

The Concept of Human Rights, Democracy and the Rule of Law

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Abstract - Human rights are basic rights inherent to all human beings and are universal. Therefore, human rights must be protected, respected, defended, and should not be taken away from anyone. Human rights and democracy are conceptions of humanity and social relations born from the history of human civilization throughout the world. Human rights and democracy could also be interpreted as the result of human battle to maintain the dignity of humanity. Countries that have a strong commitment to the recognition and protection of human rights included human rights stipulation in the constitution.

Keywords: *human right, democracy, rule of law*

1. Introduction

Human rights are basic rights that are inherently attached to all human beings, are universal and inalienable. Therefore, human rights must be protected, respected, defended, and should not be taken away by anyone. The development of human rights is inseparable from the development of philosophical thoughts, and conceptually, the history of human rights can be traced down to the emergence of constitutionalism in the 17th and 18th centuries. The concept of human rights emerged from several natural law doctrines, specifically the teachings of Thomas van Aquinas (1224-1274) and Hugo de Gorte (1583-1645). These teachings are one of the reasons behind the creation of Magna Charta (1215), Petition for Human Rights (1628) and The English Bill of Rights (1689). Their thinking was elaborated in a modern way by Francis Bacon and John Locke, thus reinforcing the position of human rights in a more rational natural law.

In his book, "The Second Treatise of Civil Government and a Letter Concerning Toleration" Locke proposes a postulation of idea that all men are endowed with certain natural right of life, liberty, and property, and such rights belong to each individual, are unalienable and no government shall revoke these rights. Through a social contract, the protection of these irrevocable rights is surrendered to the state. However, Locke also pointed out that, if the state's authorities ignore the social contract by violating the natural rights of the individuals, the people in that country have the freedom to bring down the ruler and replace him with a one that is willing to respect these rights.

The human rights idea based upon the natural law was seriously challenged in the 19th century. Edmund Burke, an Irishman who was anxious about the French Revolution, was one of the opponents of the theory of natural rights. Burke accused the authors of the "Declaration of the Rights of Man and of the Citizen" of propagating the "frightening fiction of human equation". In Thomas Hobbes's view, human rights constitute a solution to a situation he calls "homo homini lupus, bellum omnium contra omens". Hobbes argues, humans are like wild animals in an ancient legend that he calls 'Leviathan'. The situation then encouraged the creation of social contract in

which the people surrendered their rights to the authorities. The transfer of power from the community to the government shows the indirect nature and constitutional principle of the social contract. Two opinions emerged related to the social contract. Firstly, the power of the people since the social contract has expired, for the reason that the power is transferred to the ruler who now possess absolute power. The ruler is sovereign; the people are not. Secondly, human possess set of rights ever since they were born, and to guarantee those rights, they entered into a social contract by establishing a state to protect human rights.

John Locke argued that humans do not absolutely give up their individual rights to the authorities. Locke divided the social contract process into two types which he called "Second Treaties of Civil Government". The emergence of human rights was at its peak in the 20th century, and after the first World War there were no more countries that dared to reject the principles of human rights.

2. The Development of Human Rights

The development of the conception of human rights, according to "The new Encyclopedia Britain, 1992" as quoted from Dodi Harjono, is divided into several stages, namely:

1. First stage, the Roman influence (*ius gentium*) was so tremendous on human rights, especially in formulating basic rights for citizens. The triumph of the renaissance era in 13th century until the Peace of Westphalia emerged in 1648, are still a series of Roman times.
2. Second Stage, the conceptual formulation of human rights arises from several natural law doctrines, such as the teachings of Thomas Aquinas (1224-1274), Hugo de Grote (1385-1645). Followed by the establishment of the Magna Carta (1215), the Human Rights Petition (1628) and the the English Bill of Rights (1689). Then this concept was developed by John Locke, Francis Bacon and several other figures. On August 26, 1789, the concept of human rights was developed in the United States, especially after Thomas Jefferson developed the theoretical teachings of John Locke, Thomas Hobbes and Montesquieu.
3. Third stage, this became the main development of human rights especially after the first world war of the 20th century. Human rights received an inauguration in a humanitarian memorial on December 10th, 1948. Countries which are members of the United Nations unanimously agreed on the establishment of "The Universal Declaration of Human Right".

