

## CHAPTER IV

### CONCLUSION

Human rights went through so much during the time being. It started by the human thinking and need of self-determination 'idea' into sets of regulation followed by many, among others, among states, also between people and state. The existence of human rights cannot be ignored since it was given to a human from the day this human born until the death. May scholars interpret human rights and try to spread it into the wide idea that accepted by all and followed.

According to the history, human rights development emerged during colonial period, based on self-consciousness of self needs and self-determination on how to live. Colonial era was the worst period of time, even though not all of people around the world 'hate' to live under colonialism. That is why, the first human rights known widely was rights to self-determine. This gives people the right to determine themselves, on how they will live, to choose between to be free (from slavery) and determine their life whether they going to live their life as they want as free person or keep their status as a colony (part or under the authority of certain state).

As time passes, human rights developed into more complexes and wider, its scale wider, not just about personal rights (rights of only a human), but also rights that existed during human relation, far more among states. State relation had been made since colonial era, to determine which the allies and which the enemies. Allies are needed to gain people and powers to war with enemies. War was done to

widened state's authorities and area. It was wrong idea to make war to another, but people who lived during war had no choice than to go to war or live as a colony, in other words, kill or to be killed.

When the concept of norms and law appears, it regulates rules among people to avoid them in conflict, since people relationship can turned into many shapes. It can be in positive way, such as: trade or business, marriage, gospel or religious trip, education, etc. On the contrary, it can also be in negative forms of relation such as: war, colonialism, dissatisfy and jealous of other achievements. Set of law existence leads to the appearance of human rights idea.

At first appearance of human rights, regarding to its history, human rights differ into three; first generation of human rights, second generation of human rights and third generation of human rights. In this partition, human rights experienced many changes. Started to differ from fundamental rights, a natural right which follow and given to human since born until die, also self-determination right. It changed into set of rights, mostly appears follow the human needs and human relation among others also with state or higher authorities.

The development of human rights affect to the existences of several set of regulations that regulate the human rights itself. Widely known, first made by United Nation, an international body is made to maintain global peace among state in its relationship. Right after UN as held, not long it formed set of regulation that regulates human rights of which the member state must follow the rule as terms to join UN. Soon, many states ratify this regulation and adopted in their own

constitution after the realization its importance. International human rights law might not be perfect, but it goods enough to set regulation to member state, especially when they in relationships.

International human rights law existence makes the urge to create another body or instrument, called international human rights instruments. This instrument has job to develop and regulate specific human rights, after the international human rights law keep grow more varied and create more rights. The important instrument in international human rights law are; Universal Declaration of Human Rights (UDHR), International Covenant on Civil and Political Rights (ICCPR), and International Covenant on Economic, Social and Cultural Rights (ICESCR).

According to its characteristic, human rights differentiate into derogable and non-derogable rights. Derogable rights are human rights that can be derogate, but in certain condition. A state given a certain condition to derogate human rights as long the condition is fulfilled based on what regulated on UDHR, ICCPR and ICESCR. Non-derogable rights are set of rate that cannot be derogated even though a certain condition happened. Though, there are derogable and non-derogable rights in human rights, there is another condition when human rights can be limited. This certain condition, of course, also stated in articles of UDHR, ICPPR and ICESCR. Human rights can be limited for sure, when these human rights went beyond border. It means, even though human rights are given and attached to a human since born until death, it does not mean human rights are absolute. It happened because each human attached and given this human rights. People basically have the same rights for all the people. It may lead to a clash among people to fulfill their rights. Because of this,

human rights need set of regulation to regulate the fulfillment of human rights, on how far a person rights can go, also a limitation to avoid clashes.

The case as the writer took as thesis material was one of the examples when the human rights clashed. The human rights clashed are between the rights, it was between freedom of speech and right to freedom of religion and belief. Ms. ES gives speech at her seminar about Islam, a religion, in which she said improper word describing Prophet Muhammad (PBUH) or messenger of God in Islam. Ms. ES word and speech disparage Prophet Muhammad (PBUH) as she called him a pedophile because marrying Aisha, a little girl that finally become his wife, at that time. Ms. ES also stated if Prophet Muhammad (PBUH) was a perfect figure to follow (the way of life).

