

LEGAL IMPLICATIONS OF UNCLEAR REGULATION OF RESPONSIBLE SUBJECTS IN THE FULFILLMENT OF HUMAN RIGHTS

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Abstract. This study aims to provide an in-depth understanding of the legal implications which arise regarding the subject and scope of responsibility for the fulfillment of human rights including the social security rights of Indonesian citizens, as referred to the Constitution as the highest law and to reflect on the purpose of law or constitution (conclusion of law, legal discovery). This type of research is normative juridical, with a philosophical approach, a conceptual approach and a statutory approach. Data analysis was carried out using qualitative techniques with descriptive analysis. The research results show that there is no clarity regarding the legal implications of the subject and the scope of responsibility for the fulfillment of human rights including social security rights. This ambiguity occurs because of the blurring of legal norms regarding human rights in the 1945 Constitution of the Republic of Indonesia, particularly regarding the regulation of the responsibility for the fulfillment of human rights including social security rights, regarding the subjects who must be responsible for and the scope of their responsibilities for implementing social guarantees.

Keywords: Legal implications, Fulfillment of Human Rights, Social Security Rights, The 1945 Constitution.

INTRODUCTION

Indonesia is a state based on law, a state whose governance and social systems are governed by law, this is in line with the provisions of the 1945 Constitution of the Republic of Indonesia (the 1945 Constitution) which clearly formulated “Indonesia is a state law”. Through the 1945 Constitution, the Indonesian State affirms itself as a welfare state, a state founded with the aspiration to realize general welfare and social justice for all Indonesian people. It is stated in the fourth paragraph of the Preamble to the 1945 Constitution.

A country is said to be prosperous if it has an ideal development model, and aims to improve the welfare of its people by providing maximum service to social infrastructure facilities as a whole and comprehensively (Suharto, 2006). Hidayat (2016) stated “In the minds of our founding fathers, the independent state of Indonesia was a welfare state. Not liberal country or country in any other form”. However, social facts show that there are still many Indonesian citizens who do not get services and fulfill their rights to social security, namely the right to health social security. August 1, 2019 the number of Indonesian citizens participating in Health insurance was 223,347,554 (BPJS, 2019). Indonesia’s population has reached 267 million people since 2019, it shows the ontological fact that there is inequality in citizens’ access to social security rights. This social security right is a human right which should be fulfilled. Based on this data, it is estimated that there are 44 million people who do not have access to health social security services from the state.

The 1945 Constitution as the highest law has specifically regulated social security, at least in the provisions of Article 28H paragraph (3) and Article 34 paragraph (2). The inclusion of the right to social security in the constitution shows the seriousness and importance of the state’s responsibility for granting this right to its people. The Constitution only regulates norms which apply in general, does not regulate rigid and technical norms. However, the formulation of norms in the 1945 Constitution does not explicitly place who is the subject who must be responsible for fulfilling social security rights for their people.

Paragraph (4) of Article 28I of the 1945 Constitution provides an explanation of the fulfillment of social security for Indonesian citizens. However, the formulation of Article 28I paragraph (4) creates unclear who is responsible and how big the scope of responsibility is in fulfilling human rights including the right to social security for every Indonesian citizen. The issue of the subject who must be responsible becomes blurred with the formulation of the norm “the responsibility of the state, especially the government”. According to these norms, are other legal subjects, besides the government, responsible for the fulfillment of human rights? Who are they? Such a formulation as “especially the government” provided in the norm also raises questions. How heavy is the responsibility of the government to fulfill the human rights of Indonesian citizens according to the 1945 Constitution?

Based on the description above, there is a blurring of norms in the 1945 Constitution in terms of who are the responsible subjects and the scope of their responsibilities for the fulfillment of human rights including social security rights. The blurring of norms in the 1945 Constitution has in fact led to different legal interpretations by the government and the People’s Representative Council (DPR) in drafting laws as implementing regulations for the provisions on social security rights in the 1945 Constitution. The blurring of norms has also given a rise to new meanings carried out by the Constitutional Court (MK). The

Constitutional Court stated that norms related to social security have been regulated in Article 34 paragraph (2) of the 1945 Constitution. The legal norm is an “open legal policy”, meaning that it leaves it to the legislators to regulate and make policies which are free.

