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Observance of the Legal Choice for the Settlement of Indonesia's Past Gross Violations of Human Rights

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Abstract
Global developments attempt to rectify serious human rights breaches within the context of legal regulations, as well as to build human rights systems and institutions on a national and global scale. However, in Indonesia, the paradigm shift from authoritarianism to democracy leads human rights as one of most important issues faced by the Indonesia government. In the last two decades, the red record in resolving major human rights abuses has not been attained, necessitating a study to evaluate effective legal choices in settlement of the past human rights violations settlement. This paper employed a statutory method, legal concepts, legal cases, and citations. The comparison validates the direction of this paper's research on the dynamics of national legal concerns in the policy of resolving gross human rights abuses and the selection of law that may be employed in effectively resolving major human rights violations in favor of transitional justice. The obtained results and findings show that problems have emerged in policy orientation at the macro, mezzo, and micro policy strata, as well as the need for future direction in the substance of legislation and the enforcement system, both through judicial and extrajudicial channels, against serious human rights violations.
Keywords: Legal Choice; Indonesia; Past Gross Violations of Human Rights Settlement.

Introduction

Human rights recognition began about two centuries ago, with various dynamics, most notably the United Nations' steps to outline the basic principles of human rights[1] through a charter that grounded universal attention toward human rights based on universal respect toward human right through the UDHR.

[1] I Gede Yusa and Ni Ketut Supasti Dharmawan, 'The Balinese Traditional Law Instrument: A Realism between the Balance of Cosmic and Human Rights Context' (2019) 5 PADJADJARAN Jurnal Ilmu Hukum (Journal of Law).[447].

Affirmation through the ICCPR and the ICESCR regarded the values and universal legal norms that are required regulate human life.[2]

A state that is subject to international law is also known as a power organization; in essence, it is a party with authority. The exercise of this authority must be supported by the state's pledge not to abuse power. This state obligation has also been articulated internationally through several international legal instruments, and it is also incorporated at the level of national law in each country[3] as the government's responsibility.

The guarantee that the government will not abuse its authority and the protection of every person's inalienable rights are concrete examples of how the state's responsibility to ensure that commitments to uphold human rights are realized. This obligation calls for the state to exist within a framework designed to protect, ensure, and uphold human rights. According to Article 28I, paragraphs (4) and (5) of the Indonesia Constitution directed moral and legal commitment to upholding the preservation of human rights.

The 1948 UDHR Preamble outlines that the human rights protection should be carried out within the framework of a rule of law. To specify, the protection of human rights in national legislation is based on legal certainty and legally required to employ legal instruments.[4]

Before the formation of the PHAM Law and related laws and regulations, several gross violations of human rights were massive and not settled, while they tended to be resolved through a repressive approach such as the 1965 G 30 S/PKI case, the 1984 Tanjung Priok case, the 1989 Mesuji Lampung case, the East Timor case, and several cases at the beginning of the 1998 reform which tended to be resolved through force owned by the authorities or the military, not based on a state

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[2] Azadeh Chalabi, 'Law as a System of Rights: A Critical Perspective' (2014) 15 Human Rights Review 117 <https://doi.org/10.1007/s12142-013-0297-8>.

[3] I Ged Yusa, *Hukum Tata Negara Pasca Perubahan UUD NRI 1945* (Bagus Hermanto ed, Cetakan Pertama, Setara Press 2016).

[4] Titon Slamet Kurnia, 'Perlindungan HAM Melalui Pengujian Undang-Undang Oleh Mahkamah Konstitusi' (2013) 28 Yuridika.[269] <https://e-journal.unair.ac.id/YDK/article/view/1884/1386> accessed 9 August 2023.

mechanism that prioritized civility and human rights.[5]

The steps that were the result of "international community pressure" finally prompted the government to enact Presidential Decree Number 50 of 1993 regarding the National Human Rights Commission or Indonesia NHRC (hereinafter referred to as Presidential Decree 50/1993) as a starting point for furtherance and dignifying human rights issues. The legal form of this Presidential Decree is problematic considering that the Indonesia NHRC can be dissolved at any time by the government on the principle of *ius contrarius actus*[6] with an *ad-hoc* institutional nature and the impression of being a mere accessory to the authorities.[7] Furthermore, the government at the time did not prioritize human rights issues, such as the procedures necessary to stop several flagrant human rights breaches; instead, it adopted a forceful strategy that was at odds with human rights ideals.

The beginning of the reform in Indonesia opened a wider space, including on human rights issues, starting with the MPR meeting which stipulated the Decree Number XVII/MPR/1998 (also known as the MPR Decree on Human Rights), Article 104 paragraphs (1) and (2) of Law 39 of 1999 (also known as the Law on Human Rights) as well as demands from countries in the world for Indonesia to encourage the democratization process, one of which is by resolving past human rights violations in Indonesia. Even if the *Perpu* on PHAM was rejected by the House of Representatives because of a pressing situation that was not resolved and did not follow political will, the legal facts and actions taken by the government during this period also served as inspiration for its writing. However, a better draft was created, and it was used up until Law 26 of 2000 (also known as the PHAM Law) was passed as a strong legal foundation.

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[5] Nadirsyah Hosen, 'Human Rights Provisions in the Second Amendment to the Indonesian Constitution from Shari'ah Perspective' (2007) 97 The Muslim World .[200].

