

## Implementation of Civil Rights against Vulnerable Groups in the Legal and Constitutional System in Indonesia

Rudy<sup>1</sup>, Rudi Natamiharja<sup>2</sup>, Jalil Alejandro Magaldi Sernac<sup>3</sup>, Ahmad Syofyan<sup>4</sup>

<sup>1</sup> Faculty of Law, Universitas Lampung, Indonesia. E-mail: [rudy.1981@fh.unila.ac.id](mailto:rudy.1981@fh.unila.ac.id)

<sup>2</sup> Faculty of Law, Universitas Lampung, Indonesia. Email: [rudi.natamiharja@fh.unila.ac.id](mailto:rudi.natamiharja@fh.unila.ac.id)

<sup>3</sup> Constitutional Law, Externado of Colombia University, Colombia, Email: [jalilmagaldi@gmail.com](mailto:jalilmagaldi@gmail.com)

<sup>4</sup> Faculty of Law, Universitas Lampung, Indonesia. Email: [ahmad.syofyan@fh.unila.ac.id](mailto:ahmad.syofyan@fh.unila.ac.id)

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**Abstract:** Constitutional Court is established as an effort to uphold the rule of law and provide maximum protection for democracy as well as human rights, particularly civil rights. The main purpose of the rule of law is to protect citizens' freedom from state power. Therefore, this study aims to examine the implementation of civil rights against vulnerable groups in the Indonesian legal and constitutional system. Data were analyzed using a normative juridical approach by examining theories, concepts, legal principles, and statutory regulations obtained from legal sources such as books, articles/writings, and other documents. The government issued various laws and regulations with multiple conventions such as the rights of the child and the elimination of all forms of discrimination but this effort has not been supported by a strong shared commitment. Based on these circumstances, it is necessary to develop an effective law enforcement mechanism to protect citizens' rights, particularly vulnerable groups.

**Keywords:** Civil Rights; Constitution; Human Rights; Vulnerable Groups

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### 1. Introduction

The constitution becomes the highest source of law and it functions to limit the power and guarantee human rights as well as freedoms. Indonesia as a constitutional state ensures civil rights to all citizens, particularly vulnerable groups.<sup>1</sup> The country provides special attention and protection for children, and minority groups in terms of physical and psychological violence, discrimination, poverty, underdevelopment, and other problems.<sup>2</sup>

According to the universal declaration of human rights in 1948 article 2, human rights need to be guaranteed to everyone without any form of discrimination.<sup>3</sup> This shows every

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<sup>1</sup> Murphy, Ann Marie. "Indonesia returns to the international stage: Good news for the United States." *Orbis* 53, no. 1 (2009): 65-79.

<sup>2</sup> Darajati, Muhammad Rafi, and Muhammad Syafei. "Politik Hukum Pembentukan Dua Kovenan HAM Internasional Tentang Hak Sipil Politik dan Hak Ekonomi Sosial Budaya." *Syah Kuala Law Journal* 4, no. 2 (2020): 106-122.

<sup>3</sup> Sari, Ratna Kumala, and Sapto Budoyo. "Perkembangan Pengaturan Hak Asasi Manusia (Ham) Dalam Hukum Di Indonesia." *Jurnal Meta-Yuridis* 2, no. 2 (2019): 91-100.

citizen is guaranteed the protection and fulfillment of their constitutional rights due to the differences generated by the patriarchal society. Meanwhile, this particular protection needs to maintain discrimination against vulnerable groups.

The meaning of human rights becomes clear when it is recognized as part of the humanization of life. This is initiated because everyone is aware of their place and duties in the world. In the moral, social, and political fields, culture becomes part of the humanization of life through law. The principles embodied in human recognition are also formulated as an integral part of the legal system.<sup>4</sup> Currently, legal protection for vulnerable groups is not properly implemented in the world. Indonesia has various laws and regulations but their implementation is very weak. Furthermore, the legal system failed to fully accommodate matters relating to the protection of vulnerable groups.

