



## **Discrimination Identification of Race, Ethnicity and Employment in the Law No. 40 of 2008, Law No. 13 of 2003 in the Civil Code**

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### **Abstract**

*This study sought to find forms of discrimination in the Law No. 40 of 2008 and Law No. 13 of 2003, and compares them with the Civil Code. This research is using library method. The results show that there are 24 chapters in the Civil Code which are discriminatory. Meanwhile, there are six forms of discrimination in the Law No. 40 of 2008; 17 forms on Law No. 7 of 1984, and 22 form the Law No. 13 of 2003. Discrimination in the Civil Code is contained in 13 forms and 20 articles, in line with 6 forms of international human rights formulations, 22 out of 27 forms of national human rights formulations. The Civil Code in the perspective of human rights can be seen that there are still articles that are discriminatory. This is not in accordance with democracy which contains the principle of non-discrimination.*

**Keywords:** *Discrimination; Race and Ethnicity; Employment; Civil Code; Human Rights*

### **Abstrak**

*Penelitian ini berusaha mencari bentuk diskriminasi dalam UU No. 40 tahun 2008 dan UU No. 13 tahun 2003, dan membandingkannya dengan KUH Perdata. Penelitian ini menggunakan metode pustaka. Hasilnya menunjukkan bahwa ada 24 bab dalam KUH Perdata yang bersifat diskriminatif. Sementara itu, ada enam bentuk diskriminasi dalam UU No. 40 tahun 2008; 17 formulir UU No. 7 tahun 1984, dan 22 bentuk UU No. 13 tahun 2003. Diskriminasi dalam KUH Perdata terdapat dalam 13 formulir dan 20 artikel, sesuai dengan 6 bentuk formulasi hak asasi manusia internasional, 22 dari 27 bentuk formulasi hak asasi manusia nasional. Kode Sipil dalam perspektif hak asasi manusia dapat dilihat bahwa masih ada artikel yang bersifat diskriminatif. Ini tidak sesuai dengan demokrasi yang mengandung prinsip non-diskriminasi.*

**Kata kunci:** *Diskriminasi; Ras dan Etnis; Ketenagakerjaan; KUHPerdata; HAM*

## **A. INTRODUCTION**

Human rights mean fundamental rights. This fundamental right is inherent in every human being since he was born as a gift from God. This right cannot be revoked or removed by anyone. Human rights are fundamental rights inherent in every human being since he was born, cannot be revoked or eliminated by anyone because it is a gift from God. According to Hendarmin Ranadireksa, human rights are a set of provisions

or rules to protect citizens from the possibility of oppression, detention and or limitation of the movement of citizens by the state.<sup>1</sup> Anton Baker explained that human rights are found in human nature, for the sake of humanity, everyone has them one by one, can not be revoked by anyone, even the individual can not be released because the right is not just a property, but wider than that. Humans have awareness or free will of moral awareness. Humans are blessed by God in the form of the right to life which is the most basic human right brought from birth.<sup>2</sup>

Anticipating the law of racial and ethnic discrimination, an international convention in 1965, namely, the International Convention on the Elimination of all Forms of Racial Discrimination was established which was then endorsed by the Indonesian government as the Law of the Republic of Indonesia Number 29 Year 1999 on Ratification of the 1965 International Convention On the Elimination Of All Forms Of Racial Discrimination.

Law No. 40 of 2008 is a human rights instrument specifically aimed at protecting citizens from racial and ethnic discrimination, as an extension of Law No. 39 of 1999 concerning Human Rights.<sup>3</sup> Racial and ethnic discrimination in Law No. 40 of 2008 is any form of differentiation, exclusion, limitation, or election based on race and ethnicity, which results in revocation or reduction of recognition, acquisition, or implementation of human rights and basic freedoms in an equal civil, political, economic, social and cultural fields. Article 1 states that race is a nation based on physical characteristics and lineage, while ethnicity is a classification of people based on beliefs, values, habits, customs, language norms, history, geography, and kinship. Explanation of Law Number 40 of 2008 emphasizes that the condition of the Indonesian people, which is multi-dimensional in various aspects of life, such as culture, religion, race and ethnicity, has the potential to cause conflict. In his explanation also stated that this Law was also motivated by racial riots that had occurred in Indonesia, where some citizens still had

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<sup>1</sup> In Muladi (ed.). (2005). *Hak Asasi Manusia, Hakekat, Konsep dan Implikasinya dalam Perspektif Hukum dan Masyarakat*. Bandung: PT Refika Aditama, p. 39.

<sup>2</sup> In Harum Pudjiarto. (1999). *Hak Asasi Manusia Kajian Filosofis dan Implementasinya dalam Hukum Pidana di Indonesia*, Yogyakarta: Universitas Atma Jaya, p.26.

