

APPLICATION OF THE RETROACTIVE PRINCIPLE IN CRIMINAL LAW ON GROSS HUMAN RIGHTS VIOLATIONS

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Abstract

Starting from the development of law in Indonesia to resolve the problem of gross human rights violations, it is necessary to establish a human rights court that is specifically a court for gross human rights violators. The superiority of regulating human rights in the constitution provides a very tight guarantee because amendments and/or deletion of one of the articles in the constitution, such as in the Indonesian constitution, experience a very difficult and lengthy process, while the weakness is that what is regulated in the constitution only contains rules that are still global in nature. The purpose of this research is to find out and understand the existence of the principle of legality in the applicable laws and regulations in Indonesia, restorative policies in law enforcement against human rights violations in the legal context in Indonesia, and find the ideal legal concept in law enforcement against human rights violations. The type of research to be used is included in the normative legal research group, namely legal research on legal principles, legal systematics, legal synchronization, comparative law, and legal history. So, research or study of legal norms is the legal system's contents. The results of the study found that the legality principle in Indonesian laws and regulations still needs to be maintained because the essence of the legality principle is to create legal certainty and justice. Retroactive policies in law enforcement against human rights violations in the context of Indonesian law need to be carried out to uphold justice because there are general or greater benefits than protecting the rights of perpetrators that are partial. The ideal concept in retroactive policies against gross human rights violations is to clarify the substance of statutory provisions regarding retroactive enforcement of extraordinary crimes

Keywords: Retroactive Principles, Law, Criminal Law, Human Rights, Human Rights Violations

Abstrak

Berawal dari perkembangan hukum di Indonesia untuk menyelesaikan masalah pelanggaran HAM berat, maka perlu dibentuk pengadilan HAM yang khusus merupakan pengadilan bagi pelanggar HAM berat. Keunggulan pengaturan hak asasi manusia dalam konstitusi memberikan jaminan yang sangat ketat karena perubahan dan/atau penghapusan salah satu pasal dalam konstitusi, seperti dalam konstitusi Indonesia, mengalami proses yang sangat sulit dan panjang, sedangkan kelemahannya adalah yang diatur dalam konstitusi hanya memuat aturan-aturan yang masih bersifat global. Tujuan penelitian ini adalah untuk mengetahui dan memahami adanya asas legalitas dalam peraturan perundang-undangan yang berlaku di Indonesia, kebijakan restoratif dalam penegakan hukum terhadap pelanggaran HAM dalam konteks hukum di Indonesia, dan menemukan konsep hukum yang ideal dalam penegakan hukum terhadap pelanggaran HAM. Jenis penelitian yang akan digunakan termasuk dalam kelompok penelitian hukum normatif yaitu penelitian hukum tentang asas-asas hukum, sistematika hukum, sinkronisasi hukum, perbandingan hukum dan sejarah hukum. Jadi, penelitian atau penelaahan terhadap norma hukum yang merupakan isi dari sistem hukum. Hasil kajian menemukan bahwa asas legalitas dalam peraturan perundang-undangan di Indonesia masih perlu dipertahankan keberadaannya, karena hakikat asas legalitas adalah untuk menciptakan kepastian dan keadilan hukum. Kebijakan retroaktif dalam penegakan hukum terhadap pelanggaran HAM dalam konteks hukum Indonesia perlu dilakukan

untuk menegakkan keadilan karena ada kemanfaatan yang bersifat umum atau lebih besar dari perlindungan hak pelaku yang bersifat parsial. Konsep ideal dalam kebijakan retroaktif terhadap pelanggaran HAM berat adalah memperjelas substansi ketentuan perundang-undangan tentang pemberlakuan retroaktif terhadap kejahatan luar biasa.

