality and human equality. Democracy places humanity as the owner of sovereignty which is then known with the principle of popular sovereignty.

The legal politics of human rights in democratic law countries must be promotive, protective and implemented of human rights in order to prevent abuse of power in the form of human rights violations. Promotive, means that the laws made have moral and legal powers that enable every policy, every person and power to respect human rights. Protective, means that the law made has a preventive effect on various possibilities for human rights violations, while implementing it, means that the laws made must be implemented in the event of a violation, and not a law that cannot be implemented, either because of the formula blurred, unclear, duplication or multiple interpretations, or because the implementers of the law are not independent. The legal politics of human rights in the post-New Order era was also marked by a legal policy of strengthening and making various institutions to protect human rights as an effort to strengthen the institution of respect, protection and fulfilment of human rights.

The existence of constitutional protection for human rights with legal guarantees for the demands of its enforcement through a fair process. Protection of human rights is widely promoted in order to promote respect and protection of human rights as an important feature of a democratic state of law. Every human being from his birth has rights and obligations that are fundamental. The formation of a State and so with the implementation of state power must not reduce the meaning or meaning of freedom. Therefore, protection and respect are an important pillar in every country called the rule of law. If in a country human rights are ignored or violated intentionally and cause suffering that cannot be dealt with fairly, then the State concerned cannot be called a law state in the real sense.¹ The obligation of the government to protect, promote, fulfill and respect the values of human rights as mandated by Article 28 I paragraph (4) of the 1945 Constitution must be carried out in one breath, where if one obligation is carried out then another obligation must also be carried out. At that point, the government must be consistent in upholding human rights.

Therefore, the obligation to provide guarantees, protection, promotion of human rights, specifically the right of religion for every citizen is in the state. It is the country that acts as the duty holder. The state is not permitted to delegate the implementation of these obligations to non-state actors to implement them. Because, the implementation of state obligations by non-state actors will open the space for violations of the right to religion and belief. In addition, it will also open up the space for groups that act on behalf of religion to commit violence against people of different faiths. In General, the Right to Religion and Belief are regulated in various instruments, both international instruments of the UDHR and ICCPR, and National Instruments through the Constitution, as well as legislation, such as Human Rights Law and Law No. 12 Year 2005. Human rights law has an international civil character that places the state as parties; meaning that the state is a legal subject that is obliged to comply with human rights law. As a legal subject, every human rights violation always puts the country as the culprit. Violations of human rights law occur when the state does not comply with the norms that bind it, which are contained in the covenants and international conventions, in which the state has promised to comply with it through the ratification process.

This clarifies the difference between human rights law and international criminal law, which places individuals as legal subjects. As a civil law, the types of penalties known in human rights law are international sanctions, obligations for policy changes, and fines for victims whose rights are violated in the form of compensation, restitution and rehabilitation. Whereas in international criminal law (Rome Statute), in addition to the legal subjects are individuals, the type of punishment imposed on the perpetrators is also in the form of imprisonment. In terms of the interrelationship between Instruments internationally can be seen when it began in 1948 with the UDHR, 1965 with the Convention on the Elimination of all forms of Discrimination, 1966 with the ICCPR, 1981 with the UN Declaration on the Elimination of All Forms of Intolerance and Discrimination based on Religion or Belief, and 1989 with the Convention on the Rights of the Child. The instruments are all related to the protection of human rights.

¹ Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme* (Constitution and Constitutionalism), Penerbit Sinar Grafika Jakarta, 2017, p. 131-132

In international norms, human rights are the minimum standards for the country. Standards are at least a reference for the international community to conduct evaluations and scoring related to the responsibility of the state in carrying out its duties to respect, protect and fulfil human rights. In this case, human rights is a modern legal concept that clearly distinguishes between State and citizens. This distinction has the easy effect of identifying human rights violations committed by the state, and how the people or citizens can sue them.¹