[6] Ken Setiawan, 'From Hope to Disillusion: The Paradox of Komnas Ham, the Indonesian National Human Rights Commission' (2016) 172 Bijdragen tot de Taal-, Land- en Volkenkunde.[1].

[7] Melissa Crouch, 'Asian Legal Transplants and Rule of Law Reform: National Human Rights Commission in Myanmar and Indonesia' (2013) 5 Hague Journal on the Rule of Law.[146].

The PHAM Law expands on the purpose of Article 104 of the Law on Human Rights, which states that the Human Rights Court was established to address serious abuses of human rights that ensure its implementation by giving people social protection, assurance, and a sense of security. The PHAM Law allows for resolution by both extrajudicial and judicial means.[8] The formulation of accommodation pathways in the PHAM Law can be carried out either through a permanent Human Rights Court for cases that occurred post promulgation of the PHAM Law, an *ad-hoc* Human Rights Court for retroactive cases, or an extrajudicial settlement through national TRC.

The exploration and determination of the various laws related to human rights, can be found in Article 7 paragraph (1)-(2) of the Human Rights Law. This regulation provided space for a choice of law to determine the settlement of human rights violations, although it did not state the resolution patterns of abuse issues. In this case, the observation of human rights was very heavy on these provisions.[9] When subsequently investigated, the Human Rights Law only provided space for a mechanism to resolve gross violations through the HRC (Human Rights Court), by mandating the establishment of a separate policy according to Article 104 paragraph (1)-(4).[10] From this context, no alternative settlement of violations was found, with serious matters externally observed in the Human Rights Court.[11] This was in line with the Elucidation Section of the Human Rights Law, where the space for a resolution mechanism was confirmed through the HRC.[12] These outputs led to the understanding that the existence of the Human Rights Law did not provide a specific arrangement providing space for the extrajudicial settlement of gross violations in Indonesia.[13]

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[8] Peter Machmudz Marzuki, 'The Functions of Principle as the Basis of Court Decision in Hard Cases' (2021) 36 Yuridika.[383].

[9] Ni Luh Gede Astariyani and others *HUKUM KEBIJAKAN PUBLIK* (Bagus Hermanto ed, Cetakan Pertama, Swasta Nulus 2022).

[10] Muhammad Ashri, 'Reconciliation of Humanitarian Law and Human Rights Law in Armed Conflict' (2019) 5 Hasanuddin Law Review.[209].

[11] Anbar Jayadi, 'What Constitutes as Limitation of (Human) Rights in Indonesian Legal Context?' (2017) 3 Hasanuddin Law Review.[290].

[12] Rian Saputra, M Zaid and Silaas Oghenemaro Emovwodo, 'The Court Online Content Moderation: A Constitutional Framework' (2022) 2 Journal of Human Rights, Culture and Legal System.[139].

[13] Ni Luh Gede Astariyani and others, 'Policy on the Right to Education of Refugees in Indonesia and Australia' (2023) 7 Lex Scientia Law Review.[249].

In this case, the emergency condition during the early periods of *reformasi* led to several efforts by the government in 1999-2000, to deliberate a new legal framework toward settling Timor Timur human rights abuses and solving acute violation problems inherited by the New Order regime. This showed that the government initially proposed Emergency Law on HRC 1999, which was rejected by Parliament due to inadequate legal standing and materials capable of leading to precedent. Meanwhile, a new bill was drafted and proposed under process in early 2000,[14] until its enactment as Law on Human Rights Court 2000. This regulation led to a worse bill preparation, which absorbed legal substance on the Rome Statute 1998 without having an in-depth impact or strict legal drafting preparatory. From this context, the weak legal framework caused inadequate successful trial processes to settle gross violations,[15] without the acquisition of fairness or fulfillment for victim affairs.

Law Number 27 of 2004 on TRC was recently enacted and subsequently annulled the Constitutional Court Decision 006/PUU-IV/2007. This law was enacted to address the threat of impunity and the lack of understanding, on restitution, rehabilitation, and compensation for victims. However, the Constitutional Court found that the law lacked operator norms and was unable to deliver extrajudicial settlements,[16] with no specific rule regulating the mechanism.[17] After the issuance of the Law on Special Region of Aceh 2006, Aceh also adjusted the implementation of the Helsinki Accord 2005,[18] which integrated previous

[14] Hernadi Affandi and Tarsisius Murwadji, 'An Endless Struggle of Fighting Discrimination in the Name of Human Rights Protection' (2020) 7 Padjadjaran Jurnal Ilmu Hukum.[207].

[15] Ni Luh Gede Astariyani and others, 'Preventive and Evaluative Mechanism Analysis on Regulatory and Legislation Reform in Indonesia' (2023) 19 Law Reform: Jurnal Pembaharuan Hukum.[248].

[16] Bagus Hermanto, I. Gede Yusa and Nyoman Mas Aryani, 'Constitutional Court of the Republic of Indonesia: Does the Ultra Petita Principle Reflect the Truth of Law?' (2020) 14 Fiat Justisia: Jurnal Ilmu Hukum.[261].

[17] Bagus Hermanto, 'Discover Future Prospect of Indonesia Criminal Law Reform: Questioning Adat Criminal Law Existence, Material and Formal Legislation, and Constitutional Court Decision Frameworks' (2021) <https://orcid.org/0000-0002-0220-5574,>.

