

THE CONSTITUTIONAL WILL IN HUMAN RIGHTS PROTECTION FOR REFUGEES

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Abstract

Human rights protection granted to refugees in Indonesia has not received serious attention, in particular for those who are included in the cross-border refugees. This issue is a question of how the Constitution mandates a protection to them, whether it is an obligation of the government of Indonesia or it is volunteerism alone. The provisions are addressed in Article 28A, Article 28B paragraph (2), Article 28D paragraph (4), Article 28E paragraph (1), Article 28G paragraph (2), and Article 28H paragraph (1), and Article 28J paragraph (1). Broadly speaking, the Indonesian constitution calls for better protection of refugees to internally displaced persons and refugees across borders. This is reflected in several articles in the 1945 Constitution that mention the word “everyone” in the subject which meant regardless of citizenship status or population. This is certainly in line with the values of human rights that have been recognized along with the universality of human rights that are applicable. Therefore the will of the constitution on refugees needs to be implemented in legislation in Indonesia, which describes in details the human rights protection to internally displaced persons and refugees state that the will of the constitution in the protection of human rights to refugees be implemented correctly.

Keywords: Constitutional, Human Rights, Refugees.

I. INTRODUCTION

A. Background of Study

Issue on refugees is not yet resolved fairly up to now, whether internally displaced persons (IDPs) or cross-border refugees. The obscure regulations on

refugees are merely extinguishing fire, instead of preventing the fire. This can be seen from how tangled to refugees who are spontaneous and not systematic. Cross-border refugees in Indonesia is also problematic due to the uncertainty of status and protection given by the government of Indonesia, whether it is an obligation or only a matter of hospitality to provide human rights protection. At that time, when a refugee came to Indonesia, the Indonesian government did not seem to give orders and regulations because it does not have a national policy. In the Law on Foreign Relations No. 37 of 1999, the mandate of the refugee camp in the health center. Moreover, all countries including those who have not ratified the Refugees Convention shall uphold the standard of refugee volumes that have become part of general international law. Looking at it in general, it certainly becomes an interesting study looking at how the constitution provides the will in human rights law against refugees.

B. Problem of Study

Based on the background above, in this paper the author reviews how constitutional will human rights protection for refugees is.

II. DISCUSSION

1. Internally Displaced Persons in Indonesian Legal Framework

Jesuit Refugee Service (JRS) applies the expression 'de facto refugee' to all persons persecuted because of race, religion, membership of social or political groups and the victims of armed conflicts, erroneous economic policy or natural disasters and for humanitarian reasons. It also includes internally displaced persons, that is civilians who are forcibly uprooted from their homes by the same type of violence as refugees but who do not cross national frontiers.¹

Internally displaced persons are those obliged to relocate from their homes due to conflict, natural disasters or other causes but are within their own country. Indonesia is one of countries susceptible for various natural and social disasters.²

¹ Jesuit Refugee Service Indonesia, 2013, *Pengungsi dan Pencari Suaka di Indonesia*, Jakarta: Jesuit Refugee Service Indonesia, p. 3. in http://jrs.or.id/wp-content/uploads/downloads/2013/07/20130703_ido_adv_Booklet-Public-Awareness-CS4_by-indro.pdf downloaded on 15 April 2016.

² *Ibid.*, p. 6.

National protection is provided to internally displaced persons. Such protection is usually manifested in the enactment of law or particular policy pursuant to internationally acknowledged norms (guiding principles on internal displacement). Government of Indonesia provides protection for internally displaced persons through Law No. 24 of 2007 on Disaster Relief, Article 54 which reads as follows: the management of society and refugees hit by disaster shall be made through activities of collecting data, relocating to safe area, and fulfilling basic needs.³

Therefore, issue on internally displaced persons is not a big deal, since the state is present in terms of legislation and implementation. Data collection is conducted for all refugees receiving logistic aid and proper healthcare, as well as relocation to safe area equally without any disregard.

The frequently appeared issue is the basic needs set out by Government provided for the refugees. Basic needs should not only be intended as clothing, shelter, and foods, but also mental (psychological) needs. It cannot be denied that the refugees relocated due to unpleasantly heavy state (involuntary), resulted from conflict or disaster. Therefore, psychological needs are certain.