Several efforts aimed at the protection and promotion of human rights tend to become strategic matters that require the state's attention. The Indonesian government issued laws and regulations as well as conventions on child rights and eliminate all forms of discrimination against women but this effort is not supported by a strong shared commitment.<sup>5</sup> Based on these circumstances, it is necessary to develop an effective law enforcement mechanism to protect human rights, specifically for vulnerable groups. Article 5 paragraph (3) of Law No. 39 of 1999 explained that vulnerable groups have the right to receive more treatment and protection concerning their particularities. These groups include the elderly, children, the poor, pregnant women, and people with disabilities. The Human Rights Reference also states that vulnerable groups involve refugees, internally displaced persons (IDPs), national minorities, migrant workers, indigenous peoples, children, and women. Therefore, this study elaborates on how to implement civil rights for vulnerable groups in the Indonesian constitutional system.

## 2. Method

This is an empirical juridical study since library materials and data collection were directly carried out for further analysis. The primary analysis was used for this collection, while the secondary data was performed by analyzing several laws and regulations related to the topic, library materials, legal document files, and others obtained indirectly.

## 3. The Development of Civil Rights in the Legal and Constitutional System in Indonesia

Human rights also known as fundamental rights are significantly attached to human nature.<sup>6</sup> According to Mariam Budiardjo, fundamental rights are owned by everyone

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<sup>4</sup> Daud, Aidir Amin. "Human Rights, Islamophobia, and the War on Terrorism." *Hasanuddin Law Review* 7, no. 3 (2021): 169-182.

<sup>5</sup> Zaini, Naya Amin. "Politik Hukum dan HAM (Kajian Hukum Terhadap Kewajiban Pemenuhan Dan Perlindungan Hak Asasi Manusia Dalam Konstitusi Indonesia)." *Jurnal Panorama Hukum* 1, no. 2 (2016): 1-16.

<sup>6</sup> Triwahyuningsih, Susani. "Perlindungan dan Penegakan Hak Asasi Manusia (HAM) di Indonesia." *Legal Standing: Jurnal Ilmu Hukum* 2, no. 2 (2018): 113-121.

along with their birth and presence in societal life. These rights exist in humans regardless of nation, race, religion, class, or gender because they are universal.<sup>7</sup> For Indonesia, there are various kinds of human rights since it is rooted in the state philosophy called Pancasila.<sup>8</sup> These rights include human aspects and social beings because the citizens consider them as family life.<sup>9</sup> This is reflected in the second precept of Pancasila called "Just humanity and civilized".<sup>10</sup>

The history of human rights is complex because they are present and changed before the enactment of the 1945, 1949, and 1950 Constitutions. Almost all regulatory provisions follow these two conventions including the International Covenant on Economic, Social, and Cultural Rights as well as the International Covenant on Civil and Political Rights.<sup>11</sup> Indonesia preceded the Universal Declaration of Human Rights (UDHR) issued to the United Nations (UN) in 1948, which prohibited all forms of torture and crimes, inhuman or degrading treatment or punishment.<sup>12</sup> At the end of August 18, 1945, this country established the Constitution which contains the recognition and protection of human rights.

Indonesia makes several efforts for the development in the economic field during the New Order era. The protection of human rights was considered an obstacle to this development since the efforts made for its establishment as a constitutional right underwent a second chance in the 1945 Constitution.<sup>13</sup> This Constitution fully regulated the rights since it changed to freedom during the reform era. From this matter, laws on human rights and its courts began to be established and this made Indonesia ratify international conventions and other changes.<sup>14</sup>

There are several dominations of human rights in the democratic era. Since the 1948 UDHR, there is a continuous change in the dynamics of these rights. Karel Vasak, a French legal expert divided three generations of human rights as follows:<sup>15</sup>

- a. Civil and political rights (*liberte*);
- b. Economic, social, and cultural rights (*egalite*);
- c. The right of solidarity (*fraternite*).

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<sup>7</sup> Budiharjo, Mariam. *Dasar-Dasar Ilmu Politik* (Jakarta: Gramedia, 1985), 21.

<sup>8</sup> El-Muhtaj, Majda. *Hak asasi manusia dalam konstitusi Indonesia* (Jakarta: Prenada Media, 2017), 6-7.

<sup>9</sup> Sumantri, Sri. *Bunga Rampai Hukum Tata Negara Indonesia* (Bandung: Alumni, 1992), 3.