<sup>3</sup> See Law No 40 Year 2008

discrimination on the basis of race and ethnicity, for example, discrimination in the world of work or in socio-economic life.

Discrimination is basically every restriction, harassment, or expulsion which is directly or indirectly based on the differentiation of human beings on the basis of religion, race, ethnic group, class, social status, economic status, gender, language, political beliefs which is resulted in reduction, distortion or elimination of recognition, implementation or use of the human rights and fundamental freedoms in both individual and collective life in the political, economic, legal, social, cultural, and other aspects of life.<sup>4</sup> According to Theodorson & Theodorson, discrimination is a treatment that is not balanced against an individual, or group, based on something, usually categorical, or unique attributes, such as those based on race, ethnicity, religion, or social classes of membership. The term is usually going to describe the action of the dominant majority party in conjunction with a weak minority, so it can be said that their behavior is immoral and against democracy.<sup>5</sup> Moreover, Theodorson & Theodorson state that minorities (minority groups) are groups that are recognized based on differences of race, religion, or ethnic origin, who suffered a loss as a result of bias (prejudice) or discrimination of this term which is generally used not as a technical term, and instead, used to indicate the individual category, from the majority to the minority groups.<sup>6</sup>

Government Regulation Number 56 of 2010 concerning Procedures for Supervision of Efforts to Eliminate Racial and Ethnic Discrimination states that National Committee of Human Rights (Komnas HAM) is needed as a supervisor to provide protection for citizens from all forms of racial and ethnic discrimination. Komnas HAM is also needed with the intention to evaluate central and regional government policies that are carried out periodically or incidentally by monitoring, finding fact, assessing to find and find out whether there is racial or ethnic discrimination followed up with recommendations.

Meanwhile, Employment in Law No. 13 of 2003 is all matters relating to labor at the time before, during, and after the work period. This law is a follow up to ILO

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<sup>4</sup> Article 1 of Law No. 39 of 1999.

<sup>5</sup> Theodorson, George A, and Achilles G. Theodorson, 1979 *A Modern Dictionary of Sociology*. New York, Hagerstown, San Francisco, (London: Barnes & Noble Books), p. 115-116.

<sup>6</sup> *Ibid*, p. 258-259.

Convention No. 111 Concerning Discrimination in Respect of Employment and Occupation, which was further ratified through Law 21 of 1999 concerning Ratification of the ILO Convention on Discrimination in Employment and Occupation. This law contains 193 articles which contain: first, the foundation, principles and objectives of labor development; second, labor planning and employment information; third, Providing equal opportunities and treatment for workers and workers / laborers; fourth, job training aimed at improving and developing the skills and expertise of the workforce in order to increase work productivity and company productivity; fifth, employment placement services in the framework of optimizing the utilization of labor and the placement of workers in jobs that are in accordance with human dignity as a form of the responsibility of the government and society in the effort to expand employment opportunities; Sixth, the proper use of foreign workers in accordance with the required competencies; seventh, Development of industrial relations in accordance with the values of Pancasila is directed to foster a harmonious, dynamic and equitable relationship between the actors of the production process; eighth, Development of institutions and facilities for industrial relations, including collective labor agreements, bipartite cooperation institutions, tripartite cooperation institutions, industrial relations socialization and settlement of industrial relations disputes; ninth, protection of workers/laborers, including protection of basic rights of workers/laborers to negotiate with employers, protection of safety and occupational health, special protection for women, children and disabled workers/laborers, as well as protection of wages, welfare, and labor social security; and tenth, Labor inspection with the intention that in the legislation in the field of manpower is really carried out properly. This law has at least revoked thirteen (13) previous regulations. Explanation in this Law states that the importance of industrial relations development as part of labor development must be directed towards continuing to create harmonious, dynamic and equitable industrial relations.

In the current development, conditions have changed with very deep government intervention in the field of labor and employment, so that the policies issued by the government are so widespread. Not only legal aspects related to work, but before and

after work relationships. This concept is clearly accommodated in Law Number 13 of 2003 concerning Employment.<sup>7</sup>

Based on Article 1 number 2 of Law Number 13 of 2003 concerning Manpower referred to as labor is every person who is able to do work in order to produce goods or services to fulfill their own needs or society. Article 1 point 1 of Law Number 13 of 2003 concerning Manpower states that employment is related to labor at the time before, during and after the period of employment. Based on the definition of employment, the definition of employment law can be defined as all legal regulations relating to labor both before work, during or in an employment relationship, and after an employment relationship.