[18] Yusi Amdani, 'Implications of Criminal Law Deviation on Violence and Murder in Aceh from the Perspective of Helsinki Memorandum of Understandin' (2018) 5 PADJADJARAN Jurnal Ilmu Hukum (Journal of Law).[331].

human rights abuses settlement into their truth and reconciliation institution (Aceh TRC).[19] In this case, an increased broader public participation was observed in settling previous human rights abuses after the issuance of Qanun Aceh 2013 which actively involved the Aceh TRC. Recommendations were also delivered to the Aceh Governor, for fulfillment of restitution, rehabilitation, and compensation of victims.[20]

The government and parliament enacted a new Criminal Code regarding the national legal reform agenda due to several decades of deliberation since the issuance of Law Number 1 of 2023 on *Kitab Undang-undang Hukum Pidana* (KUHP; Criminal Code 2023). During the discussion and drafting processes, especially for the updated version in 2022, the engagement of gross human rights violations belonged to the extraordinary crimes,[21] which needed specialized laws and procedures for settlement purposes. However, the violation was a form of criminality when the Bill of Criminal Code was deliberated, compared to the improvement of effective gross violations of human rights settlement. The Draft of the Criminal Code was also diverse in contempt toward specific civilian groups, special courts arrangement, and general norms applicable to gross violations of human rights. This criticized the arrangements on Articles 598, 599, 612, and 622 par. (5) of the Criminal Code 2023, as degradation toward *lex generalis derogate legi specialis* familiarizing gross violations with the ordinary arrangement of crimes. The 2023 Criminal Code also lacked a "systematic and broad" conceptualization, indicating the failure to explain subsequent types of gross violations, including (1) inadequate conceptualization of "the persecution" concept and (2) a lack of special principles to settle gross violations of human rights.[22] In addition, the code did not identify

[19] Made Subawa, Ni Putu Niti Suari Giri and Bagus Hermanto, *Dinamika Filsafat Ilmu Hukum Pancasila: Ontologi Dan Aksiologis Sumber Dari Segala Sumber Hukum Di Indonesia* (Bagus Hermanto ed, First Edition, Uwais Inspirasi Indonesia 2023) <www.penerbituwais.com>.

[20] Jiwon Suh, 'Preemptive Transitional Justice Policies in Aceh, Indonesia' (2015) 4 Southeast Asian Studies.[95].

[21] Budi Sastra Panjaitan and Adlin Budhiawan, 'Realizing Justice, Relationship Between Actors And Victims In Indonesian Criminal Law Enforcement', vol XI (2023).

[22] Desia Rakhma Banjarani and others, 'The Urgency of War Crimes Regulation in Indonesian Criminal Law' (2023) 17 Fiat Justisia: Jurnal Ilmu Hukum.[109].

command liability principles, with the imposed prison crime being arranged with lower sanctions than Law on Human Rights Court norms.[23]

Due to this fundamental issue, this paper attempts to examine the legal options that can be used to settle human rights violations in Indonesia concerning the strategy to be used going forward in the choice of a legal settlement within the framework of national legal politics based on the values of Pancasila, and its provisions of the Indonesian Constitution. It is also possible to think about how transitional justice operates to institutionalize extrajudicial settlements in several nations with troubled histories under oppressive regimes.

This paper differs in this regard from earlier studies, namely Irene Hadiprayitno's, which concentrated solely on the context of implementing Pancasila values, the dynamics of constitutional change, and criticism of legislative policies which sparked a delay in the attainment of transitional justice and guarantees for human rights in Indonesia, including the resolution of egregious human rights violations.[24] Previous studies by Haris Azhar only specifically looked at the government's failure in practicing transitional justice, the lengthy process of addressing egregious human rights breaches, and the actions taken by civil society organizations to support these ambitions.[25] Last, by contrasting J.L. Gibson's research, which shows that institutions of TRC provide the primary support for the successful human rights violations settlement, namely the support of a fair/unbiased/evenhanded attitude to produce fairness, both of these create legitimacy and credibility so that with all of them a change in attitude/acceptance can be achieved as the key to a nation's success in resolving gross violations of human rights.[26]

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[23] Tongat Tongat, 'The Ambiguous Authority of Living Law Application in New Indonesian Penal Code: Between Justice and the Rule of Law' (2022) 17 International Journal of Criminal Justice Sciences.

[24] Irene Istiningsih Hadiprayitno, 'Defensive Enforcement: Human Rights in Indonesia' (2010) 11 Human Rights Review.[373].

[25] Haris Azhar, 'The Human Rights Struggle in Indonesia: International Advances, Domestic Deadlocks' (2014) 11 SUR-International Journal on Human Rights.[227].

[26] James L Gibson, 'On Legitimacy Theory And The Effectiveness Of Truth Commissions' (2009) 72 Law, and Contemporary Problems 123 <http://www.law.duke.edu/journals/lcp>.

In contrast to previous studies, this paper investigates the political dynamics of regulatory law or legal substance on gross human rights violations settlement related to the urgency of encouraging a legal need[27] to outline legal politics through positive legal reform with regulations that can be determined separately or combined with the new PHAM Law, keeping in mind that legal politics necessitate a deeper understanding of both non-legal and legal issues.[28] Additionally, the dimensions of legal choice must be appropriately taken into account and prioritize effectiveness in ensuring transitional justice and in favor of upholding human rights for victims and inheritance for future generations, by realizing a just, ideal, and practical solution to solving gross human rights violations through an in-depth study, namely: first, how is the legal politics governing the settlement of gross human rights violations in Indonesia, and second, how is the legal system, in general, governing gross human rights violations legal settlements.

