



Application of Human Rights Principles in the Formation of Draft Laws Concerning the Civil Code

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Abstract

As a rule of law, Indonesia has an obligation to guarantee people's welfare through law. Good legislation is legislation that has a basis or foundation called Grundnorm. Grundnorm is a foundation for forming laws that have the value of justice. Apart from that, good laws and regulations must fulfill principles and concepts, protect human rights, and must pay attention to community participation. Because the purpose of forming laws and regulations is to protect the public. This research aims to find out how good legislation is formed and how the community participates in implementing the formation of legislation. In forming laws and regulations, various aspects must be taken into account. This is so that the aim of forming legislation can be achieved and does not injure the rights of the Indonesian people. The formation of laws and regulations must be democratic, aspirational and participatory. Standard Norms and Regulations (SNP) on Human Rights is a document which is an implementable explanation of various human rights instruments, both international and national, as well as human rights norms which continue to develop dynamically, to suit the context and events, especially in Indonesia. Standard Norms and Regulations regarding the Right to Obtain Justice are expected to become references and guidelines in carrying out discussions and amendments to the Draft Criminal Code.

Keywords: Eight Principles of Human Rights, Formation of Draft Laws, Draft Criminal Code.

Introduction

BCertain sections of the Civil Code are increasingly marginalized. Moreover, business law is developing quickly. Civil law is spread across many statutory regulations. Therefore, one of the homework for the team drafting the Civil Code Bill was to accommodate new things that were developing in the realm of civil law as well as to codify the relevant laws into a revised Civil Code.



Through Decree No. PPE.232.PP.01.02 In 2008, the Minister of Law and Human Rights formed a Committee for Drafting the Civil Code Bill. The committee consists of 22 people, chaired by Elyana Tanzah. Apart from coming from within the Directorate of Legislative Regulations of the Ministry of Law and Human Rights, the team members also involved academics such as Rosa Agustina, notary A. Partomuan Pohan, and former Supreme Court justices Arbijoto and J Johansyah. The term human rights ("HAM") is a translation of the French "droits de l'homme", or English "human rights" which means "human rights". The theoretical understanding of human rights is the rights inherent in human dignity as human beings created by God Almighty, or basic rights which are principles as gifts from God. Thus, human rights are the rights that humans have according to their nature which cannot be separated from their essence, therefore human rights are noble and sacred.¹

The universal, undivided, non-discriminatory nature of human rights is discussed specifically within the scope of human rights principles. Manfred Nowak states that there are 4 human rights principles, namely universal, undivided, interdependent and interrelated. Meanwhile, Rhona KM Smith added other principles, namely equality, non-discrimination and human dignity. Meanwhile, Indonesia places important emphasis on the principle of state responsibility.²

The following is an explanation of each human rights principle which also contains the nature of human rights:

¹Eko Riyadi, Human Rights Law: International, Regional Perspective, Depok: PT RajaGrafindro Persada, 2018;

²Bayu Dwiwiddy Jatmiko, Examining the Recognition and Protection of Political Human Rights After the Amendment to the 1945 Constitution, Legal Panorama Journal, Vol. 3, no. 2, 2018;



1. Universal

Universal human rights mean that all people throughout the world, regardless of their religion, nationality, language, ethnicity, regardless of political or anthropological identity, and regardless of disability status, have the same rights as humans.

2. Indivisible (Indivisibility)

Indivisible human rights means that all human rights are equally important and therefore it is not permissible to exclude certain rights or certain categories of rights from their parts.

The universal and indivisible nature of human rights is considered the two most important sacred principles. Both are the main slogans for the UDHR's 50th anniversary, namely all human rights for all.

1. Interdependent

The interdependent nature of human rights means that the fulfillment of one particular category of rights will always depend on the fulfillment of other rights. For example, the right to work will depend on the fulfillment of the right to education. Then the right to choose and practice a belief will depend on the right to express an opinion in public. Followers of certain religions will be allowed to lead worship if the right to express opinions in public is fulfilled.