In the constitution of modern democracies, the protection of human rights is the main content so that the constitution becomes the main instrument for the protection of human rights. The Bill of Rights which was proclaimed in 1778 by Virginia, for example, expressly stated that every human being was created with liberty and the gift of non-deprivation. Every human being has the right to live in welfare and peace without the fear of being deprived of his property by the authorities. In France, ill-treatment of the absolute kings has pushed the French revolution 1789 which later lead to statements about people's rights and independence (*declaration des droit de l'homme et du citoyen* or Declaration of Human Rights and Citizens), in which these rights are owned by each individual because they are human and are not determined by positive law. In communist countries the Constitution has a dual function. On one hand it reflects the victories that have been achieved in the battle towards the achievement of communist society, on the other hand, the the constitution provides the legal

basis for the social change that is aspired. The founders of the United States sought the justification of human rights in the social contract theory and the natural rights of John Locke, then poured the idea of human rights into the Declaration of Independence of 1776. The idea was compiled by Thomas Jefferson as follows:

"All men are born equally free and independent and have certain inherent natural rights of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety. We hold these truths to be self-evident, that to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed"

Islam as a universal religion also protects the rights of every individual. Dr. Sheikh Syaikat Hussain divided the obligations that were ordered to mankind under divine guidance into two categories. That is huququallah and huquququl 'ibad. Huququallah (the rights of God) are human obligations towards Allah SWT which are manifested in various rituals of worship, while huquququl 'ibad (human rights) establishes human obligations towards each other and towards Allah's beings. Human rights in Islam are transcendent in the interest of humanity through Islamic law which is revealed through revelation. According to Shari'ah (Islamic Law), human beings are free beings who have duties and responsibilities, and therefore they also have rights and freedoms. The basis is that justice is upheld on the basis of equality or egalitarianism. That is, the task carried out will not be realized without freedom. While existential freedom is not realized without responsibility.

Human rights in Islam are different from understanding human rights according to Western views. Islam concentrates human rights into five main points summarized in al-dloruriyat al-khomsah or also called al-huquq al-insaniyah fi al-Islam (human rights in Islam). The five main points are hifdzu al-din (respect for religious freedom), hifdzul al-mal (respect for property), hifdzul al-nafs wa al-'ird (respect for soul, right of life and individual honor), hifdzul al-'aql (respect for freedom of thought) and hifdzul al-nas (necessity for protecting ones descendant). Some provisions in the Qur'an related to human rights issues can be found in several letters, including:

"And (remember), when Moses said to his people, "O my people, remember the favor of Allah upon you when He appointed among you prophets and made you possessors and gave you that which He had not given anyone among the worlds." (QS. Almaidah; 20)

Say, "Would you acquaint Allah with your religion while Allah knows whatever is in the heavens and whatever is on the earth, and Allah is Knowing of all things?" (QS. Alhujurat; 13)

And say, "The truth is from your Lord, so whoever wills - let him believe; and whoever wills - let him disbelieve." Indeed, We have prepared for the wrongdoers a fire whose walls will surround them. And if they call for relief, they will be relieved with water like murky oil, which scalds [their] faces. Wretched is the drink, and evil is the resting place. (Surat al-Kahf; 29)

Islamic law is an inseparable part of the Koran and Al-Hadith as the source of Islamic teachings which contains muamalah principles and some specific rules about various life. In a long period of time, Muslims have experienced this law-

based life so that they have a very close relationship with the personality of Muslims and are identical with their identity. In the context of the international world, this is increasingly difficult because of the exclusive style that it contains, tends to deny and affirm other legal provisions. The milestone of Islamic civilization as a religion of human rights is the birth of the Madinah declaration known as the Medina Charter. This Charter contains humanist ideas in the nation and state that have relevance to the development and desires of the global community, and has even become a view of modern life, which contains the principles of equality, brotherhood, unity, freedom, religious tolerance, peace, help, and defending the persecuted, as well as defending Medina from enemy attacks.

The principles of human rights and the challenges of Muslims are two things that are universality and particular. Both can be approached in an effective and practical way through mediation, negotiation and reconciliation to resolve rooted problems, but are able to bring them into inseparable parts. This condition is more dynamic through mutual consultation with margins that are very thin and not visible, but there are.