Dynamics of Legal Politics Arrangements for the Past Gross Human Rights Violations Settlement in Indonesia: Spectrum of Policy Strata

As the core of legal evolution in Indonesia, which is supposed to be close to social reality, is the politics of national law as the legal direction that the state wishes to use in accomplishing the state's aims through drafting new laws or changing old laws. This confirms that the political essence of national law lies in the growth of national legal knowledge.[29] In short, the growth of legal knowledge contributes to the construction of law, refers to the practice or practical application, and is normative or ethical. This is the foundation for the formulation of national legal policies, the essence of which is the development of law, including the process of

[27] Peter Machmudz Marzuki, 'The Essence of Legal Research Is to Resolve Legal Problems' (2022) 37 Yuridika.[37].

[28] Mathew Davies, 'States of Compliance?: Global Human Rights Treaties and ASEAN Member States' (2014) 13 Journal of Human Rights.[414].

[29] Bagus Hermanto, 'Deliberate Legislative Reforms to Improve the Legislation Quality in Developing Countries: Case of Indonesia' (2023) 11 Theory and Practice of Legislation.[1].

developing laws based on regulatory instruments for the dynamic and complicated lives of people.[30]

In terms of process, the previously mentioned legal politics, legal formation is a policy concerned with the establishment, renewal, and evolution of law, which includes legislative policy formulation, jurisprudential law policy (formation), or a judge's decision; and policies against other unwritten regulations. The politics of law enforcement is a policy concerned with policies of justice and legal services. The two legal political spheres, it is merely distinguished, but cannot be separated because the success of a statutory regulation depends on its application[31] and is related to law enforcement, which is the dynamics of statutory regulations, through decisions in the framework of law enforcement, statutory regulations come alive and stipulated following the needs and developments of society;[32] specifically, this study limits itself to the politics of national legislation including the political scope of legal substance concerning institutional arrangements on gross human rights violations settlement.[33]

The scope of legal politics on legal substance policies, legal structure policies, and legal culture policies referred to legal material as a substantive component, institutions as structural components, and community legal awareness as a cultural component of the system. law. It persists to this day, namely in the legal politics enacted in the post-reform era, including in the legal political order regulating human rights, especially in the extrajudicial settlement on human rights violations seen from the spectrum of macro legal politics, mezzo legal politics, and micro legal politics.

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[30] Made Subawa, 'Implikasi Yuridis Pengalihan Kekuasaan Membentuk Undang-Undang Terhadap Sistem Ketatanegaraan Republik Indonesia Pasca Perubahan Undang-Undang Dasar 1945' (Universitas Airlangga 2003).

[31] Hermanto, 'Discover Future Prospect of Indonesia Criminal Law Reform: Questioning Adat Criminal Law Existence, Material and Formal Legislation, and Constitutional Court Decision Frameworks' (n 17).

[32] Azis Budianto, 'Pembangunan Politik Hukum Pasca Reformasi Di Indonesia' (2016) 3 Jurnal Lex Librum.[429].

[33] Made Subawa, 'Hak Asasi Manusia Bidang Ekonomi Sosial Dan Budaya Menurut Perubahan UUD 1945' (2008) 33 Kertha Patrika.[1].

From a macro perspective, it was discovered that an extrajudicial settlement institution had not materialized following what was outlined in Pancasila legal ideals,[34] by upholding the realization of transitional justice in Indonesia, as well as what was outlined in the MPR Decree Number V/MPR/2000 concerning the Stabilization of National Unity (hereinafter referred to as the Tap MPR V/MPR/2000).[35] This is given the urgency of realizing transitional justice which embodies the value of national unity according to Pancasila, and the strengthening of the substance of national unity according to the Decree of the MPR V/MPR/2000, in an appropriate institution over extrajudicial settlement in the future, and a reflection at the macro level. Human rights legal politics in the reform era normatively chose the "never to forget and never to forgive" approach, but the reality is that "to forget and to forgive" perpetuates impunity. This is evident in terms of the extrajudicial settlement, the failure to form a TRC, the Truth and Friendship Commission (KKP), or other alternatives as a package of institutional arrangements chosen by the government.[36]

According to the Decree of the MPR V/MPR/2000, the mandate to resolve gross human rights violations outside the courts or extrajudicially according to the Decree of the MPR V/MPR/2000, the commitment to ensure the stability of national unity and integrity in resolving the mistakes of the previous regime was carried out one way by forming a TRC. According to the Decree of the MPR V/MPR/2000, it was outlined that the existence of the TRC was to create an acknowledgment of mistakes, and manifest an attitude of maturity to be able to forgive each other and provide justice for the parties who were "victimized" in various past gross human rights violations, with the ultimate goal being in line with Pancasila values for national unity based on national

[34] I Ged Yusa and Bagus Hermanto, 'Alternatif Penataan Mekanisme Preventif Dan Evaluatif, Dasar Dan Usulan Rekomendatif Dalam Akselerasi Peningkatan Kualitas Legislasi Dan Regulasi Nasional, Komparasi' (2022) <https://www.theglobaleconomy.com/Indonesia/wb_regulatory_quality/>.