2. Interrelated (Interrelated)

Human rights are interrelated, it is understood that all human rights are an inseparable part of each other. In other words, all categories of human rights are one package and one unit. For example, someone will be able to choose legislative candidates well if their education is also good. By fulfilling the right to education, a



person is able to read the ballot papers and the vision and mission of legislative candidates and the political parties that promote them well. Confirmation of the universal, undivided, interdependent and interrelated nature of human rights is contained in Article 5 of the 1993 Vienna Declaration and Program of Action, namely all human rights are universal, indivisible and interdependent and interrelated.

3. Equality

Equality is a very fundamental human rights principle. Equality is interpreted as equal treatment, where in the same situation people must be treated the same, and in different situations people are treated differently too. Equality is considered an absolute prerequisite in a democratic country, for example equality before the law, equality of opportunity, equality of access to education, equality in accessing fair justice, equality of belief and worship according to one's beliefs, and so on.

4. Non-Discrimination (Non-Discrimination)

Discrimination occurs when everyone is treated or has unequal opportunities, such as inequality before the law, inequality of treatment, or education opportunity, etc. Discrimination is interpreted as a situation is discriminatory of unequal if like situations are treated differently or different situations are treated similarly or a situation is said to be discriminatory if the same situation is treated differently and/or different situations are treated the same.

5. Human Dignity (Human Dignity)

The main aim of agreeing and codifying human rights law is to ensure that all humans can live with dignity. Because, basically humans must be respected, treated well, and considered valuable. If a person has rights, it means he can live his life with



dignity. However, if a person's rights are revoked, then he or she is not treated with dignity.

6. State's Responsibility

Fulfilling, protecting and respecting human rights is the responsibility of the state. The main actor burdened with responsibility for fulfilling, protecting and respecting human rights is the state through its government apparatus. This principle is confirmed in all international human rights conventions and domestic regulations.

In Indonesia, state obligations are expressly recognized in Article 8 Human Rights Law which states: The protection, promotion, enforcement and fulfillment of human rights is primarily the responsibility of the government. State responsibility can also be found in the UDHR Preambles, namely; "Whereas Member States have pledged themselves to achieve, in cooperation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms." This means that member states promise to achieve progress and general respect for human rights and fundamental freedoms, by cooperating with the UN.

Based on the description above, it can be concluded that there are several basic characteristics of human rights, including universal, undivided, equal, interrelated, and others. The nature of human rights is then discussed in detail within the scope of human rights principles.

In essence, human rights are rights that humans have because they are human. Apart from being universal, human rights are also inalienable. This means that no matter how bad or cruel a person's treatment is, he will not stop being human and therefore he still has human rights. In other words, human rights are inherent in him as a human being.



This research is normative legal research, namely research on secondary data obtained through literature study. Secondary data in this research is in the form of primary legal materials, namely legislation related to human rights, as well as secondary legal materials in the form of literature and expert opinions related to the problem. The collected data is analyzed qualitatively, namely analysis based on the value, quality and condition of the data obtained. In other words, the search for truth in this research is based and measured by the quality, value and state of the data in question.

IMPLEMENTATION OF HUMAN RIGHTS PRINCIPLES IN THE FORMATION OF THE KUHPER

Rights basic man in field economy, social And culture is usually referred to as positive rights (*positive rights*) which is called "Rights to (Rights to)". While civil and political rights are referred to as negative rights, they are also called "freedom from". These positive rights are rights that cannot be demanded in court (non-justicible), such as if the state cannot guarantee its citizens the opportunity to provide employment opportunities. Meanwhile, civil and political rights as negative rights can be sued before the court. (justifiable).³In Indonesia, based on the Amendment to the 1945 Constitution in Chapter XA, human rights are determined. However, the connection with rights in the economic, social and cultural fields is still scattered in existing articles and has not been regulated in detail and clearly in a law. Economic

³ Kasim, Ifdhal and Johanes and Masenus Arus, Economic, social and cultural rights selected essays, Jakarta: Institute for Community Studies and Advocacy, 2001, p. xii - xiv



rights are human rights related to basic human needs of a physical nature. In the 1948 UN Declaration of Human Rights, economic rights are defined as follows:⁴

- A. The right to own property both individually and collectively
- B. The right to work and earn an income
- C. The right to welfare and an adequate life.

