

Legal Discretion and State Responsibility to Realize Political Human Rights Law for Foreigners Without Documents

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ABSTRACT

The population living without documents in Indonesia continues to grow from year to year. Problems that arise the number of people who are settlers without documents increases, especially if they have mixed marriages with Indonesians. The handling so far that has been carried out by the government is only unclear and tends to ignore the problem of how the state's discretion and responsibility towards foreign citizens are without documents. This study aims to determine how the Immigration Office's discretion for foreign nationals is without documents to obtain residence permits and citizenship. By using normative research methods, this research is carried out. The results of the study show that the immigration office's discretion regarding the status of foreigners without documents is unclear. Moreover, the state is not responsible for the status and existence of foreign citizens without documents by neglecting their civil rights status. The politics of protecting human rights against foreign nationals without documents have been unclear until now.

Keywords: Discretion, Foreign Citizens, Immigration, Without Documents.

INTRODUCTION

The problem of undocumented foreign nationals is complicated in Indonesia today. It is related to population administration and status and guaranteeing their civil rights. The lack of clarity about their status adds to the burden on the state's budget for eating and drinking at immigration detention centers, especially since it has been going on for years. In the immigration administration law, all residents in Indonesia who do not have valid documents cannot be arbitrarily prosecuted because they have human rights that must be respected. Law Number 12 of 2006 concerning Citizenship has regulated the legal relationship between the government and citizens, although it has not specifically regulated the relationship between the government and foreigners. Even though they are not citizens, foreigners without documents who reside and live in Indonesia must be protected by the government. Several regulations have been issued regarding handling foreigners without documents, but these rules have not been maximally resolved for them. Nothing specific has happened if there is no circular letter regarding handling foreigners without documents to obtain residence permits and their citizenship status. It was only the discretion of immigration officials without clear guidelines.

The dilemma of prosecution of citizens against foreign nationals without documents is the problem in immigration law enforcement in Indonesia. The prosecution, detention, or deportation process does not solve the problem. The data record of foreigners without documents by the Bitung City Government in Bitung is around 1492 people. Granting a residence permit or the citizenship process is needed to solve the problem. Not only that, but juridical and non-juridical issues have to be figured out because the law cannot solve the problem. Law enforcement is solely for realizing human welfare through the guarantor of fundamental human rights because the law aims to help human life. It is in line with Hidayatin and Al Muchtar (2020), who state that human right awareness is influential in our lives because if we hold on to that regulations we are not going to abuse mankind's rights. With that being said, it can be concluded that the purpose of the law is not merely for justice. Based on the explanation above, this study aims to determine how the Immigration Office's discretion for foreign nationals is without documents to obtain residence permits and citizenship. Furthermore, what are the state's responsibilities towards marital status, children, and other civil rights of citizens foreigners without documents? Moreover, how is the legal politics of protecting human rights for foreign citizens without documents?

LITERATURE REVIEW

Legal protection for every human being is very meaningful for the government's actions in the field of immigration. In dealing with foreigners and Indonesian citizens, discretion is the freedom to act by the government to develop public assistance. Discretion (*freies ermessen*) is freedom or policies applied by certain officials or agencies such as immigration. Philipus Hadjon stated that *freies ermessen* is the government's act of freedom to realize public assistance, therefore the state administration officials have broad authority to make that happen (Hadjon, 2002).

Everyone in Indonesia needs legal protection, the reason is so the government will choose carefully the decision they have made according to their discretion (Arief, 1998). Legal protection is a universal concept embraced and implemented by every country that puts itself forward as a state of law. However, each country has its own way and mechanism of discerning legal protection and to what extent it is provided (Paulus, 1983). In the Immigration Law, it can be said that legal protection is given to both Indonesian citizens and foreigners residing in Indonesia. The Indonesian government always

guarantees human rights. Legal protection for foreigners can be found in Article 86 of Law Number 6 of 2011 concerning immigration; the provisions of Immigration Administration Actions are not applied to victims of trafficking in persons and people smuggling. Law Number 15 of 2009 concerning Ratification of the Protocol Against The Smuggling of Migrants By Land, sea and Air, Supplementing The United Nation Convention Against Transnational Organized Crime state that The Indonesian protocol must protect foreign nationals residing in Indonesia as a manifestation of the basic legal state of the State of Law that applies today as the main pillars that refute the establishment of a modern state (Asshiddiqie, 2006).