3. Human Rights and the Rule of Law

The concept of the creation of a country in Western Europe stems from a long history, and until now legal experts have difficulty formulating the origin of the country, who formed it, and which country or human was born first? Muhammad Tahir Azhary reviewed three theories to examine the thoughts of the state based on religious and state approaches. The three theories are each from Augustine (354-330), Nicolo Machiavelli (1469-1527), and Hugo de Groot or Grotius (1583-1645). They have given their own style about the idea of the state from the theological approach (religion) which is motivated by the socio-political situation and conditions at that time. Therefore, their views can be considered "representing" medieval, renaissance and natural law.

In *De Civitas Dei*, as quoted from Azhary, Augustine unfolds a theory about the state of God. This philosopher divides the country into two types, namely *Civitas Dei* (state of God). and *Civitas Terrena* or *diaboli* (state of satan). In Augustine's view, the first type of state was the best, and ideal and therefore of he delivered a sharp criticism towards the second type of state. He strongly rejects the state of satan because justice can only be upheld in the state of God. Augustine's theory is slowly shifting and changing. The change began with the rise of the opinion that the position of the state was the same as the position of the church as stated by Thomas Aquinas. Thomas said, the state organization led by the king had the same position as the church organization led by the Pope. It's just that each organization has different tasks. The task or power of the state is in the worldly field, while the task or power of the church is in the religious field.

Machiavelli said, the life of the country must be firmly separated from the principles of decency. As for the state's objectives according to Machiavelli, seeking order, security and tranquility. This goal can only be achieved by a king who has absolute power. Therefore, the effort was heading towards gaining and gathering as much power as possible in the hands of the king. But that goal is not the ultimate goal of a country, but rather only a means to achieve a higher goal, namely mutual prosperity. Hugo de Groot, in his book *De Jure Belli ac Paris* (Law of War and Peace) quoted from Azhary, argues that the country was born because of an agreement, but the agreement was not inspired by God, rather because of the urge of the human ratio as the basis of natural law.

The emergence and the development of a modern rule of law cannot be separated from the great ideas of Plato (429 BC) and Aristotle (384 BC) about the rule of law. Plato's views were then followed by Aristotle, in "*Nomoi*" as quoted by

Suparman Marzuki from Azhary, a good country is a country that is governed by the constitution and has legal sovereignty. To be a constitutional government there are three elements that must be fulfilled. Firstly, government is carried out for the sake of the public interest. Secondly, government is carried out according to the law based on general provisions, as opposed to law that is made arbitrarily which overrides conventions and constitutions. Thirdly, government is carried out on the will of the people, not coercion as implemented by the government disposed. According to Marzuki, the concept of the rule of law is social construction of the socio-political reality of the Ancient Greek era where the two great philosophers lived and became part of the political reality of the time. Likewise, the concept of a legal state that arose and developed in European society who experienced oppression by the absolute power of the king. The people want to regulate the relationship of their fellow citizens through the law because the people are sovereign. The concept of the idea of legal sovereignty is known and developed in the concept of *rechtsstaat* and rule of law. In view of A.V. Dicey, as quoted from Efik Yusdiansyah, the rule of law has experienced development to answer the development of society, and one of the people who developed it is H.W.R. Wade by analyzing in depth, that there are five aspects of the rule of law, namely:

1. All governmental action must be taken according to the law;
2. That government should be conducted within a framework of recognized rules and principles which restrict discretionary power;
3. Third, then disputes as to the legality of acts of government are to be decided upon by courts which are wholly independent of executive;
4. Fourth, that the law should be even – handed between government and citizen; and
5. Fifth, that no one should be punished except for legally defined.

The description shows that the important thing of the rule of law is to prevent abuse of power from the government, especially the authority that comes from discretion. The government is also prohibited from using unnecessary privileges or free from ordinary legal rules. The emergence of constitutional government is always related to the limitation of the state and the power of the authority. Therefore, constitutionalism, --- an abstraction that is slightly higher than the rule of law or *rechtsstaat* --- means understanding the "limited state" state where official political power is surrounded by clear laws and whose acceptance will change the power to be determined law.