The concept and regulation of Human Rights in the economic sector in Indonesia is regulated in Article 27 paragraph 2, Article 28 D paragraph 2 and Article 33 of the Amendment to the 1945 Constitution. This is also regulated in Article 36 of Law no. 39 of 1999 concerning Human Rights article 36, namely that every person has the right to own property and no one may confiscate his property arbitrarily, however, property rights have a social function.⁵ Meanwhile, cultural rights are rights related to spiritual needs.⁶ This right is also regulated in the 1948 UN Declaration of Human Rights, namely the right to education and teaching, as well as the right to participate in the cultural life of society and the protection of scientific, literary or artistic works created. Meanwhile, the concept of social and cultural regulation is regulated in Article 28 H paragraphs 1 and 3, Article 31 and Article 32 of the Amendment to the 1945 Constitution. The state advances Indonesian national culture amidst world civilization by guaranteeing the people's freedom to maintain and develop their cultural values.⁷

Meanwhile, civil rights are individual rights in the form of personal freedom guaranteed by law. This right is also regulated in the 1948 UN Declaration of Human

⁴ Explanation of Law of the Republic of Indonesia Number 39 of 1999.

⁵ *Ibid*

⁶ *Ibid*

⁷ *Ibid*



Rights, which includes: the right to be free from discrimination, the right to life, the right to be free from slavery, the right to equality before the law, the right to a fair trial, the right to the presumption of innocence and the right to obtain legal protection, etc.⁸ Political rights are the right to participate in politics, government administration, the right to hold public office. These rights are also regulated in the 1948 UN Declaration of Human Rights.

In personal rights in the field of economic law, it also concerns the issue of unfair business competition, especially regarding the issue of democracy in the economic sector, requiring equal opportunities for every citizen to participate in the production and marketing process of goods and services, in a healthy business climate, effective and efficient so as to encourage reasonable economic growth. Every person who does business in Indonesia must be in a situation of healthy and reasonable competition, so that it does not give rise to a concentration of economic power in certain business actors.

Individual rights in the field of civil economic law have also been regulated in civil law, namely the Burgerlijk Wet Book (BW), namely regarding civil partnerships, firms, CVs, Limited Liability Companies and other forms of business fields. These individual rights are also related to contract law, namely freedom of contract or freedom in contracts for the public interest and social functions which must pay attention to unity and sustainability, welfare, equality and justice based on the 1945 Constitution and Pancasila. Contracts made by the government relating to the public interest must also

⁸ *Ibid*



pay attention to non-legal aspects such as economic, social and cultural aspects. This was also stated by Hayyan UIHaq, as follows:

The general legal principles, legal theories, legal dogma and legal practice concerning the just utilization of information, knowledge, technology and natural resources should be emanate from the grand norm. In Indonesia, basic concepts of justice can be explored from the social justice concept within the framework of the Pancasila. Consequently, all laws and regulations relating to the utilization of information, knowledge, technology and natural resources, including land and biodiversity should be taken into consideration the greatest benefit of people based on social justice in the Pancasila and the 1945 Constitution. This reason is reflected in a series of Indonesian intellectual property, research, science, and technology legislative acts which refer to the Pancasila and the 1945 Constitution.

Indonesia as a country that seeks to improve the welfare of its people, Indonesia should prepare a national development program to improve the welfare of the people. This state obligation is based on two main ideas, namely:⁹

As a welfare state, Indonesia should prepare a national development program to improve society's welfare. This duty is derived from two ideas:

- (i) the State should facilitation and accelerate the fulfillment of citizen's rights, and*

⁹Zeffry Alkatiri, Learning to Understand Human Rights, Ruas Publishers, Jakarta, 2010.



