

PROCEEDING

The 2016 International Conference and Call for Papers (ICCP) UNS

“The Administration of Justice”



19-20 November 2016
The Alana Hotel Solo

Universitas Sebelas Maret



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Theme
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***“Law and Sustainable Development amongst
Developed and Developing Countries”***

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Reviewer

Dr. Hari Purwadi, S.H., M.Hum.

Dr. Pujiyono, S.H., M.H.

Dr. Emmy Latifah, S.H., M.H

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Rachma Indriyani, S.H., LL.M.

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PREFACE

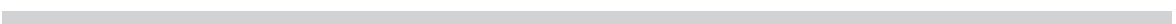
The 2016 International Conference and Call for Papers (ICCP) UNS, held in Surakarta from November 19-20 November, 2016, with an overarching conference theme of “The Administration of Justice”. This theme was developed due to highlighted issue in ensuring that public bodies and those who exercise public functions make the right decisions, and challenges on providing justice for all.

This proceedings from the conference provides multiple meanings of the term sustainability that divided into seven panels, namely Human Rights and Criminal Justice System; The Administration of Islamic Law; Maladministration and its Remedies; Environmental Crime and Administration of Justice; Business Law Perspective; Customary Law; and Miscellaneous. There were eight plenary sessions covering the different areas of the conference : Prof. Dr. Ida Madiha Abdul Ghani Azmi (International Islamic University Malaysia); Dr. A (Albertjan) Tollenaar (the University of Groningen); Prof. Huala Adolf, S.,H., LL.M., Ph.D., FCARB (Universitas Padjajaran); Pan Mohamad Faiz, PhD (The Constitutional Court of Indonesia); Prof. Dr. Supanto, S.H., M.Hum (Universitas Sebelas Maret).

These public talks, respectively, were very accesible to a general audience. The conference participants came from various background such as researcher, lecturer, practitioner, and college students as well. The first day before conference program was started by a special gala dinner to honor all of distinguished guests, invitation, and participants.

The selected paper that were presented on the conference program formed the heart of the conference and provide ample opportunity for discussion. Of the total number of presented papers, all papers that split into seven panels sub theme are included in this proceedings. We would like to thanks to the committee who were facing the challenge during the conference to achieve the aims of the event. All in all, the ICCP UNS was successful and we expect this proceeding could be useful for the entire scholar.

Dr. Hari Purwadi, S.H., M.Hum



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STRENGTHENING INSTITUTIONS, FUNCTIONS AND AUTHORITY THE INDONESIAN NATIONAL COMMISSION ON HUMAN RIGHTS IN IMPLEMENTING THE PROTECTION AND ENFORCEMENT OF HUMAN RIGHTS IN INDONESIA

K h a l i d

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ABSTRACT

One of the requirements of state law is the recognition and guarantee of the protection and enforcement of human rights, this guarantee should be included in the constitution in force in a country. To guarantee the implementation of human rights protection and enforcement is then required institutions of human rights protection and enforcement of an effective and independent in exercising its functions and powers guaranteed by the constitution.

Powerlessness The Indonesian National Commission on Human Rights in resolving cases of human rights violations to the fullest is inseparable from the question of institutional models that still contains a number of weaknesses. As the issue is still weak independence, functions and authority, inadequate budgets, yet the strong position of the Commission in the state system of Indonesia and the number of members who are not in accordance with the mandate of the law. These issues make the Commission has not so strong when faced with the challenges and complexities of the issues of human rights in Indonesia today.

Human Rights on the Second Amendment was included in a separate chapter, Section XA on Human Rights, which includes as many as 10 (ten) articles from Article 28 to Article 28j set out in the 1945 Constitution. However, it should be noted that in Chapter XA on Human Rights on the 1945 changes is no list of institutional/ enforcement institutions Human Rights or The Indonesian National Commission on Human Rights in it, whereas the habit of setting “chapter” in the 1945 Constitution will bear State institutions that govern them. Whereas in some other countries, especially in the Asia Pacific region, where their human rights commission has been set up by a special law, even in Thailand and South Africa is set directly in the constitution.

Keywords: Strengthening Institutions, Functions and Authority, The Indonesian National Commission on Human Rights.