It is based, affirming the meaning of the norms of the 1945 Constitution is important to clarify social security arrangements in accordance with the ideals of the nation’s founders who have liberated the nation and formulated them in the 1945 Constitution as a whole. Theoretically, the concept of a welfare state is a state which places the welfare of its citizens in the hands of the government (the government is fully responsible for meeting the basic, social and economic needs of every citizen to achieve a decent standard of living). Juridically, the 1945 Constitution is the highest constitution or law in the legal system in Indonesia, so all rules in the form of laws and other implementing regulations must be in accordance with the intent of the articles of the 1945 Constitution. Based on the research background, this study aims to determine legal implications arising from the unclear regulation of responsible subjects and the scope of their responsibilities for the fulfillment of human rights, including the social security rights of Indonesian citizens.

RESEARCH METHOD

This research is a normative juridical research. The main research method is a legal research method which bases its analysis on applicable laws and regulations which are relevant to the research topic. Based on its type, the legal materials in this study consist of primary legal materials (consisting of the 1945 Constitution of the Republic of Indonesia, the RIS Constitution and the UUDS, along with their discussion texts, as well as the Rulings of the Constitutional Court of the Republic of Indonesia), secondary legal materials (consisting of international instruments resulting from congresses of world bodies (UN) and ILO (International Labor Organization) which contain international policies in the field of Social Security and Human Rights; legal doctrines, concepts, theories and expert opinions related to constitutional law and Social Security contained in written form (books, texts, legal journals and papers or views of legal experts published in the mass media as well as direct interviews to deepen analysis), and tertiary legal materials, consisting of the Big Indonesian Dictionary and the Legal Dictionary which provides definitions of etymology (word or grammatical meaning) for the terms - certain terms especially those that related to the title variable component. Data collection techniques were carried out through literature and internet searching. Data analysis was carried out using qualitative methods which were presented systematically by analyzing descriptive analysis (Marzuki, 2005).

RESULTS AND DISCUSSION

A. There is No Clear Legal Subject who is Fully Responsible for the Fulfillment of Human Rights for Everyone

Three main elements characterize the concept of human rights (HAM), namely human integrity, freedom and equality. Each of these elements provides its own definition related to the conceptualization of human rights and the understanding of human rights itself. In the relationship between individuals and the state (vertical context) and between individuals (horizontal context), humanization occurs when a person gets de facto and de jure

recognition of his rights as a human being. Over time the concept of human rights changed both through evolutionary and revolutionary processes (Huijbers, 1990). The concept of human rights changes from a normative force into a process of social and political change in the whole order of human life. So that the meaning and understanding of human rights in terms of substance needs to be reviewed and returned to the main concept, namely the basic concept of why human rights regulations must be regulated, what human rights are, and why there must be human rights. The emergence of human rights with the reason that human rights are very fundamental and very important for individual welfare, and human rights need to exist with the aim that individuals can develop according to their talents, aspirations and dignity as human beings regardless of differences that cause discrimination based on nation, race, religion and gender (United Nation, 1998).

Human rights are implemented by the state and each individual in accordance with their respective portions and roles. Human rights contain authority or freedom, individual responsibility or obligation. This is a principle of balance related to the role of the individual in the context of human rights. Individuals as human rights subjects are obligated and responsible for mutual respect for the human rights of other individuals, as other individuals must also respect their human rights. If human rights violations occur between individuals, individuals must be held accountable before the law for these actions. It is based, the government's role is very important and central in terms of the implementation of human rights. The state, which is an instrument of human rights, has a full obligation to implement the concept of human rights. The state must guarantee respect for human rights, besides that, human rights must also receive protection from the state, and the state is obliged to promote and fulfill the human rights of all its citizens. The action of implementing human rights by the state is carried out in 4 ways including respecting, protecting, advancing and fulfilling.