[35] Nisrina Irbah Sati, 'Ketetapan MPR Dalam Tata Urutan Peraturan Perundang-Undangan Di Indonesia' (2020) 49 Jurnal Hukum & Pembangunan.[834].

[36] Suparman Marzuki, 'Politik Hukum Penyelesaian Pelanggaran HAM Masa Lalu: Melanggengkan Impunity' (2010) 17 Ius Quia Iustum Journal.[171].

reconciliation. That is, accompanied by consideration of the fundamental philosophy of Pancasila in the political and legal spectrum to reconstruct the arrangements for extrajudicial institutions that uphold its settlement by mainstreaming the five precepts of Pancasila in achieving national reconciliation.

From the mezzo level, various laws reflect the problem as perceived from the legal political spectrum, namely provisions in Article 47 paragraph (1)-(2) of the PHAM Law mandating that major human rights abuses with a retroactive nature of cases be resolved. Extrajudicial channels, such as a TRC, will be governed further in a separate law. Initially, the mandate of the PHAM Law was embodied according to TRC Law but was declared unconstitutional based on the Constitutional Court Decision Number 006/PUU-IV/2006 (also known as PUMK 006/PUU-IV/2006)[37] related with principle of non-retroactivity to the TRC design in Article 1 point (9), Article 22 and Article 44 of the TRC Law. In this case, the consideration of Constitutional Judge cancelling all UU KKR related to UU KKR operationalization in Article 27 UU KKR, as such the article is contrary with the Indonesian Constitution, which ultimately means all UU KKR cannot be enabled to be implemented. As a result, while there is no statutory rule that serves as the institutional foundation for the extrajudicial settlement of serious human rights abuses, the mandate for establishment is nonetheless implemented through other laws.[38]

Based on the mezzo legal political spectrum, there are also extraordinary conditions within the special autonomy framework after the issuance the 2005 Helsinki Memorandum of Understanding or the 2005 Helsinki MOU) on 15 August 2005 in Section 2 concerning Human Rights in Point 2.3 it mentions the mandate for the establishment of Aceh Truth and Reconciliation Commission (hereinafter referred to as the Aceh TRC) by the Indonesian TRC with the special task in formulating and determining Aceh forward reconciliation steps.

[37] Radian Salman, Sukardi and Mohammad Syaiful Aris, 'Judicial Activism or Self-Restraint : Some Insight Into The Indonesian Constitutional Court' (2018) 33 Yuridika.[145].

[38] Mahrus Ali and Ari Wibowo, 'Kompensasi Dan Restitusi yang Berorientasi Pada Korban Tindak Pidana' (2018) 33 Yuridika.[260].

The mandate of the 2005 Helsinki MOU was later internalized into Law 11 of 2006 (hereinafter referred to as the UUP Aceh 2006) which accommodated Aceh TRC establishment[39] as stipulated in Chapter XXXIV Human Rights in Article 229 paragraph (1)-(4) and Chapter XXXIX Transitional Provisions Article 260 UUP Aceh 2006 as an integral part of the Indonesian TRC, to seek the truth and seek regional reconciliation in Aceh, which can also consider the application of customary principles that live in society. The mandate to establish the Aceh TRC within one the year 2006 could only be implemented through the Aceh *Qanun* 7 of 2013 (hereinafter referred to as the Aceh TRC *Qanun*) which does not have a direct relationship with a national institution related to the extrajudicial settlement of human rights violations which is heavy, only limited to being based on the 2006 Aceh UUP and the 2005 Helsinki Memorandum of Understanding,[40] based on the customary principles that apply in Aceh by upholding the spirit of Islamic teachings as a fundamental basis of life relations in Aceh in solving various Aceh problems.

This Commission operates in Aceh as well, hearing survivors' and victims' testimonials, accepting voluntary official submissions from various civic organizations, and making recommendations for restitution for Aceh victims of egregious human rights violations.[41] The performance achieved by the Aceh TRC in uncovering the truth across past violations in Aceh between 1976 and 2005 was marked by several concrete steps in the form of taking private and public statements three times in hearings at the Governor's Hall in Banda Aceh (November 2018), North Aceh DPRK Building (July 2019), and Aceh DPR (November 2019) toward 50 survivors, as well as statements of around 5000 victims and their families, although limited in several aspects, support was also obtained from several civil society groups who voluntarily submitted official reports regarding the results of

[39] Gunnar Stange and Roman Patock, 'From Rebels to Rulers and Legislators: The Political Transformation of the Free Aceh Movement (GAM) in Indonesia' (2010) 29 Journal of Current Southeast Asian Affairs.[95].

[40] Bagus Hermanto, 'Law Instruments within Disruptive World and Polarization of Culture' (2019) <https://www.researchgate.net/publication/353835117>.

[41] Lia Kent, 'Transitional Justice and the Spaces of Memory Activism in Timor-Leste and Aceh' (2019) 31 Global Change, Peace and Security.[181].

their studies.[42] This commission has also provided recommendations for victim reparations to the Government of Aceh and the government has followed up on 245 victims in the form of urgent recovery services such as medical services, psychosocial services, living allowances, business assistance, and residence status.[43]

Based on the political spectrum of mezzo law, until now several proposals have been made to realize human rights violations settlement either through the courts or by considering reviving the TRC at the national level. However, this is hampered by how to place the right institutional arrangements in the future to facilitate extrajudicial settlement on human rights violations in Indonesia, both in terms of practices that have been experienced by other countries, as well as how to look at the political spectrum of national law within the macro and mezzo level to achieve national reconciliation and the realization of transitional justice, both in terms of acknowledging past violations and concrete steps to realize compensation, rehabilitation, and restitution for victims in the future.

