

## **TAKING POLICY SERIOUSLY: WHAT SHOULD THE INDONESIAN GOVERNMENT DO TO STRENGTHEN THE ACEH TRUTH AND RECONCILIATION COMMISSION?**

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**Abstract:** This article discusses three key questions. First, what and how is the development of policies and legal protection that can be the support for the central government in implementing the Aceh Truth and Reconciliation Law? Second, how is the Aceh TRC and Human Rights Court as a mechanism of justice can mutually strengthen the protection of human rights for victims and their families? Third, how is to build solid legal relationships among state institutions to fortify the TRC's recommendation regarding reparation? This article is written based on research and focus group discussion and is aimed to encourage several legal policy developments oriented as solutions to the limited efforts to protect and fulfill victims, particularly related to reparation and restoration of their rights. It also emphasizes the legal position of the basic national political and legal context, associated as a reminder to the dignity of the Memorandum of Understanding of Helsinki for the future of Aceh.

**Keywords:** Truth And Reconciliation Commission, Human Rights Law, Indonesian Government Policy, Aceh Government

**Abstrak:** Artikel ini mendiskusikan tiga pertanyaan kunci, yakni pertama, apa dan bagaimana pengembangan kebijakan dan payung hukum yang dapat menjadi dukungan Pemerintah Pusat terhadap pemberlakuan KKR Aceh? Kedua, bagaimana secara institusional kelembagaan KKR Aceh dan Pengadilan HAM sebagai mekanisme keadilan

dapat saling memperkuat perlindungan HAM bagi korban dan keluarganya? Ketiga, bagaimana membangun relasi hukum yang kuat antar Lembaga negara untuk memperkuat rekomendasi KKR terkait reparasi? Dihasilkan dari proses riset dan diskusi grup terarah, artikel ini mendorong sejumlah pengembangan kebijakan hukum yang diorientasikan sebagai jalan keluar atas terbatasnya upaya perlindungan dan pemenuhan bagi korban, terutama terkait reparasi dan pemulihan hak-haknya. Serta, menegaskan posisi hukum atas konteks politik hukum nasional yang mendasar dikaitkan kembali sebagai pengingat marwah MOU Helsinki bagi masa depan Aceh.

**Kata Kunci:** Komisi Kebenaran dan Rekonsiliasi, Hukum Hak Asasi Manusia, Kebijakan Pemerintah Indonesia, Pemerintah Aceh

## Introduction

*Qanun* (Local Government Regulation) No. 17 of 2013 on the Aceh Truth and Reconciliation Commission (Aceh TRC, *Komisi Kebenaran dan Rekonsiliasi Aceh*) regulates reparation in detail, ranging from the format to its implementation. Article 1 (21) of the *Qanun* defines reparation as: “the victim’s rights to reparation and restoration that must be given by the state to the victims, due to the loss suffered, in the scheme of restitution, compensation, rehabilitation, guarantees of non-repetition and the rights to satisfaction.” Article 26 (2) of the *Qanun* determines reparation as the obligations and responsibilities of the central government and/or the provincial and city/district government in Aceh.

Article 26 (1) of the *Qanun* states that reparations as mentioned above are provided to individuals and/or groups by the Aceh TRC after the process of truth-telling. It should be kept in mind that reparation is not a substitution for truth. Instead, it is a process and form of justice that can only be done after the truth is available. In other words, reparation is the acknowledgment of victim’s experience. However, Article 26 (7) of the *Qanun* states that reparations can also be given before the truth-seeking process is completed. In this case, Article 26 (8) of the *Qanun* determines that such reparation (which is called urgent reparation) will be recommended by Aceh TRC by considering the interest of the victim’s recovery, both physical or psychological.

In its implementation, Article 28 (1) of the *Qanun* states that reparations for the purpose of victim’s rehabilitation can be carried out in cooperation with organizations that have abilities to provide the necessary rehabilitation measures by considering the fundamental rights of the victims. This, according to Article 28 (2) of the *Qanun* can be done both in a short term (in the form of immediate service for most vulnerable victims) and in a long term (by gathering information to prepare programs that must be implemented by the government based on recommendations from the Aceh TRC).

