

DEVELOPMENT OF HUMAN RIGHTS COURT FROM TIME TO TIME IN LAW ENFORCEMENT IN INDONESIA

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Abstract

Court of Human Rights is a special court below the General Court that located in the Regency/City which jurisdiction includes in its District Court. The authority of the Court of Human Rights is tasked to examine and rule on cases of human rights violations, investigate and adjudicate serious violations of human rights which heavily committed outside the territorial boundaries of the Republic of Indonesia by an Indonesian citizen. Court of Human Rights, which adjudicate cases of gross human rights violations in East Timor Polls Post-defendants have been executed by both military and civilian, and was decided by the Court of Human Rights under law No. 26 Year 2000 regarding Human Rights Court

Keywords: court of human rights, violation of human rights, law enforcement.

Abstrak

Pengadilan Hak Asasi Manusia merupakan pengadilan khusus yang berada di lingkungan Peradilan Umum yang berkedudukan di Daerah Kabupaten/Kota yang daerah hukumnya meliputi daerah hukum Pengadilan Negeri yang bersangkutan. Kewenangan Pengadilan Hak Asasi Manusia adalah bertugas untuk memeriksa dan memutus perkara pelanggaran hak asasi manusia yang berat, memeriksa dan memutus pelanggaran hak asasi manusia yang berat yang dilakukan di luar batas teritorial wilayah negara Republik Indonesia oleh warga negara Indonesia. Pengadilan Hak Asasi Manusia yang mengadili pelanggaran HAM berat dalam kasus Timor Timur Pasca Jajak Pendapat telah dilaksanakan dengan terdakwa baik dari kalangan militer maupun sipil dan telah diputus oleh Pengadilan HAM berdasarkan Undang-Undang No. 26 Tahun 2000 tentang Pengadilan Hak Asasi Manusia.

Kata Kunci: pengadilan HAM, pelanggaran HAM, Penegakan Hukum

PRELIMINARY

Since the 20th century there have been changes in law based on aspects of society so that the legal relationship with the state is very strong, for example in economic endeavors it seems as if there has been a world revolution in social relations, among others in the form of anti-monopoly program efforts. The form of attitude and belief in a way that was never thought of by jurists before that the law is actually also to fulfill economic and social interests. This problem is more or less influenced by the view that all layers can live on the basis of diversity; guaranteed for him human rights (HAM) which include justice in the social,

economic and political fields, freedom of thought and expression, freedom to adhere to and practice one religion and another not contrary to the laws of the State and morality¹.

The development of the influence of human rights in its journey has had an impact on various countries, including Indonesia. The end of the reign of the New Order government, which was very repressive after being in power for 32 years, has raised awareness of the importance of respecting human rights. Demands for justice to be carried out against past human rights violators are increasingly widespread, while human rights violations continue to take place in various forms, patterns and different actors. Human rights issues are often used by groups of people for their political and economic interests, while the authorities are reluctant to act because they are afraid of being accused of violating human rights.

The understanding of human rights in Indonesia as values, concepts and norms that live and develop in society can be traced through a study of the years, and before the human rights court was formed, cases of gross human rights violations were tried by an authorized general court. Given the growing pressure for human rights violations committed by the TNI and civilians to be tried, the BJ Habibie government used its constitutional rights based on Article 22 of the 1945 Constitution to stipulate Government Regulation in Lieu of Law Number 1 of 1999 concerning the Human Rights Court, and counted starting October 8, 1999 declared valid. Strictly speaking, this Perpu has stipulated the types of gross human rights violations and the perpetrators must be sentenced to prison if legally and convincingly proven by a human rights court. Human rights violations that can be punished according to the Perpu include racial extermination, arbitrary or extrajudicial killings, enforced disappearances, slavery, systematic discrimination and persecution by authorized officials. Thus, even though Indonesia has not become a party to several main human rights conventions, the principles contained in the provisions of the human rights conventions have been recognized and can become positive law in Indonesia².