As a member of the United Nations, Indonesia has ratified at least six important UN instruments on human rights. Meanwhile, as a member of the UN Human Rights Council Indonesia also has an obligation to improve human rights protection standards in its territory. Although the basic nature of human rights cannot be eliminated or revoked and is total in every human, but based on the agreed Siracusa Principles, there are two treatments for the implementation of human rights, namely: the principle of non-derogable rights (rights that cannot be postponed or suspended) and derogable rights (rights that can be postponed or deferred). The Siracusa principle underlines that rights that can be postponed or suspended can only be applied to certain situations or conditions which are considered to endanger the public interest. The obligation to protect human rights means that the state in this case the government must provide guarantees of protection and prevent all forms of violations of human rights, whether carried out by the state or non-state actors, including intolerant masses, militias and/or companies.

The obligation to respect and promote human rights means that the state must issue regulations, policies or regulations that do not conflict with the values, norms and rules of human rights law, while the obligation to fulfil human rights means that the state must take concrete actions, namely allocating budgets, compiling programs, and making policies in the context of guaranteeing the fulfilment of human rights of every citizen can work well without interference and threats from any party. The basic concept of human rights according to Franz Magnis Soeseno has two dimensions of thought, namely:²

1. the dimension of universality, the substance of human rights in essence has a general meaning, and is not bound by time and place, is needed by anyone and in any aspect of culture, it becomes a means to express himself freely in social life.
2. the dimension of contextuality, the application of rights in terms of the place where these rights apply. The idea of human rights can be used effectively as long as the place of the idea of rights provides a conducive atmosphere for that.

The existence of the state's responsibility for guaranteeing the fulfilment and protection of human rights cannot be separated from the basic principles of human rights which become a standard reference for the implementation of international and national human rights, including:³

1. Universality and inalienability. Human rights are inherent rights, and all humanity in the world has them. These rights cannot be surrendered voluntarily or revoked. This is in line with Article 1 of the Universal Declaration which reads "Every human being is born independent and equal in dignity".
2. Cannot be divided (indivisibility). Human rights, both civil, political, social, cultural and economic are all inherently inherent as part of human dignity that is inseparable. Consequently, all people have equal rights status, and cannot be classified according to hierarchical levels. Ignoring one right will have an impact on the neglect of other rights. The right of everyone to obtain a decent livelihood is a right that cannot be negotiated. This right is the basic capital for everyone so that they can enjoy other rights, such as the right to education or the right to health.
3. Interdependence and interrelation. Both in whole and in part, the fulfilment of one right often depends on fulfilling other rights. For example, in certain situations, the right to get an education or the right to obtain information is the right that depends on each other.
4. Equality and Non-discrimination. Every individual is equal as a human being and has good inherent in their respective dignity. Every human being has the full right to his rights without

¹ Eko Riyadi and Syarif Nurhidayat (Ed), *Vulnerable Groups: Kajian dan Mekanisme Perlindungannya* (Vulnerable Groups: Study and Protection Mechanism), Yogyakarta: Pusham UIL, 2012, p. 17-18

² Franz Magnis Soeseno in Heru Cipto Handoyo, *Hukum Tata Negara, Kewarganegaraan dan Hak Asasi Manusia* (Constitutional Law, Citizenship and Human Rights), UAJ Yogyakarta, 2013, p. 271

³ Muhammad Firdaus, *et.al.*, *Pembangunan Berbasis Hak Asasi Manusia: Sebuah Panduan* (Human Rights Based Development: A Guide), Jakarta: National Human Rights Commission, 2007, p. 14-16

distinction for any reason, such as differentiation for reasons of race, colour, sex, ethnicity, age, language, religion, political views and other views, citizenship and social background, disabilities and shortcomings, level of welfare, birth and other status.

5. Participation and contribution. Everyone and all people have the right to take an active and free role in participating and contributing to enjoy the life of development, both civil, political, economic, social and cultural life
6. State responsibility and rule of law. The state is responsible for obeying human rights. They must be subject to legal norms and standards listed in human rights instruments. If the state fails in carrying out its responsibilities, the aggrieved parties have the right to make appropriate claims, in accordance with applicable rules and procedures.

