State Sovereignty And Refugee Protection

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Abstract

State sovereignty is often used by some countries as a shield to refuse refugee arrivals and provide protection to them. This is felt detrimental to refugees, even though the original nature of the absolute and exclusive sovereignty of the state can no longer be maintained. In this connection, this paper would like to explain the ideal attitude that countries need to have and take towards refugees so that the international protection goals for refugees can be achieved. This paper is part of the results of the research (dissertation) of the writer who uses the normative legal research method with a conceptual approach.

Kata Kunci:
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Abstrak

Kedaulatan negara sering digunakan oleh beberapa negara sebagai tameng untuk menolak kedatangan pengungsi dan memberikan perlindungan kepada mereka. Hal ini dirasakan merugikan para pengungsi, padahal sifat asli kedaulatan negara yang mutlak dan eksklusif sudah tidak dapat dipertahankan lagi. Sehubungan dengan itu, tulisan ini ingin menjelaskan sikap ideal yang harus dimiliki dan diambil negara terhadap pengungsi agar tujuan perlindungan internasional bagi pengungsi dapat tercapai. Tulisan ini merupakan bagian dari hasil penelitian (disertasi) penulis yang menggunakan metode penelitian hukum normatif dengan pendekatan konseptual.

PRELIMINARY

Jean Bodin as the pioneer of the teaching of sovereignty defines sovereignty as "supreme power over citizens and subjects, unrestrained by law".[1] For Bodin, the laws and regulations in a country cannot limit the concept of sovereignty as the highest authority in the country itself.[2] This is because sovereignty is the source of supreme law. This sovereignty is eternal, absolute, and undivided.[3]

Absolute and exclusive state sovereignty has two different sides. The first side certainly brings benefits for the country itself to determine what is useful for the welfare of its people. But on the other hand, state sovereignty will have a bad impact when associated with violations of obligations under international law in a country, and that country uses 'sovereignty' as an argument to justify its actions. Especially in international law recognizing and respecting the authority of each country to

[1] S. C. Dash, "Is there Demise of Sovereignty Today", *The Indian Journal of Political Science*, Volume 25, No. ¾, July-Desember 1964, p. 5.
[2] Usep Ranawijaya, *Hukum Tata Negara Indonesia*, Ghalia Indonesia, Jakarta, 1983, p. 182.
[3] J. S. McClelland, *A History of Western Political Thought*, Routledge, London, 1996, p. 283.

act on any event that occurs in the territory of his country, and the prohibition of other countries to intervene. Thus, a country cannot be blamed when using the reasons for state sovereignty.

This can be seen clearly in the practice of refugee protection carried out by countries, namely by implementing or complying with the non-refoulement provisions. It is not uncommon to find several countries such as Australia and America that do not implement the provisions of non-refoulement on the grounds of state sovereignty. These countries take refuge behind the concept of state sovereignty to reject the arrival of refugees and provide protection to them. Departing from these phenomena, scholars often say that sovereignty is a barrier to the growth of the international community and at the same time for the development of International Law that governs the life of the international community.[4]

This paper will discuss the ideal practices of the countries in the world in using the power granted by the state sovereignty to treat refugees. This ideal attitude needs to be explained and adopted so that the objectives of international protection of refugees can be achieved.

RESEARCH METHODS

This research is a normative legal research. This research studies the concept of law as a norm or rule that applies in a society and becomes a reference for everyone's behavior.[5] The conceptual approach used in this research. Researcher solve research problems by exploring as well as studying the views of experts and doctrines that are developing in Law Science[6], especially International Law.

DISCUSSION

John Austin stated very clearly about the theory of legal or Monetary sovereignty in his famous book "Province of Jurisprudence Determined" in 1832. Although he was very impressed with Hobbes and Bentham's views, his theory of sovereignty was quite different. This he poured in his book entitled "Lectures on Jurisprudence", where he described the difference between law and morality. As for Austin's statement regarding sovereignty is as follows:

> *If a determinate human superior, not in the habit of obedience to a like superior, receives habitual obedience from the bulk of given society that determinate human superior is the sovereign and that society (including the superior) is a society political and independent. Every positive law or every law simple or strictly so called, is set directly or circuitously by a sovereign person or body to a member or members of the independent political society wherein that person or body is sovereign or supreme.*[7]