Such psychological needs may be provided through psychologists' service and guaranteed aid in forms of self-building and self-development, i.e. employment training and coaching. Psychologists' treatment and debriefing are expected to bring better hope for the refugees.

2. Cross-Border Refugees according to International Law

The term 'refugee' first appeared during the World War I, considered as a culmination point of development process of a nation.⁴ Refugees who were victims of war were people trapped in poverty and could not earn any living and improve their life standard without nation's helping hand. The left involuntarily and consequently, they could not deal with the documents (certificates) of travel required in passing other countries' border to seek for refuge. This complicated, alarming state inspired the definition of refugees.⁵

³ *Ibid.*, p. 10.

⁴ Peter J.Taylor, *Political Geography World Economy, Nation State and Locality, Es Sex: Longman*, 1993 ed. in Achmad Romsan, *Pengantar Hukum Pengungsi Internasional: Hukum Internasional dan Prinsip-prinsip Perlindungan Internasional*, Jakarta : UNHCR, 2003, p. 28.

⁵ Daniele Joly, *Haven or Hell: Asylum Policies and Refugee in Europe*, London : Mac Millan Press, 1966, p. 11.

Webster Dictionary defines 'refugee' as 'an individual seeking refuge or asylum; *especially*: an individual who has left his or her native country and is unwilling or unable to return to it because of persecution or fear of persecution (as because of race, religion, membership in a particular social group, or political opinion).'⁶ Meanwhile, the Great Dictionary of the Indonesian Language (KBBI) mentions the etymology of *pengungsi* (refugee) is *ungsi* (evacuate) with verb *mengungsi* (to evacuate), as in evacuating (dismissing) oneself from danger or saving oneself (to a secured area), *pengungsi* is a noun which means a person who refugees, a civilian of a country who moved out to other political refugee's country due to political view opposite to the political view of one's native ruler.⁷ Based on the opinion above, it is clear that refugees are the consequence of dangers such as natural disasters (flood, earthquake, eruption, drought) and manmade disasters (armed conflicts, political regime change, fundamental immunity oppression, human rights abuse, etc). Refuge may be undertaken within any country or cross-border due to political view difference.⁸

United Nation High Commissioner for Refugees (UNHCR) formed on January 1951 classifies refugees in two terms: mandatory refugees and statutory refugees. The former is all people recognized as refugees by UNHCR pursuant to function, authority, or mandate as set out by UNHCR statutes, whereas the latter is those within countries of 1951 Convention (upon the effectuation of this Convention since 22 April 1954) and/or 1967 Protocol (upon the effectuation of this Protocol since 4 October 1967). The two terms are used to differentiate the refugees before 1951 Convention and pursuant to 1951 Convention, both categorized as refugees protected by UNHCR in international instruments.

Article 1A (2) of 1951 Convention relating to the status of refugees, those considered as refugees are:

1. Refugees according to 12 May 1926 Agreement and 30 June Agreement, or 10 February 1938 Protocol, 14 September 1939 Protocol or International Refugee Organization Constitution.

⁶ <http://www.merriam-webster.com/dictionary/refugee#legalDictionary> downloaded on 22 November 2016.

⁷ The Great Dictionary of Indonesian Language, Department of Education and Culture, 1995, p. 675.

⁸ Achmad Romsan, et. al. *Pengantar Hukum Pengungsi Internasional*, Bandung: Sanic Offset, 2003, p. 35.

2. "... any person who: "As a result of events occurring before 1 January 1951 and owing to wellfounded fear of being persecuted for reason of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return it."
3. In the event that someone having more than one nationality, the term 'country of his nationality' means any country, where he is the citizen, and he shall not be entitled for protection from the country of its nationality without any unacceptable reason, owing to well-founded fear is unwilling to avail himself of the protection of one country of his nationality.

Definition of refugee in 1951 Convention then extended in Article 1 (2) on Protocol relating to the status of 1967 refugees as follows:

"For the purpose of the present Protocol, the term "refugee" shall, except as regards the application of paragraph 3 of this article, mean any person within the definition of article 1 of the Convention as if the words "As a result of events occurring before 1 January 1951 and ..." and the words "... a result of such events", in article 1 A (2) were omitted".

Pietro Verri defines refugee by quoting Article 1 of 1951 UN Convention on the status of refugee as follows:

"Applies to any person who fled the country of his nationality to avoid persecution or threat of persecution".