<sup>10</sup> Arimanto, Satya. "Human Rights in Context of the Historical Non-Aligned Countries' Debates on Universalism and Cultural Relativism, and Current Human Rights Development in Indonesia." *Indonesian J. Int'l L.* 7 no. 3 (2021): 479.

<sup>11</sup> Tarigan, Jefri Porkonanta. "Akomodasi Politik Hukum di Indonesia terhadap Hak Asasi Manusia Berdasarkan Generasi Pemikirannya." *Jurnal Konstitusi* 14, no. 1 (2017): 168-187.

<sup>12</sup> Pratiwi, Cekli Setya. "Bridging the Gap Between Cultural Relativism and Universality of Human Rights: Indonesia Attitudes." *JILS (Journal of Indonesian Legal Studies)* 5 no. 2 (2020): 449-478.

<sup>13</sup> Gaffar, Janedjri M. *Demokrasi Konstitusional: Praktik Ketatanegaraan Indonesia Setelah Perubahan UUD 1945* (Jakarta: Konstitusi Press, 2012), 193.

<sup>14</sup> Gde Wiryawan, I. Wayan. "Vaccines for Tourism Business Actors: Fulfilment or Violation of Human Rights?" *Padjadjaran Journal of Law* 8, no. 3 (2021): 401-416.

<sup>15</sup> Allan, Alfred. "Are human rights redundant in the ethical codes of psychologists?" *Ethics & Behavior* 23, no. 4 (2013): 251-265.

Dated back to the 17th and 18th centuries through the theory of the reformers, the first generation put the placement of human rights in negative terminology (freedom from) rather than the positive aspect (rights from). This generation is based on the principle of human integrity, basic needs, and civil as well as political liberties. It has the following rights including the right to life, the right to freedom of movement, the right to asylum from oppression, the right to property, freedom of thought, religion, and belief, the right to be free from torture, the right to be free from retroactive laws, and the right to a fair trial.<sup>16</sup> These rights are closely related to civil and political rights contained in the Declaration to Article 1 of the International Covenant on Civil and Political Rights:<sup>17</sup>

*The Granting of Independence to Colonial Countries and Peoples, as well as the Declaration on Principles of International Law concerning Friendly Relations and Cooperation Among States with the relevant paragraph of the 1993 Vienna Declaration and Program of Action, the words 'the right to self-determination is not applied to a section of people within a sovereign independent state and tends not to be construed as authorizing or encouraging any action which dismembers or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states.*

In this regard, international instruments that regulate human rights have not been ratified since they are not formally part of Indonesian positive law.<sup>18</sup> This country ratified a covenant in Law Number 12 of 2005 concerning the Ratification of the International Covenant on Civil and Political Rights due to Law Number 24 of 2000 concerning International Treaties. Based on the first generation, Indonesia began to experience development even before it ratified the convention. Law number 39 of 1999 concerning Human Rights contains the recognition of civil and political, economic, social, and cultural rights in vulnerable groups such as children, women, disabilities, and indigenous peoples. These civil rights include the right to life, the right to have a family and continue offspring, the right to self-development, the right to justice, the right to personal freedom, the right to feel safe, the right to welfare, the right to participate in government, rights of women, and rights of the child.<sup>19</sup>

### 3.1. Old Order

The Preparatory Committee for Indonesian Independence (PCII), chaired by Soekarno, established the 1945 Constitution. This agency also assists in selecting the first president and vice president since the parliament had not been formed. At the beginning of independence, state power was fully in the hands of the president and assisted by the

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<sup>16</sup> Arthanti, Berliana Dwi, and Nabilla Dyah Eka Pramudhita. "Law and Human Rights in Addressing Labor Problems during the Pandemic to Achieve Sustainable Development Goals." *Lex Scientia Law Review* 4, no. 2 (2020): 39-54.

<sup>17</sup> Rhona KM Smith, Knut D. Asplund, and Suparman Marzuki. *Hukum Hak Asasi Manusia*. (Yogyakarta: Pusat Studi Hak Asasi Manusia, Universitas Islam Indonesia, 2008), 17-19.