A. INTRODUCTION

The Indonesian National Commission on Human Rights was first established by Presidential Decree No. 50 Year 1993 and later present in the Act. No. 39 of 1999 on Human Rights. It is not regulated by a specific legislation, but only a part of the setting of other legislation. Whereas in some other countries, especially in the Asia Pacific region, where human rights institution was already regulated by a specific legislation, even in Thailand and South Africa, it set directly in the constitution. The existence of the National Commission on Human Rights not only is not regulated in a specific legislation, but it is not directly regulated in the 1945 Constitution of Indonesia. Although it contains a quite comprehensive provisions on human rights norms.

In the reform era, the Commission stipulated in the Act No. 39 of 1999 on Human Rights. Article 75 states that, the Commission aims: (1) to develop a conducive conditions for the implementation of human rights in accordance with Pancasila, the 1945 Constitution, and the United Nations Charter and the Universal Declaration of Human Rights; and (2) to improve the protection and enforcement of human rights for the personal development of the Indonesian people and their ability to participate fully in the various fields of life. Furthermore in Article 76 paragraph (1) states that “to achieve its objectives, the Commission functions to assess, research, education, monitoring and mediation of human rights”.

The recognition and protection of human rights set out in the amendment of the 1945 Constitution unfortunately not yet set about human rights institutional itself. State institutions in the field of human rights such as the National Commission on Human Rights should be set in the amendment of the constitution in order to ensure the implementation of the recognition, protection and enforcement of human rights that are more independent, effective, and equitable as state institutions are strong and equivalent with other state institutions that are regulated by the 1945 Constitution.

Although there have been many cases of human rights violations in Indonesia, but unfortunately the Government does not strengthen the position and function of the National Commission of Human Rights in the Constitution.

All these institutions are supposed to do with the empowering policy, and not the institutionalizing policy. Empowering policy mainly covering the strength, the institutional, and the control. During this time, solving the effectiveness, efficiency and control problems is done by creating new institutios (both permanent and ad hoc). Power or authority that is too fragmented or separated could be ineffective and inefficient and can cause confusion and uncertainty. On the other hand, it will lead to powerlessness.¹

According to Soetandyo Wignjosoebroto, as cited by Ni'matul Huda, the problems that arise in the life of developing countries, such as Indonesia, originate from the fact that the growing ex-colonial countries is willing to organize the stat institutions based on the Constitution. The Constitution they know from former colonial countries inherited Western Legal System. But it failed to inherit and accept the basic constitutionalism idea on the supremacy of law, the limitation of state power, and the warranty of human rights. What happened here is not reception in complexu, but acceptance of severed Western concept of the state and constitutional law. The constructions and positive norms are understood and accepted, but the idea and the essential meaning were detached and lost.²

Strengthening the protection and enforcement of human rights for citizens is not only by ratifying and putting many articles regulating the rights of the citizens. But it should be written clearly and completely in the Constitution. The most important thing is the political will and the consistency to perform those provisions in the conduct of the national level. This cannot be separated from the establishment of a state institution whose responsibilities are to maintain, to perform, and to be the guardian of the realization of the recognition, protection, and enforcement of human rights.

1 Bagir Manan, *Law Development Challenges in Indonesia, Papers on Subjects Constitutional Law and Human Rights*, PDIH UNS, Surakarta, 2015, p. 13-14.
2 Ni'matul Huda, *State Institutions in Transition Democracy*, UII Press, Yogyakarta, 2007, p. 31.

B. URGENCY INSTITUTIONAL HUMAN RIGHTS COMMISSION IN THE CONSTITUTION

Structuring the legal institutions and the institutionalization of clear laws by arranging these components, so that the development process of law can run harmoniously and focus more on substantial issues. Therefore, there needs to be a mechanism of integration, that the development of the law should include (all-encompassing) all components of the legal system on top, which simultaneously runs through strategic measures, ranging from planning the creation of rules (legislation planning), the manufacturing process (law making process), to the rule of law (law enforcement) that was built by the awareness of law (law awareness).³

Constitution as a container that holds something of ideas, thoughts or ideas. The idea was subsequently listed one by one as the content of the Constitution. Means the constitution is the embodiment of the ideals, for example; aspiration of the people to protect their human rights when in conflict with government.