This definition indicates that refugees are all people who left their country to avoid persecution or threat of persecution. For such a case, those fleeing within his country cannot be called as refugees as in 1951 Convention.

Refugees as defined in Geneva Convention are all people, owing to well-founded fear of persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion outside the country of his

nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of his native country.⁹

3. Human Rights Protection for Refugee accordance to International Law

International protection is available to cross-border refugees and asylum seekers. Such protection is usually made available by UNHCR (United Nations High Commissioner for Refugees) or international society. The international society who provide protection are those ratifying 1951 Geneva Convention and 1967 Protocol on cross-border refugees. 1951 Geneva Convention was built upon situation in Europe post-World War (WW) II. Since the cross-border refugees is an international issue – not only protecting refugees in time of World War II – additional Protocol then established in 1967. Until recently, 145 countries have ratified this convention. Meanwhile, government of Indonesia and most Southeast Asian countries have not ratified this convention.¹⁰

Arrangement on refugees pursuant to international law are contained in several conventions, they are:

(1) The Fourth Geneva Convention Relative to the Protection of Civillian Persons in Time of War

This Convention made in Geneva on 12 August 1949 regulates the protection for casualties of war and regulates the refugees categorized as protected people. The refugees not protected by any Country shall not be treated as enemy. Such arrangement is contained in Article 44 of this convention as follows:

“in applying the measures of control mentioned in the present convention, the detaining power shall not treats the as the enemy aliens exclusively on the basic of their nationality de jure of an enemy state, refugees who do not, in fact, enjoy the protection of any government.”

⁹ *Ibid.*, p. 4.

¹⁰ Jesuit Refugee Service Indonesia, *Pengungsi dan Pencari Suaka di Indonesia*, Jakarta: Jesuit Refugee Service Indonesia, p. 8-9. in http://jrs.or.id/wp-content/uploads/downloads/2013/07/20130703_ido_adv_Booklet-Public-Awareness-CS4_by-indro.pdf , 2013, downloaded on 15 April 2016

This Convention incorporates additional protocol to the Geneva Convention of 12 August 1949.¹¹ In this protocol on refugees is contained in Article 73 as follows:

Persons who, before the beginning of the hostilities, were considered as stateless persons or refugees under the relevant international instrument accepted by the parties concerned or under the national legislation of the state of refugees or state of residence shall be protected persons within the meaning of parts I and III of the Fourth Convention, in all circumstance and without any adverse distinction.

(2) Convention Relating to the status of Refugees

This Convention was ratified on 28 July 1951 by United Nations Conference of Plenipotentiaries On the Status of Refugees and Stateless Persons enforced by resolution of United Nations General Assembly No. 429 (V) on 14 December 1950. This Convention applied since 22 April 1954 and defines refugees in very general meaning in Article 1A (2) of 1951 Convention Relating to the Status of Refugees.

1951 convention regulates the protection for refugees and helps the refugees, as follows:¹²

a) No discrimination

Countries ratifying Convention shall not treat refugees based on discriminative politic related to race, religion or country of origin as well as skin complexion and they are free to practice their religious activities (Articles 3 and 4).

b) Private status of refugees regulated pursuant to the law of their domicile. Should they not have domicile, their private status shall be regulated by the law of their place of residence. Rights related to marriage shall also be recognized by countries ratifying Convention and Protocol (Article 12).

c) A refugee shall be equally entitled to have or own movable or immovable assets and retain them as other people and to transfer such assets to the country of their settlement (Articles 13, 14 and 30).

¹¹ This Protocol is referred to as the 1977 Additional Protocol

¹² Sri Setianingsih Suwardi, "Aspek Hukum Masalah Pengungsi Internasional", IR Journal, Vol .2 No.1 of 2004, Jakarta: LPHI FH UI, p. 35

d) Rights of association

Countries ratifying Convention shall recognize the freedom of association and alliance for the refugees by establishing non-profit, non-political trade association (Article 15).

e) Refugee shall be entitled on freedom of litigation before the court (Article 16).

f) Entitled to secure jobs and establish a trade company and other independent businesses wherein pursuant to applicable provision, such as certificate, to ascertain the expertise and to facilitate the job placement (Articles 17, 18 and 19).

g) Every refugee shall be equally treated with other citizens for the right to acquire basic education (Article 22).

h) Right on social welfare.