Based on his views above can be taken several important points regarding the theory of Monistic sovereignty quoted from Political Science[8] as follows:

a. Sovereignty always lies with the determinate person,[9] not in the public will or voter or God;
b. Sovereignty is absolute, inseparable and unlimited both internally and externally;
c. A society without sovereignty cannot be called a state;
d. The determine person is the only lawmaker. The order is law, and without it, the state cannot have law;
e. The determine person does not have a rival who has an equal position with him, and he also does not obey anyone's orders;
f. The determinate person's orders are usually obeyed, and the authority is immune to orders from other authorities (outside the country). This is a sovereign force within the scope of the state;[10]

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[4] Naeem Inayatullah and David L. Blaney, "Realizing Sovereignty", *Review of International Studies*, Volume 21, No. 1, 1995, p. 3.
[5] Abdulkadir Muhammad, *Hukum dan Penelitian Hukum*, PT Citra Aditya Bakti, Bandung, 2004, hlm. 52.
[6] Peter Mahmud Marzuki, *Penelitian Hukum*, Kencana, Jakarta, 2007, hlm. 94-95.
[7] David G. Ritchie, "On the Concept of Sovereignty", *The Annals of the American Academy of Political and Social Science*, Volume 1, January 1891, p. 385.
[8] Pooja, "8 Criticism Faced by Austin's Theory of Sovereignty", http://www.politicalsciencenotes.com/theories/8-criticism-faced-by-austins-theory-of-sovereignty/252, 7 September 2019.
[9] John Dewey, "Austin's Theory of Sovereignty", *Political Science Quartely*, Volume 9, No. 1, March 1894, p. 41.
[10] Debaditya Das, "Concept of Sovereignty: Monism, Pluralism and New Development in the Context of

g. The superior strength possessed by the determinate person is sovereignty.

Authority as mentioned above is unlimited. In this theory, Austin asserts that the moral character of the law does not apply, but the priority is its effectiveness. The law is the ruler's order that contains certain obligations and is supported by sanctions. John Austin argues that "sovereignty rests in a determinate person or body of persons, and law emanates from this body."[11]

1. Pluralist Theory of Sovereignty

Pluralist sovereignty theory emerged as a reaction to the theory of Monistic sovereignty. Pluralists are not like Monists. Pluralists believe that sovereignty is not the exclusive prerogative of the state, but is owned by various groups and associations in society.[12] Pluralists point out that the absolute nature of state sovereignty cannot be maintained because the countries in the modern world and the internal complexity of the developed industrial countries depend on one another. This makes the countries in the world no longer maintain absolute state sovereignty.[13]

According to them, sovereignty lies not only with the state but also other institutions, such as social, political, cultural and economic institutions. In fact, these institutions were formed before the country existed. Furthermore, Pluralists criticize Austin's view as a pioneer of Monistic theory of sovereignty as follows:

a. That Austin theory is inconsistent with the idea of popular sovereignty. Democracy is based on the principle that sovereignty is in the hands of the people, but according to Austin, the ruler is the determinate person who has the highest power, so that other people who are not the rulers of his position are under him.[14]
b. That the notion of the Law described by Austin is also unacceptable. According to him, law is an order given by a superior to his subordinates, or a person who has a superior position and power to those who have an inferior position and strength. In fact, not all laws come from the ruler. This can be found in customary law that grows through customs in society. Therefore, according to Duguit, the law is binding not because it was made by the state but because of the need to achieve social solidarity.[15] In line with that, Laski found that it was the individual's conscience that became the true source of law.[16]
c. The idea that sovereignty is indivisible was also rejected. In every political society there is a division of functions. Therefore, Pluralists challenge the claim of the state to enjoy supremacy on the grounds that society consists of several associations, and the state is one example of such associations. Thus, the state does not have the authority to exercise sovereignty according to its will, and sovereignty does not only belong to the state. A pluralistic state is a simple state in which there is no single source of authority.[17]

A. Research Results

1. State Sovereignty and Human Rights

State sovereignty is reflected or implemented through the exercise of jurisdiction by the state within the borders of its country.[18] As Judge Marshall put it on *Schoone Exchange v. M'Faddon* which states that the jurisdiction of a country within its boundaries is exclusive and absolute. For more details, Marshall's view can be seen as follows:

> *The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose*

Globalisation", *International Journal of Applied Social Science,* Volume 5, No. 12, Desember 2018, p. 2217.

[11] *Ibid.*

[12] Ellen Deborah Ellis, "The Pluralistic State", *The American Political Science Review,* Volume 14, No. 3, August 1920, p. 399.