Kata kunci: *Asas Retroaktif, Hukum, Hukum Pidana, Hak Asasi Manusia, Pelanggaran Hak Asasi Manusia*

A. Introduction

Law is basically an instrument used to protect the human rights of individuals and groups. Humans in the same position and having the same opportunities in various aspects to develop all their potential is the basis of human rights.¹ Indonesian constitution, namely the 1945 Constitution, regulates laws on human rights as a concrete form of protection for human rights. human rights as stated in Chapter XA articles 28A-28J. In substance, human rights as regulated in the written constitution of Indonesia continue to change according to the context.² Changes in the map of the ruling political regime, starting from the 1949 RIS Constitution, the 1950 Constitution, the 1945 Constitution, to the post-amendment 1945 Constitution.³

Starting from the development of law in Indonesia, both in terms of national and international interests, in order to resolve the problem of serious human rights violations and to restore security and peace in Indonesia, it is necessary to establish a human rights court that is specifically a court for serious violators of human rights. Therefore, Law No. 26 of 2000 concerning Human Rights Courts was formed; this is a continuation of Article 104 of Law No. 39 of 1999, which mandates that to try serious human rights violations by establishing a Human Rights Court. in Indonesia in the general court environment. In legal rules or regulations, some actions must be taken, such as law enforcement, because the law cannot be

called law if it has never been implemented. The source of law is law; outside the law, it is not considered as law. The superiority of regulating human rights in the constitution provides a very tight guarantee because the amendment and/or abolition of one of the articles in the constitution, as in the Indonesian constitution, has a very difficult and lengthy process,⁴ while the weakness is that what is regulated in the constitution only contains rules that are still global in nature, such as provisions regarding human rights contained in the provisions of the 1945 Constitution of the Republic of Indonesia which are still global in nature.

The new constitutional amendment on retroactivity does not exempt authorities from trying those responsible for past human rights violations that amount to crimes under national and international law. The draft amendment states that the right not to be prosecuted retroactively is a human right that cannot be violated under any circumstances. However, there is a serious risk that this amendment will be used not to protect human rights but to protect those responsible for their violations.

While it allows suspects to be tried under existing penal laws, there are concerns that it will be used to protect senior military and government officials from being tried for crimes not covered by Indonesian domestic law, such as crimes against humanity and torture. The fact that Indonesia has not included or explicitly prohibited crimes such as

¹ Budiyono, Rudy. *Konstitusi dan HAM*. Bandar Lampung: PKKPU, 2015.

² Wiratraman, Herlambang Perdana. "Hak-Hak konstitusional warga Negara setelah amandemen UUD 1945: konsep, pengaturan dan dinamika implementasi." *Jurnal Hukum Panta Rei* 1, no. 1 (2007): 1-18.

³ Astuti, Laras. "Penegakan Hukum Pidana Indonesia dalam Penyelesaian Pelanggaran Hak Asasi Manusia." *Kosmik Hukum* 16, no. 2 (2017), 111

⁴ Basuki, Udiyo. "Konstitusionalisme HAM Indonesia: Dinamika Pengaturan HAM Indonesia Pasca-Amandemen UUD 1945." *Supremasi Hukum: Jurnal Kajian Ilmu Hukum* 1, no. 2 (2012).

torture or crimes against humanity in its domestic criminal law does not relieve it of its international responsibility to carry out judicial investigations into these cases, the organization said. Although international law does not permit the application of retroactive criminal law, this principle does not prevent everyone from being tried for acts that constitute crimes under international law such as crimes against humanity and torture. This principle appears to have been accepted in the draft law to establish a Human Rights Court which is currently awaiting approval by the lower house of parliament. Under the proposed law it is possible to establish an ad hoc tribunal for cases of past serious human rights violations.

There are concerns that the amendments could be used to try and block prosecution under the proposed Court. The move to establish a Human Rights Court, combined with efforts to investigate a number of past cases, is a positive sign of a renewed desire to confront the dire human rights record of Indonesia's security forces. The proposed amendments could turn back years and cast doubt on Indonesia's seriousness in conducting investigations including human rights crimes.

In Indonesia alone there are thousands of unresolved cases of extrajudicial killings, "disappearances", torture – including rape, and other human rights violations. Only by tackling these past cases can Indonesia begin to build a future based on justice and the rule of law. Any attempt to protect perpetrators of past human rights violations will effectively render all recent efforts to end impunity in Indonesia meaningless.