Based on international human rights instruments regarding the obligations of the state for the implementation of human rights, there are differences between civil and political rights, and economic, social and cultural rights. Civil and political rights: the steps required by the International Covenant on Civil and Political Rights (ICCPR) for a country are to take immediately the necessary steps in the field of legislation, for example by strengthening the Law regulating human rights. Emphasizing in this regard is the effort to add regulations on human rights or change existing laws in order to respect and guarantee the implementation of civil and political rights. Economic, social and cultural rights: the State is obliged by the International Covenant on Economic, Social and Cultural Rights (ICESCR) to take steps including maximizing the use of its resources. It is done with the aim of realizing economic, social rights and progressive culture. The implementation of the realization of political and civil rights does not require large economic resources. It does not mean that the state will realize human rights in the economic, social and cultural fields when the country has reached a certain level of economic growth. In this case, it can be concluded that regardless of the level of economic achievement, the state must immediately realize human rights in this field (economic, social, cultural).

An example of the implementation of human rights in the economic, social and cultural fields is that the state immediately reforms laws and regulations which are discriminatory in

nature or prevent people from enjoying their rights, or laws and regulations which “facilitate” violations of rights by the state. Steps like these do not have to wait until the country is truly prosperous. When a country ratifies an international human rights instrument, it can directly incorporate the provisions of that instrument into its domestic legislation through other steps. The implementation of human rights can be carried out properly if there are good laws, an independent judiciary and established democratic institutions. In addition, education and dissemination of human rights values are also very important efforts in the framework of human rights implementation. Thus it can be seen that the Government is only obliged in the main priority scale, because there are many subjects related to responsibility for the fulfillment of human rights (distribution of obligations), including those related to social security rights.

Then who are other legal subjects that can be legally held accountable? If you pay attention to the formulation of norms in Article 28I paragraph (4) of the 1945 Constitution, the phrase: “... the responsibility of the state, especially the government”. It shows that there are other subjects in the state besides the government, which have an obligation to fulfill human rights in Indonesia. The ambiguity of norms regarding other subjects who are given responsibility for the fulfillment of human rights besides the government, makes the responsibility for the fulfillment of human rights unclear, and it is not clear who can be held responsible, apart from and after the government.

B. There is No Clear Limit of Responsibility for Every Legal Subject in the Fulfillment of Human Rights for the Community

As a country which has a bad record of human rights violations in the past, the implementation of the obligations of the Indonesian government in implementing the fulfillment and protection of human rights, of course, cause a concern, not only by its people but also by the international community. History records that human rights violations are related to the weakness of the law enforcement system and the government’s political will in implementing human rights norms. The fulfillment and protection of human rights in Indonesia must be placed within the framework of the rule of law in order to gain a legal, constitutional and institutional base. In order to measure the performance of the government with regard to the obligation to implement the fulfillment and protection of human rights, we need to define what the government needs to do to implement the rights and then compare it with the commitment and capacity to do so. This commitment and capacity can be seen from the efforts made by the government and their achievements. Because of that we are required to be able to formulate indicators which can assess the level of willingness and ability of the government in fulfilling its obligations. The government must also move away from a tendency to play only at the formal legal level or stop at normative or political aspects only towards real or substantial commitments which are realized through steps such as: “The harmonization of regulations and laws is carried out by revising or revoking regulations or laws which have the potential to violate human rights and enact laws which support the realization of rights. There is a budget allocation for the implementation of human rights. The allocation of the budget for the implementation of human rights shows that the government gives priority to the implementation of human rights. Particularly with

regard to the fulfillment of social and social economic rights, it is necessary to have concrete steps that can be accessed and enjoyed by the community, especially marginalized groups and other things" (Nasution, 2003).