Law is a rule that appears along with the existence of humans who live in groups or societies (*zoon politicos*). In essence, it was made by humans and to be obeyed by themselves. The law was created to regulate the order of life in society, nation, and state. According to Soeroso (2009) argues that law is all regulations that contain moral considerations, shown in human behavior in society and become guidelines for state authorities in carrying out their duties. Society refers to a mass of people who reside in a certain territory in which the group applies a series of rules that serve as behavioral guidelines for each group member in their social life; those rules are made by the group itself and apply to themselves.

According to Radbruch (1946), the term has three legal bases or legal values, including justice, expediency, and legal certainty. These three things reflect legal certainty, which is an absolute requirement. Therefore, the law can implement its duties as an escort for true legal content. The certainty of law and justice do not contradict each other. However, both are needed to carry out their duties properly and achieve their goals. Clearly, the law oversees ensuring legal certainty in society and protecting and preventing everyone from becoming their own judge.

The law must be enforced to realize legal protection for everyone in Indonesia. Law enforcement (Abdussalam, 1997) several activities which is completed by officers in implementing legal provisions in order to construct a secure, serene, and orderly environment. According to Van Bemmelen (1984), the law's main purpose is to maintain order, tranquility, welfare, and peace in society. However, to enforce various legal regulations, it is unavoidable that some people will experience suffering. Meanwhile (Rahardjo, 2006) describes that the essence of law enforcement is a process of embodying legal wishes or beliefs into reality. Legal desires are the thoughts of the legislature in the form of ideas or concepts about justice, legal certainty, and social benefits formulated in the legal regulations. The theory of legal certainty is constructed from the idea of the practicable law in the community. An authoritative law is a law obeyed by the person who makes the law and opposed to the law. The connection between an individual and the law is apparent here. Authoritative laws are needed to keep up the development. In another context, the need for legal certainty is observed (Himawan, 2003). Legal certainty is connected to legal authority in which the law gets legitimacy from society. The function of law (custom) in the development of national law (especially criminal law) depends on the ability of law in order to create predictability, stability, and fairness (Leonard, 2006). According to Notohamidjojo, three legal objectives must be harmonious: justice, usability, and legal certainty (Notohamidjojo, 1975).

In the study of Legal Science, there are various theories about the purpose of the law. For example, the ethical theory emphasizes justice. Meanwhile, utility theory emphasizes its usefulness and legal certainty. At the same time, active and passive protection is what protection theory highlights. Order is the ultimate goal of all laws. This need for order is

a fundamental requirement for the existence of an orderly human society. Besides that, another goal of the law is the achievement of justice which differs in content and size based on its society and era. To achieve this social order, it is necessary to have certainty in the association between human beings in society. Of great importance not only for an orderly but an absolute requirement for a living organization that transcends the boundaries of the present. Therefore, there are some acts that must be fulfilled by the parties who entered them. Salman (2002) states that the community expects legal certainty because it will make them organized, as the law aims for public order. The nonexistence of law will make people brutal and it can cause chaos. However, if you place too much attention on legal certainty and strictly obey the law, the result will be rigid and will create a sense of injustice. Anyhow, the regulations remain the same, so they must be obeyed and implemented. As Mertokusumo (1988) states, the law frequently feels harsh when strictly enforced, *lex dura sed tamen scripta* (the law is cruel, but that's what it says).

Scholten (2003) stated that the law must protect private and public rights: uncertainty can always be felt in the institutions (intelligent) created for certainty because humans cannot bear uncertainty. He wants the law to be stable and certain; the human soul everywhere in connection with it follows the same path. In the abstract, the whole positive law is a struggle against uncertainty. But legal uncertainty can never be eliminated (Scholten, 2003). As stated by experts, the starting point of thinking about the principle of legal certainty is that there is a correlation between legal certainty and every human activity. This means that if there is legal certainty, then every human activity in society will run well. Therefore, legal certainty is one of the principles of good governance.

RESEARCH METHOD

The research was conducted on the regulation of enforcement and handling of undocumented foreigners in Indonesia. The approach used by the researchers is normative legal research which focuses on legal aspects related to the prosecution of foreigners without documents who have settled and resided in Indonesia. As a legal material that is the object of research, namely the Citizenship Law Number 12 of 2006 and the Immigration Law Number 6 of 2011 related to the supervision and prosecution of settlers without documents.