Workers according to Lalu Husni can be differentiated into the workforce and not the labor force. The groups that Lalu Husni classifies as not the labor force are those who study/study; groups that take care of households; as well as income groups, namely those who do not conduct economic activities but earn income such as retirees.<sup>8</sup> The work force consists of groups who work and who are still looking for workers (unemployed). Working groups are divided into full-time and underemployed. The underemployed group has several characteristics, namely opinions under the provisions of the minimum wage, below standard/low productivity capabilities, types of education not in accordance with what the workers do, and others.<sup>9</sup>

A slow economic recovery has caused unemployment to increase, the number of poor people has increased, employment has become scarce. Other consequences, rights and protection of labor are not guaranteed and public health is declining. This was supported by Rozali Abdullah and Samsir which stated that there were several groups that were vulnerable to human rights issues, including labor / labor groups and women's groups.<sup>10</sup> In Law No. 13 of 2003 has accommodated the provisions of Article 27

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<sup>7</sup> Abdul Khakim. (2004.) *Pengantar Hukum Ketenagakerjaan Indonesia Berdasarkan Undang-undang Nomor 13 Tahun 2003*, Bandung: PT. Citra Aditya Bakti, p.8

<sup>8</sup> Lalu Husni. (2003). *Pengantar Hukum Ketenagakerjaan Indonesia (Edisi Revisi)*, Jakarta: Raja Grafindo Persada, p.19

<sup>9</sup> Zaenal Asikin, dkk. (2008). *Dasar-dasar Hukum Perburuhan*, Jakarta: Raja Grafindo Persada, p.98

<sup>10</sup> Rozali Abdullah and Samsir. (2014). *Perkembangan HAM dan Keberadaan Peradilan HAM di Indonesia*, Jakarta: Ghalia Indonesia, p.15

paragraph (2) of the 1945 Constitution and Article 49 of Law No. 39 of 1999 concerning Human Rights, as stipulated in Article 5, which formulates that every workforce has equal opportunities without discrimination to obtain employment.

Humans are created by the Almighty God with a set of rights that guarantee their status as humans. These rights are then referred to as human rights, namely the rights obtained since his birth as a human being which is the gift of the Creator.<sup>11</sup> Every human being is created equal and with the same rights, so that the principle of equality and equality is the main thing in social interaction. The reality shows that humans always live in social communities to be able to maintain humanity and achieve their goals. This cannot be done individually. As a result, a social structure appears so that power is needed to run the social organization.

The rule of law is one of the principles of state life born of modern political philosophy, in addition to democracy, and protection of human rights. According to Mahfud MD, democracy, the rule of law and protection of human rights are born from a philosophy that prioritizes equality of position and rights of mankind. The most important basis is that humans are born free and with the same position, without caste, and carry the basic rights given by God.<sup>12</sup>

Civil law in force in Indonesia by Hasyim can be said to be compound, namely there are still various divisions, one of which is the classification of the Indonesian population.<sup>13</sup> The discussion in the Civil Code stated in 1993 article does not rule out the possibility of discussion about racial, ethnic, and employment discrimination.

Moving on from the description, the author intends to conduct research with the title, "Identification of Racial, Ethnic and Employment Discrimination According to Law Number 40 of 2008 and Law No. 13 of 2003 in the Civil Code." Formulation of the problem in this study, namely: first, How many articles in the Civil Code which is in line

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<sup>11</sup> Article 1 point 1 of Law Number 39 of 1999 concerning Human Rights defines, "Human rights are a set of rights inherent in the nature of human existence as creatures of God Almighty and are His gifts that must be respected, upheld, and protected by the state, law, government, and everyone for the honor and protection of human dignity and dignity ". Republic of Indonesia State Gazette Year 1999 No. 165, Additional State Gazette of the Republic of Indonesia No. 3886.

<sup>12</sup> Mahfud MD. (1999). *Pergulatan Politik dan Hukum di Indonesia*, Yogyakarta: Gama Media, p.186.

<sup>13</sup> Hasyim Dardiri. (2004). *Amandemen KUHPerdata Dalam Kerangka Sistem Hukum Nasional*, Surakarta: UNS Press, p.17-18.

with discriminatory forms according to Law No. 40 of 2008 and Law No. 13 of 2003; second, what is the form of discrimination according to Law No. 40 of 2008 and Law No. 13 of 2003, which is in the Civil Code; and third, what is the form of discrimination in the view of human rights.

## **B. METHOD OF THE RESEARCH**

This research is a normative research (literature). The search of written data is through legislation and books related discrimination. This study concentrates on the Civil Code (BW) applied in Indonesia since 30 April 1847 Statblat: S.1847-23 which was translated by Prof. R. Subekti, SH and R. Tjitro Sudibio published by PT Pradnya Paramita Jakarta. There are 1993 article being studied, which will then be reviewed from the standpoint of Law No. 40 of 2008, Act No. 13 of 2003 and Law No. 7 of 1984 on aspects of racial-ethnic, women and employment. Data collection techniques used in this study is documentation. While the analysis used in this research is descriptive qualitative. Analyses were performed by, first, the collection of data in the form of legislation that became the object of research; second, reduction the data through categorization or identification early to determine the topics that will be used; third, presentation the data presented in writing or verbal words systematically; and fourth, drawing conclusions.