Every refugee shall be allowed to enjoy the rights on social welfare, such as right on works, settlement, remuneration from the jobs they performed (Articles 20 and 22).

i) Every refugee shall be entitled on identity cards and documents for travelling beyond their country of their settlement unless for security reason and common interest. The travel document issued on international treaty shall be recognized by countries ratifying the Convention (Articles 27 and 28).

Other than rights of refugees mentioned above, Convention has also underlined obligations of refugees as contained in Article 2 thereof: Every refugee has duties to the country in which he finds himself, which require in particular that he conform to its laws and regulations as well as to measures taken for maintenance of public order. Based on Article 2 above, every refugee is obliged to comply with all laws, regulations and provisions to create public order in the country in which he finds himself.

(3) 1967 Protocol Relating to the Status of Refugees

This Protocol was approved by Economic and Social Council through resolution 1186 (XLI) on 18 November 1966 by UN General Assembly through

resolution 2198 (XXI). This Protocol is effective as of 4 October 1947. The countries are entitled to participate in thus 1967 Protocol without participating in 1951 Convention. Article 1 (2) of this Protocol has extended the definition of refugees in 1951 Convention as the words “As a result of events occurring before 1 January 1951 and ...” and the words “... a result of such events”, were omitted”. Article 1(2) of 1967 Protocol states as follows:

For the purpose of the present protocol, the term “refugees” shall, except as regard the application of paragraph 3 of this article, mean any person within the definition of article 1 of the convention as if the words “As a results of events occurring before 1 January 1951 and...” and the word “... a results of such event”. In Article 1(2) were omitted.

Such extended definition of refugees and protocol relating to the status of refugees are aimed to overcome issue on refugees after the World War II, primarily refugees resulted from political conflict in Africa during 1950s and 1960s.

(4) The Convention Relating to the Status of Stateless Persons (1954)

This Convention regulating the status of stateless persons was ratified through convention attended by sovereign countries on 28 September 1954 through Resolution of Social and Economic Council number 526 (XVII) on 26 April 1954 and effective as of 6 June 1960, pursuant to provision of Article 39 of Convention. The complete name of 1954 Convention is Convention Relating to the Status of Stateless Persons.

1954 Convention consists of 42 Articles and contained in 6 Chapters. One article worth to know is Article 1 that formulates ‘stateless person’, general obligation to be obeyed by them, human rights attached to them, such as right to practice their religious activities and religious education to their children, right on perpetual settlement, right to possess movable and immovable assets, including the right on works of art and industrial property, right on association, right on employment and decent life, rights on welfare, such as housing, general education, freedom of movement. Countries ratifying 1954 Convention shall also be required to issue identity card to

stateless persons in their country, as well as travel documents. Furthermore, this convention regulates the stateless seamen.

(5) The Convention on the Reduction of Statelessness (1961)

This Convention was ratified on 30 August 1961 through Resolution of UN General Assembly No. 896 (IX) on 4 December 1954. 1961 Convention contains 21 Articles. It outlines the diminution of stateless persons in a country by giving nationality status for their children born in such country. The nationality given that way is as obliged by 1961 Convention by paying attention to provisions applicable to the concerned country.

For the information, children born from stateless parents on boat or aircraft are considered to be born in the Country whose flag in country where such boat or aircraft is registered. This Convention also regulates the loss of nationality of stateless persons by marriage, broken marriage or obtaining other nationality.¹³

(6) African Territory

There is an instrument applicable to this territory on refugees within African territory, i.e. Convention Governing the Specific Aspects of Refugees Problems in Africa.

This Convention was ratified at the sixth extraordinary session of Heads of State and Heads of Government on 10 September 1969 in Addis Ababa. The reason behind this was the huge amount of refugees occurred in African Countries.

This Convention extends the definition of refugee as contained in 1951 Convention and 1967 Protocol. In Article 1 paragraph 2 of Convention Governing the Specific Aspects of Refugees Problems in Africa, refugees defined as those displaced owing to aggression, invasion, foreign domination or events causing public order intervention, in part or the whole area of a Country. Article 1 paragraph 2 states as follows:

¹³ Document Series Symbol: ST/HR/, Secretariat Center for Human Rights

For the purposes of this convention, the term “refugees” shall also apply to every person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residences as a results of such event in unable or, owing to such fear, is unwilling.