Sources of Data/Legal Materials

The researchers used primary data and secondary data. Primary data is derived from Citizenship Law Number 12 of 2006 and Immigration Law Number 6 of 2011 from the subject through interviews. The interviews related to the status, length of stay in Indonesia, and documents owned. Secondary data is data obtained through official documents, whether in the form of literature, books, journals, legal analysis, regulations, legislation, jurisprudence, or writing decisions of the head of immigration related to the policies of foreign nationals in Indonesia. Secondary Legal Materials are explanations of primary legal materials and legal books on prosecuting undocumented foreign nationals, whether through deportation or other actions with justice and legal certainty. Moreover, Tertiary Legal Materials provide guidance on primary and secondary legal materials. Including Legal Dictionary, Language Dictionary, and Encyclopedia.

Data Collection

After determining the data and legal materials that are the object of study and analysis of this research. In a further step, researchers also collect the data using Library Research which is carried out by reading and studying books/literature, journals, articles, magazines, jurisprudential media, regulations, laws, and regulations, which are related

to this research, in order to obtain a theoretical basis as the basis for conducting this dissertation research. Moreover, the research was conducted by collecting data directly from related or competent parties by means of interviews with residents of foreign nationals who live in settlements without clear documents.

Data Analysis

Data analysis was carried out to answer or solve the problems; qualitative and quantitative descriptive analyses were carried out by collecting and sorting data, then analyzed scientifically. For the study of immigration law, the analysis focuses on the study of the legal reality applied by settlers who do not have documents and related immigration authorities to obtain answers to various problems in managing immigration documents for residents of foreign nationals.

RESULTS

Immigration Office's Discretion Against Undocumented Foreign Citizens

The results of the study show that several regulations and guidelines regarding handling foreigners without documents do not provide the right solution for them because they need to get citizenship status concerning immigration law. The process of prosecution, detention, or the process of deportation without documents is unclear until now. Data on foreigners without documents by the Bitung immigration carried out in 2018 was about 311 people. The results of the study show legal discretion and the responsibility of state power to realize human rights politics in the field of immigration for foreigners without documents. The government, with its authority, cannot be separated from the demands of public services. Then with 'discretion' in every situation faced, can take policies and/or decisions taken to overcome concrete problems that can deviate from the laws and regulations without reducing their accountability. Discretion is the freedom to act on one's own initiative, which can be administratively accounted for to provide services. The rule of law and democracy in force in Indonesia is based on the prevailing foreign policy system. The discretion is situational. Such as the Confirmation of Citizenship Status of 277 Foreigners without Documents in the Bitung Region which was carried out ahead of the 2019 General Election, namely in 2018.

The results of this study show the inability of the immigration office to exercise their discretion, whether it is a residence permit or citizenship. Even though it is recorded that there are more than 1000 undocumented foreigners living in the Bitung City area. The discretion issued by government officials in the context of public services or the implementation of complex/concrete government tasks has the potential to be constrained by legal and administrative problems. Therefore, the community and organizational elements need strict supervision to use discretion and results effectively. Implementation and enforcement of the rule of law and democracy must be based on applicable regulations or laws.

State Responsibilities for Foreign Citizens Without Documents

Currently, the state is not responsible for foreigners without documents in Indonesia because it seems to allow foreigners without documents to be in Indonesian territory. Even though these foreigners are married and have children and grandchildren without clear marital administrative and legal status. This is a violation of human rights as mandated in the 1945 Constitution and the General Declaration of Human Rights. From the beginning of independence until now, many figures have discussed it in both formal and non-formal forums, namely that human rights are included in the basis of the state, from the founders of the state to the officials who carry out justice. Human rights must be respected and upheld by humans in this world. The politics of human rights law in the

era of democratic reform by government stakeholders is formed/strengthened protection institutions human rights. This guarantees human rights in a political and democratic system with the principles of democracy or popular sovereignty that are practical and can be implemented for human rights.