## **C. ANALYSIS AND DISCUSSION**

### **1. Discrimination of the Civil Code Perspective of Law No. 40 of 2008 and Law No. 13 of 2003**

Based on the analysis that the researcher did, it can be seen that there are 6 (six) forms of prohibition of discrimination in Law No. 40 of 2008 which are contained in 1 (one) article, namely article 4 (verse 1, verse 2 points 1-4). While in the Civil Code there are 5 (five) articles that are in line with the form of discrimination and limitation as stated in article 4 paragraph 1 of Law No. 40 of 2008, namely articles 4, 6, 9, 275 and 284.

There are also 22 (twenty two) forms of implementation of elimination of discrimination in Law No. 13 of 2003 contained in 189 (one hundred and eighty nine) articles, namely: article 2, article 3, article 4, article 7, article 8, article 102, Article 103, Article 5, Article 6, Article 9-Article 30, Articles 31- 38, Articles 39- 41, Articles 42-49, Articles 50-66, Articles 67-75, Article 76, Article 77 Article 85 Article 87 Article 88 Article 98 Article 101 Article 104 Article 116 Article 135 Article 105 Article 107 Article 108 Article 115 Article 136 Article 149 Article 150 Article 172, articles 173-181, and articles 182-190. While in the Civil Code there are 6 (six) articles that are in line with the implementation of the elimination of discrimination as stated in Law No. 13 of 2003, namely: article 433, article 447, article 448 , article 1137, Article 1603e Article 1603f, Article 1601g, 1601h, Article 1603k, Article 1601n, Article 1601s, Article 1603t, and Article 1601x.

Thus it can be said that there are 11 (eleven) forms of discrimination in the Civil Code of 22 (twenty two) forms of implementation of elimination of discrimination in Law No. 13 of 2003. The Civil Code can be explained in detail as follows:

1. There are 5 (five) articles in the Civil Code that are in line with the form of discrimination, in the form of 1 (one) form of 6 (six) forms of discrimination Act No. 40 of 2008. There are 6 (six) articles in the Civil Code that are in line with the form of implementation elimination of discrimination, in the form of 11 (eleven) forms of 22 (twenty two) forms of implementation of the elimination of discrimination Act No. 13 of 2003.
2. Forms of discrimination according to Law No. 40 of 2008 and Law No. 13 of 2003, which are in the Civil Code, namely:
  - a. Classification
  - b. Incompetence of women in legal acts
  - c. Wife's incompetence
  - d. There is a deadline for the settlement of labor disputes
  - e. Wife restrictions
  - f. Ban on marriage within a certain time limit
  - g. Wife's limited rights
  - h. Job potential exploitation
  - i. Corporate opportunities to cut workers' wages
  - j. Termination of Employment



- k. Minimize opportunities for disabled workers
- l. There is a gap for unwritten agreements that have the potential to be laid off without notice
- m. Opportunities to hire children

When summed up as a whole, the two laws (Law No. 40 of 2008, Law No. 13 of 2003) contain 28 (twenty eight) forms of discrimination and the implementation of their removal. And of these, there are 13 (thirteen) forms that are in line with the Civil Code.

## **2. Discrimination of the Civil Code of Human Rights Perspective**

The World Conference on Human Rights in Vienna in 1993 formulated a declaration as a result of the compromise of existing differences. The conference approved the following formulations: first, all human rights are universal, inseparable, interdependent and interconnected; second, the international community must maintain human rights globally, carry out honest actions and on the same footing and with the same emphasis, third, the meaning of national and regional peculiarities and differences in history, culture and religious background must be considered; fourth, every country must promote and protect all human rights and fundamental freedoms without showing political, economic and social systems; fifth, development rights as universal and irrevocable rights, and sixth, (developed) countries help the government in achieving full realization of the economic, social and cultural rights of its population so that the international community is obliged to help reduce the debt burden of developing countries.<sup>14</sup>

The provisions on human rights have obtained a very strong constitutional guarantee in the 1945 Constitution. Most of the material in the Constitution is actually derived from the formulation of the Law that has been passed before, namely the Law on Rights Human Rights. According to Jimly Assidieqie, if reformulated, the human rights material that has been adopted in the formulation of the 1945 Constitution includes the following 27 materials<sup>15</sup>:

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<sup>14</sup> A. Masyhur Effendi. (1994). *Hak Asasi Manusia*, Jakarta: PT Ghalia Indonesia, p.79-80.