<sup>18</sup> Hadiprayitno, Irene Istiningsih. "Defensive enforcement: Human rights in Indonesia." *Human rights review* 11 (2010): 373-399.

<sup>19</sup> Farhat, Salem Aessa, Rohaida Nurdin, and Salawati Bit Basir. "Attacks Against Civilian Objects: An Analysis Under International Humanitarian Law." *Hasanuddin Law Review* 8, no. 1 (2022): 60-78.

National Committee. Soekarno stated that the 1945 Constitution was temporary and he believed the People's Consultative Assembly (PCA) tends to make a complete and perfect one when the state's atmosphere was more peaceful. On December 27, 1949, the Constitution was amended to become the United Republic of Indonesia (URI) which was valid until August 17, 1950. This change makes the Unitary State of the Republic of Indonesia (USRI) become the United Republic of Indonesia (URI). The URI Constitution was only valid for one year because the Provisional Basic Law (PBL) was in effect from 1950-1959. On July 5, 1959, Soekarno issued a Presidential Decree such as Law No. 7 of 1953 that the 1945 Constitution tends to be reinstated. This lawfully regulates the electoral system because it failed to allow the executive to personally interpret with delegative statutory regulations. The process of enacting this Presidential Decree was discussed fairly in Parliament since it became driven by the people's will. Public participation makes the material content of the law partial. There is a new political configuration that was more authoritarian after the end of the liberal political system.

In the democratic era, the political configuration was marked by the existence of three main forces including Soekarno, the Army, and the Indonesian Communist Party (ICP). Soekarno and ICP are needed to face the mighty rivals and obtain protection from the president against the Army. Meanwhile, the Army needed Soekarno to gain legitimacy for his involvement in politics. This is contrary to the 1945 Constitution that the powers of the Head of State need to be limited. The statement shows the Head of State is not a dictator and has to be guided by applicable legal provisions while carrying out the wheels of government. This legal product produced during the Guided Democracy period had an orthodox/conservative character. At this time, there is no law concerning elections because they had never been held. The provision regarding regional government in Law Number 1 of 1957 was replaced by Presidential Decree Number 6 of 1959. Furthermore, the regional head was only appointed by the center and not the Parliament.

The Principles of Regional Government are almost the same as Presidential Decree No. 6 of 1959. In the region, central control is carried out through a strict mechanism called regulations. Law Number 18 of 1965 failed to participate in this regional government because the main stand was the president's social and political vision. Therefore, legal products become an instrument to realize the president's vision. There was an exception in the formulation of Law Number 5 of 1960 concerning the Basic Agrarian Law (BAL) because it contains customary law content and social functions over land. The customary tradition adheres to a responsive legal development strategy since it pays attention to the conditions and societal wishes. This Law is different from others due to the following reasons (a) the materials have been collected and compiled by committees formed in 1948, (b) the materials are resistant to the legacy of Dutch colonialism, (c) the materials have no power relations, and (d) the public (state administrative law) and the private (civil law) serves as the two fields of law. Soekarno as the president was criticized by the people for his authoritarian leadership. This president's policy to make the PCA Decree containing the affirmation of his leadership without term limits (lifetime) was also criticized. The palace and the military became stronger, while other parties apart from the ICP are weaker. However, there was a student action demanding the disbandment of the ICP because it undermined the democratic order in Indonesia. The New Order government began in 1966 with the March Eleventh Order, which was later

misinterpreted as a transfer letter of power. On March 7, 1967, Soekarno stepped down in the decision of the Provisional PCA Special Session and this marked the end of the old order's rule.

### 3.2. New Order

Suharto purely and consistently stated the implementation of the 1945 Constitution. However, all economic and political democratic policies were not following this Constitution. This shows legal politics gradually became a tool to maintain the position at hand. The New Order government held elections six times including in 1971, 1977, 1985, 1987, 1992, and 1998. Furthermore, the New and Old-order governments had something in common such as using a system between civil and military. Based on article 5 of the 1945 Constitution, the President holds the power to form laws with the approval of the Parliament in Indonesia. The political system was carefully carried out formally since it looked constitutional during the New Order. At this time, the rules were provided before taking legal action and this was accomplished by using its enormous authority and the hands placed on PCA as well as the Parliament. The goal was to strengthen authoritarianism with the PCA decree and laws. Constitutionally Suharto's policy is correct but substantially, it was not in line with the constitutional values.