While cases can still be tried for crimes already listed in the Indonesian Criminal Code, the limited scope of the Criminal Code and the narrow definitions of some crimes mean that many of those guilty of serious human rights violations can escape prosecution. Past

experience has shown that the Criminal Code is inadequate to deal with the large-scale violations that occur in Indonesia - investigations and prosecutions are rare, only junior officers end up in court and sentences rarely reflect the seriousness of the crime. The principle of non-retroactivity should not be used as a back door for those responsible for massive violations that have occurred over the years, including those who design and direct policy.

The principle of legality or *nullum crimen, nulla poena sine lege* is one of the most basic principles of criminal law that applies both in international and domestic law.⁵ Its core element is the principle of non-retroactivity of crime and punishment, which requires, for a person to be found guilty and convicted of a crime, that the act constitutes a punishable offence at the time it occurs.⁶ In the context of international criminal law, the legal basis for these principles can be found in customary international law, general principles of law and agreements, some of which have been universally ratified. Thus, it is safe to say that it is part of general international law. The principle of *nullum crimen* is also a fundamental human right, having a prominent place in most international and regional human rights instruments, such as the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights (ECHR)⁷. In the ICCPR, ECHR and other treaties, such as the American Convention on Human Rights (ACHR), the principle is one of the few rights that may not be waived, even in an emergency.⁸

Its main purpose or reason is to give the individual fair notice of the grave consequences arising from criminal wrongdoing. Thus, this principle also protects individuals from the arbitrary exercise of power by domestic or international judicial,

⁵ De Asúa, Luis Jimenez. "Nullum crimen, nulla poena sine lege." *Zeitschrift für die gesamte Strafrechtswissenschaft* 63, (1951): 166-198.

⁶ Latifah, Marfuatul. "Urgensi Indonesia Menjadi Negara Pihak Statuta Roma Bagi Perlindungan HAM Di Indonesia." *Jurnal Politika Dinamika Masalah Politik Dalam Negeri dan Hubungan Internasional* 5, no. 2 (2016).

⁷ Gerungan, Pingkan. "Perspektif pemenuhan hak sipil dan politik perempuan dalam hak asasi manusia di Indonesia." *Lex Administratum* 3, no. 4 (2015).

⁸ Marasinghe, Charika. "The right to legal assistance in international law, with special reference to the ICCPR, the ECHR and the ACHR." In *Asian Yearbook of International Law*, 5 (1995), 15-44.

legislative and executive bodies. Ultimately, this protects one of the most basic human values, namely individual freedom. Some refer to it as the 'first principle of criminal law', and as the 'very important' principle.⁹ Nearly all countries in the world recognize it in their domestic legal systems, with some going beyond non-retroactivity to include strict construction requirements, legal certainty (or specificity), *in dubio pro reo*, *lex mitior*, and even *lex scripta*. In the same vein, this principle now applies to international criminal law rules, whether they are interpreted and applied by states and their national organs, in particular domestic courts, or by international courts and other subjects of international law.

B. Research Methods

This study uses normative legal research methods. This research was conducted with the intention of being able to provide legal arguments as a basis for determining the right or wrong of an event that occurred according to law. This research method will use library research methods or library research to find out the basis for applying the retroactive principle in criminal law for gross human rights violations. Research using this kind of method is commonly referred to as "legal research". This type of legal research does not recognize field research because what is studied is primary and secondary legal materials. This research is library-based, with a focus on reading and analysis of primary and secondary materials.

C. Results and Discussion

The principle of legality is the principle that applies the law to things that occur after the regulation is implemented, based on Article 1 paragraph (1) of Law No. 1 of 1960.¹⁰ The principle of legality in Indonesian national law is the main principle used in the application of the law that has long been known and applied as stated in Law No. 1 of 1960. However, it turns out that this legality principle can also be set aside because it is based on Article 1

paragraph (2) of the Law No. 1 of 1960, stipulates that "If there is a change in the laws and regulations after the act has occurred, then the lightest provisions must be used for the defendant". This means that if new or later criminal legislation is expected, if indeed the actions contained in the new or newer legislation are more profitable for him, it is the same as declaring the retroactive effect of a statutory regulation.