<sup>15</sup> See Jimly Assidieqie, *op.cit.*, p. 3-6.

- a. everyone has the right to live and has the right to maintain his life and life;<sup>16</sup>
- b. everyone has the right to form a family and continue the descent through a legal marriage;<sup>17</sup>
- c. every child has the right to survival, growth and development and is entitled to protection from violence and discrimination;<sup>18</sup>
- d. every person has the right to be free from discriminatory treatment on any basis and has the right to receive protection against such discriminatory treatment;<sup>19</sup>
- e. every person is free to embrace religion and worship to ask his people, choosing education and teaching, choosing jobs, choosing citizenship, choosing to live in the territory of the country and leaving it, and having the right to return;<sup>20</sup>
- f. everyone has the right to freedom of belief, to express their thoughts and attitudes, according to their conscience;<sup>21</sup>
- g. everyone has the right to freedom of association, association, and issue of opinion;<sup>22</sup>
- h. everyone has the right to communicate and obtain information to develop personal and social environment and has the right to seek, obtain, possess, listen, process, and inform information by using all types of channels available;<sup>23</sup>
- i. everyone has the right to personal self-protection, outside, honor, dignity and property under his authority, as well as the right to a sense of security and protection from the fear of doing or not do something that is human rights;<sup>24</sup>
- j. each person has the right to be free from torture or treatment which degrades the degree of human dignity and has the right to obtain political asylum from other countries;<sup>25</sup>
- k. everyone has the right to live physically and mentally prosperously, live in a place, and get a good and healthy environment and have the right to receive health services;<sup>26</sup>
- l. everyone has the right to get special convenience and needs to get the same opportunities and benefits to achieve equality and justice.<sup>27</sup>

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<sup>16</sup> From article 28A Second Amandment UUD 1945.

<sup>17</sup> Paragraph (2) comes from Article 28B paragraph (1) Second Amendment to the 1945 Constitution.

<sup>18</sup> Derived from paragraph 28B paragraph (2) Second Amendment to the 1945 Constitution.

<sup>19</sup> From Article 28I paragraph (2) Second Amendment to the 1945 Constitution.

<sup>20</sup> Article 28E paragraph (1) Second Amendment to the 1945 Constitution.

<sup>21</sup> Article 28E paragraph (2) Second Amendment to the 1945 Constitution.

<sup>22</sup> Article 28E paragraph (3) Second Amendment to the 1945 Constitution.

<sup>23</sup> From Article 28F of the Second Amendment to the 1945 Constitution.

<sup>24</sup> Paragraph (5) is derived from Article 28G paragraph (1) Second Amendment to the 1945 Constitution.

<sup>25</sup> From Article 28G paragraph (2) Second Amendment to the 1945 Constitution.

<sup>26</sup> Paragraph (1) is derived from Article 28H paragraph (1) Second Amendment to the 1945 Constitution.

<sup>27</sup> Article 28H paragraph (2) Second Amendment to the 1945 Constitution.

- m. every person has the right to social security that allows for his full development as a person who is a smart person;<sup>28</sup>
- n. everyone has the right to own private property and the property rights cannot be taken arbitrarily by anyone;<sup>29</sup>
- o. everyone has the right to develop themselves through the fulfillment of their basic needs, the right to education and benefit from science and technology, art and culture, in order to improve the quality of their lives and for the welfare of humanity;<sup>30</sup>
- p. everyone has the right to advance himself in fighting for his rights collectively to use the community, the nation and his country;<sup>31</sup>
- q. everyone has the right to fair recognition, guarantee, protection, and legal certainty and equal treatment before the law;<sup>32</sup>
- r. everyone has the right to work and get compensation and fair and decent treatment in a work relationship;<sup>33</sup>
- s. everyone has the right to citizenship status;<sup>34</sup>
- t. the state, under any circumstances, cannot reduce the right of everyone to live, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right not to be prosecuted a retroactive legal basis;<sup>35</sup>
- u. the state guarantees respect for cultural identity and the rights of traditional communities in harmony with the development of times and the level of national civilization;<sup>36</sup>
- v. the state upholds the ethical and moral values of humanity taught by every religion, and expects the independence of each citizen to live and practice their religion;<sup>37</sup>

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<sup>28</sup> Article 28H paragraph (3) Second Amendment to the 1945 Constitution.

<sup>29</sup> Article 28H paragraph (4) Second Amendment to the 1945 Constitution.

<sup>30</sup> Paragraph (5) is derived from Article 28C paragraph (1) Second Amendment to the 1945 Constitution.

<sup>31</sup> From Article 28C paragraph (2) Second Amendment to the 1945 Constitution.