That is why it can be said, the relationship between freedom of speech and freedom of religion is close enough; both are part of freedom of expression. Even though, there are also cases related to both rights, when both rights are clashed to each other. Therefore, in general, certain restrictions or limitations on the freedom of expression are permitted under human rights law. Thus, Article 20 (2) of the ICCPR requires states parties to prohibit 'advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence.' CERD also requires states parties to prohibit certain hostile expressions. Article 19 ICCPR stipulates that these limitations 'shall only be such as are provided by law and are necessary: a) for respect of the rights or reputations of others; b) for the protection of national security or public order (*ordre public*), or of public health or morals'.

A reporter in disguise who attended the seminar reports her as blasphemy to Islamic figure. Vienna Regional Criminal Court brings in verdict of guilty to Ms. ES and makes her pay fine. Dissatisfied with court decision after her Renewal request to the case was rejected, Ms. ES bring her case to European Court of Human Rights (ECtHR) as breaking her freedom of speech according to Article 10 of European Convention on Human Rights (ECHR).

However, the ECtHR judges also decide Ms. ES's case a dismissal because there was no violation of her freedom of speech based on article 10 of ECHR. Even though freedom of speech categorized as non-derogable rights, it does not mean freedom of speech is an absolute rights. There is a limitation that can be applied to the implementation of freedom of speech. Freedom of speech can be limited when it clashed to another human rights, when freedom of speech goes beyond its limit. The limits are when the speech categorized as blasphemy, degrade, slander, and resulting hurts to other people until create damage. This kind of speech should be limit; at least there is a limit on how far someone's speech can be tolerated. At this point, UN gives member states which adopted and ratify UN regulation regarding human rights, to make their own limitation on freedom of speech considering the state's situation. In other words, member state has authority, given by UN, to limit freedom of speech of its citizen in their own constitution as long as it was aim for peace and public order.

Regarding the decision of the case between Ms. ES v Vienna Regional Criminal Court under European Court of Human Rights, the writer agrees with the court's decision. First, because the speech given by Ms. ES in her seminar and

discussion about Prophet Muhammad (PBUH) was incorrect and totally cross the limit, inappropriate to say in public during seminar and discussion. It can convey the public opinion and degrade Islam, especially its figure Prophet Muhammad (PBUH) himself. Second, the seminar's topic Ms. ES chooses itself was contain the sensitive issue, yet the words Ms. ES saying was completely offensive. It can create public sentiment, especially from Muslim who lived there. When it happened, chaos is unavoidable. As the writer explained in previous chapter and just now, that freedom of speech are allowed to be limited by state in its constitution to keep public order. Lastly, Ms. ES was incorrect to determine of what happened in Prophet Muhammad (PBUH) era by today's value on human rights as wrong or labeled famous religious figure by very offensive words. Human rights keep changing and developing, the values that follow human rights also changed. We cannot look the past event and measure it with today's value, because it will not fit and look weird on today's perspective. Prophet Muhammad (PBUH) marriage with underage Aisha happened not only hundred years ago, but more than a thousand year ago. So, it is incorrect to make comparison and put today's standard on human rights to view and measure the event that happened a thousand year ago. To add it, the speech Ms. ES gave during her seminar was not speech for seminar and discussion material, but an offensive, blasphemy and degrading statement that put a negative label towards famous figure in Islam.

Underage marriage still happened nowadays actually. The writer just wants to say if Ms. ES has huge concern on child marriage or underage marriage, Ms. ES should just fight for it today, on current issues about child marriage. The writer found

when searching for materials that underage or child marriage practice numbers are high in India. There are some cases happened in Indonesia too, especially in rural area, but underage or child marriage cases worse in India. This is the suggestion from the writer regarding to Ms. ES v VRCC under ECtHR case.