Human rights protection can be put in the framework of the rule of law. Thus, the struggle for human rights must be understood as a national commitment that obtains legal, constitutional footing with the establishment of institutions relating to human rights and law. The link between protection, respect and fulfilment of human rights at the national level and at the international level is very close. All international human rights law instruments require that the national or domestic legal systems of each country provide adequate compensation to people whose rights are violated. The international legal mechanism to guarantee human rights will only be applied if the protection system in the country is shaky or non-existent. Thus, the international mechanism serves to strengthen domestic protection of human rights and provide substitutes if the national system fails or is inadequate.¹ The right to freedom of religion/belief has been guaranteed by law in Indonesia, but there are still going on some violations of the right to freedom of religion/belief in the various regions.²

At present, there are various national action programs through the National Action Plan, the rules of the technical ministry responsible for certain fields, and other affirmative programs in the framework of respecting, protecting and fulfilling human rights. There are three national human rights institutions with different mandates and constituencies, namely the National Human Rights Commission; National Women's Commission; and the Indonesian Child Protection Commission and has formed six Regional Human Rights Commissions and several Indonesian Child Protection Commission in the Region in both the Province and City/Regency. The existence of constitutional protection for human rights with legal guarantees for demands for enforcement through a fair process. Protection of human rights is widely promoted in order to promote respect and protection of human rights as an important feature of a democratic state of law. Therefore, protection and respect for human rights is a very important pillar in every State of law.

Human rights protection is not only meaningful as a proactive state guarantee to protect human rights in various existing regulatory policies, but also as an effort to react quickly to take legal action in the event of human rights violations because it is an indicator of the rule of law. Protection of human rights is how the State carries out policies to prevent and overcome violations intentionally or through omission.³

Respect means that the state does not take actions that are prohibited or contrary to standard human rights norms, and the state refrains from interfering in the enjoyment of fundamental freedoms. Protecting specifically, the state protects certain groups that are vulnerable or discriminated against (children, women, laborers, indigenous people, minority groups). In general, the state guarantees that basic rights and freedoms are not violated by other parties (through law and justice). Fulfilling means that the state takes steps needed for the realization of human rights.

IV. Conclusion

The Legal politics of human rights on religious freedom still leaves plenty of room to discuss. One of them is the absence of a special law regulating this matter, except for an existing technical regulation and

¹ Retno Kusniati, *Integrasi Standar Perlindungan, Penghormatan, dan Pemenuhan Ham dalam Tugas Dan Fungsi Satuan Kerja Perangkat Daerah* (Integration of Standards for Protection, Respect, and Fulfillment of Human Rights in the Tasks and Functions of Regional Work Units), Papers Presented at the Workshop on Strategic Agenda for Research and Development in Cross-Sectoral Human Rights, Ministry of Justice and Human Rights of the Republic of Indonesia, on 7 April 2010 in Jambi, p. 11

² Kadarudin, *Legal Guarantees and Inconsistency of State Recognition to the Right of Religion/Belief in Indonesia*, Hasanuddin Law Review, Vol. 1 No. 1, April 2015, p. 1

³ Suparman Marzuki, *Tragedi Politik Hukum HAM* (The Politics Tragedy of Human Rights Law). Yogyakarta: Pusham UII-Pustaka Pelajar, 2011, p. 182

penalization available. Although guaranteed constitution and related human rights instruments are available, but in the implementation level there are many problems. The guarantee of the existing constitution is not followed by the making of a law which is expected to become a legal basic in its implementation. It is needed as a basic philosophy in the framework of the state and nation as also a philosophical foundation in the context of how the state ideology of Pancasila can revive the spirit of non-discrimination and tolerance through dialogue. An understanding of the concepts of freedom and equality before the law and equality, adequate and enforceable state legal policies and the politics of human rights law within the framework of the state's obligation to respect, protect and fulfil are prerequisites so that this human right can be upheld by the state.

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