



# The Concept of Constitutional Importance to Human Rights in Indonesia

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**Abstract.** The United Nations published the so-called Universal Declaration of Human Rights in 1948, after the end of World War II. The UDHR of 1948 was the world's response to a country that had insulted humanity around the world. Building a more peaceful world free from fear and oppression and unfair treatment. Therefore, Indonesia as a state of law, the guarantee of human rights protection is considered an absolute feature that must exist in every State so that norms regarding human rights guarantees have been contained in the Constitution or Constitution of the Republic of Indonesia Year 1945. Institutionally, the state does not have state institutions established under the Constitution to guarantee human rights. So that the implementation of human rights guarantees was formed an institution that protects human rights based on the Law, so that researchers identify a problem regarding legal arrangements in arranging policies related to human rights as an effort to provide constitutional rights to Indonesian citizens. The method used in this study is Normative Juridical. The conclusion of this study is that there are human rights listed in the Constitution of the Republic of Indonesia Year 1945 some are listed in the Law but have the same quality of constitutional importance so that they have "Constitutional Importance".

**Keywords:** Human Rights, Constitution, State

## 1. Introduction

State obligations regarding international human rights are regulated in various international human rights law instruments, among others, such as the UDHR, ICCPR, and the aforementioned Convention Against Torture (CAT). As for the national level, state obligations regarding human rights are regulated in national laws and regulations, for example in the constitution and laws. Concretely, state obligations regarding human rights are realized by protecting the human rights of every individual from abuse of state power, guaranteeing the existence of human rights of every individual in legal provisions and their implementation, and fulfilling the human rights of each individual. For example, against the right not to be tortured (right not to be tortured), States should enact laws prohibiting the practice of torture to protect individuals from torture. States should also ensure that every individual is completely free from torture. The state must also fully fulfill the right not to be tortured in real terms. Andre Sujatmoko[1] states that: By law, the state is a party obliged to protect, guarantee, and fulfill human rights. Why is that? Because the state

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is a party that has power. Regarding human rights, the state is required not to abuse its power. The definition of the state here includes not only the government but also the legislature and judiciary. This includes all state apparatuses/law enforcement officials.

The Constitution of the Republic of Indonesia in 1945 before it was amended by the Second Amendment in 2000, contained only a few provisions that could be related to the definition of human rights. The articles that are usually associated with the understanding of human rights are:

- a. Article 27 Paragraph (1) which reads, "All citizens simultaneously have a position in law and government must uphold the law and government with no exception";
- b. Article 27 Paragraph (2) which reads, "Every citizen has the right to work and a decent living for humanity";
- c. Article 28 which reads, "The freedom of association and assembly, expressing thoughts orally and verbally and so on shall be stipulated by law";
- d. Article 29 Paragraph (2) which reads, "The State guarantees the freedom of every citizen to profess his religion and to worship according to his religion and belief";
- e. Article 30 Paragraph (1) which reads, "Every citizen has the right and must participate in the defense of the state";
- f. Article 31 Paragraph (1) which reads, "Every citizen has the right to be taught"; 7. Article 34 which reads. "The poor and abandoned children are taken care of by the state".

The hierarchy or position of a state institution lies in the regulation of the state institution itself by applicable laws and regulations.[2] State institutions in Indonesia are regulated in several forms, namely State institutions that are regulated and formed by the constitution are constitutional organs, state institutions that are regulated and formed by law are legal organs, while state institutions formed based on Presidential decrees then the degree of legal treatment of officials sitting in them as well as institutions formed at the level of regional regulations.[3] State institutions whose positions at the constitutional level are the President, Vice President, People's Representative Council, Regional Representative Council, People's Consultative Assembly, Constitutional Court, Supreme Court, and Audit Board.[4] The authority of the above state institutions is regulated directly in the constitution, namely the constitution, and is specified again in law, although the appointment of its members is determined through a presidential decree as the highest state administration official. [4] State institutions that have the same degree of interest as state institutions referred to in the constitution are the National Human Rights Commission, the Corruption Eradication Commission, and others.[5] Although these state institutions are not explicitly mentioned in the 1945 Constitution, they have constitutional importance to the constitutional system based on the 1945 Constitution.[6]