On September 23, 1999 Law Number 39 of 1999 concerning Human Rights was promulgated. The promulgation of this law was carried out for two reasons. First, human rights are basic rights that are naturally attached to human beings, are universal and lasting, therefore they must be protected, respected, maintained and cannot be neglected, reduced or seized by anyone; and secondly, the Indonesian nation as a member of the United Nations has a moral and legal responsibility to uphold and implement the Universal Declaration of Human Rights established by the United Nations and various other international instruments on human rights that have been accepted by the Republic of Indonesia³.

One manifestation of the protection of human rights is that a person who commits gross human rights violations that can be known must be tried and if proven must be punished according to the legal sanctions that are threatened. This is as regulated in Article 104 of Law Number 39 of 1999 concerning Human Rights which determines:

1. To try gross violations of human rights, a human rights court is established within the general court environment.
2. The court referred to in paragraph (1) shall be established by law within a maximum period of 4 (four) years.

¹ Nurhasan, 'Pasang Surut Penegakan Demokrasi Dan HAM Di Indonesia', *Jurnal Ilmu Hukum Litigasi*, 6.2 (2005), 217.

² Denny Indrayana, 'Negara Hukum Indonesia Pasca Soeharto Transisi Menuju Demokrasi VS Korupsi', *Jurnal Konstitusi*, 1.1 (2004), 106.

³ Marcus Priyo Gunarto, 'Perlindungan Hak Asasi Manusia Di Indonesia Dalam Dinamika Global'.', *Jurnal Mimbar Hukum*, 19.2 (2007), 267.

3. Prior to the establishment of the Human Rights Court as referred to in paragraph (2), cases of human rights violations as referred to in paragraph (1) are tried by an authorized court.

As an implementation of the provisions of Article 104 of Law Number 39 of 1999, on November 23, Law Number 26 of 2000 concerning the Human Rights Court was promulgated, namely to create world peace and guarantee the implementation of human rights, as well as provide protection, certainty, justice and feelings of security for individuals and society. However, the presence of this heavy human rights court when it is associated with the political events behind it is not necessarily based on the will to provide protection for the public so that they have an honorable position in the eyes of international relations but more driven by the political interests of the Indonesian government.

As a consequence of the promulgation of this law, the government has an obligation to establish a Human Rights Court. For cases of gross human rights violations committed prior to Law Number 26 of 2000, a special Ad Hoc Human Rights Court was established. This specificity is an exception to adhere to the retroactive principle. As a realization, on April 23, 2001, the Decree of the President of the Republic of Indonesia Number 53 of 2001 concerning the Establishment of an Ad Hoc Human Rights Court at the Central Jakarta District Court was promulgated.

RESEARCH METHODS

This study uses normative juridical research methods with a library approach. The main data from this study are laws related to human rights courts and secondary data are books, journals, and literature that discusses human rights and human rights courts.

DISCUSSION

ESTABLISHMENT OF A HUMAN RIGHTS COURT

Article 104 paragraph (2) of Law Number 39 of 1999 was used as the basis for the formation of a Human Rights Court, as stated by Soerdjono Dirdjosisworo as follows: Through a fairly long process, the Ad Hoc Human Rights Court was finally formed. The Ad Hoc Human Rights Court is located at the Central Jakarta District Court (according to Presidential Decree No. 96 of 2001). Judges at the Human Rights Court of first instance were sworn in on 31 January 2002. Then, the Attorney General of the Republic of Indonesia through the decision of the Attorney General Number Kep 092/A/JA/02/2002 dated 7 February 2002 appointed 24 (twenty four) Attorneys Ad Hoc, and on Thursday 21 February 2002 the Prosecutor handed over the case for the first time to the Ad Hoc Human Rights Court.

INDONESIAN HUMAN RIGHTS COURT AND INTERNATIONAL COURT OF JUSTICE

A human rights court is appropriate and even very appropriate to be established in Indonesia. The struggle to protect human rights must also be included in the criminal justice process starting from investigations, investigations, prosecutions and trials in court, even the treatment of prisoners. Opinions that consider Indonesia to have just entered the struggle for the protection of human rights with the promulgation of Law Number 39 of 1999 which is relatively new is a wrong assumption, even Pancasila as the nation's philosophy and the Preamble to the 1945 Constitution already contain values of human rights protection. Based on the Comprehensive Text of Amendments to the 1945 Constitution, it is explained that the

Articles on Human Rights are a form of egalitarianism in carrying out the life of the nation and state, and will become a strong basis for efforts to uphold the law, rights and awareness of living together⁴.