The implementation of fulfilling and protecting human rights can now also be used as a basis for the legitimacy of government power. Thus, the government continues to be encouraged to carry out its obligations to guarantee people's rights to obtain welfare through joint efforts called "development". In this concept, development is no longer limited to its definition as a program (especially as an ideology) of the government, but rather as a part of a democratic national activity to fight for freedom from wants. Thus, everything depends on the provisions of the sectoral law, the subjects referred to when formulating the norms for regulating the responsibility for fulfilling human rights in the 1945 Constitution of the Republic of Indonesia and how the provisions of the sectoral law are regulated, and what the forms of their responsibilities and the limits of their responsibilities for the fulfillment of rights related to social security (Soetandyo, 2007).

Then what about the limits of authority and responsibility of subjects who are given the obligation to fulfill human rights, including the limits of government authority and responsibility for the fulfillment of human rights as meant in Article 28I paragraph (4) of the 1945 Constitution. The same thing also becomes a question of when the limits of responsibility move from the government as the main subject to other subjects in fulfilling human rights. This problem arises as an implication of the ambiguity of subject norms and their authorities and responsibilities for the fulfillment of human rights based on the provisions of the 1945 Constitution norms.

C. Ambiguity of Public Claim Rights on Legal Subjects Who Are Fully Responsible the Fulfillment of Human Rights in Demanding Fulfillment of Obligations related to Human Rights

Citizens' lawsuits against state administrators have never actually been recognized in the Civil Law legal system as implemented in Indonesia. Citizen Lawsuit itself was born in countries that adhere to the Common Law legal system, for example in the United States, India and Australia. And in its history Citizen Lawsuit was first filed regarding environmental issues. However, in its development, Citizen Lawsuit is no longer only filed in environmental cases, but in all areas where the state is deemed to have committed negligence in fulfilling the rights of its citizens" (Fadjar, 2018).

Characteristics of Citizen Lawsuit: "a) Citizen Lawsuit is the access of individuals or citizens to submit applications in court for funds on behalf of the interests of all citizens or the public interest; b) The purpose of the Citizen Lawsuit is to protect citizens from possible losses as a result of the actions or omissions of the state or state authorities; c) Citizen Lawsuit gives power to citizens to sue the state and government institutions which violate laws or fail to fulfill their obligations to implement laws; d) Individual citizens who become applicants in Citizen Lawsuit, lawsuits do not need to prove the existence of real or tangible direct losses; In general, the court does not accept compensation demands if submitted in a Citizen Lawsuit application" (Mahmoedin, 2010).

In principle, Citizen Lawsuit notifications must be made in written form and sent, both to the alleged violators and to agencies responsible for implementing the provisions of the

law which have been violated, as well as to state agencies responsible for enforcing the law. Notification in the Citizen Lawsuit must contain: “a) Information about the alleged violation by the relevant institution based on which the applicant intends to sue the defendant; b) Type of violation/object of lawsuit” (Hermawanto, 2008). Normatively, there are no Indonesian regulations governing Citizen Lawsuits. However, with many Citizen Lawsuit cases which have existed, we can analyze their main features. The practice of Citizen Lawsuits in Indonesia has been submitted to the General Court (under the auspices of the Supreme Court). There are two main reasons why a Citizen Lawsuit is filed at the General Court. First, judicial power when the Citizen Lawsuit first appeared in Indonesia, was only in the Supreme Court. So that the Citizen Lawsuit, like other lawsuits, is filed at the General Court (District Court). Second, there is no regulation governing Citizen Lawsuit in Indonesia. So based on the principle “a judge may not reject a case on the grounds that it has no legal basis”, then this is the reason behind the Citizen Lawsuit in Indonesia being submitted to the General Court. In substance, the submission of a Citizen Lawsuit to the General Court is inappropriate (Gumayra, 2006). Basically Citizen Lawsuit is a legal effort from citizens to dispute the responsibility of state administrators for negligence in fulfilling citizens’ rights. The rights of citizens in a country based on law (rule of law), such as Indonesia, have been regulated in the 1945 Constitution.