[13] Debaditya Das, *Loc. Cit.*

[14] Pradeep Kumar K, and G. Sadanandan, "Political Science (Part-I)", in *Complementary Course,* University of Calicut School of Distance Education, p. 27.

[15] W. Y. Elliot, "The Metaphysics of Duguit's Pragmatic Conception of Law", *Political Science Quartely,* Volume 37, No. 4, December 1992, p. 643-645.

[16] Harold J. Laski, *Studies in the Problem of Sovereignty,* Batoche Books, Kitchener, 1999, p. 6-19.

[17] Pradeep Kumar K, and G. Sadanandan, *Loc. Cit.*

[18] Yudha Bhakti Ardhiwisastra, *Hukum Internasional Bunga Rampai,* Alumni, Bandung, 2003, p. 98.

such restriction. All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.[19]

The application of jurisdiction which is a symbol of the state sovereignty was also stated by Judge Mac Millan in *the Cristina case* in 1938 which stated that:

It is an essential attribute of sovereignty [...] *as of all sovereign independent states, that it just process jurisdiction over all persons and things, within its territorial limits and in all causes, civil and criminal arising within this limits.*[20]

The jurisdiction exercised by a country is not limited by international law, except for restrictions that have been proven to be a principle of international law. However, if there is a country that raises an accusation against another country that the country in exercising its jurisdiction is contrary to international law, then the first country must prove this.[21] This is in accordance with the principle of law known in legal theory which reads *"actori in cumbit probatio / actori incumbit onus probandi"*[22]. This means that who is demanding his rights, he is obliged to prove / who accuses him is obliged to prove.[23] There is only one practical limitation for jurisdictions that are too broad, namely that states will not exercise jurisdiction over persons and objects that have nothing to do with the state.[24]

When state sovereignty is seen as something absolute, then arbitrary action by a state to disobey international obligations cannot be avoided. Due to this problem, the state's sovereignty should be limited. This is consistent with a recommendation put forward by a commission in the United States during World War II in order to study the formation of a peace organization which argued that the unlimited exercise of state sovereignty would lead the country to arrogance. The state will demand to implement its own conception in solving its problems without considering the impact that it could have on other countries.[25]

As previously explained, International Law recognizes the principle of non-intervention. This principle can be seen in a number of international rules, including the Montevideo Convention 1933 and the UN Charter. In the Montevideo Convention 1933, the prohibition on intervention is regulated in Article 8, namely no state has the right to intervene in the internal or external affairs of another. Meanwhile, the UN Charter is regulated in Article 2 paragraph (7) which confirms the following:

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but the application of enforcement measures under Chapter VII.

These two rules are often used by certain countries to legalize their actions. Whereas there are exceptions to the provisions above. For example, the principle of non-intervention contained in Article 2 paragraph (7) of the UN Charter does not limit the right granted to the Security Council to take actions in accordance with Chapter VII of the UN Charter, so that the sovereignty of countries that uphold the principle of non-intervention has an exception.

State sovereignty as one of the basic norms in the International Law system has changed. There are at least three phenomena that can illustrate that state sovereignty currently has a narrower meaning when compared to the eighteenth and nineteenth centuries as expressed by Riyanto in his dissertation.[26] The phenomena referred to are the limitations imposed by international agreements that are made and bind a country, the emergence of international and supranational organizations, and the respect and enforcement of human rights.

The third phenomenon needs to be given special emphasis because it is closely related to the conditions of refugees. As it is known that a person becomes a refugee and his departure to another

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[19] Joseph H. Beale, *Loc., Cit.*. See also L. C. Green, *International Law Through The Cases,* Carswell, Toronto, 1978, p. 237.

[20] Herbert W. Briggs, *The Law of Nations: Cases, Documents and Notes,* Appleton Century Inc., New York, 1955, p. 496-497. See also R. C. Hingorani, *Modern International Law,* Oceana Publications Inc., London, 1984, p. 121.

[21] Yudha Bhakti Ardhiwisastra, *Op. Cit.,* p. 99.

[22] See Eddy O. S. Hiariej, *Teori dan Hukum Pembuktian,* Erlangga, Jakarta, 2012, p. 43.

[23] Hariman Satria, "Ke Arah Pergeseran Beban Pembuktian", *Integritas,* Volume 3, No. 1, March 2017, p. 90.

[24] Yudha Bhakti Ardhiwisastra, *Op. Cit.,* p. 99.

[25] J. L. Brierly, *The Law of Nations,* Clarendon Press, London, 1954, p. 48.