Pancasila as the philosophy of life of the Indonesian nation is dynamic, which means that development efforts by developments or changes and demands of the

community are not something taboo that makes these basic values frozen, rigid, and gives birth to illogical fanatics. Pancasila as a state ideology has a peculiarity that distinguishes it from other state ideologies, this is because Pancasila brings certain values that are extracted from the socio-cultural reality of the Indonesian nation[7] and Chapter XA Articles 28 A to Article 28 J of the Constitution of the Republic of Indonesia Year 1945 guarantees the protection of human rights in Indonesia, which is then strengthened protection and enforcement through Law 39 of 1999 concerning Human Rights and Law 26 of 2000 concerning Human Rights Courts. To protect, respect, and uphold human rights in Indonesia, the National Commission on Human Rights was formed which is a constitutional Important institution at the level of other state institutions that has the task of assessing and researching, counseling, monitoring, and mediating human rights. Institutions of constitutional importance[8] an independent state institution that has a position or degree that is equal to the state institutions in the 1945 Constitution, Although these state institutions are only formed by legislation products or limited to law but have an equal position to carry out the function of checks and balances.[9]

Although Indonesia has shown its commitment to the protection of human rights through its constitution, the protection of human rights in Indonesia only reached its culmination in 1993 with the establishment by the United Nations, the UN High Commissioner for Human Rights, and the appointment of the UN High Commissioner for Human Rights, Indonesia responded, among others, with the establishment of Komnas HAM to show that Indonesia pays attention to international and national efforts for the promotion and protection of human rights. However, because Komnas HAM was born, and in the first five years of its existence, lived under an authoritarian, repressive, and suppressive human rights regime. Komnas HAM at that time was more of a mere display than a credible institution for the promotion and protection of human rights, independence, and integrity.[10]

The National Commission on Human Rights was established based on Presidential Decree No. 50 of 1993 concerning the National Commission on Human Rights. This institution was later strengthened through the Human Rights Law and the Human Rights Court Law. Komnas HAM is a quasi-institution, which is a second tier state organ born from the Law, has equality with other state institutions, and is independent and special. This institution is specifically formed to solve certain problems specifically based on the authority possessed by each institution.

However, if taken seriously, only one provision provides a constitutional guarantee of human rights, namely Article 29 paragraph (2) which states "The State guarantees the freedom of each citizen to profess his religion and to worship according to his religion and belief". Meanwhile, other provisions, are not at all formulations of human rights or Human Rights, but only provisions regarding the rights of citizens or The rights commonly also called the citizens' constitutional rights. The constitutional rights of citizens only apply to people who have the status of citizens, while for foreigners it is not guaranteed. The only thing that applies to each resident, regardless of citizenship status, is Article 29 paragraph (2). In addition, the provisions of Article 28 can be said to be related to the idea of human rights. However, Article 28 of the 1945 Constitution of the Republic of Indonesia does not

provide direct and unequivocal constitutional guarantees for the existence of 'freedom of association and assembly, and freedom of expressing thoughts orally and in writing' for everyone, Article 28 only stipulates that matters concerning freedom of association and assembly, and expressing thoughts orally and in writing will still be stipulated by law.

## **2. Problems**

The scope of this research focuses on the problem of legal regulation in arranging policies related to human rights as an effort to provide constitutional rights to Indonesian citizens.

## **3. Method**

The method used in this study is Normative Juridical, which is a legal research methodology that bases its analysis on applicable laws and regulations that are relevant to legal issues that are the focus of research through the Statute Approach which opens opportunities to study the consistency and compatibility between law and other laws or between laws and the Constitution or between regulations and regulations and law. The presentation of data is carried out qualitatively with data analysis methods that are Descriptive Analysis. The use of data analysis through the Descriptive Analysis method is intended to analyze and present facts systematically and describe the problems faced in providing constitutional rights directly and firmly as an effort to fulfill and protect human rights in Indonesia.

## **4. Discussion**

### **4.1 The Concept of the Existence of State Commissions in the Constitutional System in Indonesia**

Discussing the state commission must first be understood related to the understanding of state institutions in Indonesia. The understanding of state institutions is still very diverse,[11] Constitutional experts to date have not found a point of agreement in the terminology of state institutions. Today, state institutions cannot be dictated to three state institutions alone as the classical theory of trias politica: the executive, the legislature, and the judiciary. In the theory of trias politica put forward by Baron de Montesquieu the division. State institutions are divided into only three. However, M. Yamin in a book stated that the division of state power when our constitution was drafted was based on consultation and citizenship according to Indonesian civilization and the will of the people by not prioritizing all the influence of trias politica teachings and Western influences that were not by Indonesian civilization.[12] This means that the teachings of trias politica can be applied in the constitutional system in Indonesia, but if it is no longer relevant then there is no need to force it. In the context of the constitutional system in Indonesia, what is meant by state institutions is known as the main state institutions/organs and supporting institutions/organs. Since the

amendment of the 1945 NRI Constitution to the 4th there have been various Auxiliary State' 's Organs, namely several state commissions.[13]