This Convention regulates the residence of the refugees;¹⁴ obligation of refugees to the Countries where he placed;¹⁵ non-discriminative principle to the refugees;¹⁶ voluntarily repatriation of refugees;¹⁷ and travel documents of refugees.¹⁸

(7) Latin America Territory

Likewise African territory on mass relocation owing to war, civil conflict, violence, and political chaos, Cartagena Declaration of Refugees was ratified at Colloquium entitled “Protection to Refugees from Central America, Mexico and Panama: Judicial Humanitarian Problem” held in Cartagena, Colombia on 19-22 November 1984. Refugees in definition therein have been extended as contained in section III (3) as follows:

In addition to containing the elements of the 1951 Convention and the 1967 Protocol, includes among refugees persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstance which have seriously disturbed public order.

Although the Declaration above adds other reason for people to be considered as refugees, but the status of refugee must be given by paying attention to basic criteria of 1951 Convention and 1967 Protocol. Moreover, this Declaration also recommends the participation to 1951 Convention and 1967 Protocol.¹⁹

¹⁴ Convention Governing the Specific Aspect of Refugees Problems in Africa, Article 2 paragraph 5

¹⁵ *Ibid.*, Article 3 paragraph 1

¹⁶ *Ibid.*, Article 4

¹⁷ *Ibid.*, Article 5 paragraph 1

¹⁸ *Ibid.*, Article 6 paragraph 1

¹⁹ Cartagena Declaration of Refugees, section II letter (a)

(8) European Territory

Instruments related to refugees in this territory are, among others, Agreement of the Abolition of Visas for Refugees, regulating the facilities given to the refugees to hold travel documents²⁰ for travelling within Countries ratifying European Agreement on Transfer of Responsibility for Refugees that regulates the assignment of responsibility to the refugees living more than two years in one ratifying Country to other ratifying Country and Recommendation on the Protection of Persons not Formally Recognized as Refugees Under 1951 Convention, regulates the recommendation not to reject application in a country's frontier, or repatriate a person to the place where he is threatened for persecution.

4. Constitutional Will in Providing Human Rights Protection for the Refugees

Although the government of Indonesia has not yet ratified 1951 Geneva Convention and 1967 Protocol on cross-border refugees and regulations of laws applicable in Indonesia has not specifically discussed the issue on refugees, it does not release government of Indonesia to the refugees within Indonesian territory.

Indonesia is a constitutional country where government is limited by constitution, thus 1945 Constitution is the guiding fundamental law.²¹ The first paragraph of Preface of 1945 Constitution recognizes the freedom to be free, as follows: Whereas independence is the truest right of all nations, and therefore, colonization on the world shall be abolished for it is not in accordance with humanity and justice. The recognition to humanity is the essence of human rights and to justice is the essence of legal state principle that is one of our country systems.²² The second paragraph states that Indonesia is a fair country. The adjective 'fair' indicates a legal state, the purpose of law is to seek fairness. The third paragraph underlines that Indonesian society declares that a manifestation

²⁰ These travel documents must be pursuant to the provision of 1951 Convention or agreement on the issue of travel documents for refugees dated 25 October 1946.

²¹ Ismail Suny, *Hak Asasi Manusia*, Jakarta: Yarsif Watampone, 2003, p. 1.

²² Ismail Suny, *Mekanisme Demokrasi Pancasila*, Jakarta: Aksara Baru, 6th ed, 1987, p. 10-30.

of an independent statehood is human rights recognition and protection, such as political equality.

The fourth and last paragraph contains the purpose and objective of the “Government of the Republic of Indonesia, protecting the whole Indonesian people and the whole blood-spilled land of Indonesia and to promote social welfare, educate the nation life, and participate in world order by virtue of independence, perpetual peace and social justice, it establishes the independence of Indonesia into a Constitution in a structure of the Republic of Indonesia with sovereignty of its people based upon: the Almighty God, just and civilized humanity, unity of Indonesia, and democracy led by the wisdom of deliberations among representatives, and by manifesting the social justice for the whole people of Indonesia.” This completely quoted last paragraph contains the outline of human rights recognition and protection in aspects of politic, legal, social, economic, cultural, and education.²³

In addition to Preface, several articles of 1945 Constitution, i.e. Article 28A, Article 28B paragraph (2), Article 28(D) paragraph 4, Article 28E paragraph (1), Article 28G paragraph (2), and Article 28H paragraph (1) as well as Article 28J paragraph (1) guide the human rights protection for the refugees. The Constitution wishes the philosophy of human rights is not individualistic freedom, rather putting humans in their relation to the state (social being) so that human rights could not be separated from human obligations.