The initial thought of the regulation of human rights in the framework of the rule of law began when John Locke expressed his speculative thoughts about social contracts. According to Locke, the state was formed based on the most votes. This view is based on the *pactum unionis* equipped with *pactum subjectionis*. The state is given the authority to exercise its powers according to agreements made with the community through the majority vote agreement, but the state is limited by the rights of the people (as individuals) not to interfere in taking care of the most basic rights of humans. On the contrary, the state is obliged to safeguard and maintain natural rights so that human life is not naturally disturbed or damaged by the interests of the state that deviates from the constitutional contract. Noor Syam assessed, based on its contents, *pactum unionis mutatis mutandis* with the state constitution, and Locke's thought concerning human rights, its contextual nature is inherent in human dignity, so that it cannot be transferred to the state, even obligatory for the state to protect it.

Concrete steps of a country that has a strong commitment to the recognition and protection of human rights are normalized into a declaration, legislation, or constitution. France, for example, based on the agreement on the establishment

of the 1st republic (in 1792) arranged its state structure to establish a democratic state order. The basic motto that is very well known is *Liberte, Egalite, and the Fraternite*. Likewise, the United States, in the preamble to its constitution in 1787 established the principles of basic human freedom as individualistic rights inherent in human nature to be protected by the state. The UN Universal Declaration of Human Rights, which was established on December 10th, 1948, also contains the same thing, in addition to regulating many human rights issues, the declaration of human rights also regulates the obligation of the state to fulfill rights compared to individual obligations to the state. Therefore, the characteristics of the UN Charter are universal and individual so that the Charter can apply generally to every independent nation and to uphold human rights, until the establishment of two UN International Covenant on Civil and Political Rights (1966). The Covenant raises the level of the right to self-determination to the level of statements and the main requirements of human rights. In 1970, the United Nations awarded these rights to be one of the six fundamental principles governing friendly relations between countries. Legal and constitutional norms that formulate and protect human rights become a substantive framework for the implementation of democracy.

In relation to the rule of law, a good constitution as a prerequisite for *rechtsstaat* and rule of law, is a constitution which, according to Zainal Arifin Mochtar's terms, is friendly to its citizens. The hospitality is shown by the strengthening of respect for human rights and the rights of citizens. There are high, strong and full awards. There are more widespread awards for various dimensions of rights. The rights converted into state duties and obligations, namely duty to prospect, duty to protect, and duty to fulfil. In Europe and America, for example, every citizen who travels to the south, either due to establishing a trading company or other matters, international regulations do not require the state to recognize foreigners; all countries, both past and present, can refuse entry of whoever it wants. But once a foreigner has been recognized, then he has a series of rights to get compensated. If the regulation is not implemented by the receiving country, the country of origin of the victim can provide "diplomatic safeguards" to him.

The development of the principles of the rule of law is strongly influenced by the strong acceptance of popular sovereignty and democracy in the life of the state. The rule of law (*nomocratie*) and the principles of popular sovereignty (*democratie*) are carried out in parallel just like two sides of a coin. This understanding of the rule of law is known as a democratic state (*democratische rechtsstaat*) or in a constitutional form called constitutional democracy. Within that concept, law was established and is enforced in accordance with the principle of democracy.

According to Islam, establishing a state to manage the affairs of the people (*ummah*) is the greatest religious obligation, because religion cannot be upright without a state or government. As a great religion, Islam does not adhere to a system of governance that is "oligarchi", "democracy" or "theocracy". De Santillana, an Italian Orientalist, in his book "The Legacy of Islam" quoted from Fuad Mohd. Fachruddin, said: "Islam is the direct government of Allah the rule of God whose eyes are upon his people. The state in Islam is personified by Allah, even the public functionaries are the employees of Allah". Fachrudin agreed that if it was said that Islam was the Government of Law (*nomocracy*) which acknowledged that the shariah in Islam was the main basis upon which the desired government stood, and so would the purpose of its existence.