In the state of law there are always legal recognition and protection of human rights. All men would be treated the same position in the legal, social, economic, cultural and others. So also in the Republic of Indonesia is guaranteed the protection of human rights under the provisions of law and not the whim of a person or group that became the basic of power.⁴

According to ECS Wade in his book “Constitutional Law”, as cited by Ni'matul Huda, that the constitution is a script that describes the framework and main tasks of the agencies of the state government and determine the main points of the workings of the bodies the. So, in essence, the basis of any system of government regulated in a constitution.⁵

Although there are state institutions established by or because they were given power by the Constitution, some are formed and get its power from the Act, and even some are only established by Presidential Decree. Hierarchy position of course depends on the degree of regulation according to the legislation in force. State agencies are governed and shaped by the Basic Law is a constitutional organ, while established under the Act is an organ of the Act, while only formed because of the Presidential Decree of course lower levels and the degree of legal treatment of the officials who sat in it.⁶

For those who view the state of the power angles and considered the organization of power, the constitution can be seen as an institution or set of principles that define how power is divided among several institutions of state, such as between the legislature, executive and judiciary. The Basic Law determines the ways in which these power centers work together and adapt to each other, the Constitution recording power relations within a country.⁷

The recognition, protection and enforcement of human rights for citizens is not necessarily just by ratifying and many articles that regulate the rights of citizens, but the constitution still must be written with clear and complete for the human rights of citizens, the most important thing then is the political will and consistency run those chapters in the behavior of national and state level, and this can not be released necessity of State institutions that maintain, run and oversee the realization of the recognition, protection and enforcement of human rights.

3 Muladi, *Human Rights: The Nature, Concepts and Implications in the Perspective of Law and Society*, Refika Aditama, Bandung, 2009, p. 33.

4 Didi Nazmi Yunas, *Conception of the State of Law*, Angkasa Raya, Padang, 1992, p. 50.

5 Ni'matul Huda, *The 1945 Constitution and Amendment notion Repeat*, Eagle Press, Jakarta, 2008, p. 16.

6 Jimly Asshiddiqie, *Efforts to Strengthen The Indonesian National Commission on Human Rights Bill Through Design Commission*, in www.jimlyschool.com Accessed on October 22, 2016.

7 Ni'matul Huda, *Op.cit.*, p. 16.

Formulation of Human Rights does not include the essential understanding of the responsibility (liability) human. In addition, the formulation of human rights is also most inviting variety of questions, among them, the first, namely the absence of State institutions that were born in the formulation of constitutional amendments, when it was governed by a separate chapter, namely Chapter XA Human Rights, which is usual in the 1945 Constitution each setting with “chapter” that govern institutional childbirth. Secondly, regarding Article 28-I of paragraph (1) of the 1945 Constitution regarding the enactment of legislation that is retroactive.

There is a kind of understanding, both experts and designers of the constitution, that the rights contained in the Constitution or the Constitution is human rights or basic rights (fundamental rights). By placing the rights in the constitution, these rights into constitutional rights. Thus, the meaning of human rights is not just an assessment philosophy as natural rights or inalienable rights, but is part of a rule-based as “the higher law”. Then the rights as constitutional rights, it can not be revoked or restrictions, unless the Constitution or the Constitution proclaim it. Therefore strictly prohibited and may be canceled in a judicial manner all legislation or government action that limits or contrary to the rights as constitutional rights.⁸

Given the importance of human rights, its presence should be established in the Constitution or the Constitution and become constitutional rights. No exaggeration notes Richard Bellamy said, “where by a constitution’s task is Viewed as being to embody the substance of the fundamental law rather than to provide a fundamental structure for law making”. These new realities, and can be used to revisit the teaching of constitutional law Indonesia highly emphasizes the institutional aspects as taught Logemann (Staatsrecht van Indonesia).⁹

In the historical development of the nation and state, constitution occupies a very important position. Understanding and substance of the Constitution are constantly evolving along with the development of human civilization and the state organization. By researching and reviewing the constitution, can know the basic principles of the common life and state administration as well as the organizational structure of a particular country. Even the values of the constitution can be said to represent the level of civilization of a nation.