In relation to the normative clauses above, the earliest post-conflict attempt for reparations in Aceh was made in the year of 2002 by the then vice-governor Azwar Abubakar. The scheme of this reparation was compensation popularly known as *diyat*, a practice based on Islamic law to address post-conflict grievances. In its development however, *diyat* was criticized by activist and civil society because the acceptance of *diyat* was suggested as the sign that the perpetrators have been forgiven. Apart from the controversy, the program set a precedent for a policy-based reparation, not an adjudication or known as administrative reparation.

Helsinki Memorandum which was signed on 15 August 2005, focuses the reintegration program on economic recovery, particularly agreement to provide agricultural land and employment for former combatants, political prisoner, and “a civilian who can show harm”.

The Memorandum also includes social security for those who cannot work. These forms of reintegration can be included in urgent reparations which become a part of the mandate of Aceh Reintegration Agency (ARA, *Badan Reintegrasi Aceh*), an institution established under the Aceh Governor Regulation No. 138 of 2016. Although the Memorandum did not mention the term “victim” as well as special needs of vulnerable groups such as women and children, ARA’s assistance was given to “civilians who are affected by conflicts” and was part of the reintegration program in general. Regarding the negotiation between, Kingsbury stated that the first lesson is that negotiating is about the capacity of the respective parties to impose their will to realize interests.<sup>1</sup>

ARA accommodated proposals from some conflict victims for economic assistance. The number of aid proposal to ARA exceeded the ability of the existing funds, that was around 48,500 proposals involving 600,000 people. Given this large number of requests, the program was then cancelled by ARA. ARA also cooperated with the World Bank to design and implement a new program which was aimed to support the people who were affected by the conflict. This program was managed under a national program of World Bank, Sub-District Development Program (SDP) which employed locals to facilitate discussion in the village to collectively decide what development programs should be supported by the sub-district government.<sup>2</sup> The beneficiaries of this program could be individuals, groups, or villages. ARA distributed funds of US\$ 24,000,000<sup>3</sup> that covered 1724 villages.<sup>4</sup> Each village received IDR 60,000 -170,000,000, depending on the intensity of past conflicts and their total population.<sup>5</sup> Of the total ARA-SDP funds, 89% was used for economic activities such as purchasing seeds and livestock, 10% for village infrastructure development, and 1% for other activities, such as education and health programs.<sup>6</sup>

ARA also managed the compensation program for *diyat*. According to this scheme, each victims’ family received an annual grant around IDR 3,000,000 transferred directly to their bank account. The procedure to receive *diyat* varied by location, yet in many cases security forces and local government were involved in the process by deciding who will receive the *diyat*. The problem was that the lack of transparency in the decision-making process has resulted in many criticisms on the procedure for receiving *diyat*.<sup>7</sup> According to ARA, 47,710 individuals received *diyat* from this program. Of the total recipients, 52% (21,596) are women.<sup>8</sup>

There are at least two important notes to highlight in these various administrative reparations program related to the role of the Aceh TRC. *First*, the program was implemented without a truth-telling process and official acknowledgment by the state, in this case, the government of Aceh. Ironically, victims of sexual violence did not have access to the reparations program.<sup>9</sup> *Second*, the reparation program did not recognize the term

1 Damien Kingsbury, *Peace in Aceh: A Personal Account of the Helsinki Peace Process* (Equinox 2006), 1.

2 ‘Indonesia Sub-District Development Program at [Http://www.worldbank.org/id/kdp](http://www.worldbank.org/id/kdp); World Bank, “Aceh Conflict Monitoring Update” (November 2006), 4.’

3 1 USD is equal to IDR 9.250, so 1 million USD is equal to IDR 9.25 trillion.

4 Sri L. Wahyuningrum, ‘BRA-KDP Program Final Assessment, November 2007.’

5 ibid. ‘World Bank, “Aceh Conflict Monitoring Update” (March 2007), 6, n. 10.’

6 ‘World Bank, “Aceh Conflict Monitoring Update” (March 2007), 6, n. 10.’ (n 5).

7 ‘UNDP, “Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh” (2007), 37, 59.’

8 ‘Concept Paper “Reparasi Mendesak Bagi Perempuan Korban Kekerasan Seksual Dan Kejahatan Berbasis Gender Dalam Konflik Aceh” Published by LBH APIK, RPUK, KontraS Aceh, PASKA, Balai Sy-Ura, Komnas Perempuan, and ICTJ, n.d.’; Mary-Jo Del Vecchio Good, ‘Acehnese Women’s Narratives of Traumatic Experience, Resilience, and Recovery’ in Devon E Hinton and Alexander L Hinton (eds), *Genocide and Mass Violence* (Cambridge University Press 2014).