The Choice of Law Used in Realizing an Effective Gross Human Rights Violation Settlements in Indonesia

Choice of Law through the Judicial Path (Court)

The state is the main responsibility holder in human rights issues, which is outlined both in international treaties and international human rights customs, and includes four aspects of obligations, namely the duty to respect (the state is obliged not to intervene or take actions that deny the human rights furtherance and fulfillment); the duty to protect (the state is obliged to protect individuals from violations by non-governmental actors, foreign government agents, or state apparatus that exceed their authority, both with a preventive approach and a judicial dimension); the duty to fulfill (the state has responsibility to take action on

[42] Teuku Okta Randa and Wahyu Ramadhani, 'Kedudukan Komisi Kebenaran Dan Rekonsiliasi Aceh Menurut Qanun Nomor 17 Tahun 2013' (2020) 4 Syiah Kuala Law Journal.[266].

[43] A Darmi, 'Pernyataan Akhir Rapat Dengar Kesaksian Komisi Kebenaran Dan Rekonsiliasi Aceh Penghilangan Orang: Kembalikan Mereka, Jangan Terulang!' (2019).

forthcoming human rights, focus on variants of human rights and the availability of human rights resources, as well as the establishment of legal, institutional and procedural frameworks for holders of human rights to obtain realization and enjoy their human rights);[44] and the duty to provide domestic level and legal remedies toward human rights violations (obligation for the state to provide the necessary legal steps at the national level).

In this case, the settlement is through a judicial route based on the existence of the PHAM Law through the mechanism of the ad-hoc Human Rights Court for past cases and the Human Rights Court following the provisions of Article 46 of the PHAM. These arrangements and implementations are seen as reflecting the embodiment of a social defense policy, which is ultimately part of a social policy, but the PHAM Law is still not in line with efforts to deal with gross human rights violations. As is the case with data submitted by Kontras RI, since the enactment of the PHAM Law, the PHAM Law has had several legal problems which have led to delays in the resolution of several serious human rights violations, and out of 15 cases, only three have been resolved by the ad-hoc Human Rights Court mechanism, namely the Tanjung Priok Incident, the East Timor Incident, and the Abepura Incident.[45]

Regarding the existing cases, there are main issues in the context of setting the choice of law for the settlement of gross human rights violations through the judicial channel, namely, first, the accuracy of the translation of the legal concept of the crime of "persecution" in Article 7 (1) (h) and Article 9 (h)) of the PHAM Law, which has a different meaning from the formulation of Article 7 (2) (g) of the Rome Statute in an act of persecution as an intentional act of eliminating one's fundamental rights as a member of a minority group. Second, other forms of inhumane acts in Article 7(k) of the Rome Statute put forward the principle of *nullum cermien sine*

[44] Ken MP Setiawan and Anthony J Spires, 'Global Concepts, Local Meanings: How Civil Society Interprets and Uses Human Rights in Asia' (2021) 45 Asian Studies Review .[1].

[45] Kontras RI, 'Critical Note 20 Years Implementation of UU Human Right Justice (2000-2020): Re-Imagining an Effective Law of HAM Court' (2020).[11].

lege certa, prioritizing justice over certainty. Third, the discourse on the principle of "responsible subordinates" vs. the principle of command responsibility in Article 33 UUPHAM, taking into account the relatively international practice in the formulation of Article 8 Statute Nuremberg Trial 1945, Article 7(4) ICTY Statute 1993, and Article 7(4) ICTR Statute 1994. Fourth, realizing a process system human rights court which will be able to run more effectively and objectively in Article 15 (3), (4), and (5) of the Rome Statute which leads to the Pre-Trial Chamber model primarily in preventing the political influence between parliament and government from undermining the ad hoc Human Rights Court that guarantees of objectivity and political influence can be resisted.[46] Fifth, the elements of genocide are referred to in Article 25(3)(a),(b),(c),(d), and (f) of the Rome Statute, which specifically urges perpetrators to be individually liable, with additions in PHAM Law requirements.[47]

These issues reflect the employment of law through a judicial model, as well as a critical point in the future for Indonesia to consider resolving egregious human rights breaches within the framework of an effective policy and system, or in other words, as a critique of the presence of a court. The judicial system is based on criminal justice, with a court of law determining individual criminal liability or other criminal consequences. However, the courts only focused on specific individual actions rather than the overall pattern of the alleged violations, did not investigate several social and political factors driving the violations or the internal structure of the violations,[48] and were unable to provide policy recommendations or input for political or military changes. Even court legal opinions are frequently not released and extensively disseminated, which truth commissions based on transitional justice might do instead.

[46] I Made Pasek Diantha, *Hukum Pidana Internasional* (Cetakan Pertama, Kencana Prenada Media 2014).

[47] Ken M Setiawan, 'Struggling for Justice in Post-Authoritarian States: Human Rights Protest in Indonesia' (2022) 26 The International Journal of Human Rights .[541].

[48] Katharine McGregor, 'Memory Studies and Human Rights in Indonesia ' (2013) 37 Asian Studies Review.[350].