In addition to the written form, modern constitutions in the world, marked, one of them by confirmation or assurance arrangements protection of human rights. Constitutions adopted the principles of human rights, at least has been pushed to a religious ideal political system (constitutional) that is responsible to the masses, as confirmed in the basic or supreme law of the country. Here the real context of country-people relationships are tested, not only in shape in material the constitution of a country, but how the country implements its responsibilities for the respect, protection and fulfillment of human rights.¹⁰

Recognition and protection of human rights always exist in any constitution in the world, because it is the substance that is essential in a constitution. And regulations on human rights in the 1945 Constitution before the amendment contained only a few chapters, namely:

1. About equality before the law and government; in Article 27 paragraph (1);
2. About jobs and a decent living; in Article 27 paragraph (2);
3. About Association, association and expression; in Article 28;

8 Bagir Manan, *Point Links Constitution Concept with Constitutionalism Concept, the State of Law, Rights and Democracy*, in the paper as a tribute Purnabakti Deputy Chief of the Supreme Court., H.M. Imron Anwari, Jakarta, 2014, p. 22.

9 *Ibid.*

10 R. Herlambang Prime Wiratraman, *Constitutionalism and Human Rights: Conception The State's Responsibility in the Constitutional System of Indonesia*, in the Journal of Legal Studies Yuridika Vol. 20 No. 1, 2005, p. 2.

4. About freedom of religion; in Article 29 paragraph (2);
5. About getting instruction; Article 31.

Human rights contained in the 1945 Constitution limited in number and be formulated briefly, because the Constitution's text was made at the time of independence, so it is not possible to create a script about human rights completely, because some figures founding fathers disagree about importance of human rights included in the constitution. On this Sukarno at that time stated: "If we really want to base our country to understand the family, the schools of mutual help, are clear mutual cooperation and social justice, Away with every thought (on Human Rights), every ideology of individualism and liberalism thereof". Instead Hatta said that although the country formed a family, but still need to set some of the rights of the citizens, do not arise until the state power (machsstaat).¹¹

The importance of institutional arrangements in the field of human rights in the constitution, so that the recognition and protection of human rights is not to be biased by the power of the state. One of the identity of a state of law is the guarantee and protection of human rights that must be respected and upheld by the organizers of the country and all its citizens. Because basically the rights it is God's gift and will always be attached to the parcel of life and human existence itself.

In the context of constitutional law and human rights protection, normativisme approach is the approach make sense to promote and strengthen the institutions of human rights protection through adjudication rather than theoretical formalism and realism. Therefore, to safeguard human rights are not sacrificed so arbitrarily in the name of public interest, the establishment normativisme in order of adjudication of human rights is a necessity.

Protection of human rights is an absolute demand for justice for the opposite, injustice, unwanted. Evidence for this claim is the birth of motion as follows. First, konstitusionalisasi and internationalization of human rights aspects of substantive law to determine the scope of human rights. Second, the establishment of institutions and national and international mechanisms for protection both judicial and non-judicial. Third, corrective justice for the injustice inflicted through various practices of human rights violations both past and present in the form of responsibility and liability of individual players and the country.¹²

The first consequence of the recognition of human rights is a deeper understanding of the meaning of democracy. Human Rights form the cornerstone of democracy. At the time of forming the country, people do not let go of their human rights, such as the right to live their own life, thus, the people as a whole retains the right to determine this along with the organization of collective life in the country.¹³

In order dynamic state of law, the state is actively involved in efforts to create a welfare society. Thus the set of state functions to the implementation of the rights and obligations of the human rights. On the one hand the state is required to always protect the rights, but on the other hand are required to effectuate the purposes of the public in the form of social welfare. The role of the state that is double this should always be in harmony in the implementation, capable of guaranteeing and protecting human rights following the implementation of the obligations essentially for the purpose of welfare of the people themselves, if not then the state (government) violates human rights.

11 Miriam Budiardjo, *Fundamentals of Political Science*, Gramedia Pustaka Utama, Jakarta, 2014, p. 127. See also Moh. Mahfud MD, *Primary and Constitutional Structure of Indonesia*, Rineka Cipta, Jakarta, 2001, p. 138.

12 Titon Slamet Kurnia, *Constitutional Rights, The 1945 Constitution and The Constitutional Court*, Pustaka Pelajar, Yogyakarta, 2014, p. 35.

13 Adnan Buyung Nasution, *Aspirations Constitutional Government in Indonesia, Socio-Legal Studies on Constituent 1956-1959*, Pustaka Utama Grafiti, Jakarta, 2001, p. 176.