On May 21, 1998, Suharto as a president declared his resignation after 32 years of the New Order. The resignation was inseparable from demonstrations that continued to be held by students throughout Indonesia. These demonstrations were carried out due to the decline in social and economic conditions. Furthermore, the helm of leadership was taken over by B.J. Habibie, who previously served as vice president. Several demands were made by the people to improve the constitutional structure after the New Order era and they include:

- a) Amendments to the 1945 Constitution;
- b) Abolition of Indonesian Armed Forces' dual function;
- c) Upholding the rule of law, respecting human rights, and eradicating corruption, collusion, and nepotism;
- d) Decentralization and fair relations between the center and the regions;
- e) Realizing freedom of the press; and
- f) Realizing freedom of democracy.

### 3.3. Reformation

The constitution becomes the basis for the formation of subordinate laws and regulations during the Reformation era. Successively, there is an amendment of the 1945 Constitution to that of 1999, 2000, 2001, and 2002. The PCA as part of the constitutional reform was no longer the highest state institution. This institution has an equal position by strengthening the system of checks and balances. Furthermore, the Constitutional Court which helps in reviewing of law is one of the new state institutions that was formed. The Reformation Era also promoted bureaucratic reform and this causes each region to have the right to develop its potential. This era increases welfare because a society such

as Indonesia has a very large number of human resources. Therefore, it is expected that each region can explore natural and human resources, culture, and customs, as well as foster a sense of love.

#### 4. Vulnerable Groups: Implementation of Civil Rights for in the Legal and Constitutional System

In Indonesia, the establishment of the Constitutional Court become a new state institution in terms of judicial power. It is related to the third amendment of the 1945 Constitution.<sup>20</sup> This institution is formed as an effort to uphold the principles of a rule of law and provide maximum protection based on the citizens' rights. Therefore, the Constitutional Court can guarantee citizens' rights. Constitutional rights also known as human rights are important elements that need to be possessed and protected by a state of law.<sup>21</sup>

Human rights consist of the aspects of civil, political, economic, and socio-cultural. In social life, civil rights are related to the position of an individual, particularly vulnerable groups. It includes the right to freedom of religion, the right to life, and the right to equality before the law. In Article 5 paragraph 3 of Law Number 39 of 1999 concerning Human Rights, vulnerable groups have the right to receive more treatment and protection about their specificity. These groups include the elderly, children, the poor, pregnant women, and people with disabilities. According to the Human Rights Reference, those belonging to the vulnerable group are:<sup>22</sup>

- a. Refugees;
- b. Internally Displaced Persons (IDPs);
- c. National Minorities;
- d. Migrant Workers;
- e. Indigenous Peoples;
- f. Children; and
- g. Women.

The existence of vulnerable groups which include children, women, people with disabilities, and minorities has an important meaning in a society that upholds human rights values. This makes the government to issued various laws and regulations as well as conventions such as the rights of the child, and the elimination of all forms of discrimination against women but this effort is not supported by a strong shared

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<sup>20</sup> Siahaan, Maruarar. *Hukum Acara Mahkamah Konstitusi Republik Indonesia*. (Jakarta: Sinar Grafika, 2011), 54

<sup>21</sup> Cammack, Mark. "The Indonesian human rights court." In *New Courts in Asia*, pp. 194-222. Routledge, 2010.

<sup>22</sup> Rosser, Andrew. "Towards a political economy of human rights violations in post-New Order Indonesia." *Journal of Contemporary Asia* 43, no. 2 (2013): 243-256.

commitment. Based on these conditions, it is necessary to develop an effective law enforcement mechanism to protect citizens' rights, particularly for vulnerable groups.<sup>23</sup>

In Indonesia, there are special cases such as the problem of protecting children and women. The following are data from the Indonesian Child Protection Commission (ICPC) in 2022. According to the ICPC data, there is still a high number of cases in Indonesian children. There are at least 3 (three) main reasons why they face the law. First, there is a strong doctrine with the view that all children's wrong needs to be punished through the court. Second, the culture of law enforcers prefers the formal justice process rather than other possible avenues through the process of restorative justice (justice with the method of restoring relations) and diversion (transfer of punishment). Third, several state regulations such as juvenile justice provisions as reflected in Law Number 3 of 1997 concerning Juvenile Courts do help to criminalize children.

