

STRENGTHENING OF INSTITUTIONS AND PROTECTIONS ENFORCEMENT OF RIGHTS OF WOMEN AND CHILDREN IN CONSTITUTION

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ABSTRACT

In the 1945 Constitution of the State of the Republic of Indonesia (UUD 1945) in Chapter XA on Human Rights, there is no mention of the institution of protection and enforcement of human rights therein, this constitutional amendment has not accommodated institutional strengthening of the protection of the rights of women and children. The existence of Komnas HAM as a state institution that has been regulated in the law, is also not included in the 1945 Constitution as a state institution that implements the protection and enforcement of human rights in Indonesia. The strengthening of human rights protection institutions for women and children is important in strengthening their institutions, through a law that regulates them independently and integrated. During this time, the institutional arrangements became separate, namely between the National Commission on Violence Against Women and the Indonesian Child Protection Commission. This separation of the institutions causes protection and enforcement of human rights to women and children to be biased and weak, because the implementation of the protection and enforcement of human rights are related and in touch with each other. When the number of human rights violations against women and children has not been resolved optimally, due to the unintegrated institutional concept, this implies the independence and budget allocated by the state to be small, not comparable with the number of cases to be resolved. The strengthening of human rights protection institutions in Indonesia should be carried out by integrating all existing human rights protections against the National Commission on Violence Against Women, the Commission on the Protection of Indonesian Children and the National Commission on Human Rights to become a human rights institution human beings for all the protection and enforcement of human rights in Indonesia.

Key words: strengthening, human rights institutions, women and children, constitution.

Introduction

The amendment of the 1945 Constitution is not only a redactional change, but a very basic paradigm shift in thinking about how the blueprint and macro-design of the legal state's ideas have so far not been formulated comprehensively. The building of a legal state should be laid in a unified legal system that includes of institutional elements, elements of rules (instrumental elements), and elements of behavior of legal subjects with rights and obligations determined by the norms of the rule (subjective and cultural elements).¹

The strengthening of human rights institutions by placing this institution in the constitution (the 1945 Constitution) as a state institution. The consequence of such reinforcement is protocol and the institutional rights will be very strong. A national institution granted separate and distinct legal status of a legal person, enables it to exercise power, make decisions independently, and perform its functions without interruption or obstruction from government, public or private institutions.²

The affirmation of Indonesia as a state of law is implemented with a broader and more comprehensive regulation of human rights in a special chapter, Chapter XA consisting of Article 28A-28J. In this chapter all aspects of human rights are guaranteed (including women and children). These aspects are not only civil and political rights, but also the right to the welfare of society, such as economic, social and cultural rights. The regulation of human rights in the 1945 Constitution is a state commitment to qualify the existence of Indonesia as a state law.³

When it is guaranteed and constitutionally protected, it does not mean that human rights will certainly be respected. Guarantees at the constitutional level are of course only limited to the norms that regulate that human rights exist, recognized and

¹SuparmanMarzuki, *Politik Hukum Hak Asasi Manusia*, Penerbit Erlangga, Jakarta, 2014, hlm. 67.

²SuparmanMarzuki, *Pengadilan HAM di Indonesia Melanggengkan Impunity*, Penerbit Erlangga, Jakarta, 2012, hlm. 255.

³Saldi Isra, *Peran Mahkamah Konstitusi dalam Penguatan Hak Asasi Manusia di Indonesia*, dalam *Jurnal Konstitusi MK. RI.*, Volume 11, Nomor 3, September 2014, Jakarta, hlm. 410.

protected. Meanwhile, its implementation depends on the availability of institutional infrastructure, mechanisms and commitments of state officials.⁴

According to SoetandyoWignjosoebroto, as quoted Ni'matul Huda, that the problems that arise in the life of the state in a developing country, such as Indonesia, originated from the fact that the former colonies of this developing country are willing to organize constitutional institutions based on the constitution. The constitution they know from former colonial countries that inherited the Western legal tradition, but failed to inherit and accept without reserve the basic ideas of constitutionalism about the rule of law, the limitation of state power and the guarantee of civil rights of the people over their fundamental freedoms. Here what happens is not the reception in complex but the acceptance of the concept of state and the constitutional law of the West in severed. The constructs and their positive norms are understood and accepted, but the basic ideas and meanings are released and not caught.⁵

Indonesia's first human rights protection and enforcement agency, was firstly born National Commission on Human Rights, but has not yet been regulated in the 1945 Constitution as a state institution, and has not yet been regulated under special laws, Law Number 39 Year 1999 on Human Rights. Whereas in some other countries especially in the Asia Pacific region, the existence of its human rights institution has been regulated by special law, even the countries of Thailand, South Africa, Malaysia, Australia, Nepal and New Zealand are governed directly in the constitution.