The study of the constitution in times of constitutional change shows that the different forms of transition will cause various constitutional character. According to Ruti G. Teitel, as cited by Adi Sulistiyono, there are three possible character of the constitution, that is, the first, critical constitution. In this case the new constitution explicitly turn reconstruct constitutional order that is associated with injustice. Secondly, the constitution restorative. This character appears if the new constitution serves to restore normative order before the regime was overthrown. Third, the constitution residual. This character is born if the new constitution is a continuation of the previous government.¹⁴

So many laws that have been set on Human Rights from the 1945 Constitution until the regulations under it, including those ratified by the demands of globalization with international law. The most important thing then is the existence of human rights enforcement institutions must be empowered and strengthened in order to realize the protection and enforcement of human rights in Indonesia independent and fair.

The existence of the Commission as an institution directly governed by the 1945 Constitution will have implications, namely; reinforce its position as a state institution not only as an institution that is on par with state institutions such as the set for this; The Indonesian National Commission on Human Rights will have legal standing to be a party either as an applicant or respondent in a dispute on the constitutional authority of the Constitutional Court. This would be a solution to clarify the institutional relations between The Indonesian National Commission on Human Rights and other state institutions so as to avoid overlapping in the implementation of tasks and functions. Furthermore, emphasized the urgency of the existence of the Commission in the state system of Indonesia because of its duties and functions is the main function in the modern life of the nation that is providing protection and enforcement of human rights in Indonesia.

That by making the Commission as a constitutional organ would make these institutions become more authoritative dealing with institutions and other parties within the framework of the implementation of its tasks. In addition a number of powers which is owned by The Indonesian National Commission on Human Rights should also be strengthened and for more detailed settings of the institutional organization regulated by special laws.

Efforts to strengthen the institutional commission should begin by strengthening the legal basis of its formation is to be regulated directly by the Constitution. The procedure is the draft menyahuti the Fifth Amendment of the 1945 Constitution in order to make arrangements as well as the arrangement of the existence of The Indonesian National Commission on Human Rights and institutional relationships that should be governed by the Constitution.

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14 Adi Sulistiyono, *State of Law: Power, Concept, and Paradigm of Moral*, LPP UNS, UPT UNS, UNS Press, Surakarta, 2008, p. 23-25.

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C. STRENGTHENING FUNCTIONS AND AUTHORITY OF THE INDONESIAN NATIONAL COMMISSION ON HUMAN RIGHTS

The Indonesian National Commission on Human Rights that was formed in 1993 through Presidential Decree No. 50 of 1993, but after the fall of the New Order, the agency got a stronger legal basis once the expansion and strengthening of the duties and authority through Act No. 39 of 1999 on Human Rights. With this legislation, the Commission placed as one of the state institutions on par with other state agencies that serve carry out an assessment, research, education, monitoring and mediation of human rights. In addition the Commission authority to perform the functions of monitoring the cases of human rights violations also expanded with the authority to call witnesses by force.¹⁵ It is as stated in Article 95 of Law No. 39 of 1999 which states “if a person who called did not come before or refuse to give testimony, the Commission may request assistance from the Chairman of the Court for the fulfillment of the call by force in accordance with the provisions of the legislation”.

In addition, the Commission is also authorized to conduct investigations into human rights violations are severe with the issuance of Law No. 26 of 2000 on Human Rights Court. In conducting this investigation the Commission may establish an ad hoc team comprising the Commission and the public.

Furthermore, The Indonesian National Commission on Human Rights in Law No. 40 of 2008 on the Elimination of Racial and Ethnic Discrimination, get an additional form of supervision authority. Where surveillance is a series of actions taken by the Commission to evaluate government policies both central and local levels which is done regularly or

15 Suparman Marzuki, *Political Tragedy of Human Rights Law*, Pustaka Pelajar and Pusham UII, Yogyakarta, 2011, pp. 229.

incidental by monitoring, for facts, assess for and find whether there is a racial and ethnic discrimination are followed up with recommendations.