Choice of Law through Extrajudicial Routes

Comparative legal studies in constitutional development have received recognition and strengthened their role at the beginning of the twenty-first century, by including a broad multidisciplinary scope to understand constitutional structures formed and operated, including the dynamics of human rights that are adopted into national and local laws in each country. In this case, Indonesia has been facing a post-reform democratization process since 1998, particularly in realizing responsibility to address several violation cases in the past, based on a constitutional framework toward human rights values, substance, or principles, and in the spirit of providing reparations for victims, realizing transitional justice, and being able to build a solid substantive democratic foundation in Indonesia.[49]

However, the government under Joko Widodo's presidency attempted to immediately settle previous human rights abuses, especially during 2022-2023, through Presidential Regulation Number 17/2022 by forming *Tim Penyelesaian Non-Yudisial Pelanggaran Hak Asasi Manusia yang Berat Masa Lalu* (Special Task Force for the Settlement of Past Human Rights Violation). After legal uncertainty on the previous abuses delayed for almost two decades, the General Prosecutor subsequently submitted 12 similar cases as their joint recommendation with National Human Rights Commission (*Komisi Nasional Hak Asasi Manusia –Komnas HAM*). Under this regulation, the Special Task Force led by Makarim Wibisono was authoritatively tasked to independently, objectively, strictly, fairly, and effectively prioritize gross violation settlement and national reconciliation within an alternative mechanism. A recommendation was also delivered regarding the reparation of victims' affairs, toward fairness conditions. Despite being perceived as a legitimate bias and a lack of accountability by several NGOs,[50] the demand of human rights defenders to charge any convicted individuals for

[49] Rachael Diprose, Dave McRae and Vedi R Hadiz, 'Two Decades of Reformasi in Indonesia: Its Illiberal Turn' (2019) 49 Journal of Contemporary Asia.[691].

[50] M Misbahul Mujib and Mustari Kurniawati Muchlas, 'Achievements and Challenges of Human Rights Protection Policy in Realizing Good Governance in Indonesia and China' (2023) 3 Journal of Human Rights, Culture and Legal System.[328].

previous human rights abuses was yet to be fully addressed. After conducting several efforts since the inauguration in September 2022 until the submission of the Final Report to the President in January 2023, the feedback of the Special Task Force for the Settlement of Past Human Rights Violation was admitted with regret and recognition toward 12 violation cases. From this context, the rights and affairs of the victims were subsequently met, accompanied by the promise to prevent similar cases in the future. The failure of the legal system and the lack of public trust were also attributed to the perception that the government was complicit in the 1965 massacre by the ex-Indonesian Communist Party (G30 S/PKI) and the Banyuwangi *Dukun Santet* (Black Magic Cases).[51] In that case, the government implemented victim rights fulfillment with the issuance of the Presidential Instruction Number 2 of 2023 on *Pelaksanaan Rekomendasi Penyelesaian Non-Yudisial Pelanggaran HAM yang Berat,* toward 19 institutions. This was performed for the coordination and integration of specific frameworks, to implement the Task Force's recommendations for victim rights and affairs fulfillment. The control measure was also supervised by Observer Team on Implementation Recommendation on Non-Judiciary Gross Violations of Human Rights Settlement, under Presidential Decree Number 4 of 2023. Therefore, the process was used to settle the reparation, rehabilitation, or compensation of victims, according to the recommendation from the Task Force's Final Report.[52] TRC's existence principally focuses on allegations across violations in the past and sometimes those that are currently occurring through an investigation process into the motives for the violations that occurred according to *locus delicti* and *tempus delicti* based on in-depth information from witnesses and victims of alleged human rights violations, which occurs systematically, directly, and widely. The truth commission was similarly established during a transitory working period in

[51] Konstantinos Retsikas, 'The Semiotics of Violence: Ninja, Sorcerers, and State Terror in Post-Soeharto Indonesia' (2008) 162 Bijdragen tot de Taal-, Land- en Volkenkunde.[56].

[52] Made Subawa and Bagus Hermanto, 'Despite Complicated Portraits and Policy Orientation: Struggle to Articulate Right to Education Based on the Indonesia Constitutional Court Decisions' (2023) 20 Revista de Direito Internacional.

an ad hoc institution, and its authority was granted by the state with the ultimate purpose of achieving a consensus on truth, justice, and peace.

The basic goal of establishing this truth commission is to find facts, to establish and aid in the establishment of an accurate track record of the nation's past as well as destructive actions by governments or power holders in the past,[53] to provide objectivity in disclosing alleged past violations, and to open up possibilities for the community to learn from the past that prevent potential violations from occurring in the future.

Internationally, transitional justice practices are carried out by several countries to build a more effective settlement solution and provide legal certainty for its victims to realize the restoration of their rights through reconciliation, one of which has been achieved by South Africa, through settlement institutions extrajudicial by the South Africa TRC. Through the determination of the Nelson Mandela government, the African National Congress Party, and Archbishop Desmond Tutu to realize national reconciliation with the Promotion of National Unity and Reconciliation Act 34 of 1995, the TRC became a decisive turning point in South African history regarding the importance of transitional justice through extrajudicial settlement institutions uncovering and resolving any violations during the Apartheid era. TRC was established with the basic notion of national reconciliation based on the principles of peace and national cohabitation, to expose massive breaches of human rights committed by the Apartheid system through public acknowledgment and to achieve restorative transitional justice.[54]

South Africa's extrajudicial institution, through the TRC, with 17 commissioners appointed through an extensive public nomination and selection process, is given powers to grant individual pardon, search and seizure, subpoena power, and also witness protection power. In carrying out its authority, the TRC

[53] Katharine McGregor, 'Exposing Impunity: Memory and Human Rights Activism in Indonesia and Argentina' (2017) 19 Journal of Genocide Research.[551].