<sup>32</sup> Paragraph (7) is derived from Article 28D paragraph (1) Second Amendment to the 1945 Constitution.

<sup>33</sup> Paragraph (8) is derived from Article 28D paragraph (2) Second Amendment to the 1945 Constitution.

<sup>34</sup> This paragraph is derived from Article 28E paragraph (4) Second Amendment to the 1945 Constitution.

<sup>35</sup> Derived from the formulation of Article 28I paragraph (1) of the Second Amendment to the 1945 Constitution, the formulation of the matter invited controversy among many parties. Here the formulation is reversed with the subject of the country.

<sup>36</sup> Derived from Article 28I Paragraph (3) which is adjusted to the systematization of the entire article's clause with the subject of the state in relation to citizens.

<sup>37</sup> This is an additional verse taken from the proposal regarding the perfection of Article 29 paragraph (2) of the 1945 Constitution as stated in the attachment to TAP No.IX / MPR / 2000, namely alternative 4 by combining alternative formulation 1 item 'c' and 'a' . However, specifically regarding the last clause of this verse, namely: "... and protecting the population from disseminating ideas that are related to religious teachings", it should be abolished, because it can reduce the freedom of people to

- w. protection, promotion, enforcement and fulfillment of human rights are the responsibility of the state, especially the government;<sup>38</sup>
- x. to promote, uphold and protect human rights in accordance with the principles of a democratic rule of law, if the implementation of human rights is explored, regulated and set forth in the legislation;<sup>39</sup>
- y. to guarantee the implementation of Article 4 paragraph (5) above, a National Human Rights Commission is established that is independent in accordance with the provisions regulated by law;<sup>40</sup>
- z. everyone is obliged to respect the human rights of other people in an orderly life in society, nation and nation; and
- aa. in exercising its rights and freedoms, every person must submit to the restrictions set forth by the law with the sole purpose of guaranteeing the recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with the requirements. Morality, religiosity, security and public order values in a democratic society.<sup>41</sup>

Based on the answers to the formulation of the previous problem, taking into account the concept of human rights formulation, both International and National, as well as the principles of Islamic law, the Civil Code can be explained in detail that discrimination in the Civil Code contained in 13 forms and 20 articles, in line with the 6 forms of International Human Rights formulation, 22 from 27 forms of National Human Rights Formulations. The forms of national alignment of human rights formulas are:

- a. The state upholds the ethical and moral values of Indonesia taught by every religion, and expects the independence of each population to live and practice their religion
- b. Everyone has the right to live physically and mentally prosperously, live in a place, and get a good and healthy environment and have the right to receive health services

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embrace the notion that even though may be misguided in the eyes of some people, but can also not be misguided according to some others. The state or government is deemed improper to interfere in regulating the matter of dissent in internal beliefs of a religion. Let the internal affairs of religion be the domain of the public (public domain). This is because the protection provided by the state to a group of religious understandings can mean other human rights groups understand the freedom of freedom that should be guaranteed by the Constitution.

<sup>38</sup> Paragraph (6) is derived from Article 28I paragraph (4) Second Amendment to the Second Amendment of the 1945 Constitution.

<sup>39</sup> From paragraph (5) Article 28I of the Second Amendment by adding regulation "... advancing ...", so that it becomes "To advance, uphold, and protect ..."

<sup>40</sup> Komnas HAM has indeed been confirmed by the law. However, to be stronger, it needs to be stated firmly in the Constitution.

<sup>41</sup> Derived from Article 28J Second Amendment to Second Amendment of the 1945 Constitution.

- c. to promote, uphold and protect human rights in accordance with the principles of a democratic rule of law, if the implementation of human rights is explored, regulated and set forth in legislation
- d. Komnas HAM was established as an independent institution according to the provisions regulated by law
- e. In exercising its rights and freedoms, every person must submit to the restrictions set forth by the law with the sole purpose of guaranteeing the recognition and respect for the rights and freedoms of others and to fulfill just demands in accordance with the requirements. moral, religious, security and public order values in a democratic society

### **3. Discussion**

The concept of human rights as the inherent rights of human beings that must be respected and protected initially grew at the national level in the XVII and XVIII centuries, especially in Britain, America and France. With the issuance of 1688 Bill of Rights in England, Virginia Declaration of Rights in 1776, compiled by George Mason a month before the issuance of the Declaration of Independence, 1776 Declaration of Independence compiled by Thomas Jefferson in the United States, *Declaration des Droits de l'Homme et du Citoyen* in 1791 in France, and Bill of Rights in 1791 in the United States. These national instruments set the points that are now called "human rights", which at the time they were made in the 17<sup>th</sup> and 18<sup>th</sup> centuries were not yet mentioned.<sup>42</sup>

In the 19<sup>th</sup> century and the first decades of the 20<sup>th</sup> century, the concept of human rights began to develop at the international level, meaning that it was embraced by the community of nations in their relationship. Nazi German atrocities during World War II made the international community aware of the importance of respecting human rights for humanity as a whole. Such provisions were taken before the end of World War II, when on January 1, 1942, in Washington, D.C., 26 nations opposed the power of the axis to sign the United Nations Declaration. The Declaration stated in its preamble states, among other things, "the essence of maintaining life, freedom, freedom and freedom of religion, and protecting human rights and justice within their own territory and also in other countries ..."