Although it deviates from the principle of legality, this deviation can indeed be justified because it is a deviation that benefits the person concerned (the defendant). In other laws and regulations that regulate human rights is the Decree of the People's Consultative Assembly of the Republic of Indonesia No. XVII/MPR/1998 concerning Human Rights, but in it there is no affirmation of the principle of legality but rather appears in Article 28 I of the 1945 Constitution which combines with human rights. . Other human rights, such as the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as an individual before the law, and the right not to be prosecuted on the basis of retroactive law are human rights that cannot be reduced in any way. Based on Article 4 of Law No. 39 of 1999 it stipulates that: "The right to life, the right not to be tortured, the right to personal freedom, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as an equal before the law, and the right not to be prosecuted retroactively according to the law. Law is a human right that cannot be reduced under any circumstances."

Furthermore, Article 18 paragraph (2) of Law No. 39 of 1999 stipulates that "*Everyone cannot be prosecuted or blamed for committing a criminal act because of an act or omission which was not a crime according to the prevailing laws and regulations, at the time it was committed.*"

With regard to the right to be prosecuted on a retroactive legal basis, this is where the dilemma begins with the application of Law

⁹ Packer, Herbert. *The limits of the criminal sanction*. California: Stanford university press, 1968.

¹⁰ Sudarto. *Hukum Pidana I*. Semarang: Fakultas Hukum, Universitas Diponegoro, 1990.

No. 39 of 1999 and Law No. 26 of 2000. These two laws were promulgated and promulgated on 23 September 1999 and 23 November 2000. Subsequently, an ad hoc Human Rights Court was established by applying the law to those accused of being perpetrators of serious human rights crimes. If it is examined at the time it came into force and its application, it actually occurred before the enactment of the two laws mentioned above. This was a problem at the time because Indonesian human rights courts retroactively enforced the law. The problem is the binding nature of the explanation of a law itself which actually has positive binding legal force. If this is the case, then the substance as referred to in the explanation may not be included in the law, but a separate article in the law must be made or an incorrect paragraph must be made in the law.

The principle of legality, namely the principle of the time limit for the validity of the criminal law. The principle of legality is not a crime or crime, except on the basis of the strength of the laws and regulations that have regulated it, before the act is committed.¹¹ Referring to the provisions of the principle of legality an act can be said to be a crime if:¹²

1. Mentioned or included in written legislation. This means that someone's actions that are not listed in the law as a crime cannot be prosecuted by law. So, with this principle, unwritten law does not have the power to apply.
2. Legislation (rules and legal provisions) must have existed before the occurrence of a crime. This means that the law cannot be applied retroactively. Therefore, a person's actions committed before the issuance of an applicable statutory regulation cannot be prosecuted by a law issued after the act was carried out.

According to Farid, the principle of legality must be understood according to the legal values of the Indonesian nation itself, sourced from the laws that live in society and formulated in clear and firm legal provisions.¹³

A balanced understanding of the law will automatically guarantee legal protection and certainty if this is enforced. The main concern is the law itself in understanding the formal-material legality principle. The basis of this understanding is very important, considering that only through legal products in the form of laws can every community's rights be reduced or taken if there is a violation of the law. However, this does not mean that legal provisions are not recognized according to the law. Legal provisions under the law are still recognized as long as their contents and materials are based on law and do not conflict with the applicable customary law and life in society in this view is still recognized as long as its validity is shown by law and its contents are not against the law. This recognition must still be maintained, considering that most Indonesian people are subject to customary law. Therefore, to accommodate this, an understanding of the legality principle must be formal in the sense that its existence is recognized in certain societies and is based on national law.

The form of this legal provision itself can vary, both in the form of statutory regulations and unwritten laws. In the unwritten law, it must be seen whether there are clear parameters regarding whether or not customary law communities prohibit an act. This parameter can be seen from the first, whether the community supports the law or not; second, the existence of customary institutions as law enforcers; third, there are sanctions and enforcement of sanctions for violations that occur. The basis for enforcing this unwritten law may not be based on material understanding but must refer to the provisions of the applicable laws and regulations. For example, in the case of research on local customs (Balinese moral crimes), the enforcement of customary law is still based on Article 5 paragraph (3) letter b of the Emergency Law of the Republic of Indonesia No. 1 of 1951 concerning Temporary Acts. For the Implementation of the Unity of Structure,

¹¹ Amira, Novitasar. *Asas-asas Hukum Pidana*. Jakarta: Rineka Cipta, 2002.