[54] Glenda Wildschut and Pat M Mayers, 'Conflict, Complicity, and Challenges: Reflections on the South African Truth and Reconciliation Commission Health Sector Hearing' (2019) 51 Journal of Nursing Scholarship.[299].

decided to combine grant amnesty to perpetrators with victims acknowledging the truth in front of the public, both in terms of law, business, religious faith, media, and health, by providing space for 23,000 victims and witnesses (2,000 people including those appearing in public hearing forums), the rest were provided with other spaces either through closed hearing forums for key institutions or through special hearing forums for victims.

The TRC's first report was in October 1998 and the last report from the TRC on March 21, 2003, accompanied by the process of submitting a pardon for the perpetrators, as well as giving recommendations by the TRC to 16,500 victims who were awarded "urgent relief" and for 22,000 victims of the Apartheid regime who were given compensation, "a one-time grant", embodying courage to prioritize national reconciliation measures, by ensuring the independence, impartiality, autonomy, and objectivity in the successful practice of South Africa.[55] Nonetheless, Paul van Zyl acknowledged that the TRC SA's performance was inextricably linked to limiting its ability to determine the extent of the truth of past crimes, the causes of their occurrence, and measure the involvement of the government and the military, who were suspected of being the main perpetrators. Previously, the goal was to bring justice for victims by prosecuting criminal criminals, achieving reconciliation, and gauging the durability of South Africa's national transition and democratization process.[56] South Africa's political and legal decisions were to build an extrajudicial settlement institution that emphasizes reconciliation to commit impunity for crimes that have occurred, encouraging forgiveness and non-prosecution after achieving reconciliation, which is capable of building a national paradigm that promotes reconciliation based on truth.

In short, by being able to identify and find out the truth from witnesses and victims as well as perpetrators from the tense times when the Apartheid regime was

[55] Nevin T Aiken, 'The Distributive Dimension in Transitional Justice: Reassessing the South African Truth and Reconciliation Commission's Ability to Advance Interracial Reconciliation in South Africa' (2016) 34 Journal of Contemporary African Studies.[190].

[56] Paul van Zyl, 'Dilemmas of Transitional Justice: The Case of South Africa's Truth and Reconciliation Commission' (1999) 52 Journal of International Affairs.[647].

in power, TRC SA was able to build a national narrative that was built in South Africa to build new memories to cover up old memories of the nation's dark history. Telling and listening to testimonies about what they suffered and their aspirations was the main key to finding motives and perspectives and especially building the nation's journey toward reconciliation, recovering from the wounds that occurred in the past and finding a common memory toward consensus on what has happened and how to resolve and look at the future in building the nation.[57]

The achievements of South Africa in seeking an institutional extrajudicial settlement in Indonesia, this far include the presence of UU KKR cancellation by PUMK 006/PUU-IV/2006 but the weakness of UU KKR in operationalization of Article 24 and Article 29 becomes the main problem of its substance. Looking at what has been done by other countries such as El Salvador, Bosnia, Guatemala, and South Africa apart from its plus and minus, reflecting the bravery of shifting transitional justice paradigm,[58] bearing in mind several issues that have surfaced according to the spectrum of political studies of national law based on Pancasila values and national principles according to the 1945 Indonesia Constitution and laws and regulations, can provide valuable lessons in the future.

Conclusion

In the future, comprehensive and ongoing macro, mezzo, and micro legal political relations will serve as the foundation for institutional structures for the extrajudicial settlement of significant human rights violations. In this case, the design of legal politics for institutional arrangements for the extrajudicial settlement, namely the design of legal development of carefully planned national regulations with improvements to the substance of sectoral laws *inter alia* the Human Rights Law, the PHAM Law, the establishment of the Bill on Institutional

[57] Bagus Hermanto and Nyoman Mas Aryani, 'Omnibus Legislation as a Tool of Legislative Reform by Developing Countries: Indonesia, Turkey and Serbia Practice' (2021) 9 Theory and Practice of Legislation.[425].

[58] Ifdhal Kasim, 'Penyelesaian Non-Prosekutorial Dan Rekonsiliatif Terhadap Pelanggaran Hak Asasi Manusia Yang Berat' (2009) 16 Ius Quia Iustum Law Journal.[222].

Extrajudicial Resolution of Serious Human Rights Violations, the synchronization of harmonization between the 2005-2025 RPJPN Law and the RPJMN Presidential Decree and RANHAM Presidential Decree, which must be able to be directed at building a national legal order that reflects the legal ideals of Pancasila, providing an efficient and responsive legal framework and rules for the administration of present and future life.

To achieve transitional justice, which is based on an effective choice of law, both within the framework of the judicial and extrajudicial channels, which require strengthening and future management, it is important to prioritize the interests of victims and survivors. This is the main direction for realizing the settlement of gross human rights violations in Indonesia.

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