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<sup>42</sup> Enny Soeprapto, Enforcement of Human Rights in Indonesia, Paper made to fulfill the request of the Indonesian House of Representatives in connection with the discussion and election of Candidates for National Human Rights Commission Members at <http://www.komnasham.go.id>, accessed June 4, 2009.

The UN Charter received by 50 nations at its meeting in San Francisco on 25 April-25 June 1945 confirmed the 1942 UN Declaration in the second opening paragraph, Article 1 paragraph 3, Article 55 letter c, and Article 56 of the United Nations Charter. The efforts of the international community to strengthen human rights recognition and respect reached its culmination on December 10, 1948 with the acceptance and proclaiming of the 1948 Universal Declaration of Human Rights, which is a human rights catalog and consists of 30 articles, outlining the rights and freedoms of everyone who must be recognized and respected and the obligation of everyone to be fulfilled. The rights and freedoms set forth in the declaration can be classified into two major fields, namely, first, civil and political rights, and second, economic, social and cultural rights. The Charter itself reaffirms fundamental beliefs about human rights, human dignity and dignity, equal rights between men and women and between large and small countries. The signatories pledged themselves to conduct joint and separate actions in cooperation with this organization to fight for universal awards for, and adherence to, human rights and fundamental freedoms for all human beings, regardless of race, gender, language or religion.<sup>43</sup>

The formulation of the concept of human rights in the Western world can be traced from the 17th-century English philosopher John Locke (1632-1704) who formulated some natural rights inherent in humans. This concept resurfaced after World War II in 1948 with the launch of the Universal Declaration of Human Rights by countries that are members of the United Nations. Twenty years later, namely in 1966, the universal Declaration was outlined in two international agreements, one containing economic rights, the other political rights.<sup>44</sup> In Europe, the standard setting process was continued in the 1970s with the acceptance of the Helsinki Accord in 1975. In the 1980s followed by Africa Charter on Human and People's Right in 1981. In the 1990s followed by Cairo Declaration on Human Rights in Islam in 1990 the work of the Organization of Islamic

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<sup>43</sup> Ian Brownlie (ed.), (1971). *Basic Documents on Human Rights*, Oxford: Clarendon Press, p.93

<sup>44</sup>Miriam Budiarto. (1997). *Hak Asasi Manusia*, Jakarta: Badan Pendidikan dan Pelatihan Depdagri, p.37.

Conference abbreviated as OKI, Bangkok Declaration in 1993, Vienna Declaration in 1993 and Human Rights Declaration of AIPO in 1993.

More about the human rights of the United Nations, stems from the desire of leaders of European countries to formulate human rights recognized worldwide as a standard for universal human behavior, whose formulation was submitted to the United Nations Human Rights Commission in 1946. On December 10, 1948 the formulation of the commission received by acclamation by countries that are members of the United Nations; 48 countries fully agreed, 8 countries abstained and no country refused<sup>45</sup>; and then announced by the United Nations as the Universal Declaration of Human Rights. This universal human rights statement was published in 30 articles, 28 articles on human rights, one article on individual obligations and one more article on the prohibition to abolish one of the rights in the statement.<sup>46</sup>

According to Scott Davidson, the emergence of the rights of the final generation of human rights today is related to the rise of Third World nationalism and the perception of developing countries that the existing international order tends to weaken and marginalize them. It can also be seen as the demands of developing countries for fair treatment and building a world system and order that can facilitate distributive justice. These developments reveal 2 (two) characteristics of third generation human rights, namely: (1) these rights are collective; and (2) the realization of these rights depends on international cooperation.<sup>47</sup>

Meanwhile, the main source of civil law in Indonesia is the civil law abbreviated to the Civil Code, which is a derivative of Burgerlijk Wetboek (BW), which is the book of civil law applicable in the Netherlands. The implementation of the Civil Code in

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<sup>45</sup> Nevertheless, there is a different form of criticism, although carefully voiced by representatives of Saudi Arabia, Al-Barudi. At the beginning of the commission discussions, he commented that the earlier draft of the declaration was largely based on patterns of domination of Western culture, patterns that were often different from those of Eastern countries. The difficulties posed by Al-Barudi began to be evident in the discussion on the fundamentals of human rights (article 1 and the culmination of religious freedom (article 18). See David Little (ed.), (1997). *Human Right and The Conflict of Cultures: Liberty and Western Perspectives on Religion Liberty*, translated Riyanto, Yogyakarta: Student Literature, p.41.