9 ‘Concept Paper “Reparasi Mendesak Bagi Perempuan Korban Kekerasan Seksual Dan Kejahatan Ber-

“victim”, but “civil society affected by conflict” as stated in the Helsinki Memorandum. The consequence of the absence of truth-telling and acknowledgement was that ARA and the government of Aceh did not have clear data and information on who was categorized as a victim. Thus, it makes sense that proposals for aid assistance submitted to ARA reach a high rate.

In relation to sexual violence as mentioned above, the challenge for cases of sexual crime was to prove that such an act had actually taken place. By not including sexual violence in the criteria of victims who can receive compensation through the reintegration scheme, many victims feel that their experiences have been denied. This would later affect the increasingly difficult process of recovery, in terms of medical, psychological, socio-cultural and economic. Apart from that, the data collection procedures, criteria for compensation recipient, and verification mechanism conducted by ARA have not integrated with gender-based human rights violations. Thus, victims of sexual violence were excluded from aid programs because their experiences were equated with other victims of violence.

As the mandate of the Helsinki Memorandum and a follow-up to the agreement written in Law No. 11 of 2006 on the Governing of Aceh, it is necessary or even urgent to consider ways in which the political commitment of the Indonesian government should respond to the developments in the works recommended by the Aceh TRC.

This article discusses three key questions that are analyzed and intended to be a policy reference, that is necessary and fundamental for the Indonesian government to take. *First*, what and how is the development of policies and legal protection that can be the support of the central government for the implementation of Aceh TRC? *Second*, how is the Aceh TRC and the Human Rights Court as a mechanism of justice can mutually strengthen the protection of human rights for victims and their families? *Third*, how is to build solid legal relationships among state institutions to fortify the TRC’s recommendation regarding reparation?

To analyze the three questions above, this article used a socio-legal approach. As a multi or interdisciplinary approach, various stance of studies such as normative, historical, and legal realism were combined. In addition, this article utilized relevant theories to examine efforts and action taken by the Aceh TRC, as well as looked at the context of Aceh’s transitional justice, the politics of human rights law and other aspects of state administration and governance.

### Human Rights Constitutionalism

Human rights constitutionalism is a perspective which explains that the human rights that have been adopted as constitutional rights become a policy foundation to ensure advanced efforts to protect and fulfill the basic rights of citizens.<sup>10</sup> This perspective is necessary to assess to what extent the government has been applying human rights in their policies, including to protect and fulfill victims of violence.

The proverb above really manifests in Indonesian politics of today. Up to the writing of this article, both the National Commission for Human Rights (NCHR) and the Attorney General Office (AGO) have not shown firm resolution strategies in the legal process. This situation

Basis Gender Dalam Konflik Aceh” Published by LBH APIK, RPUK, KontraS Aceh, PASKA, Balai Sy-Ura, Komnas Perempuan, and ICTJ, n.D’ (n 8).

10 Soetandyo Wignyosoebroto, ‘HAM Dan Konstitusionalisme: Hubungan Antara Masyarakat Dan Negara’, *Hukum, Paradigma, Metode dan Dinamika Masalahnya* (Elsam- HuMa 2002). Herlambang P. Wiratraman, ‘Konstitusionalisme Dan HAM: Konsepsi Tanggung Jawab Negara Dalam Sistem Ketatanegaraan Indonesia’ (2005) 20 *Jurnal Ilmu Hukum Yuridika*. Manunggal K Wardaya, *Konstitusionalisme Dalam Dinamika Negara Hukum* (Indepth Pub-lishing 2014).



leads to a 'dead-lock' without legal clarity on how to resolve past gross human rights violations. Both institutions insisted that they have carried out their duties in accordance with the mandate of Law No. 26 of 2000 on Human Rights Court. In the context of post-Soeharto Indonesian democracy, this situation is actually not surprising, due to the design of the political system that strongly inheriting the interest of the New Order's economy.<sup>11</sup>

It is important to note that from the year of 2002 to date, the NCHR has submitted reports of preliminary investigations of seven cases on serious human rights violations to the AGO to be followed up with investigation. The seven case files were: Trisakti Events, Semanggi I of 1998 and II of 1999; May 1998 Events, Enforced Disappearances within the Period 1997-1998; Lampung Talangsari Incident 1989; Mysterious Shooting Events 1982-1985; 1965-1966 Events; and the events in Wasior of 2001 and Wamena of 2002 Papua (non-retroactive).