[26] Sigit Riyanto, "Kajian Hukum Internasional tentang Pengaruh Kedaulatan Negara terhadap Perlindungan Pengungsi Internal", *Dissertation,* Faculty of Law, Gadjah Mada University, 2009.

country is due to persecution in his home country. In this regard, Article 14 paragraph (1) of the Universal Declaration of Human Rights (UDHR) states that everyone has the right to seek and enjoy asylum in another country to protect himself from persecution. It also stipulates that no one should be arrested, detained or disposed of arbitrarily (Article 9 UDHR). All these things are guarantees of protection of human rights. Countries in the world are obliged to provide and guarantee such protection, because the livelihood, freedom and safety of individuals are at stake. Thus, the refugee problem is considered to be part of a phenomenon that contributes to the relative enforcement of state sovereignty.

The existence of the phenomenon as mentioned above strengthens the viewpoint of the Pluralists that countries in the world can no longer maintain absolute state sovereignty. Power from state sovereignty has been divided. So the sovereignty of this country should be used to provide protection to refugees, not the other way around.

2. Ideal Practices of a State in the Exercise of Sovereignty to Refugees

Refugees should no longer feel adversity and other obstacles when they come to other countries to seek refuge. If this continues to be experienced by them, it will be the same when the refugees are in the territory of their country of origin. Refugees leave their home countries because of persecution and other threats.

Refugees are protected by the country they visit is the ultimate goal of international protection according to International Law. The principle of non-refoulement is used as a guarantee for refugees to achieve this goal. With this principle, refugees will be accepted with open arms into the territory of their destination country. Nevertheless, it cannot be denied that countries tend to act on their free will, which does not heed the principle of non-refoulement. This will sometimes cannot be controlled because these countries claim to have the sovereignty of their respective countries. The reasons behind the use of state sovereignty, such as national security or national order are quite plausible, even though we know that refugees will be disadvantaged in this regard.

Apart from the reasons stated above, countries that refuse the arrival of refugees also claim that they have no legal obligation to comply with the principle of non-refoulement as set out in the 1951 Geneva Convention. These countries are not state parties. As a consequence, the International Treaty *in casu* the Geneva Conventions of 1951 could not bind them in accordance with the legal principle of *pacta tertiis nec nocent nec prosunt*. This certainly adds to the polemic of the refugee problem.

With the conditions as mentioned above or the existence of different views or practices carried out by countries in the practice of international relations, it shows that all of this is a progressive development in International Law. This means that there are new things that appear outside those regulated in International Law Instruments, and the fact that they are practiced in the international community. For example, ideally, protection of refugees through the implementation of the principle of non-refoulement must be obeyed by state parties in the Geneva Convention 1951. This is a logical consequence of the principle of pacta sunt servanda. But in reality, what happens is that non-state parties can also implement the principle of non-refoulement without being bound by the 1951 Geneva Convention. There are certain considerations or factors that make this possible, and it is practiced in the international community. The factors referred to are for example humanitarian factors and values that have developed in the life of the people of a country, such as the values of Pancasila that are owned by Indonesia. In essence, what is practiced in the international community is not always the things that have been regulated in the 1951 Geneva Convention.

The explanation above is the main point of progressive development in International Law. This certainly has a certain impact on the development of international law. On the one hand, this adds to the treasure trove of knowledge, especially the Refugee Law. This is what makes the Refugee Law more mature in its development to answer any problems that arise in handling refugees. On the other hand, this is a challenge in itself for countries in the world in determining ideal attitudes or practices aimed at refugees.

With regard to this ideal practices and in view of the objectives of international protection, some of the things that countries can do are as follows:

a. First, States Parties to the Geneva Conventions continue to welcome refugees in order to provide international protection. It should be recalled that so far the main problem faced by refugees is the resistance by countries that do not allow refugees to enter the territory of their country. In this regard, I propose that the state needs to change its focus in accepting refugees. Countries in the world need to open doors for refugees to their territory. The opening of this door is not due

to non-refoulement recognized in Article 33 of the 1951 Geneva Convention, but based on values or basic principles that are universally applicable in the international community. So, countries need to focus on something that is most essential, the basics. The focus should not be on international agreements anymore, because if that is the case then the debate will again be focused on state parties and non-state parties. By changing the focus of countries on something that is essential and fundamental to why international protection needs to be given to refugees, the polemic of refugees will surely gradually diminish.