According to Cornelis Lay, the presence of state commissions is a government mechanism in adjusting the government system which was previously dichotomized into only three branches of power, this is also a form of the state in responding to existing constitutional problems.[14] The idea of the emergence of a state commission began when in this case the state was above the people and then in its development the state wanted the community to also be involved in supervising the state, this was manifested in the mechanism of this commission.[15] So, when the position of the state is still strong, there still creates stability of accountability supervision horizontally and vertically, because in this case, the community can still supervise. The existence of the state commission is intended so that the state can fulfill its function, namely implementing democratic principles in every administration of government through accountable, independent, and trustworthy institutions. In essence, effectiveness and maximization in realizing the state process are aspects to be achieved with the emergence of this state commission.

The emergence of various kinds of state commissions in Indonesia is a manifestation of legal development. This phenomenon is a global thing because the development of state commissions with an independent nature does not only occur in Indonesia but also in many other countries. Examples of the development of state commissions also occur in the United States and Britain where these institutions are usually still in the executive realm or legislatively and some even stand truly independent. Various state commissions have emerged, this is because, at the level of bureaucratic implementation in the government area, it is felt that it cannot meet the demands of the needs in serving the community with increased standards and quality. So with the existence of this state commission, it is hoped that the bureaucratic system in the government area will be more efficient and effective.[11]

In the context of Komnas HAM itself, Komnas HAM is a state commission that first appeared in Indonesia. At the beginning of its formation, the position of Komnas HAM was nothing but an extension of executive power, this can be observed if you look at the basis of its formation at that time using a Presidential Decree. With this assumption, the independence of this commission was finally doubted, but this was refuted by various achievements of this commission since its inception which can handle cases of gross human rights violations or not. This commission in carrying out its duties can properly open relations with civil society and with this Commission can finally be trusted by the public in resolving various human rights violations in Indonesia.[16]

#### **4.2 The Concept of the Existence of State Commissions in the Constitutional System in Indonesia**

When understanding the concept of state institutions or what is also usually referred to as state organs comprehensively, we can first look at the opinion of Hans Kelsen regarding his view, namely "the concept of the state organ". Then Hans Kelsen elaborated again on his opinion that "Whoever fulfills a function determined by the legal order is an organ".[17] Which means if, in this case, anyone who carries out a

function contained in a legal order can be said to be an organ. So we can draw a common thread here that Komnas HAM is also an organ because Komnas HAM here carries out functions regulated by law. Then when we re-understand the concept of Constitutional Organ, this cannot be interpreted the same in every country. Because there are differences in the style of the constitution in each country in determining its state organs. Taking the example of Germany, the state organ which is said to be the Constitutional Organ is a state organ that in this case carries out its direct functions mandated by the constitution. Then if we compare it with Indonesia, the state organs whose status, functions, and authorities are mentioned in the 1945 NRI Constitution are also Constitutional Organs. But in reality, it is indeed different, and cannot be compared because of the different institutional forms of the Indonesian Constitution.

In the constitutional system of the State of Indonesia, there are 3 (three) classifications of state organs/institutions. (1). First, basic state institutions. Its formation and function are contained in the 1945 NRI Constitution, (2). State institutions whose formation and functions are regulated by law, and (3) State institutions whose formation and functions are regulated by presidential decree.[13] Then, if you look back there are only 33 state institutions whose existence is regulated in the constitution. State institutions regulated in the constitution are considered to have Constitutional Importance value because their functions are regulated directly in the constitution. Then the question is whether state institutions or organs that are regulated outside the constitution do not have the value of Constitutional Importance equivalent to state institutions or organs whose basis for formation and functions are regulated in the 1945 NRI Constitution. The answer is no, that there are several state institutions or State organs whose functions and formation are regulated outside the 1945 NRI Constitution and have the value of Constitutional Importance. If we look back at the articles in our constitution, namely the 1945 NRI Constitution, there is article 24 paragraph (3) which states "Other bodies whose functions are related to judicial power are regulated in the Law" There is the phrase "Other bodies regulated outside the Law" then we can explicitly draw a common thread that there are other bodies that also have the value of "Constitutional Importance" as well. These other bodies are the Attorney General's Office, the Corruption Eradication Commission, and Komnas HAM. This is logical because the three institutions or organs of the State have functions related to judicial power.[11]