Constitution contains the will that “everyone” is deserved to live, is deserved to survive, and maintain his life, is deserved to perpetually live, grow, develop and is deserved to be protected from any violence or discrimination, is deserved for citizenship status, is deserved to embrace religion and pray pursuant to his religion, choose education and study, choose occupation, choose nationality, choose residence within the territory of country and left them and is deserved to come back, and is deserved for political asylum from other country, is deserved to live physically and mentally prosperous, reside and acquire proper and healthy

²³ Ismail Suny, *Hak Asasi Manusia*, Jakarta: Yarsif Watampone, 2003, p. 2-3.

environment and is deserved to get healthcare service, and is required to respect each other's human rights in social, societal, and national life. This is as contained in Article 28A, Article 28B paragraph (2), Article 28D paragraph (4), Article 28E paragraph (1), Article 28G paragraph (2), and Article 28H paragraph (1), as well as Article 28J paragraph (1).

In addition to Constitution's call to protect refugees, Indonesia is also one of countries approving Universal Declaration of Human Rights. Its consideration states that the recognition on natural dignity and equal, absolute rights of all members of family are fundamental to independence, justness, and world peace. Furthermore, Article 2 explains that:²⁴ Any person shall be entitled to all rights and freedoms contained herein without any exclusion, such as distinguishing race, skin color, gender, language, religion, political or other view, origin of nationality or society, proprietorship, birth or other position. Moreover, it shall not recognize any distinction on political, legal or international position from the country or area of origin, whether an independent country, trust territory, colonized land, or under other's sovereignty limitation.

Government of Indonesia states its view on Human Rights that:²⁵ Indonesian people, in its history has suffered misery and sorrows owing to colonization. Therefore, Preface of 1945 Constitution mandates that independence is the right for every nation and colonization shall be banished from the world since it is not in accordance with humanity and justice. Indonesian people is determined to participate in the world orderliness by virtue of independence, perpetual peace and social justice which essentially are obligation of every nation. Thereby, Indonesia views human rights are inseparable to human obligations. It is based on two things as follows:²⁶

1. Indonesia has view and attitude on human rights originated from religious teachings, universal moral value, and national cultural noble value, and based on Pancasila and 1945 Constitution.

²⁴ Secretary General and Registrar Office of Constitutional Court, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945: Latar Belakang, Proses dan Hasil Pembahasan 1999-2002*, Jakarta: Secretary General and Registrar Office of Constitutional Court, 2010, p. 43.

²⁵ *Ibid.*, p. 52-53.

²⁶ *Ibid.*, h. 84.

2. Indonesia as a member of United Nations has responsibility to respect the Universal Declaration of Human Rights and other international instruments on human rights.

Human rights are substantially formulated through normative, empirical, descriptive, analytic approach as follows:²⁷

1. Human rights are fundamental rights naturally, universally attached to human being as a gift from the Almighty God and serves as assurance of perpetual life, independence, development of mankind and society, should not be disregarded, snatched, or contested by anyone.
2. Indonesian society that is developed from simplicity to modernity basically is a kinship society. This society has recognized social institution regarding societal rights and obligations consisting of religious institution acknowledging that humans are created by the Almighty God with all of their rights and obligations; family institution as a vessel for life in communion to develop offspring to maintain existence; economic institution constituting human's efforts to increase prosperity; educational and teaching institution to develop intellectuality and personality of human; information and communication institution to expand insight and openness; legal and justice institution to ensure life order and harmony; security institution to ensure security of every human. Thus, the substantial human rights consist of: right to live; right to raise family and procreate; right of self development; right of justice; right for independence; right to communicate; right for security; and right for prosperity.
3. Indonesian people acknowledge and recognize that every individual is a part of society and thereby, society consists of individuals with human rights who live in environment that is resource for their life. Therefore, in addition to human rights, every individual is required to assume obligation and responsibility to respect other individual human rights, public order and continuity of function improved system and improvement of environmental standards.