In the era of transition to reform, Komnas HAM was tested to carry out its functions and authority, with mass riots in May 1998 in major cities in Indonesia, with the most violating cases of human rights at the time being the tragedy of sexual violence (rape) experienced by women especially ethnic Chinese (Tionghoa). Unfortunately, it is not the empowerment and the strengthening of authority and institution to Komnas HAM in order to carry out its functions and authority well, but instead it gave birth to a new institution, namely the National Commission on Violence Against Women (KomnasPerempuan).

As the reform era grew, another institution was created as a human rights protection agency, the Indonesian Child Protection Commission (KPAI). This institution is declared as an independent institution established under Law Number 23 Year 2002 regarding Child Protection. It was established to respond to reports of violence, neglect and non-fulfillment of the basic rights of Indonesian children. The political decision to establish the KPAI is inseparable from the international community's impetus which expresses its concern over the condition of Indonesian children. The number of cases of child labor, children in conflict areas, involvement of children in armed conflicts, such as those occurring in Aceh, the high rates of dropping out of school, malnutrition, underage marriage, trafficking, etc., have prompted the international community to pressure the Indonesian Government in order to establish a special institution in charge of monitoring the condition of child protection in Indonesia.⁶ This happens because of the lack of function and authority of Komnas HAM in dealing with various violation cases against children's rights.

Bagir Manan stated that it should be with empowering politics, not institutionalizing policy. Political empowerment mainly includes man power, institutional, and control. So far, solving the problem of effectiveness, efficiency and control is done by creating new institutions (both permanent and ad hoc). Overly fragmented or fragmented powers or powers on the one hand become ineffective and inefficient and can cause confusion and uncertainty, on the other hand causing helplessness.⁷

The number of human rights violations occurred in Indonesia with various cases, aspects and various dimensions, but unfortunately the state does not strengthen the position of human rights institutions in Indonesia, instead forming a new institution whose essence is the same, that is providing protection, counseling, socialization, education and human rights enforcement, thus causing overlapping of functions and authorities respectively if it is in contact with human rights abuses against women and children.

The lack of protection and enforcement of human rights in Indonesia can be seen from various cases of human rights violations, including gross human rights violations that have not been resolved properly. This is inseparable from the problem of institutional model, which each institution still contains a number of weaknesses, namely; still lack of independence and effectiveness of functions, authority, and budget. Therefore, the strengthening of human rights protection and enforcement is important to be integrated and integrated.

Discussions

The basic principles of human rights are: *first*, universal and can't be revoked (universality and inalienability). Human rights are an inherent right, and all humanity in the world has it. These rights can't be voluntarily submitted or revoked. This is in line with the statement contained in Article 1 of the Universal Declaration of Human Rights: "Every human

being is born independent and equal in dignity and prestige". *Second*, indivisibility can't be shared. Human rights, civil, political, social, cultural and economic rights are all inherent, united, as part of the inherent dignity of humanity. Consequently, everyone has equal and equal status of rights, and can't be categorized according to hierarchical levels. A waiver of one right will affect the

⁴ *Ibid.*, hlm. 411.

⁵ Ni'matul Huda, *Lembaga Negara dalam Masa Transisi Demokrasi*, UII Press, Yogyakarta, 2007, hlm. 31.

⁶ Rahayu, *Hukum Hak Asasi Manusia (HAM)*, Badan Penerbit Universitas Diponegoro, Semarang, 2012, hlm. 179-180.

⁷ Bagir Manan, *Tantangan Pembangunan Hukum di Indonesia*, Makalah pada Mata Kuliah Hukum Konstitusi dan HAM, PDIH UNS, Surakarta, 2015, hlm. 13-14.

abandonment of other rights. *Third*, Interdependence and interrelation. In whole or in part, the fulfillment of one right often depends on the fulfillment of other rights. *Fourth*, equality and non-discrimination. Every individual is equal as a human being and has an inherent goodness in the dignity of each. Every human being is entitled entirely to his rights without any distinction for any reason, such as those based on race, color, sex, ethnicity, age, language, religion, political views and other views, nationality and social background, shortage, welfare, birth, or other status. *Fifth*, participation and contribution (participation and contribution). Everyone and the whole community shall have the right to participate actively and freely in participation and contribute to the enjoyment of development, civil, political, economic, social and cultural life. *Sixth*, state responsibility and rule of law. States are responsible for complying with human rights, in which case they shall be subject to the legal norms and standards set forth in human rights instruments. Should the State fail to carry out its responsibilities, the aggrieved parties shall have the right to make appropriate demands, in accordance with the rules and procedures applicable in the state. States are responsible for complying with human rights, in which case they shall be subject to the legal norms and standards set forth in human rights instruments. Should the State fail to carry out its responsibilities, the aggrieved parties shall have the right to make appropriate demands, in accordance with the rules and procedures applicable in the state.⁸