The struggle for the protection of human rights in the world of justice began to materialize with the promulgation of Law Number 39 of 1999 concerning Human Rights, followed by Law Number 26 of 2000 concerning Human Rights Courts as an embodiment of Article 104 paragraph (2) of Law Number 39 of 1999 stipulating establishment of a Human Rights Court within a period of 4 (four) years. Indonesia was apparently able to "build" a Human Rights Court in less than 3 (three) years. In early 2002 the Human Rights Court with all the necessary equipment was ready to operate. The competent court referred to in paragraph (3) is a general court or military court according to the status of the accused⁵.

This has a positive meaning that the existence of regulations related to human rights should be appreciated as proof that the Indonesian people have good will to resolve allegations of human rights violations by themselves through the national human rights court⁶. This government activity is a legal development that reflects a humanitarian perspective that is rooted in the nation's culture, which in essence is an expression of respect for human rights contained in Pancasila as the nation's way of life.

The Human Rights Court was held for the first time on March 14, 2002 which tried gross human rights violations in East Timor after a ballot⁷, for gross human rights violations that were committed before Law Number 26 of 2000 concerning Human Rights trials were carried out by the Ad Hoc Human Rights Court or specifically based on the decision of the House of Representatives, while what was carried out after Law Number 26 of 2000 was carried out by the permanent Human Rights Court.

The establishment of the International Court of Justice is usually preceded by the formation of a Commission of Inquiry which is specially formed to obtain field data as a UN reference to determine whether or not a special tribunal is needed in this case. For example, regarding the formation of the International Tribunal for Yugoslav Farmers which began with UN Security Council Resolution Number 806 of 1993, which later formed a Tribunal which had the authority to try all parties deemed to be seriously involved in the Violation of International Humanitarian Law since January 19, 1991 in the territory of Yugoslavia before it was divided broken.⁸

Sensing how complicated it is to set up a special International Court of Justice as exemplified above, the United Nations commissioned the International Law Commission to draft the status of a permanent International Criminal Court. Finally, in July 1998, Rome succeeded in ratifying the Statute of the International Criminal Court, known as the Rome Statute. So officially the International Criminal Court (ICC) became a new body in the field of criminal law enforcement to try human rights violations. The International Criminal Court (ICC) is a permanent Human Rights Court, therefore the International Criminal Court (ICC) does not adhere to the retroactive principle.

⁴ D Soedjono, *Pengantar Ilmu Hukum* (Jakarta: Rajawali Press, 1984).

⁵ Todung Mulya Lubis, 'Menegakan Hak Asasi Manusia , Menggugat Diskriminasi'. *Jurnal Hukum Dan Pembangunan*, *Jurnal Hukum Dan Pembangunan*, 39.1 (2009), 71.

⁶ Halili, 'Pengadilan Hak Asasi Manusia Dan Pelanggaran Budaya Impunitas', *Jurnal Civics*, 7.1 (2010), 3.

⁷ Syamsiar Julia, 'Pelanggaran HAM Dan Peranan Polri Dalam Penegakan Hukum Di Indonesia', *Jurnal Equality*, 11.2 (2006), 118.

⁸ Rudi M. Rizki, *Beberapa Catatan Tentang Pengadilan Pidana Internasional Ad Hoc*.

For a country that recognizes and becomes a member of the international community as a cultured nation, it is obliged to absorb the human rights spirit contained in a Covenant that has not been ratified by it to be respected and applied as national law by the courts. One day the Indonesian Human Rights Court will be faced with cases of gross human rights violations, which require international human rights references.

Since the arrival of the reformation period which was marked by the cessation of Suharto as President of the Republic of Indonesia, conditions for understanding and the possibility of implementing universal human rights values have become increasingly strengthened in Indonesia. One of the effects of strengthening human rights is that it opens up the possibility of holding a popular vote in East Timor which is the implementation of one of the universal values of human rights, namely the right to self-determination⁹.