²⁷ *Ibid.*, h. 55-57

The understanding of human rights for Indonesian people is as contained in comprehensive text below:²⁸

1. Human rights are fundamental rights of mankind without any difference. Since fundamental rights are given by the Almighty God, definition of human rights is the rights given by the Almighty God attached to human rights, naturally existing, universal and perpetual, in respect to human dignity and prestige.
2. Every human has equal human rights believed and respected without distinguishing gender, skin color, nationality, religion, age, political view, social status, and language as well as other status. The ignorance and snatch to human rights lead to the loss of dignity and prestige as human, resulting in the lack of self-development and role as a whole.
3. Indonesia realizes that human rights are historical and dynamic, the implementation is developed social, societal, and national life.

Based on the explanation above, it clearly indicates that the Constitution will of Indonesia confirms that the principle of humanity must be highly respected. Article 28G of 1945 Constitution states, every person is entitled to be liberated from persecution or treatment humiliating dignity and is entitled to seek for political asylum from other country. Furthermore, Articles 25, 26, and 27 of Law Number 37 of 1999 on International Relations sets policy that asylum seekers and refugees to be regulated in a Presidential Decree. In fact, Indonesia has scheduled two accessions of 1951 Convention and 1967 Constitution in Proposed Action of Human Rights in 2009 and 2014. However, until recently, both the Presidential Decree and scheduled accessions of Refugees Convention have not seen the light. Consequently, issues on asylum seekers and refugees have not yet overcome properly.

It belongs to the category of illegal immigrants or under the provisions of Law No. 6 of 2011 on Immigration, as they have not been designated as Refugees by the United Nations High Commissioner for Refugees (UNHCR). The status of refugees is important to obtain because with refugee status then international

²⁸ *Ibid.*, p.57

law will work with all its systems and structures. With no ratification of the 1951 International Convention and 1967 Protocol on the Status of Refugees, the Government of Indonesia can not directly establish the status of immigrants as refugees.

5. Issues on Implementation of Human Rights Protection for Cross-Border Refugees in Indonesia

There are some problem in the implementation of human rights protection, they are: First, the lack fulfillment of basic needs such as shelter, health, and education. Second, the little amount of immigration detention house (*rudenim*) and Third, the long waiting process for permanent placement to the third country. Fourth, there is possibility for repatriation.

In addition to the above problems, Government of Indonesia has not yet signed 1951 Convention on Refugees. It means that government of Indonesia allows two international institutions to deal with the Asylum Seekers, they are:²⁹

- Office of United Nations High Commissioner for Refugees (UNHCR) who supervises the process of determining status as Refugees, placement to the third country, and repatriation.
- International Organisation for Migration (IOM) who is responsible to provide daily assistance, covering foods, accommodation, and healthcare service; Asylum Seekers and Refugees are the responsibility of IOM until their placement to the third country or voluntarily return to their home country. Both UNHCR Indonesia and IOM Indonesia are extremely lack of resource but full of workload.

UNHCR is operated in Indonesia with the approval of the Government of the Republic of Indonesia. Director General of Immigration of Indonesia issued instruction in 2010 (No: IMI-1489.UM.o8.o5) stating that asylum seekers or refugees shall be referred to UNHCR to follow the process of refugee status determination and the status and presence of foreigners holding attestation letter or identity card issued by UNHCR as asylum seekers, refugees or people served by

²⁹ <http://suaka.or.id/public-awareness/id-masalah-perlindungan/> downloaded on 15 April 2016

UNHCR shall be respected. Those without documents in question are threatened to be put into immigration detention house, sanctioned, and/or deported. The registered asylum seekers can apply for refugee status recognition as refugees assessed by UNHCR through process called refugee status determination (RSD). They are interviewed by RSD officer assisted by interpreter in respect of their application for protection. Should the application be rejected, RSD procedure gives one more chance to appeal such negation. Generally, legal aid and advise are not provided, therefore many negative determinations are the consequences of the non-understanding by asylum seekers of processes to be complied with, because of language barrier, fear of speaking to authority, and because of their non-understanding on their rights and obligations for persons applying for refugees. In practice, right to have legal advisor for asylum seekers and refugees is not completely recognized by UNHCR and the government. It jeopardizes RSD process integrity since the asylum seekers do not completely understand their rights and responsibilities, as well processes involving them. A research held by Australian scholars indicates that there are several legal aspects of protection needs for asylum seekers in Indonesia worth considering. One proposed solution is providing independent legal aid since “most of interviewed asylum seekers and refugees apparently have slight understanding on legal substance of their case or on refugee determination status procedure held by UNHCR in Indonesia.”³⁰