The National Commission on Human Rights itself has a monitoring function in Law No. 39 of 1999 concerning Human Rights, which then contains investigative authority. In Law 26 of 2000 concerning Human Rights Courts, Komnas HAM also has the authority to be an investigator in cases of gross human rights violations. So we can conclude that the investigative authority possessed by Komnas HAM is a function related to judicial power as stated in Article 24 paragraph (3) of the 1945 NRI Constitution. So it can be concluded that Komnas HAM is a Constitutional Organ because it also has the value of Constitutional Importance. Then the question that arises is whether Constitutional Importance is only determined based on what has been described above, the answer is certainly no. If we look back at the existence of Komnas HAM Komnas HAM is mandated by the Constitution as the protector of human rights. In addition, the substance of Human Rights Protection is a substance that must always be present in every constitution in the world. So it is logical when it

is concluded that although the basis for its formation and function is not directly contained in the constitution, Komnas HAM is still a constitutional organ with Constitutional Importance because in this case, Komnas HAM is a very important institution in promoting and protecting Human Rights as written in the Constitution, namely the 1945 NRI Constitution. The National Commission on Human Rights which is considered to have Constitutional Importance is expected to solve various kinds of Constitutional Problems that exist in Indonesia so that its existence as a Constitutional Organ can be strengthened through its position, function, authority, budget, and rules.

#### **4.3 State's Constitutional Obligation in Managing Human Rights**

Today, after the Second Amendment to the 1945 Constitution of the Republic of Indonesia in 2000, the provisions regarding human rights and citizens' rights in the 1945 Constitution have undergone very fundamental changes. The original material contained only seven points of provisions. Setya Arinanto stated that the articles on human rights themselves, especially those contained in articles 28A to 28J, basically came from the formulation of TAP MPR Number XVII / MPR / 1998 concerning Human Rights. Therefore, to understand the conception of human rights completely and historically, the three legal instruments of the Constitution of the Republic of Indonesia Year 1945, TAP MPR Number XVII / MPR / 1998, and Law Number 39 Year 1999 concerning human rights can be seen in the continuum. Overall, it can be said that the provisions on human rights that have been adopted into the Indonesian legal system and constitution are derived from various international conventions and universal declarations on human rights and various other international legal instruments.[18]

After the Second Amendment in 2000, the entire material of human rights provisions in the 1945 Constitution of the Republic of Indonesia, which when combined with various provisions contained in laws relating to human rights, can be grouped into four groups containing 37 provisions. Among the four human rights groups, there are human rights that cannot be reduced under any circumstances or nondelegable rights, namely:

- a. The right to life;
- b. The right not to be tortured;
- c. The right to freedom of mind and conscience;
- d. Religious rights;
- e. The right not to be enslaved;
- f. The right to be recognized as a person before the law; and
- g. The right not to be prosecuted based on retroactive law.

Jimly Ashiddiqie[11] states that some of the rights mentioned above are included in the category of human rights that apply to all persons living and within the jurisdiction of the Republic of Indonesia, and some are citizen rights that apply only to citizens of the Republic of Indonesia. Some of these rights and freedoms are

contained in the 1945 Constitution of the Republic of Indonesia and some are listed only in law but have the same quality of constitutional importance so that they can be called having the same "constitutional importance" as explicitly mentioned in the 1945 Constitution of the Republic of Indonesia. By the principle of the "social contract", every right related to a citizen is automatically reciprocal with the state's obligation to fulfill it. Similarly, the constitutional authorities possessed by the state through its organs are also reciprocal with constitutional obligations that must be obeyed and fulfilled by every citizen.

In this connection, by the four formulations of state goals above, every citizen has the right to demand the fulfillment of state responsibilities in improving the general welfare and educating the life of the fiber nation in protecting the entire nation and all Indonesian bloodshed, and in actively participating in world association based on the principles of independence, lasting peace, and social justice. These four objectives are not only collective but also individual for each citizen of the Republic of Indonesia.

#### **4.4 Obligations and Responsibilities of Citizens in Guaranteeing Human Rights**

In addition to the obligation and responsibility of the State to ensure that all provisions concerning human rights and freedoms or the rights and freedoms of citizens as mentioned above, are respected and fulfilled properly. Conversely, every citizen is also obliged to fulfill his responsibility to respect and comply with all matters related to the constitutional authority of state organs that carry out the functions of state power according to the constitution and applicable laws and regulations. Therefore, doctrines arise such as, for example, no representation without taxation or no taxation without representation. Similarly, there should be no imposition of burdens on citizens' wealth in the form of tax levies carried out by the government without the consent of the people through their representatives. In fact, in some countries, provisions regarding what is used as a tax object and the amount of taxable value must be determined in or by law. That is, the determination of tax object and tax value should not be determined unilaterally by the government, and people's representative institutions. Thus, between the dimensions of rights and obligations and between citizens and state organizations can be said to be mutual feedback.