It's just that if viewed from a constitutional perspective, BJ Habibie's actions were inappropriate, because the opening up of the possibility of holding an opinion poll in East Timor was not preceded by a request for approval from the People's Consultative Assembly, which legally and constitutionally has the authority to determine whether or not this can be done. However, seen from a human rights perspective, Habibie's actions can be seen as the impact of strengthening human rights values internationally.

In the end, the pro-independence group won the opinion determination, and as a result, East Timor's land was burned to the ground. This incident sparked the formation of the Commission to Investigate Human Rights Violations (KPP) by Komnas HAM. In line with the formation of the KPP HAM, BJ Habibie stipulated the enactment of Government Regulation in Lieu of Law (Perpu) Number 1 of 1999 concerning the Human Rights Court. The preamble section of the Perpu emphasizes that the person authorized to try gross human rights violations in accordance with the provisions of Article 104 paragraph (1) of Law Number 39 of 1999 concerning Human Rights is a human rights court.

HUMAN RIGHTS COURT IN EAST TIMOR CASE POST POPULAR CONSULTATION

The Government of the Republic of Indonesia on 27 January 1999 issued two options relating to the popular consultation in East Timor. This option concerns the future of East Timor, namely to accept or reject special autonomy¹⁰. Following up on these two options, on May 5 1999 a triangular agreement was held in New York between the Government of the Republic of Indonesia, the Government of Portugal and the United Nations regarding the holding of a popular consultation in East Timor including arrangements for maintaining peace and security in East Timor. In the New York Agreement, the Government of the Republic of Indonesia is responsible for maintaining peace and security in East Timor¹¹.

POST-POLL THAT RESULTED

Independent East Timor, in fact various violence increased in almost all areas of East Timor in the form of killings, kidnappings, rape, vandalism, looting of property and residences, burning and destruction of military installations, offices and people's homes as well as forced evacuation. The uncertain situation following the popular consultation in East Timor forced the UN Security Council to issue Resolution 1264 on September 15, 1999. This

⁹ Sukawarsini Djelantik, 'Diplomasi Hak Asasi Manusia: Kasus Indonesia Dengan Timor Timur', *Analisis CSIS*, 29.2 (2000), 175–87.

¹⁰ Yugoslavia and Rwanda, 'Penerapan Prinsip Tanggung Jawab Negara Dalam Pelanggaran Berat HAM', *Jurnal Hukum Humaniter*, 1.2 (2006), 277–78.

¹¹ Catriona Drew, 'The East Timor Story: International Law on Trial', *European Journal of International Law (EJIL)*, 2.4 (2001), 675.

resolution urged the Indonesian government to immediately bring to justice those responsible for the violence in East Timor. This resolution places a mandatory international obligation on the Indonesian government to try the perpetrators of gross human rights violations in East Timor through an ad hoc court. Based on Article 25 of the UN Charter, Indonesia is legally bound to the Security Council resolution. If Indonesia does not carry out its obligations, the UN Security Council can impose sanctions on suspension of rights and privileges as a UN member (Article 5), expel Indonesia from UN membership (Article 6) and form an international ad hoc court (Article 29)¹².

The UN Security Council Resolution was then followed up by holding a special session by the UN Human Rights Commission on 23-27 September 1999 which resulted in Resolution 1999/S-4/1. The resolution demands that the Government of the Republic of Indonesia cooperate with the National Commission on Human Rights to ensure that those responsible for acts of violence and systematic violations of human rights are brought to justice. As a reaction to this resolution, the Government of the Republic of Indonesia issued a number of regulations related to post-ballot settlement of the East Timor case. First, Decree of the President of the Republic of Indonesia No. 770/TUA/IX/99 juncto Decree of the President of the Republic of Indonesia No. 797/TUA/X/99 of 1999 concerning the Establishment of a Commission of Inquiry on Human Rights in East Timor (KPP HAM East Timor); secondly, Government Regulation Number 1 of 1999 which was later revoked and replaced by Law Number 26 of 2000 concerning the Human Rights Court; third, Decree of the President of the Republic of Indonesia Number 53 of 2001 concerning the Establishment of an Ad Hoc Human Rights Court for Serious Human Rights Violations in East Timor; and fourth, Presidential Decree Number 6/M/2002 of 2002 concerning Appointment of Ad Hoc Judges at the Human Rights Court¹³.