For those evidently requiring international protection, UNHCR offers one of these three durable solutions:

1. Placement to third country
2. Voluntarily deportation (if the conflict in his home country is ceased) and
3. Fusion to local society

Fusion to local society is really not an option in Indonesia since it does not permit UNHCR-recognized refugees to stay in this country. In 2013, 898 people have left Indonesia for placement to the third party. This is the highest number of placement from Indonesia in a decade. Until 31 December 2013, 88 refugees

³⁰ Savitri Taylor and Brynna Rafferty-Brown, *Difficult Journeys: Accessing Refugee Protection in Indonesia*, *Monash University Law Review*, Vol. 36, No. 3, 2010, in http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1717242

accepted for placement to the third party are waiting for departure, while other 966 cases are applied by UNHCR for considered placement pending the decision from the concerned country. However, other 2,152 refugees are waiting for application or re-application of their cases by UNHCR to the third parties.

The Asia Pacific Refugee Rights Network (APRRN) has confirmed concern on Immigration Detention in this territory as follows:

- Arbitrary, non-necessary use of detention not meeting international standards
- Abandonment of fundamental rights
- Limitation to asylum procedure and legal aid; and
- Detention for vulnerable group, such as children, non-guarded children, pregnant women, elders, and physically and mentally disabled people.

Immigration detention houses in Indonesia are run by government of Indonesia, but the system does not have sufficient supervisory mechanism, does not transparent or does not have complaint procedure. This leads to common violations on human rights. Several cases on human rights abuse and violations in Indonesian immigration detention houses have been documented. Such documented violations are reports on asylum seekers detained for months not allowed to go to common room or outside the room, asylum seekers detained in prison rather than immigration detention house, blackmailing and physical abuse. Unfortunately, Indonesia does not have any independent supervisory system or sufficient complaint procedure. Treatment is given arbitrarily and discrepantly from one immigration detention house to another, and corruption and bribery practices are found ubiquitously.

Laws of Indonesia regulate that other nationalities may be detained if they entered and stayed in this country paperless. There are no criteria on who shall (or shall not) be detained, and for how long. Some regulations exempt certain groups from immigration detention house, such as children, for treatment by international organizations (like International Organization for Migration or partner institution of UNHCR). UNHCR has reported that until 31 December 2013, there 1,733 people who are detained, 1,173 of them are Asylum Seekers and

636 Refugees. Of those detained, 274 were women and 297 children (87 of the children are not guarded).

The non-ratification of Geneva Convention leads to the following effects:

1. Detention: placing asylum seekers including women and children in Immigration Detention House, supervised by Directorate General of Immigration. Those detained are lack of freedom and threatened to loss their human rights.
2. Deportation or forcible repatriation of asylum seekers to their native country.
3. Loss of right to improve the life standard (having a job or obtaining education).
4. Limited access to basic needs (shelter, foods, and healthcare).
5. Process of Refugee Status Determination is the responsibility of UNHCR.

III. CONCLUSION

Constitution provides guidelines and will in order for the Government of Indonesia to protect internally displaced persons or cross-border refugees. This is as contained in preface as well as Article 28A, Article 28B paragraph (2), Article 28D paragraph (4), Article 28E paragraph (1), Article 28G paragraph (2), Article 28H paragraph (1), and Article 28J paragraph (1). In broad outline, Indonesian Constitution is willing to provide protection for internally displaced persons and cross-border refugees. This is as reflected in the pronouncing of “every person” in several articles of 1945 Constitution in the said subject without differentiating status of nationality or civilian. It is relevant to human right values mutually recognized, i.e. universality of human rights. Therefore, it is necessary to ratify 1951 Convention on Refugees and 1967 Protocol on protection for cross-border refugees as well as establishing legal framework to deal with the issues of refugees and asylum seekers, in order to properly implement the constitution will.

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