For Ibn Khaldun, as quoted from Syarifuddin Jurdi, in "Indonesian Islamic Political Thought", people's obedience to the state (government) is not false, but has the same position as religion. That is, people's loyalty applied automatically, and there are no other alternatives. Dominant power is a feature of state power that insures individual freedom to be creative about the future of their country, the ruler is the source of all changes. In Ibn Khaldun's view, such a ruler has a position that is almost parallel to God, because everything that is said by the authorities is absolutely obeyed by its people. Concerning the obedience of the people to their country, Ibn Khaldun wrote In Indonesia, the development of human rights cannot be separated from the long history of the independence of this nation. Long before independence, the founding fathers had conveyed their ideas related to human dignity. This can be observed from the thoughts contained in the R.A letters. Kartini ("Habis Gelap Terbitlah Terang"), political articles from H.O.S. Cokroaminoto, Agus Salim, Douwes Dekker, Soewardi Soeryaningrat, and a petition made by Sutardjo in the Volksraad or Soekarno's pledoi entitled "Indonesia Menggugat", then Hatta with the title "Indonesia Merdeka" which was read before the Dutch East Indies court during the independence movement, all this became a source of inspiration during the constitution-making debate in the session of the Investigating Committee for Preparatory Work for Independence (BPUPKI). During this debate, the founders of the nation have realized the importance of human rights as a foundation for a country. Todung Mulya Lubis noted that human rights debates occur intensively within three periods of constitutional history, starting from 1945, as the initial period of human rights debates, followed by the Constituent Period (1957-1959) and the initial period of the rise of the New Order (1966 -1968) In these three periods the battle to make human rights as the central to the life of the nation and state takes place very seriously. However, during those periods human rights discourse failed to be included in the constitution.

The battle to uphold human rights is essentially a part of Indonesia's historical and cultural demands. Therefore, fighting for human rights is the same as fighting for the culture of the nation, between humans and humanity in the same world is one and the same. Masyhur Effendi and Taufani Sukmana Evandri argued, the credo of "Unity in Diversity" is the crystallization and the recognition of that battle. If there is a culture that is contrary to human rights, dialogue, approaches and gradual and continuous solutions are needed. Through this approach, a better and satisfying solution can be determined. Similar view is also shared by Effendi and Evandri, which says: "Humanitarian concepts that exist in various cultural systems certainly have points of similarity between one another. If this can be proven, the logical conclusion is that humans and humanity can be seen as nothing more than a logical continuation of the elaboration of the basic ideas that exist in each of these cultures in the context of complex and global contemporary life."

4. Conclusion

Human rights and democracy have been a topic of discussion for centuries and will continue to be the topic of discussions along with the social change issue, economic, political and cultural change of each country. The values of human rights and democracy have been the universal topic ever since those two terms were included in the constitution of a state. Human rights are the basic rights that are inherently attached to all human being and are applied universally. Therefore, human rights must be protected, respected, defended, and shall not be detached. Human rights are basic human rights inherent to all human beings, and are universal. Therefore, human rights must be protected, respected, defended, and shall not be

taken away by anyone. Human rights and democracy are concept of humanity and social relations born from the history of human civilization throughout the world. Human rights and democracy can also be interpreted as the result of human battle to maintain the dignity of humanity.

According to Jimly Asshiddiqie's view, the concept of human rights and democracy can be traced theologically in the form of human relativity and God's absoluteness. Consequently, no human being is considered to occupy a higher position, because only one is absolute and is a *prima facie*, namely God Almighty. All human beings have the potential to achieve the truth, but there is no way absolute truth is possessed by humans, because God is absolutely right. Thoughts that claim to be absolutely true, and others are wrong, are thoughts that are contrary to humanity and divinity. Humans were created by God with set of rights that guarantee their dignities as human beings. These set of rights are what we called human rights.

To measure whether a country or government is democratic, there are several aspects, namely: Firstly, the issue concerning the formation of a state. The process of forming the power will greatly determine how the quality, character and pattern of relationships will be built. In order for power to serve the interests of the people and be fair, the process of forming legislation must be done openly and indefinitely from the very beginning. In the meantime, general elections can be trusted as one of the important instruments to enable a process of forming a good government. However, the problem relies on how the results of the election are able to compile the authority who can accommodate the interests of other communities. Secondly, the basis of state power or relating to the concept of legitimacy of power and accountability of that power. Third, the composition of the state power. State power must be distributed fairly to avoid the accumulation of power in "one hand".

In practice, the principle of democracy or popular sovereignty guarantees the participation of the people in the state decision-making process, so that each statutory law that is set reflects the values of justice that lives in the community. As stated by Asshiddiqie, laws and regulations cannot be unilaterally determined and applied only for the interests of the authorities in contravention of democratic principles. Thus, the ideals of a rule of law (*rechtsstaat*) that are developed are not 'absolute *rechtsstaat*', but rather 'democratische. *rechtsstaat*' or a democratic rule of law. In every democratic rule of law, democracy must be guaranteed, and democracy must be guaranteed to operate based on the law.

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