THE EXISTENCE OF HUMAN RIGHTS COURTS IN LAW ENFORCEMENT

The stipulation of Law Number 26 of 2000 concerning the Human Rights Court is an order in Article 104 paragraph (1) of Law Number 39 of 1999 concerning Human Rights which affirms that to try gross human rights violations a Human Rights Court shall be established in the public court environment. Realizing a human rights court in the legal system in Indonesia is not as easy as writing or saying it because five things as stated by Romli Atmasasmita need attention.

First, the problem of human rights violations is a new event for the Indonesian nation. Second, a human rights violation is not synonymous with an ordinary crime as stipulated in the Criminal Code or the applicable Special Criminal Law. Violations of human rights are universal, whereas violations of criminal law are essentially violations of the customs, culture and social order of a nation, even though the quality of criminal acts has the same views among people of nations. Third, the existing competent authorities are not used to dealing with human rights violations and there are not many international legal jurisprudence in cases of human rights violations and originate from a temporary ad hoc court. Fourth, the prohibition on the use of interpretation by analogy has been recognized in the criminal law system in all countries, including in Indonesia. If this interpretation is still used in cases of human rights violations, the government will view these cases as ordinary crimes, thus reducing the meaning and essence of human rights violations and at the same time indirectly

¹² Sumaryo Suryokusumo, 'Aspek Moral Dan Etika Dalam Penegakan Hukum Internasional', *Jurnal Hukum Internasional*, 2.2 (2003), 104-5.

¹³ Lina Hastuti, 'Pengadilan Hak Asasi Manusia Sebagai Upaya Pertama Dan Terakhir Dalam Penyelesaian Pelanggaran Berat Hak Asasi Manusia Di Tingkat Nasional', *Jurnal Dinamika Hukum*, 12.3 (2012), 401

providing a strong legal loophole for the United Nations to form an ad hoc court. International for human rights violations in Indonesia. Fifth, demands from the international community through the United Nations for the government to seriously deal with human rights violations in Indonesia, including in East Timor, are very difficult to avoid or ignore by the Indonesian government.

The use of the principle of not retroactively applying in the context of human rights violations in Indonesia can be seen in the context of the time limit and the quality of the substance of human rights violations by taking into account the interests of human rights enforcement in the future. In resolving cases of human rights violations in Indonesia, especially in East Timor, it is very difficult to use a retroactive pattern with the criterion of a time limit for human rights violations in Indonesia because it is not limited to one particular period of time. The retroactive application of the law on human rights courts with a time limit in trials of human rights violations is fraught with conflicts of interest based on ideology, ethnicity, religion and ethnicity so that such retroactive application will lead to disintegration of the nation¹⁴.

Using a measure of the quality of human rights violations, perhaps it can be used with an assessment pattern of separation between absolute retroactive and limitative retroactive. The application of the principle of retroactive application applies to certain serious human rights violations such as genocide and certain crimes against humanity. Meanwhile, the application of the principle of retroactive law absolutely applies to other categories of gross human rights violations. With this approach, the retroactive application of a limitative nature still respects Indonesia's legal sovereignty and at the same time takes into account recognized national legal principles, in addition to continuing to use international human rights legal instruments.