In fact, for over fifty years of age of the Republic of Indonesia, the implementation of the respect, protection, or the promotion of human rights is far from satisfactory. This is reflected in events such as unlawful arrest, kidnapping, torture, rape, forced disappearances, killings, burning of homes and places of worship, and even attacks on religious leaders and their families. In addition, there is also abuse of power by public officials and state officials who are supposed to be law enforcement, security maintenance, and protector of the people, but rather to intimidate, mengaiaya, eliminating forced and / or loss of life.¹⁶

The issue of the number of the results of investigations that have been carried out by the Commission are still stuck in the Attorney, this is caused by the institutional relationships constructed by the Act. No. 26 Year 2000 on Human Rights Court between The Indonesian National Commission on Human Rights as a pro-judicial investigators and Attorney General who is the investigator for cases of gross human rights violations.¹⁷ According Enny Suprpto, the separation of the implementing agency investigation function, the function of investigation and prosecution of serious human rights violations such as in the Act. No. 26 of 2000 that resulted in ketidaklancaran relationship between the two institutions that perform these functions are The Indonesian National Commission on Human Rights and the Attorney General.

However, it should be noted that the relationship was not solely caused by the separation of the “physical” between the implementing agencies function investigations on the one hand and the executive functions of investigation and prosecution, on the other, but rather by the often unequal perceptions of each party regarding the problems they handle, ie gross human rights violations, and its various aspects.¹⁸

Seeing a number of authority possessed by The Indonesian National Commission on Human Rights spread into several laws such as the above, then it shows the lack of an institutional design The Indonesian National Commission on Human Rights complete and comprehensive. Impressed powers possessed by the Commission as patchy and not as an authority systemically inherent to the institution mandated goal associated with him.

Relation to their position, the Commission is a unique institution because in the Act. No. 39 of 1999 on Human Rights, its position is defined by the term agency that “the level of state institutions”. The setting position of the Commission as an institution that “the level of state institutions” has created an interpretation. Because what is a formulation like that? Is the level of state institutions mean the Commission is a state institution or not. This led to the unclear status of the institution in the state system on Indonesia.

That Commission III of the House of Representatives on 14 September 2015 conduct a Public Hearing (RDPU) with The Indonesian National Commission on Human Rights and the National Commission for Women to discuss the evaluation of the budget during the budget period 2015-2016. The Indonesian National Commission on Human Rights deliver and Program Performance Reports, among them: there were 5,643 public complaints to the Commission relating to the issue of human rights violations, where institutions most

16 Ni'matul Huda, *Indonesia Constitutional Law*, RajaGrafindo Persada, Jakarta, 2005, p. 224.

17 Ildhal Kasim, *the Commission and the Challenge Today*, Dignitas Journal of Human Rights: Human Rights and Transitional Reality, Elsam, Jakarta, 2011, pp. 81.

18 Enny Suprpto, *Revisited Act. No. 26 Year 2000 on Human Rights Court*, Paper presented at *the Human Rights Training Advanced for Lecturer of Law and Human Rights*, organized by the Centre for Human Rights Studies, Islamic University of Indonesia (PUSHAM UII) in cooperation with the Norwegian Centre for Human Rights (NCHR) University of Oslo, Yogyakarta, 8-10 June 2011, p. 23-26.

often receive complaints from the public are the police agencies. Realization of budget absorption has reached 47% during the period from January to September 2015. For 2016, the Commission proposed to the Commission III to provide additional funds amounting to Rp. 46.268926 billion; which will be channeled largely to the National Commission for Women Rp. 43 billion.¹⁹

In the view of the Commission on the situation of human rights in 2013 and the challenges in 2014, said reports on complaints of violations should be done police as much as in 1785, the corporation 937, 828 national and local government, and the judiciary as many as 485 cases.²⁰

The Commission if it is institutionally independent and strong it will be difficult to resolve complaints and cases dealing with other state agencies more independent and strong.