<sup>46</sup> Bintan Saragih. (1997). *Hak Asasi Manusia*, Jakarta: Badan Pendidikan dan Pelatihan Depdagri, p.3.

<sup>47</sup> Scott Davidson, (1994). *Hak Asasi Manusia: Sejarah, Teori, dan Praktek dalam Pergaulan Internasional* Jakarta: Pustaka Utama Grafiti, p.61-62.

Indonesia is based on the principle of concordation/principle of harmony, namely the principle of equality of law enforcement whose legal basis is regulated in article 131 (2) IS. BW that applies in the Netherlands is mostly French civil law, namely Code Napoleon. Most of this Code Napoleon is the Civil Code, which in its composition took the essays of the French author on Roman law (*Corpus Juris Civilis*) which at that time was considered the most perfect law, as well as elements of canonical law (Catholic religious law) and law local habits.<sup>48</sup> The Civil Code applies in Indonesia based on Statute Book No. 23 of 1847 and entered into force on May 1, 1848. Until now the Civil Code is still valid, according to article II of the transitional provisions of the 1945 Constitution, "all state bodies and existing regulations are still valid as long as they have not been held new ones according to the 1945 Constitution".<sup>49</sup>

Discrimination found in the Civil Code has long been a concern. This can be seen from the changes in the Civil Code / BW (*Burgerlijk Wetboek*) which has been started since 1960. The demands underlying the changes due to discrimination are motivated by several reasons, namely: first, the contents of the Civil Code are considered discriminatory in terms of sex. Secondly, the contents of the Civil Code are considered discriminatory between European and non-European races. Third, the contents of the Civil Code won Europeans and defeated Indigenous people. Fourth, the contents of the Civil Code harm Indigenous people. Fifth, the contents of the Civil Code eliminate Indonesian customary law. Sixth, the contents of the Civil Code eliminate Indonesian religious law. Seventh, the contents of the Civil Code as codified law still have questions about the validity of the validity period in Indonesia. Eighth, the contents of the Civil Code need to adjust to the development of the law in the community.<sup>50</sup> Of these eight backgrounds, there is a democratic process that is not fully implemented properly.

In line with this, Satya Arinanto, as quoted by Amin Putra, said that in a democracy, especially in Indonesia, demands the involvement of citizens as broadly as

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<sup>48</sup> Ibid, p.12

<sup>49</sup> Ibid

<sup>50</sup> Dardiri Hasyim, (2004). *Amandemen KUHPerduta Dalam Kerangka Sistem Hukum Nasional*. Surakarta: UNS Press dan UNIBA Press, p.67-74



possible, with the principles of participatory and non-discriminatory.<sup>51</sup> For this reason, Satya Arinanto further emphasized the need for several key points related to human rights in Indonesia, namely: first, preparation of the ratification of international human rights instruments; secondly, human rights dissemination and education; thirdly, the implementation of human rights is determined as a priority; and fourth, the implementation of the contents or provisions of various international human rights instruments that Indonesia has ratified.

#### **D. CLOSURE**

The legalization of Law No. 40 of 2008, Law No. 13 of 2003 and Law No. 7 of 1984 is human rights instrument which are needed to be appreciated, since the aims are specifically to protect the citizens from discrimination as the extension of Law No. 39 of 1999 on Human Rights. On the other hand, the Book of Civil Code also contains the rights and obligations of humans as individuals and communities. Based on the results of this research in addressing the research questions, it can be concluded that there are 25 (twenty five) articles in the Civil Code that is in harmony with the shape and the elimination of discrimination. Meanwhile, there are 6 (six) forms of discrimination in the Law No. 40 of 2008; 17 (seventeen) form of implementation of the elimination of discrimination in Law No. 7 of 1984, as well as 22 (twenty-two) forms on Law No. 13 of 2003. Thus, putting efforts is needed to restore regulations to the 1945 Constitution, where it certifies that all Indonesian citizens have equality before the law and government and shall abide by the law and the government with no exception. Restoring this regulation can lawfully be realized through amendments to the articles of the Civil Code which are discriminatory.

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<sup>51</sup> Amin Putra Muhammad. (2015). Eksistensi Lembaga Negara Dalam Penegakan Hak Asasi Manusia Di Indonesia. *Fiat Justisia Jurnal Ilmu Hukum* Volume 9 No. 3, July-September 2015. p.278

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