Starting from legal developments, both in terms of national interests and from international interests, in order to resolve the problem of gross human rights violations and restore security and peace in Indonesia, a Human Rights Court was formed which is a special court for gross human rights violations. The existence of a Human Rights Court is expected to be able to provide protection for human rights, both individuals and society, and a basis for enforcement, legal certainty, justice, and a feeling of security for individuals and society, against gross human rights violations. The establishment of a Human Rights Court through the enactment of Law Number 26 of 2000 concerning Human Rights Courts is based on the following considerations. First, gross violations of human rights are extra ordinary crimes and have a broad impact, both at the national and international levels and are not criminal acts regulated in the Criminal Code and cause losses, both material and immaterial that result in feelings of insecurity, both for individuals and society, so that it needs to be restored immediately in realizing the rule of law to achieve peace, order, tranquility, justice and prosperity for all Indonesian people. Second, cases of gross human rights violations require special investigation, investigation, prosecution and examination steps. The specificities in handling these gross human rights violations are: (a) it requires investigators to form ad hoc teams, ad hoc investigators, ad hoc public prosecutors and ad hoc judges; (b) it is necessary to emphasize that investigations are only carried out by Komna HAM, whereas investigators are not authorized to receive reports or complaints as stipulated in the Criminal Procedure Code; (c) it is necessary to provide provisions regarding a certain time limit to carry out investigations, prosecutions and examinations in court; (d) provisions regarding the

¹⁴ Romli Atmasasmita, *Kapita Selekta Hukum Kenegaraan* (Jakarta: Universitas Indonesia, 2001).

protection of victims and witnesses are needed; and (e) there is a need for a provision that emphasizes that there is no expiration for gross human rights violations.

Regarding gross human rights violations such as genocide and crimes against humanity which based on international law can be used on a retroactive principle, an article is enacted regarding the obligation to comply with restrictions determined by law as emphasized in Article 28J paragraph (2) of the 1945 Constitution. Article The provisions stipulate that in exercising their rights and freedoms, everyone is obliged to comply with the restrictions determined by 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 moral considerations, values religion, security and public order in a democratic society (second amendment)¹⁵.

Another appropriate expression to describe this provision is that the retroactive principle can be applied in order to protect human rights itself based on Article 28J paragraph (2) of the 1945 Constitution. Therefore, Law Number 26 of 2000 concerning the Human Rights Court also regulates the Ad Hoc Human Rights Court to examine and decide cases of gross human rights violations that occurred before the promulgation of Law Number 26 of 2000. The Ad Hoc Human Rights Court was formed on the recommendation The House of Representatives is based on certain events with a Presidential Decree and is within the General Court environment.

In addition to the Ad Hoc Human Rights Court, Law Number 26 of 2000 also states the existence of a Truth and Reconciliation Commission as referred to in the MPR Decree Number V/MPR/2000 concerning the Strengthening of National Unity and Unity. The Truth and Reconciliation Commission is meant as an extra judicial institution established by law whose duty is to uphold the truth by exposing abuses of power and human rights violations in the past, in accordance with applicable legal and statutory provisions and carrying out reconciliation in the perspective of common interests as a nation.

The Human Rights Court as stipulated in Law Number 26 of 2000 concerning the Human Rights Court is by no means established for the sake of a moment, for example to try gross human rights violations in East Timor and Tanjung Priok, but will be continuous and accompany the development of human rights protection in Indonesia. The Human Rights Court is a special court within the General Court environment. Human Rights Courts are domiciled in regency and municipal areas whose jurisdiction covers the jurisdiction of the District Court concerned, while for the Special Capital Region of Jakarta, the Human Rights Courts are located in each area of the District Court concerned

CONCLUSION

Based on the description above, it can be concluded that the existence of a Human Rights Court has the duty to examine and decide cases of gross human rights violations and to examine and decide on gross human rights violations committed outside the territorial boundaries of the Republic of Indonesia by Indonesian citizens.

The Human Rights Court which tried gross human rights violations in the East Timor case after a consultation has been held with defendants both from the military and civilian circles

¹⁵ B. Hestu Cipto Handoyo, *Hukum Tata Negara Indonesia* (Yogyakarta: Universitas Atma Jaya, 2009). 43

and has been decided by the court based on Law Number 20 of 2000 concerning Human Rights Courts.

So that the Human Rights Court can try human rights violators indiscriminately, whether from the military, civilians, or those with high ranking positions, all are treated equally before the law, and the words "attack was carried out systematically" should not be used as an excuse to acquit the accused from legal snares.

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