The AGO had returned these seven investigation files back to the Commission, stating that they have not meet several materials and formal requirements. The material requirement as referred to by the AGO was that the investigation dossier was deemed insufficient evidence, while the formal requirements were that investigators of the NCHR were not sworn. The absence of an Ad Hoc Human Rights Court established for those incidents became another reason for the AGO to return the files. Although the NCHR had improved the report several times, the AGO kept on rejecting the report with the same reason.

These events of 'back-and-forth of files' between the NCHR and the AGO are likened to a kind of table tennis game popularly known as *ping pong*. The case of adjudication for human rights violations is like a ball being thrown continuously. Instead of being able to enjoy like the audience who watch a real *ping pong* match, it has continued to wring the hearts of the victims' and their families and the public.<sup>12</sup> Beside causing pain to the victims, the match has also confused the people that, since unlike in a real *ping pong* match, the position of the ball (read: efforts to solve the case) is unknown.

The *ping pong* situation above was actually rooted in the disagreement between the NCHR and the AGO regarding the interpretation of Article 20 (3) of Law No. 26 of 2000 on Human Rights Court and its explanation. The provision reads,

*Article 20 (3): in the case that the investigator believes that the results of the investigation referred in section (2) are still incomplete, the investigator shall immediately return the investigation result to the investigator, accompanied by instructions to be completed and within 30 (thirty) days from the reception date, the investigator must complete the shortage.*

*Explanation of Article 20 (3): in this provision, what is meant by "incomplete" is insufficiency to meet the elements of gross human rights violations to proceed to the investigation stage.*

The *ping pong* between the NCHR and the AGO has caused legal uncertainty and delayed the achievement of justice that victims so desperately hoped for. It has in turn perpetuated the culture of impunity and teared down the hope for justice. Not only have that, the absence of prosecution of the perpetrators resulted in the loss or even violation of the victims and their families' constitutional rights to obtain legal certainty, and negligence

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11 Herlambang P. Wiratraman, 'Hukum, Hak Asasi Dan Demokrasi Di Indonesia', *Hukum Yang Bergerak: Tinjauan Antropologi Hukum* (Yayasan Pustaka Obor Indonesia 2009), 179-196.

12 Herlambang P. Wiratraman, "Menunda Keadilan Sama Halnya Ketidakadilan". Information in the Constitutional Court Trial, Case No. 075/PUU-XIII/2015 Judicial Review of Law No. 26 of 2000 on Human Rights Court.' (2015).

towards justice and protection from discrimination. When in fact, the victims had a great expectation that the successor governments can use the period of transition to bring justice to them by prosecute those responsible for past atrocities, something that cannot be done during the New Order regime.<sup>13</sup>

Some victim's families tried to end the deadlock by submitting a request for judicial review regarding Law No. 26 of 2000 on Human Rights Court to the Constitutional Court. In the petition file, they argued that Article 20 (3) of the Human Rights Court Law and its explanation had impaired their constitutional rights, which is granted in Article 28D (1), Article 28H (2) and Article 28I (2) of the 1945 Constitution of Indonesia.

Article 28D (1) of the 1945 Constitution reads: *"Every person has the right to recognition, guarantees, protection, and certainty of law that is just as well as an equal treatment before the law."*

Article 28H (2) of the 1945 Constitution reads: *"Every person has the right to get special facilities and treatment to obtain equal opportunities and benefits in order to achieve equality and justice."*

Article 28I (2) of the 1945 Constitution reads: *"Every person is free from discriminatory treatment on any basis and has the right to get protection against such discriminatory treatment."*

The three constitutional provisions above contain basic principles that are recognized as the principle of the Rule of Law. In relation to this, there are many definitions and approaches to describe the concept of the Rule of Law (often equated or interpreted with *Rechtsstaat*, *Rule of Law* and a number of other concepts). Definitions and approaches, from these elements, can be mapped from a continuum of thickness, formal-substantive, as stated by Adriaan W. Bedner in his article, "An Elementary Approach to the Rule of Law".<sup>14</sup> Bedner stated that there are three elements of the Rule of Law namely procedural elements, substantive elements, and controlling mechanism. The first category; procedural elements:

1. Rule by law.
2. State actions are subject to the law.
3. Formal legality (law must be clear and certain in its content, accessible and predictable for the subject, and general in its application).
4. Democracy (consent determines or influences the content of the law and legal actions).