Human rights are also regulated in the 1945 Constitution. So the rights of citizens are usually referred to as “Constitutional Rights of Citizens”. Talking about the constitutional rights of citizens, lets intersect with an institution which functions as a constitutional review, namely the Constitutional Court. The Constitutional Court has the authority to examine disputes between citizens and state administrators on the grounds that state administrators have been negligent in fulfilling citizens’ rights. In other words, the Constitutional Court has the authority to adjudicate Citizen Lawsuit cases. Indonesia as a democratic country and based on law as Article 1 Paragraph (2) and (3) of the 1945 Constitution, which already has a Constitutional Court with a constitutional review function. Implementing a Citizen Lawsuit with the authority in the Constitutional Court is not impossible. And the government must have the courage to make regulations regarding Citizen Lawsuit in Indonesia under the authority of the Constitutional Court. As we know in Indonesia there are no statutory regulations which specifically regulate Citizen Lawsuits. So far, Citizen Lawsuit practices have only based on Decision Number: 28/Pdt.G/2003/PN. JKT.PST which was decided on December 8, 2003 between J. Sandyawan Sumarji and friends (a total of 53 people) as the Petitioner/Plaintiff against the State of the Republic of Indonesia c.q Head of State, who at that time was the President of the Republic of Indonesia Megawati Soekarno Putri as the Defendant.

This case is commonly referred to as the “Citizen Lawsuit Nunukan”. This lawsuit was granted by the Panel of Judges, Central Jakarta District Court with the contents of the Decision as follows: “a) Law Number 14 of 1970 concerning Basic Provisions of Judicial Power jo. Law Number 35 of 1999, Article 14 Paragraph (1): The court may not refuse to examine and try a case submitted on the grounds that it is unclear or unclear, but is obliged to examine and try it; b) Article 27 of Law Number 14 of 1970 concerning Basic Provisions of Judicial Power: Judges as enforcers of law and justice are obliged to explore, follow and understand the values that live in society; c) The petition filed is a citizen lawsuit commonly

known as *actio popularis*, namely a lawsuit filing procedure that involves the public interest on a representative basis; d) Every citizen without exception has the right to defend the public interest. Thus, every citizen on behalf of the public interest (on behalf of the public interest) can sue the state or government or anyone who commits an unlawful act, which is clearly detrimental to the public interest and broad welfare (*pro bono publico*). This is in line with the human rights principle regarding access to justice if the state is silent or does not act in the interests of its citizens (access to justice)".

Based on the decision above, it shows that there is a legal void related to Citizen Lawsuit in Indonesia. In addition when deciding cases, judges resort to the Judicial Powers Act, which establishes that "judges may not refuse cases". Therefore, it is necessary to establish/compile regulations governing Citizen Lawsuits in Indonesia. In the Citizen Lawsuit the main point is the rights of citizens who are neglected by state administrators. Of the several Citizen Lawsuit cases which have existed, most of them are concerned with violations of human rights. The main problem with this Citizen Lawsuit is that there is no legal basis and the authority to try them. Is it the Supreme Court or the Constitutional Court? For now, the Citizen Lawsuit case is still being carried out/accepted by the General Court with a legal ratio as Decision Number: 28/Pdt.G/2003/PN. JKT.PST which was terminated on December 8, 2003, namely that judges may not reject cases. Even though at this time, as Article 24 Paragraph (2) of the 1945 Constitution notes that "Judgmental power is exercised by a Supreme Court and judicial bodies under it in the general court environment, religious court environment, military court environment, state administrative court environment and by Constitutional court" (Mahmodin, 2010).