¹² Pristiawati, Endang. "Konsekuensi yang Timbul Dari Asas Legalitas Dalam Hukum Pidana

Materiil." *Syariah: Jurnal Hukum dan Pemikiran* 13, no. 2 (2014).

¹³ Zainal, Abidin Farid. *Hukum Pidana I*. Jakarta: Sinar Grafika, 1995.

Power, and Agenda of the Civil Court (hereinafter referred to as Emergency Law No. 1 of 1951) in conjunction with Article 5 paragraph (1) of the Law of the Republic of Indonesia No. 48 of 2009 concerning Judicial Power. This is where the importance of a new understanding of the principle of legality must be based on a reminder of the importance of maintaining the principle of legal certainty and the principle of justice in a way that is realized.

According to Atmasasmita, the application of the retroactive principle in gross human rights violations is still a dilemma for several reasons, namely:¹⁴

- a. Human rights violations are new events in the history of the Indonesian nation, and there were no or no laws and regulations in effect at that time in Indonesia.
- b. Serious human rights violations are not synonymous with violations of the applicable criminal laws and regulations; therefore, the prohibition on interpreting analogies remains in effect.
- c. The retroactive application of the law on the Human Rights Court with a material content of criminal provisions, on the one hand, violates legal principles and does not apply retroactively, but if the legal principles do not apply retroactively, it means that Law No. 1 of 1960 is applied to gross human rights violations. It means that gross human rights violations are considered the same as ordinary crimes. The statutes of the ad hoc tribunals of Rwanda and of the former Yugoslavia affirm that if national human rights violations view human rights violations as ordinary crimes, then international courts will replace national courts even if the Rome Statute does not recognize the provision.
- d. The application of the retroactive principle requires a very strong justification, both in terms of philosophical, juridical, and sociological considerations.

Some experts argue that the application of the retroactive principle is contrary to the

legality principle adopted by all countries and legal systems.¹⁵ The principle of legality stipulates that a legal provision can only apply for a period of time to come and cannot apply for a period of time that has passed. Meanwhile, some other legal experts argue that the application of the retroactive principle can be enforced if indifference demands it. Have a strong foundation in national and international legislation.

Those who disagree are of the view that the application of retroactive law is contrary to the principle of legality, a legal principle that is generally and universally adhered to by all legal systems. The principle of legality is contained in the basic principles which are based on Article 1, paragraph (1) of Law No. 1 of 1960. Thus, the principle of legality becomes the basis for being used as a guideline for law enforcement in Indonesia. However, Article 1 paragraph (2) of Law No. 1 of 1960 opens up opportunities for retroactive effect, but only under certain circumstances.

D. Conclusion

The basis for applying the retroactive principle in Law No. 26 of 2000 concerning the Human Rights Court is due to gross human rights violations. The existence of the retroactive principle in Law No. 26 of 2000 concerning the Human Rights Court is strengthened by the limitations on the rights and obligations contained in Article 28 J paragraph (2) of the 1945 Constitution. Based on this, retroactive law is legally justified to resolve cases of a serious offenses. Human rights that occurred in the past cannot be achieved if the retroactive principle is not applied in Law No. 26 of 2000 concerning Human Rights Courts. The results of the study found that the existence of the legality principle in Indonesian laws and regulations still needs to be maintained because the essence of the legality principle is to create legal certainty and justice. Retroactive policies in law enforcement against human rights violations in the context of Indonesian law

¹⁴ Atmasasmita, Romli. *Pengantar Hukum Pidana Internasional*. Bandung: Refika Aditama, 2003.

¹⁵ Ikhwan. "Asas Retroaktif pada Kasus Pelanggaran HAM (Perspektif Hukum Islam)." *Ulumuna* 13, no. 1 (2009): 59-80.

need to be carried out to uphold justice because there are general (general) or greater benefits than protecting the partial (individual) rights of perpetrators. The ideal concept in retroactive

policies against gross human rights violations is to clarify the substance of statutory provisions regarding retroactive enforcement of extraordinary crimes.

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