The second category; substantive elements:

1. Subordination of all law and its interpretations to fundamental principles of justice.
2. Protection of individual rights and liberties.
3. Furtherance of social human rights.
4. Protection of group rights.

The third category; controlling mechanisms (Guardian Institutions):

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- 13 Manunggal K Wardaya. 2007, 'Menanti Keadilan: Urgensi Penyelesaian Masalah Pelanggaran HAM Berat Masa Lalu Di Ujung Masa Transisi' in Artidjo Alkostar (ed), *Mengurai Kompleksitas Hak Asasi Manusia: Kajian Multiperspektif* (2007). 386.
- 14 Adriaan W Bedner, 'An Elementary Approach to the Rule of Law' (2010) 2 Hague Journal on the Rule of Law 48; Philip Sales, 'The Contribution of Legislative Drafting to the Rule of Law' (2018) 77 Cambridge Law Journal, 630.

1. An independent judiciary (sometimes broadened to *trias politica*).
2. Other institutions charged with safeguarding elements of the rule of law.

Based on the elements above, it can be argued that the events of 'back-and-forth of files' are a fundamental problem for building a strong Rule of Law. This is related to the weakness or presumably, lack of commitment to encourage it, that could be elaborated to at least four elements.

*First*, the element of formal legality. Law should be clearly interpreted, and its substance is certain. Moreover, law should be able to be accessed transparently, predictable on the subject or case it outfaces as well as applied generally. Based on these criteria, the contradicting interpretation between the NCHR and the AGO regarding Article 20 (3) on Human Rights Court Law and its explanation, does not reflect this procedural element.

Second, the elements of subordination of all laws and its interpretation according to the fundamental *principle* of justice. This substantive element teaches us that it is inappropriate and not permissible in the rule of law to allow injustice towards victims and their families on the basis of legal issues and interpretations. The law and its interpretation (in this context Article 20 (3) of the Human Rights Court Law) must prioritize the interest of access to justice for victims and their families. It is at this point that the Constitutional Court is expected to play its role to restore and improve the Indonesian rule of law through its decision, particularly in the interpretation of Article 20 (3) and its explanation more protectively.

*Third*, the element of protection of individual rights and liberties and furtherance of social human rights should be the basis of consideration for any actions taken by state administrators. As a matter of fact, legal uncertainty, the injustice to victims and their families, as well as forms of discrimination in law enforcement, have ruled out this substantive element that is regulated constitutionally. Accordingly, it is accurate that the events of 'back-and-forth of files' is not merely a technical problem of a legal process. It has an impact on human rights violations, including the violation of the basic rights of a citizen guaranteed in the constitution.

*Fourth*, the institutional element charged with safeguarding elements of the rule of law. Both the NCHR and the AGO have been given a mandate in the Human Rights Court Law to undertake their functions in law enforcement towards gross human rights violations. Particularly, since the Constitutional Court Decision No. 18/PUU-V/2007 stating that the Explanation of Article 43 (2) of Law No. 26 of 2000 on Human Rights Court as long as the word "alleged" does not have a binding legal force because it is considered contrary to the 1945 Constitution. Both the NCHR and the AGO have a greater role and responsibility to ensure the mandate to resolve human rights violations as a mechanism of legal protection (in a criminal justice system) and estrange it from any political interest.

Therefore, it is an inaccurate step within the framework of the Indonesian rule of law, if these two institutions (the NCHR and the AGO) continue to contradict each other regarding how to save and preserve procedural as well as substantive elements of the rule of law. Also, it is incorrect for the AGO to return the investigation files of gross human rights violations on the grounds that, "there is no Ad Hoc Human Rights Court", or relying on such reason as "...because the House of Representative recommends to put the trial of several events in the Military Courts" (vide: Trisakti Event, Semanggi I, and Semanggi II).