The point is that judicial power for now is not only in the Supreme Court, but also in the Constitutional Court. Then there is the potential for Citizen Lawsuit cases to be registered/disputed at the Constitutional Court. Because constitutional judges may not reject a Citizen Lawsuit case on the grounds that there is no legal source. Article 24C of the 1945 Constitution provides limitations on the powers of the Constitutional Court. However, based on Article 1 Paragraph (2) and (3) of the 1945 Constitution, in accordance with the principles of constitutionalism and respect for, protection and fulfillment of human rights, it is explained that the important markers of a democratic state and a rule of law are: "First, the constitution (UUD 1945), as the highest law, must be properly implemented in the administration of state life; Second, human rights are recognized as constitutional rights of citizens, which means that they have become part of the provisions of the constitution, so that all branches of the Indonesian state power are bound to obey them" (Hermawanto, 2008).

Citizen Lawsuit is a lawsuit filed with the hope of fulfilling human rights (because it has been included in the 1945 Constitution, referred to as Citizens' Constitutional Rights). While the Constitutional Court was formed as a form of guardian of the Constitution (UUD 1945), the Constitutional Court is required to guarantee that the 1945 Constitution is truly embodied and adhered to in practice, including guaranteeing that constitutional rights for citizens are truly respected, protected and fulfilled in the practice of state administration. The position of the Constitutional Court is to be able to hear Citizen Lawsuit cases by presenting every citizen as the plaintiff or applicant and the government as the defendant/respondent, with a request for the fulfillment of citizens' constitutional rights (in which

there are human rights). For example, the right to education, health, to religion and belief. With the position of the Constitutional Court, actively adjudicating Citizen Lawsuit cases, the function of the Constitutional Court as an institution guarding the Constitution will be further felt by citizens. The Constitutional Court is not only trapped in one authority, namely examining laws against the 1945 Constitution. One of the reasons laws are being tested against the 1945 Constitution is that there are constitutional disadvantages for citizens contained in the relevant law. It shows that legislators consider that violations of citizens' constitutional rights are due to statutory norms alone. For example, the APBN law does not provide for a 20 percent (%) budget allocation for education, it is contrary to the provisions stipulated in Article 31 Paragraph (4) of the 1945 Constitution" (Hermawanto, 2008).

In fact, violations of citizens' constitutional rights are not only a matter of norms in laws. However, more dangerous are the direct violations committed by the government either by action or by omission. The position of the Constitutional Court is to hear citizens' lawsuits against the state/government on the grounds that citizens' constitutional rights have been violated. By itself this is a new offer for the Constitutional Court to be able to provide protection for human rights and the constitutional rights of citizens by using the Citizen Lawsuit mechanism. Based on the discussion above, it can be concluded that a citizen lawsuit is a mechanism for fulfilling human rights and constitutional rights of citizens and it is possible for the Republican Constitutional Court to examine, hear and decide on citizen lawsuits using a basic law (Judicial Power Act). However, the state should revise the Constitutional Court Law and further efforts are necessary to make the fifth amendment to the provisions of the 1945 Constitution.

As a follow-up to the unclear subject, authority and responsibility for fulfilling human rights, it makes the right to sue everyone who feels their human rights have not been fulfilled or their human rights have been violated lose their right to sue in court (justiciability). It happens because everyone who will sue in court It must be clear, who will be sued, what legal violations have been committed and responsibilities that have been violated or not carried out. And because the subject and its responsibilities are not clearly regulated in the 1945 Constitution or in the Sectoral Law, this subject cannot be sued in court and asked to make compensation or rehabilitation.

CONCLUSION

There is a lack of clarity regarding the arrangement of responsible subjects and the scope of their responsibilities for the fulfillment of human rights, including social security rights in the 1945 Constitution. It happens because there is a legal ambiguity about who are the subjects who must be responsible and the scope of their responsibilities in the implementation of social security according to the 1945 Constitution.

The lack of clarity regarding the regulation of responsible subjects and the scope of their responsibilities for the fulfillment of human rights, including the social security rights of Indonesian citizens in the 1945 Constitution, has resulted in the absence of legal protection for Indonesian people, especially in relation to human rights. This is due to the absence of clear rules governing the regulation of the responsibility for the fulfillment of human rights including social security rights, namely regarding which subjects must be responsible for

and the scope of their responsibilities for implementing social security according to the 1945 Constitution.

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