b. Second, if the States Parties to the Geneva Convention 1951 have certain considerations such as security and public order which requires them not to accept refugees, then it needs to be preceded by a legal mechanism. This mechanism serves to assess the urgency of accepting refugees, and assess whether or not refugees are dangerous for the country's security and public order. This mechanism is a form of certainty and accountability for the attitude it takes.
c. Third, non-state parties to the 1951 Geneva Convention can take advantage of the cooperation mechanism with UNHCR as the organization in charge of refugees.
d. Fourth, countries in the world need to carry out burden sharing or transfer of knowledge in dealing with refugee problems. This can be done through cooperation mechanisms, be it bilateral, regional or multilateral. Thus, the state no longer thinks that the problem of refugees in its country is a burden on its own, but a collective burden.

CONCLUSION

What I want to convey is that state sovereignty needs to be aligned with the principle of non-refoulement to achieve the goal of international protection for refugees. Sovereignty is no longer a barrier for refugees to obtain international protection. State sovereignty is used not to oppose the principle of non-refoulement but to support it more. The two of them must go hand in hand, and complement each other. If this can be done, it will become good practice which is not only emulated for the countries participating in the 1951 Geneva Convention but for all countries that are not yet bound by the instrument.

BIBLIOGRAPHY

Ardhiwisastra, 2003, Yudha Bhakti, *Hukum Internasional Bunga Rampai,* Bandung: Alumni.

Brierly, J. L, 1954, *The Law of Nations,* London: Clarendon Press.

Briggs, Herbert W, 1955, *The Law of Nations: Cases, Documents and Notes,* New York: Appleton Century Inc.

Das, Debaditya, "Concept of Sovereignty: Monism, Pluralism and New Development in the Context of Globalisation", *International Journal of Applied Social Science,* Volume 5, No. 12, December 2018.

Dash, S. C, "Is there Demise of Sovereignty Today", *The Indian Journal of Political Science,* Volume 25, No. ¾, July-December 1964.

Dewey, John, "Austin's Theory of Sovereignty", *Political Science Quartely,* Volume 9, Nomor 1, March1894.

Elliot, W. Y, "The Metaphysics of Duguit's Pragmatic Conception of Law", *Political Science Quartely,* Volume 37, No. 4, December 1992.

Ellis, Ellen Deborah, "The Pluralistic State", *The American Political Science Review,* Volume 14, Nomor 3, August 1920.

Green, L. C, 1978, *International Law Through The Cases*, Toronto: Carswell.

Hiariej, Eddy O. S, 2012, *Teori dan Hukum Pembuktian,* Jakarta: Erlangga.

Hingorani, R. C, 1984, *Modern International Law*, London: Oceana Publications Inc.

Inayatullah, Naeem and David L. Blaney, "Realizing Sovereignty", *Review of International Studies,* Volume 21, No. 1, 1995.

K, Pradeep Kumar and G. Sadanandan, "Political Science (Part-I)", dalam *Complementary Course,* University of Calicut School of Distance Education.

Laski, Harold J, 1999, *Studies in the Problem of Sovereignty,* Kitchener: Batoche Books.

Marzuki, Peter Mahmud, 2007, *Penelitian Hukum,* Jakarta: Kencana.

McClelland, J. S, 1996, *A History of Western Political Thought*, London: Routledge.

Muhammad, Abdulkadir, 2004, *Hukum dan Penelitian Hukum,* Bandung: PT Citra Aditya Bakti.

Pooja, "8 Criticism Faced by Austin's Theory of Sovereignty", *http://www.politicalsciencenotes.com/theories/8-criticism-faced-by-austins-theory-of-sovereignty/252*, diakses 7 September 2019.

Ranawijaya, Usep, 1983, *Hukum Tata Negara Indonesia,* Jakarta: Ghalia Indonesia.

Ritchie, David G, "On the Concept of Sovereignty", *The Annals of the American Academy of Political and Social Science,* Volume 1, January 1891.

Riyanto, Sigit, "Kajian Hukum Internasional tentang Pengaruh Kedaulatan Negara terhadap Perlindungan Pengungsi Internal", *Dissertation,* Faculty of Law, Gadjah Mada University, 2009.

Ronzoni, Marian, "Two Conceptions of State Sovereignty, and Their Implications for Global Institution Design", *Critical Review of International Social and Political Philosophy,* Volume 15, No. 5, 2012.

Satria, Hariman, "Ke Arah Pergeseran Beban Pembuktian", *Integritas,* Volume 3, Nomor 1, March 2017.