## **VICTIM'S RIGHTS AND ACCESS TO JUSTICE**

The right to remedy for the victims and their families is part of human rights and are

guaranteed through a number of national laws and international human rights law. At the international level, the right to remedy for victims is based on the UN General Assembly Resolution No. 60/147 which outlines the principles and guidelines on the right to recover for victims of gross human rights violations.<sup>15</sup> States have an obligation to restore the rights of victims who suffered human rights violations. The points that victims of gross human rights violations should receive restitution, compensation and rehabilitation were mentioned in the *Declaration of Basic Principles of Justice for Victim and Abuse of Power* through the UN General Assembly Resolution 40/34, 29 November 1985.

Within the framework of national law, this right is regulated in Article 35 of Law No.26 of 2000 on Human Rights Court. The article states that the granting of victims' rights to restitution, compensation and rehabilitation will be based on the existence of a Human Rights Court's decision listing such an agreement. In relation to this, the Indonesian government has issued Government Regulation No. 44 of 2008 on the Granting of Compensation, Restitution, and Assistance to Witnesses and Victims. Article 1 (2) of the regulation defines "victim" as people who experience physical, mental, and/or economical loss caused by a crime. Article 1 (3) of the regulation also defines "family" as people who have blood relationship in a straight line up or down and sideways to the third degree, or who have marital relations, or people who are dependent to the witnesses and/or victim.

Since the annulment of Law No. 27 of 2004 on Truth and Reconciliation Commission by the Constitutional Court of Indonesia, the access to justice as the rights of victims to obtain restitution, compensation and rehabilitation have to rely on the decision of the ad hoc Human Rights Court. The decision of the Constitutional Court No. 006/PUU-IV/2006 resulted in a verdict that was *ultra-petita*, or beyond what is requested by the applicants.<sup>16</sup> Those verdicts are,

- Declares that Law of the Republic of Indonesia Number 27 of 2004 on the Truth and Reconciliation Commission as contrary to the 1945 Constitution.
- Declares that Law of the Republic of Indonesia Number 27 of 2004 on the Truth and Reconciliation Commission have no binding legal force.<sup>17</sup>

The decision of the Constitutional Court above has serious impact on the enforcement of human rights law especially when dealing with serious crimes. The victims of past violations of human rights whose cases have not been tried in a Human Rights Court will never have their rights as victims. The events of 'back-and-forth of files' and the winding route for Human Rights Court to be operated, have had a greater impact on victims and their families.<sup>18</sup>

Fundamental issues related to the events of 'back-and-forth of files' and interpretations

15 'Resolution Adopted by the General Assembly on 16 December 2005 [on the Report of the Third Committee (A/60/509/Add.1)] 60/147. Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human', para. 16.

16 However, the decision was not unanimous because of the dissenting opinion taken by Constitutional Justice, I Dewa Gede Palguna. "... regardless of the context of the TRC Law as a whole, it actually results in negating the possibility of the a quo petitioners receiving compensation and rehabilitation, meaning that the a quo Petitioners become more disadvantaged. Therefore, based on all the considerations above, adopting the mindset of the a quo Petitioners, this petition should be declared unacceptable. Because, at least by declaring this application unacceptable, it is still more likely for the Petitioner to get compensation."

17 The Decision of the Constitutional Court No. 006/PUU-IV/2006.

18 Herlambang P. Wiratraman. et al., *Dampak Dan Implementasi Putusan Mahkamah Konstitusi Yang Memutuskan Pembatalan UU No. 27 Tahun 2004 Tentang Komisi Kebenaran Dan Rekonsiliasi Terhadap Mekanisme Hukum Dan Akses Keadilan Korban Bagi Penyelesaian Pelanggaran Hak Asasi Manusia Berat* (Lembaga Kajian Konstitusi Universitas Airlangga 2007).



of Article 20 (3) of the Human Rights Court Law are that it contradicts Articles 5 and 6 of the *Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power*. The articles of the Declaration emphasize the right to a judicial mechanism/process as a right that should be done immediately, modestly and without delay. Furthermore, it is also contrary to the Article 28H (2) of the 1945 Constitution which reads: *"Every person has the right to get special facilities and treatment to obtain equal opportunities and benefits in order to achieve equality and justice."*

In human rights law, the validity of a legislation does not justify discrimination in law enforcement. In fact, Article 28I (2) of the 1945 Constitution explicitly states the right of everyone from discriminatory treatment. The article reads *"Every person is free from discriminatory treatment on any grounds and has the right to get protection against such discriminatory treatment."* It is clear that the discriminatory treatment of law enforcement is contradictory to the constitution of Indonesia, and therefore, the government is obliged and must be present in any efforts to resolve gross human rights violations.