(ii) *the State should integrate economic factors into social justice.*

Based on civil law, the rights of fellow legal subjects must be accommodated by other legal subjects. Violation of the rights of other legal subjects will create certain obligations for the violating party. There are three main phases regarding the implementation of Human Rights (HAM) in the human life cycle, when viewed based on civil law, including:

- (i) Before a human is born, it means that he or she has not become a full legal subject.
- (ii) After becoming a legal subject, before adulthood, all interests are still represented by parents or guardians.
- (iii) When you are an adult and carry out activities on your own responsibility.

Currently, every human being is a legal subject who is free and independent in carrying out activities, so they are in the same position and without discrimination in carrying out activities, what is different is professional rights and obligations, so in these three phases human rights can be implemented with basic legal concepts civil.

In essence, civil law as a system regulates the life and livelihood of legal subjects from birth to death. Every phase of human life's journey always requires a proportional application of human rights protection, thus it can be said that, in civil law, human rights include civil, economic, social and cultural rights.



Apart from establishing national human rights legal instruments, Indonesia also ratified several international human rights legal instruments to strengthen existing national human rights laws. In mid-2005 Indonesia ratified the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) through Law No. 11/2005 and Law No. 12/2005. Prior to that, Indonesia had also ratified four other basic international human rights instruments, namely the International Convention against Torture through Law No. 5 of 1998, the International Convention on the Elimination of all Forms Racial Discrimination through Law No. 29 of 1999, the International Convention on the Elimination of all Forms of Discrimination against Women through Law No. 7 of 1984, and the International Convention on Children's Rights through Presidential Decree No. 36 of 1990.

With the ratification of these six basic instruments, the human rights norms contained in these basic instruments are binding on the Indonesian State and apply as national law (supreme law of the land). The Indonesian government then has an obligation to implement the provisions contained in international human rights law and at the same time recognize that the rights contained in this instrument are owned by all individuals.

In human rights law, the state, including the government, has the position of duty bearer. The obligations carried out by the state consist of three forms, namely to respect, to protect and to fulfill. The obligation to respect is the state's obligation to refrain from intervening, except according to legitimate law. For example, the state does not intervene in citizens' voting rights during elections. This obligation must be implemented. The state's obligation to respect is the most basic obligation.



In relation to economic, social and cultural rights, the state's obligation to respect is to respect individual resources. Meanwhile, the most significant aspect of the obligation to protect is the extent to which the state guarantees human rights in its legal system. The obligation to fulfill, in relation to economic, social and cultural rights, is the obligation to provide various facilities or direct provisions.¹⁰

Conclusion

In forming statutory regulations, especially the Civil Code, attention must be paid to the clauses of the articles and the material conformity of the content with what is regulated in Law no. 12 of 2011 concerning the formation of statutory regulations as amended by Law no. 15 of 2019. In Article 6 paragraph 1 letter b of the Law, it is stated that one of the material principles of the content of statutory regulations must reflect humanitarian principles. "This principle is often overlooked by the authorities when forming laws and regulations," the Indonesian state upholds human rights as a basis that is naturally inherent in every human being. Indonesia is also very active in human rights issues in the international sphere. This has encouraged the Indonesian Ministry of Law and Human Rights to be enthusiastic in carrying out various P5 HAM activities which are the responsibility of the government.

But all of this could be in vain if at the national level there are still laws and regulations that do not implement human rights values. "In reality, there are still many regulations in Indonesia that are suspected of violating human rights, because they are

¹⁰Nowak, M. (2005), UN Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition, NP Engel, Publishers, p. XX-XXI



found to be in conflict with human rights principles and principles," For this reason, the Ministry of Law and Human Rights has made efforts so that every legal regulation must be based on humanity. This is proven by the enactment of the Republic of Indonesia Minister of Law and Human Rights Regulation No. 24 of 2017 which regulates how to integrate human rights values in the formation of laws and regulations.

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