The regulation of human rights in the 1945 Constitution regulates the basic rights of every citizen in the social, economic, political, cultural, civil, and right to development fields. Every citizen is balanced between his rights and obligations, the provision of human rights in the 1945 Constitution is balanced between rights and obligations. It's just that there is no strict regulation on state institutions that implement the protection and enforcement of human rights in the 1945 Constitution.⁹

The inability to strengthen human rights institutions in the 1945 Constitution further challenges the constitutionalism of human rights in Indonesia. The forerunner of the constitution is due to the consensus between the state and the people, that the state (ruler) should not be arbitrary or arbitrary to its people, in other words, the citizen must be protected by his / her basic rights, the citizen's rights can be protected if present a strong and independent human rights protection and enforcement body in the constitution.

Joseph and McBeth emphasized the importance of strengthening the independence of human rights institutions so that any outcome of any human rights violation can be investigated until it is decided by the court; none of the human rights institutions discussed above are able to make legally binding decisions, unlike, for example, the regional human rights courts. Their powers of „enforcement“ lie in the process of naming and shaming a State that is engaged in human rights abuses.¹⁰

Given the importance of human rights, its existence needs to be strengthened in the constitution and constitutional rights. Not exaggerated note Richard Bellamy who said, “where by a constitution’s task is viewed as being to embody the substance of fundamental law rather than to provide a fundamental structure for law making”. These new facts can also be used to review the teaching of Indonesian constitutional law which emphasizes the institutional aspects as taught by Logemann (Staatsrecht van Indonesia).¹¹

The protection and enforcement of human rights, especially in the field of law and constitution must be supported by its apparatus. One of the main supporters is the existence of an independent and trustworthy institution by all parties so that efforts to implement human rights protection can be effective. Law Number 39 Year 1999 appoints Komnas HAM as an investigative and investigative body of gross human rights violations case, independent as one of law enforcement element in gross violation of human rights. These independent institutions include the functions of assessment, research, counseling, monitoring and mediation on human rights.¹²

Strengthening human rights and institutional independence of human rights in the constitution is a very important thing done, as stated by Durga Das Basu: puts human rights within the framework of constitutional law, the purpose of which is to defend by institutional means the rights of human beings against abuses of power committed by the organs of the state and at the same time to promote the establishment of humane living conditions and the multidimensional development of human personality. Human rights are those minimal rights which every individual must have against the state or other public authority by virtue of his being a „member of the human family“, irrespective of any other consideration.¹³

Discussing the human rights of women in the 1945 Constitution means to examine the constitutional rights of women as Indonesian citizens and as human beings who have the dignity and human dignity. According to Jimly Asshiddieqie as quoted by Nuraida Jamil,¹⁴ the constitutional rights or constitutional rights are not always identical with human rights or human rights. The

- ⁸ Eko Riyadi, dkk., *Vulnerable Groups: Kajian dan Mekanisme Perlindungannya*, PUSHAM UII, Yogyakarta, 2012, hlm. 14-15.
- ⁹ Yeni Handayani, *Pengaturan Hak Asasi Manusia dalam Konstitusi Indonesia dan Konstitusi Amerika Serikat*, dalam *Jurnal Rechts Vinding*, 13 Oktober 2014, Jakarta, hlm. 4.
- ¹⁰ Sarah Joseph and Adam McBeth, *Research Handbook on International Human Rights Law*, Edward Elgar Publishing Limited, Northampton Massachusetts, 2010, p. 26.
- ¹¹ Bagir Manan, *Titik Taut Konsep Konstitusi dengan Konsep Konstitusionalisme, Negara Hukum, Hak Asasi, dan Demokrasi*, dalam *Makalah sebagai Penghormatan Purnabakti Ketua Muda Mahkamah Agung RI*, H.M. Imron Anwari, Jakarta, 2014, hlm. 22.
- ¹² Article 76 paragraph (1) of the Act. Number 39 Year 1999 on Human Rights.
- ¹³ Durga Das Basu, *Human Rights in Constitutional Law*, Bhagabati Prosad Banerjee & Ashish Kumar Massey, Wadha Nagpur, 2003, p. 8.
- ¹⁴ Nuraida Jamil, *Hak Asasi Perempuan dalam Konstitusi dan Konvensi CEDAW*, dalam *Jurnal Muwazah*, Volume 6, Nomor 2, Desember 2014, hlm. 169.
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citizen's constitutional rights not included in the definition of human rights, for example the right of every citizen to occupy a position in government is the citizen's constitutional rights, but not applicable to any non-citizen. The definition of citizens' rights is also distinguished between constitutional rights and legal rights. Constitutional rights are rights guaranteed by the 1945 Constitution, while legal rights arise under the guarantees of laws and regulations under it.