Moreover, the types of crimes regulated in the Law on Human Rights Court namely crimes against humanity and crime of genocide)are determined and related to the principle of *ius cogens*, namely the basic principles of international law that are recognized by the international community as norms that cannot be violated. Those two crimes are considered as the enemy of humanity.

*Loss of slippers is punished; loss of lives is free?* Of course, the attention of the international community will be focused on cases of gross human rights violations, part of the principle of *ius cogens*, and the Indonesian government, anytime and anywhere, will continue to be liable for its responsibilities concerning the law enforcement in these cases. In the context of foreign relations, the delayed or unresolved even abandoned cases will always complicate the position of the Indonesian government in developing its foreign policy, especially for Indonesia which promotes itself as a civilized country placing great attention on humanitarian issues.<sup>19</sup>

Access to justice is the main issue when questioning the responsibility of this country that is an inseparable part of the principle of state obligations in human rights. Based on Article 28I (4) and (5) of the 1945 Constitution, the Indonesian government has had an obligation as a state administrator. Based on these provisions, the Indonesian government has actually established Law No. 39 of 1999, on Human Rights, and Law No. 26 of 2000 on Human Rights Court, two important legislations on human rights that must be read together with other provisions in the 1945 Constitution.<sup>20</sup> Including, several ratifications of international human rights treaties, both social and cultural economic rights, as well as civil and political rights which have been ratified by Indonesia through Law No. 11 of 2005 and Law No. 12 of 2005.

The statutory provisions being mentioned above are in line with the state obligation to respect, protect and fulfill human rights as recognized in international human rights law. Article 20 (3) of the Human Rights Court Law, through which the petitioner requested for its interpretation to the Constitutional Court, is closely related to Article 8 and 9 of the Human Rights Court Law and the explanation of the two articles defining the elements of genocide and crime against humanity. Both are considered as gross human rights violations by Law No. 26 of 2000 on Human Rights Court.<sup>21</sup>

19 Herlambang P. Wiratraman, 'Human Rights Constitutionalism' (2015) 1 Constitutional Review 130.

20 Herlambang P. Wiratraman, 'Hak-Hak Konstitusional Warga Negara Setelah Amandemen UUD 1945: Konsep, Pengaturan Dan Dinamika Implementasi' (2007) 1 Jurnal Hukum Panta Rei.

21 Herlambang P. Wiratraman, 'Konsep Dan Pengaturan Hukum Kejahatan Terhadap Kemanusiaan'

Hence, not only how the NCHR and the AGO treat the resolution showing the 'back-and-forth of files', the decision of the Constitutional Court is also eligible for the position in the framework of the obligation to provide interpretations that give more respect, guarantee protection and fulfill the access of justice for victims and their families.

The unresolved, delayed, or neglected settlement of cases concerning gross human rights violations is seen by the public as a serious problem of the state administrators in the post-New Order Soeharto era. Instead of enjoying better human rights protection, it is not an exaggeration to say that Indonesian people are now facing the authoritarianism legacy! The impact still can be felt up to these days, more than two decades since the fall of Soeharto.

Due to the perpetuation of the culture of impunity being described above, it is necessary not only to cut the chain of impunity, but also to push the government to be brave without discrimination, to expose and strengthen legal accountability for any perpetrators of crimes, including *in casu*, crimes against humanity and genocide crimes. The Indonesian government should prioritize, promote justice for victims and their families, and ensuring that similar cases crimes will not happen again in its jurisdiction.

The efforts of the petitioner in the trial of the Constitutional Court will be remembered as a struggle to break the impunity chain and the legacy of New Order authoritarianism in our current and future generations. It is a worrying issue that this noble goal is defeated by efforts that subordinate the principle of justice by the excuses hiding behind the phrase of "incomplete".

When the "ping pong" settlement of the case occurs between the NCHR and the AGO, human rights violators and humanitarian perpetrators have clapped to celebrate their victories for about 15 years. It is at this point that another quote from William Penn, 1693, in the same book entitled 'Some Fruits of Solitude', which states "delays have been more injurious than direct injustice" (procrastinating hurts more than direct injustice) find its relevance in Indonesian politics of today.