All implementation in Indonesia must be based on human rights as outlined in the 1945 Constitution as its derivatives with a socio-legal approach, its relationship with the constitution, and its acceptance. The right of children to get an education, vaccinations, and others. Indonesia must be responsible for undocumented foreigners because they have settled and married Indonesian citizens for the sake of realizing justice for legal protection and legal certainty for foreigners without documents as humans. The applied foreign policy greatly influences the state's policy towards foreigners without documents. The politics of human rights law in the constitution of the Republic of Indonesia must be able to strengthen the government, which fought from the beginning of independence until now to seek social justice, including foreign citizens without documents. The idea of public law, legal responsibility is related to the usage of authority that is not under legal norms, whether it consists of conflict with applicable laws and regulations, abuse of authority, or an arbitrary prosecution that cause the violation of citizens' rights.

The state's responsibility has not yet been implemented through officials issuing a decision on granting citizenship, which the immigration office must implement. In terms of administration, discretionary decisions have to be reported in writing to the direct supervisor of the official who issued the discretionary decision. Based on the judgment of the superior of the official issuing the discretionary decision, the discretionary decision can't be justified from a legal and policy point of view. The superior of the official issuing the discretionary decision have to regulate those decision to be withdrawn. The state must be responsible for undocumented foreigners because they have settled and married Indonesian citizens for the sake of realizing justice for legal protection and legal certainty for foreigners without documents as humans.

Those decisions which cause a criminal act ought to be the Government Administration Officers' responsibility or agency in charge. Meanwhile, the decision which causes civil harm to individuals, communities, or organizations should be the responsibility of Government officials who regulate them. The negligence of a Government Administration Officer or Agency due to collusion, corruption, and nepotism, which can harm regional finances, may benefit the third parties. Government Administration Officials who cannot be charged to the state, both civil and criminal.

DISCUSSION

Political Policy on Human Rights Law for Foreign Citizens Without documents

Political Policies Law on the Protection of Undocumented Foreigners is unclear, so the omission continues by violating undocumented Human Rights. Indonesia is a sovereign country; in the globalization era, it affects the economic, socio-cultural, political and legal systems. Transformation of the traffic of goods and people increases the intensity of relations with the international community. Especially in the services, supervision, and protection of the traffic of foreigners who have documents and those without documents (passports/visas). For foreigners who have (special) documents committing abuse of residence permits and criminal offences, strict immigration law enforcement is needed because they do not comply with Indonesian immigration laws. Or else, criminal acts must be processed through the courts. Regarding foreigners without state documents, they must be held accountable as a form of state responsibility so that the guarantee of human rights in Indonesia becomes real. By respecting and upholding human rights,

immigration laws and related regulations carry out selective examinations for the national interest. Based on international law, supervision, and protection, including law enforcement and security, in carrying out immigration duties for the implementers equipped with professional knowledge management, instinct, managerial ability, technical and non-technical capabilities, immigration inspection policies, including during the Covid-19 period against foreigners. Especially related to the right to freedom of movement, the right to health and the right to service/protection from the movement of foreigners entering and leaving the territory of Indonesia.

The Protection of Human Rights in Indonesia against Foreigners without Documents must be clear because Indonesia is bound to the world and has ratified the International Convention on Civil Rights. In the policy of examining public services in immigration and special inspections for foreigners with and without documents entering the Republic of Indonesia, it is necessary to separate them comprehensively. The officers not only supervise the foreigners when they are entering Indonesia, but it keeps on going as long as they are in this country. Immigration Supervision includes immigration law enforcement, both administrative and immigration crimes. Immigration is a special crime, so formal and material laws differ from general criminal law. For instance, there is an exceptional minimum sentence. Politics of supervision that is too tight must be separated from the service of the rights of foreign citizens without documents.