After the provisions on human rights are fully adopted in the 1945 Constitution of the State of the Republic of Indonesia, the human rights and human rights of the citizens may be related to the definition of "constitutional rights" guaranteed by the 1945 Constitution of the State of the Republic of Indonesia. *Asasi Perempuan* which is a part of Human Rights, is also guaranteed by the Constitution of the Republic of Indonesia Year 1945. That is, constitutional rights also apply to women. The enforceability of women's constitutional rights is evident from the formulation of the phrase "everyone," "every citizen," "every citizen," or "every citizen," indicating that constitutional rights are owned by every individual citizen without distinction, whether by ethnicity, religion, political belief, or gender. These rights are recognized and guaranteed for every citizen for both men and women, including children.

Whereas children's rights are an integral part of human rights, children's rights mean human rights for children. The Convention on the Rights of the Child is an integral part of international instruments in the field of human rights. The child has special needs that relate to his situation as a vulnerable, dependent and growing child, so there is a basic right for the child.¹⁵

The 1945 Constitution of the State of the Republic of Indonesia affirms that "Every person shall have the right to be free from discriminatory treatment on any basis and entitled to protection against such discriminatory treatment". That is, if there are provisions and actions that discriminate against certain citizens, it violates the human rights and constitutional rights of citizens, and in itself is contrary to the 1945 Constitution of the State of the Republic of Indonesia. Therefore, every woman Indonesian citizen has constitutional rights equal to the male Indonesian citizen. Women also have the right not to be discriminated against based on their status as women, or on other grounds. All constitutional rights applicable to citizens are also the constitutional rights of every Indonesian citizen.

Concluding Remarks

The strengthening of human rights institutions on women and children is important, namely; *first*, the independence of human rights institutions into the constitution, the urgency of the existence of the human rights institution as an institution which is directly regulated by the 1945 Constitution will reinforce its position as a state institution, not just as an institution equivalent to other state institutions, as regulated so far. This is to clarify institutional relationships between human rights institutions and other state institutions, thus avoiding overlapping in the implementation of functions and authorities. It further emphasizes the urgency of the existence of human rights institutions in the Indonesian state administration system because its functions and authority are very important in the life of the nation and the state, which is to provide protection and enforcement of human rights in the state. This reinforcement is important, as a form of state commitment to provide protection and enforcement of human rights in Indonesia in order to be implemented properly, independently, more effectively and equitably. The upgrading of the basic legal status to the constitutional level will provide constitutional guarantees for human rights institutions to be able to carry out their functions and authority more strongly against the violators and criminals of human rights.

Second, carrying out the principle of indivisibility with the meaning of all human rights is equally important and therefore it is not permissible to issue certain rights or certain categories of rights of its parts. The universal principle and the indivisibility are regarded as the two most important sacred principle. Both of them became the main slogan of the fiftieth anniversary of the Universal Declaration of Human Rights, "all human rights for all." Also affirmed in Article 5 of the Vienna Declaration on the Program of Action which reads "all human rights are universal, indivisible, interdependent, and interrelated".

Third, human rights institutions become integrated, which are not separated against the type of protection and enforcement, whether against serious crimes against human rights, against children, women, gender, race, ethnicity, religion, disability, social, political, . This is for the realization of an independent and effective human rights institution and focuses on one institution to promote, provide protection and enforcement of human rights in Indonesia.

Recommendation

1. The People's Consultative Assembly of the Republic of Indonesia (MPR RI) as a state institution authorized to amend the 1945 Constitution should consider the urgency of strengthening human rights institutions in the 1945 Constitution, in line with the Fifth Amendment Draft of the 1945 Constitution. The Human Rights Institution as the only non-judicial institution granted the authority to investigate cases of human rights violations which will be able to work independently and effectively, if reinforced in the 1945 Constitution. It is also important to add the authority of investigation conducted by the human rights institution into one unit contained in the Fifth Amendment Draft in the 1945 Constitution.

¹⁵ Harla Sara Octarra, dkk., *Manual Sosialisasi Konvensi Hak-Hak Anak*, Kementerian Pemberdayaan Perempuan dan Perlindungan Anak RI., Jakarta, 2010, hlm. 39.

2. House of Representatives of the Republic of Indonesia (DPR RI) as a state institution that has the authority to make laws, to be able to immediately make changes to Law No. 39 of 1999 on Human Rights and Law Number 26 Year 2000 on Human Rights Court, and the need to make a law- a special law on human rights institutions. Strengthening the functions and authority of National Commission on Human Rights (Komnas HAM) in the amendment to these two laws, as well as the enactment of new laws, is a form of respect and strengthening the protection and enforcement of human rights in Indonesia.
3. The President of the Republic of Indonesia and Vice President as the state institution most responsible for the fulfillment and respect of human rights in Indonesia, to be able to synergize with national human rights institutions on strengthening human rights institutions along with the function and its authority.

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