Women are also a vulnerable group that needs protection in the law enforcement process. They often experience acts of violence but weak law enforcement has led to an increase in cases. In 2022, Annual Records of the National Commission on Violence against Women show an 83% increase in Cyber Gender Based Violence (CGBV) from 940 in 2020 to 1,721 in 2021. The recipients of the reports were Non-Governmental Organizations (NGOs) and the Women's Crisis Center (WCC), followed by the Department of Empowerment and Child Protection (DECP) and the Integrated Service Center for Empowerment of Women and Children (ISCEWC), as well as the District Court with 170, 22, and 13 cases respectively.<sup>24</sup> In the National Commission on Violence against Women complaints and service agency data, the CGBV was dominated by cases of online intimidation (cyber harassment), threats of spreading personal photos/videos (malicious distribution), and online sexual extortion (sextortion).

People with disabilities are another set of a vulnerable group that has the right to protection. According to United Nations (UN) data in 2021, about 15% out of the 7 billion world population are persons with disabilities, where 80% of them live in developing countries. The WHO and the World Bank Report on Disability stated that more than 15% out of 1 billion people live with disabilities in 2011, where 3% of them are in a serious condition. Meanwhile, data from the 2019 National Socio-Economic Survey (NSES) showed that about 9.7% out of 26 million people in Indonesia are with disabilities.<sup>25</sup> Vulnerable groups have the potential to become victims because of physical incapacity and lack of strength as well as power. Arif Gosita explained that victims physically and spiritually suffer due to the actions of others.<sup>26</sup> This shows issues regarding vulnerable groups need to be included in civil rights that are protected by law.

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<sup>23</sup> Hoesin, Iskandar. "Perlindungan terhadap kelompok rentan (306anita, anak, minoritas, suku terasing, dll) dalam perspektif hak asasi manusia." (Paper) presented in *Seminar Pembangunan Hukum Nasional VIII Tahun 2003*.

<sup>24</sup> The National Commission on Violence against Women of the Republic of Indonesia. <https://komnasperempuan.go.id/kabar-perempuan>

<sup>25</sup> Portal Informasi Indonesia. "Presidensi G20 Indonesia Angkat Isu Kesempatan Kerja bagi Penyandang Disabilitas", Available online at: <https://indonesia.go.id/kategori/editorial/4035/presidensi-g20-indonesia-angkat-isu-kesempatan-kerja-bagi-penyandang-disabilitas>

<sup>26</sup> Gosita, Arif. *Masalah Korban Kejahatan* (Jakarta: Akademika Pressindo, 2004), 41.



The "principle of humanity" means that every material content of laws and regulations has to proportionally reflect the protection and respect for human rights and dignity in Indonesia. It needs to be supported by the "principle of equality before the law and government" that this material content tends not to contain discriminatory things based on a background including religion, ethnicity, race, class, gender, or social status. Therefore, every law and regulation have to always uphold human rights. Government policies have been more oriented toward the fulfillment and protection of civil-political and economic, social, and cultural rights. Meanwhile, the rights contained in vulnerable groups have not received priority from these policies. This fundamental problem is due to the lack of legal protection regarding the rights of children, women, people with disabilities, and minorities.

## 5. Conclusion

In Indonesia, constitutional or human rights include civil, political, economic, and socio-cultural which tend not to be violated by state administrators while exercising their power. These rights have been guaranteed by the 1945 Constitution since all branches of power have to respect it. Each material content of laws and regulations proportionally reflects the protection and respect for human rights and dignity in Indonesia. This content tends not to contain discriminatory things based on a background such as religion, ethnicity, race, class, gender, or social status. Civil rights, which mean freedom is one of the human rights and it is related to vulnerable groups. There is a broad development of these rights in the constitution dynamics but the implementation is still not good enough. Therefore, a legal system is needed to relate further to civil rights in vulnerable groups.

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