The aspect of service and supervision is also inseparable from the geography of the Indonesian territory, which consists of islands that have close distances, even direct borders with neighboring countries, where the implementation of the immigration function along the border line is the authority of the immigration agency. Traditional traffic enters and leaves Indonesian and neighboring countries at certain places along the borderline. Cross-border agreements can be arranged, and expand immigration checkpoints to improve services and facilitate supervision. Thus, people can be avoided entering or leaving the Indonesian territory outside the Immigration Checkpoints. The national interest is the interest of all Indonesian people, so the supervision of foreigners also requires public participation to report Foreigners who are known or suspected of being in the Indonesian territory illegally or abusing licensing in the field of immigration. Some efforts are needed to increase public legal awareness. Based on a selective policy that upholds human rights values, it is regulated that Foreigners who came to the Indonesian territory and obtained Residence Permits have to obey the rules and policies in Indonesia. The foreigners who are promising and not going to put a risk on local people are allowed to enter. The definition of a migrant is the mass movement of people from one place to another. Meanwhile, immigration is one of the human rights entering another country. Nevertheless, emigration is the movement of people out of a country. Finally, for the country visited, it is referred to as an immigration event. The terms immigration, emigration, and transmigration mean official displacement and have a definite tendency. A person who visits an international conference cannot be called an immigrant. Also a group of art or sports missions and other ambassadors (Wijayanti, 2011). From a primitive perspective, migration patterns are more intended to avoid the possibility of threatening dangers, such as natural disasters and trying to get food. According to the sociological view, humans are social creatures who live in groups. Living together in a territory allows each member or citizen to move freely; at the same time, there are restrictions on not being able to move freely because the ruler of a certain area must respect it. The existence of a free crossing without permission from the regional authority can be considered an intervention against the territorial sovereignty of another country. This passport usually contains the identity and the country of issue. Therefore, the issuing government must protect the holder's location. A visa has been affixed with a valid stamp from the competent authority to select foreigners who enter a country. This

indicates that the passport has been checked and approved by the destination country's officials. The function and role of immigration are universal, namely, carrying out traffic regulations for people entering and leaving the territory of a country following the policies outlined by the government. The short period of 30 (thirty) days is applied based on the principle of reciprocity. In contrast, the opposite applies to Indonesian citizens (WNI) to enter the ASEAN member countries without a visa. The new paradigm sees that immigration is multidimensional in national and international settings. This is because immigration problems are dynamic human beings, so the scope of immigration covers various fields. As part of the state administrative law system, immigration law is often accompanied by criminal sanctions. On the other hand, it also regulates a person's citizenship. In addition, it also has a very close relationship with international relations. In the political field, the immigration function is often placed on international relations. On the other hand, a person's right to cross national borders and reside in a country is seen as a human right. Nevertheless, state sovereignty cannot be ignored. Various international conventions, such as the United Nations Convention 1951, state a refugee's rights and the recipient country's obligation to obtain the rights of life and protection for himself in the last country where he is located. That means there is special treatment for immigrants. Often immigration law is used to protect the political interests of a country, such as regarding issues of racial sentiment, religion, and other factors related to the composition or structure of the population in a country.

CONCLUSION

Based on the explanation above, it can be concluded that discretion or acting on its own initiative is not carried out by the immigration office in administrative services for concrete or urgent public services to foreign nationals without documents by issuing residence permits and processing the citizenship status of these foreign nationals. Immigration discretion against foreigners without documents does not work because discretion is situational. Such as the Confirmation of Citizenship Status of 277 Undocumented Foreigners in the Bitung Region which was carried out ahead of the 2019 General Election, namely in 2018. Even though more than 1000 undocumented foreigners were recorded living in the Bitung City Area. Currently, the government is not responsible for the presence of foreigners without documents in Indonesia because it seems to allow foreigners without documents to be here, even though these foreigners are married and have children without marital status, administrative and legal status. This is a violation of human rights as mandated in the 1945 Constitution and the General Declaration of Human Rights. From the beginning of independence until now, many figures have discussed it in both formal and non-formal forums, namely that human rights are included in the basis of the state, from the founders of the state to the officials who carry out justice. Furthermore, Political Policies Legal protection of Human Rights for Foreigners Undocumented until now is unclear, so the omission continues to violate Human Rights undocumented. In the globalization era, it affects the economic, socio-cultural, political, and legal systems. The transformation of the traffic of goods and people increases the intensity of relations with the international community. Especially in services, supervision, and protection of the traffic of foreigners who have documents and those without documents (passports/visas). For foreigners who have (special) documents committing abuse of residence permits, visas, and criminal offences, strict immigration law enforcement is needed because they do not comply with Indonesian immigration laws, or criminal acts must be processed through the courts. Regarding foreigners without state documents, they must be held accountable as a form of state responsibility so that the guarantee of human rights in Indonesia becomes real. By respecting and upholding human rights, undocumented foreigners.

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