When confronted with the lack of a budget to The Indonesian National Commission on Human Rights also can lead to ineffective, can be seen from the burden of functionality and performance that are not comparable to the recognition of these institutions. The Commission complain about it; The current government has not been optimal in support through budgetary policy to ensure the Commission as a leading sector in education and human rights education. The institutional capacity of the Commission is now shrinking as a “fireman” on public complaints related to human rights violations. The government should give full support and leverage against the Commission for the prevention and preemptiv in reducing human rights violations through education and training as a human rights awareness efforts for the community and the entire government apparatus.²¹

The Indonesian National Commission on Human Rights is different from the pre-reform period, then after the reform era the Commission must face new working environment, the environment is spacious and open democracy. In the new work environment, the need for the enforcement of human rights and climate of respect towards the dignity of our fellow human beings in the society, nation and the state are becoming increasingly feels important and serious, given the democratic system without a balanced and accompanied by upright and respect for human rights humans actually creating a climate of democracy is merely procedural and formal, without authenticity. To that end, the Commission as a state institution specially established initially by the New Order Government by Presidential Decree and then enhanced status under the Act. No. 39 in 1999, needs to be further strengthened his position and authority in accordance with a passion for the promotion, fulfillment, respect and protection of human rights contained in the 1945 Constitution, particularly by adopting almost all human rights instruments International through the Second Amendment of the 1945 Constitution in 2000.²²

Progressive enforcement of human rights law can not be released by law enforcement institutions of human rights itself. More certain legal status, independence, power, and clear direction of its authority, the greater the potential for the institutions to take steps progressive law enforcement. But on the contrary, increasingly unclear legal basis and authority, as well as the independence of the institution, it would be difficult encourages human institutions and law enforcement was acting progressively. Therefore, institutional reform is expected to create a situation conducive supporting human institutions and progressive law enforcement

19 <http://wikidpr.org>. Accessed on October 2, 2016.

20 www.komnasham.go.id. Accessed on October 5, 2016.

21 *Ibid.*

22 Jimly Asshiddiqie, *Efforts to Strengthen National Human Rights Commission Bill Through Design Commission*, in www.jimlyschool.com Accessed on April 22, 2016.

to enforce the law to protect human rights.²³

Considering the authority of the Commission as investigator pro-judicial in cases of gross human rights violations in contact with other state institutions, such as Parliament, the Attorney General and the Supreme Court, then if there is a dispute with the state institutions are related to each authority, can not be resolved by The Constitutional Court because the Commission was not called as a state institution as well as the Judicial Commission or the Constitutional Court.²⁴ Including Similarly, if the tangent with the Government or the President, as it must submit a report of findings and studies conducted by The Indonesian National Commission on Human Rights to the President.

D. STUDY OF STRENGTHENING NATIONAL HUMAN RIGHTS COMMISSION OF SOUTH AFRICA AND THAILAND

State of South Africa and Thailand are examples that have entered his Commission in the constitution, so that his position is becoming stronger. This reinforcement is important, as a firm commitment form the State to provide protection and enforcement of human rights in Indonesia to be more independent, effective and fair. Raising the status of a legal basis to the level of the constitution would provide constitutional guarantees for the institution or commission on human rights to be able to function more robust against human rights violators and criminals.

In Thailand's Constitutional changes have to load the National Commission on Human Rights under Article 256 and Article 257 paragraph (1) to paragraph (9). One of Thailand's National Human Rights Commission the authority contained in Article 257, namely: Article 257. The National Human Rights Commission has the powers and duties as follows: (1) to examine and report on the commission or omission of acts which violate human rights or which do not comply with obligations under international treaties to which Thailand is a party, and propose appropriate remedial measures to the person or agency committing or omitting such acts for taking action. In the case where it appears that no action has been taken as proposed, the Commission shall report to the National Assembly for further action; (2) to present the matter together with opinion to the Constitutional Court as provided by the organic law on procedure of Constitutional Court in the case where the Commission agrees with the complainant that the provisions of certain law affect human rights and are constitutionality of which is at question.²⁵

As for the South African Constitution has full also regulates the Commission on Human Rights enshrined in the constitution, namely: Functions of South African Human Rights Commission. 184. (1) The South African Human Rights Commission must: (a) promote respect for human rights and a culture of human rights; (b) promote the protection, development and attainment of human rights; and (c) monitor and assess the observance of human rights in the Republic. (2) The South African Human Rights Commission has the powers, as regulated by national legislation, necessary to perform its functions, including the power: (a) to investigate and to report on the observance of human rights; (b) to take steps to secure appropriate redress where human rights have been violated; (c) to carry out research; and (d) to educate. (3) Each year, the South African Human Rights Commission must require relevant organs of state to provide the Commission with information on the