#### **4.5 Human Rights Regulation in Law Number 39 of 1999 concerning Human Rights as an Effort to Enforcement and Protection of Human Rights in Indonesia**

September 8, 1999, was a milestone for the revival of human rights that had long been ignored by the previous regime, with the DPR having passed the Human Rights Bill into Human Rights Law Number 39 of 1999 concerning Human Rights when viewed from the aspect of respect and protection of Human Rights formally the enactment of the law is encouraging progress, although the essential essences regarding human rights have been stated in several articles of the 1945 Constitution and the provisions of the MPR-RI No XVII / MPR / 1998. Law Number 39 of 1999 concerning Human Rights, is regulated by the national commission on human rights. Previously, Komnas HAM was formed on June 7, 1993, based on Presidential Decree Number 50 of 1993

concerning the National Human Rights Commission. Broadly speaking, by Law Number 39 of 1999, the points regarding freedom in human rights include the following: the right to personal freedom: "no one shall be enslaved or enslaved, slavery or slavery, slave trade, trafficking in women, and acts of any kind whose purpose is prohibited". Everyone has the right to his wholeness, both spiritual and physical, not to be the object of research without his consent. Freedom to profess religion and worship according to their religion and beliefs, free to choose and have political beliefs, free to assemble, express opinions, express and disseminate opinions according to their conscience, taking into account religious values, decency, order, public interest and the integrity of the nation. Everyone is free to choose his nationality and without discrimination, has the right to enjoy the rights derived and inherent in his citizenship and is obliged to carry out his obligations as a citizen by the provisions of applicable regulations. The government is obliged and responsible for enforcing, protecting, and respecting human rights by the mandate of the Constitution of the Republic of Indonesia Year 1945 and Law Number 39 the Year 1999, the obligations and responsibilities of the government include the implementation of human rights in various sectors of national and state life.

The State of Indonesia is a state of law that always upholds justice and legal certainty for all its people. Laws are created to control and bring order to society so that each legal subject can carry out his obligations properly and obtain his rights. Philipus M. Hadjon argues that legal protection is divided into two, namely preventive legal protection and repressive legal protection. Preventive legal protection aims to prevent disputes. Repressive legal protection aims to resolve disputes. Law enforcement is a process carried out to uphold and function legal norms in reality as a code of conduct in traffic or legal relations in public and state life. The law must be enforced because the values of justice contained in it are very important for the welfare of society. The enforcement and protection of human rights in Indonesia are very important for its people because human rights are related to the dignity and dignity of humans as a whole person. Human rights in Indonesia are closely related to the foundation of the Indonesian state, namely Pancasila, which is listed in the second precept. Human rights in the Indonesian state are highly upheld because it is one of the characteristics of the Indonesian state as a state of law that always maintains the dignity and dignity of the Indonesian people. Therefore, the enforcement and protection of human rights in Indonesia is highly maintained and upheld. The enforcement and protection of human rights in Indonesia progressed on November 6, 2000, when the House of Representatives (DPR) passed Law Number 26 of 2000 concerning Human Rights Courts promulgated on November 23, 2000. This law is the basis for human rights courts authorized to try perpetrators of gross human rights violations. This law regulates several specificities or arrangements that are different from the arrangements in the criminal procedure law, these differences start from the investigation stage by Komnas HAM, to the arrangement of the panel of judges whose composition is different from ordinary court courts. The composition of judges consists of five people who require three of them to be ad hoc judges.[19]

Efforts made by the Indonesian state to uphold human rights can be taken through improving legal products and legislation on human rights, conducting inventories, evaluating and reviewing all legal products, Criminal Procedure Code,

Criminal Code that are not by human rights, developing institutional capacity in judicial institutions and other agencies related to justice and human rights enforcement, Socialization of the importance of human rights to the community, and cooperation in legal protection with all aspects and levels of society.

## 5. Conclusion

Human rights are listed in the Constitution of the Republic of Indonesia in 1945, some are listed in the Law but have the same quality of constitutional importance so that they have the same "Constitutional Importance", so the state is obliged to fulfill the rights of citizens. The State has the obligation and responsibility to ensure that the human rights of every citizen are respected and fulfilled as well as possible, while citizens are also obliged to fulfill their responsibilities to respect and comply with matters related to the authority of state organs that carry out the functions of state power. The government is obliged and responsible for upholding, protecting, and respecting human rights by the mandate of the Constitution of the Republic of Indonesia Year 1945 and Law Number 39 Year 1999. Government obligations and responsibilities include the implementation of human rights in various sectors of national and state life.

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