23 Suparman Marzuki, *The Human Rights of Court in Indonesia; Impunity Perpetuates*, Erlangga, Jakarta, 2012, p. 255.

24 Suparman Marzuki, *Political Human Rights of Law*, Erlangga, Jakarta, 2014, p. 257.

25 www.nhrc.or.th. *Constitution of the Kingdom of Thailand*, Accessed on October 29, 2016.

measures that they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment. (4) The South African Human Rights Commission has the additional powers and functions prescribed by national legislation.²⁶

In celebration of 20 years of the Constitution of South Africa in 2016, the South African Human Rights Commission released, that: During 2016, South Africa will celebrate 20 years of the Constitution since the final version of the South African Constitution was adopted in 1996. Our Constitution and its Bill of Rights is regarded as one of the most progressive in the world. The Constitution protects our right to vote, our freedom of speech, our right to access basic education and our right to be treated equally in addition to many other rights. However, many South Africans appear to be unable to connect the rights contained in the Constitution with the freedoms they enjoy in post-apartheid South Africa. A recent study suggests that 90% of South Africans have never read the Bill of Rights.²⁷

During 2016 – the year in which we celebrate the 20th anniversary of the adoption of our Constitution – take a few minutes to read the Constitution and broaden your knowledge on your rights and the rights of other South Africans. It is imperative that we engage with the Constitution – we need to understand what this important document can do to protect our rights but also to recognise and understand its limitations. Reading the Constitution is only the beginning – ultimately, we should all strive to implement its human rights values in our personal lives, within our families and our communities.²⁸

What a long history of poor recognition, protection and enforcement of human rights in Thailand and South Africa with murder and war and apartheid, until the country is finally amended konstisinya that brings these two countries are recognized as a country that gives color to the recognition and protection of comprehensive human rights in its constitution because of the existence of human rights institutions.

E. CONCLUDING REMARKS

1. The urgency of The Indonesian National Commission on Human Rights arrangement in the Constitution. It will strengthen the human rights institution as an independent state institution, so that is proportional with its functions and powers. Due to its establishment as an institution for promoting and protecting human rights, it should be considered very important to be present in the Constitution. Moreover, the source of constitutional law is not only limited to the written constitution. It is very important to understand that the existence is recognized as a state institution by the 1945 Constitution, so the authority and existence become stronger because it will be equivalent to other state institutions regulated under the 1945 Constitution. At the end, it will be expected to bring a strong authority when dealing with human rights violations and crimes committed by state officials, so it is not co-opted and bias between the authority and status. Furthermore, when the institution has entered and recognized in the 1945 Constitution, in case of dispute of authority with other state institutions, it will enter into a dispute between state institutions that will be the authority of the Constitutional Court of the Republic of Indonesia to decide.
2. Strengthening the functions and authority of The Indonesian National Commission on Human Rights as one of the state institutions that function carried out the assessment,

²⁶ www.sahrc.org.za *The Constitution of the Republic of South Africa, 1996*. Accessed on October 29, 2016.

²⁷ www.humanrights.org.za Accessed on October 29, 2016.

²⁸ *Ibid.*

research, education, monitoring, and mediation of human rights. Besides strengthening the authority of the Commission in performing the function of monitoring the cases of human rights violations also expanded with the authority to call witnesses by force. Other authority in the form of supervision, where supervision is a series of actions taken by the Commission with the intention to evaluate the Government's policies, both central and local levels, which is done regularly or incidental by monitoring, facts finding, assess for and find whether there is discrimination of race and ethnicity, to be followed up with a recommendation. In addition, the Commission is also authorized to conduct investigations of crimes against humanity. The number of the results of investigations that have been carried out by the Commission are still stuck in the Attorney, this is caused by the institutional relationship between the Commission as a pro-judicial investigators and Attorney General who is the investigator for cases of crimes against humanity. The separation of the agencies with functions to investigate and to prosecute the crimes against humanity cases resulting in the disharmonization on the relations between the two institutions that perform these functions, ie The Indonesian National Commission on Human Rights and the Attorney General.

3. Indonesia should learn from the strengthening of the National Commission of Human Rights in South Africa and Thailand, which has strengthened its Commission on the Constitution as a permanent institution, and has full authority in the promotion, protection, and enforcement of human rights in a broader spectrum.

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