### THE POLITICAL COMMITMENT TOWARD THE ACEH TRC

The mandate for the establishment of the Aceh TRC was based on, first and foremost: Memorandum of Understanding of Helsinki between the Government of the Republic of Indonesia and the Free Aceh Movement which was signed on 15 August 2005. The two parties reaffirmed their commitment to resolve the Aceh conflict peacefully, comprehensively, sustainably and dignifiedly for all. Thus, Kasim has stated the local government considers that the Aceh TRC is not a regional job, but Jakarta.<sup>22</sup>

The Helsinki Memorandum. has a special degree of constitutionality in the establishment of the Aceh government. The political and legal history of the Memorandum is unique which make it different from other areas or regions in Indonesia. The Memorandum cannot be subordinated by any statutory regulation. Therefore, the legal policies of the Indonesian government in Aceh must be based on the Helsinki Memorandum.

The Helsinki Memorandum in point (2) clearly states the obligation of the Indonesian government in relation to the issues of human rights. The provision reads,

(2008) 23 Jurnal Ilmu Hukum Yuridika Volume; Herlambang P Wiratraman, 'Hukum Acara Peradilan HAM: Pengantar' (2008); Guy Goodwin-gill, 'International Law of Refugee Protection', *The Oxford Handbook of Refugee and Forced Migration Studies* (Oxford University Press 2014).

22 ELSAM, 'Memperkuat KKR Aceh' ([elsam.or.id](http://elsam.or.id), 2019) <<https://elsam.or.id/memperkuat-kk-aceh/>> accessed 15 April 2020. Ifdhal Kasim was a Commissioner and Chairman of the National Human Rights Commission from 2007 to 2012.

## 2. Human Rights

- 2.1. *The Government of Indonesia will comply with the United Nations International Covenant on Civil and Political Rights as well as Economic, Social and Cultural Rights.*
- 2.2. A Human Rights Court will be established for Aceh.
- 2.3. *The Truth and Reconciliation Commission will be formed in Aceh by the Indonesian Truth and Reconciliation Commission with the task of formulating and determining reconciliation efforts.*

As a follow-up to the operationalization of specific institutions for the accountability of the implementation of the Memorandum, two related legislations were made, namely Law No. 11 of 2006 on the Government of Aceh (State Gazette of the Republic of Indonesia of 2006 Number 62, the Supplement of the State Gazette of the Republic of Indonesia Number 4633) and *Qanun* No. 17 of 2013 on the Aceh Truth and Reconciliation Commission.

There is one common question in relation to the existence of Aceh TRC; will the *pro-justitia* (for justice) work of the NCHR be reduced or even negated by the implementation of the Aceh TRC that has encouraged truth-telling strategies for the victims? This question has become a vital platform in emphasizing the relationship between state institutions in the Indonesian legal system.

The answer to the question above is that the *pro-justitia* work of the National Commission on Human Rights is not negated by the implementation of the Aceh TRC. There are at least three reasons to support this answer. *First*, each of the two institutions has different legal basis. The duty of the NCHR to carry out preliminary investigation is based on Law No. 26 of 2000 on the Human Rights Court, while the Aceh TRC is based on the mandate of the Helsinki Memorandum. One of the founders of the Helsinki Memorandum, Soleman B. Ponto, affirmed that a Human Rights Court outside Aceh is likely to be conducted for those suspected of violating human rights, as the follow-up to the order of TRC that is in charge of seeking the truth.<sup>23</sup>

*Second*, the approach in the process of resolving human rights violations is a victim-based justice (victim-based approach). Therefore, it is inappropriate that the limitation or the absence of regulations eliminates human rights bearing mind that human rights are fundamental rights guaranteed in the 1945 Constitution of the Republic of Indonesia;

*Third*, the existence of the Aceh TRC at the local level and the NCHR at the national level is actually in line with the vision of the Human Rights Council of UN that formed the Special Rapporteur<sup>24</sup>, concerning, "Emphasizing the importance of a comprehensive approach that combines a full range of judicial and non-judicial actions, including individual prosecution, reparation, truth-seeking, institutional reformation, examinations of employee/government and public officials, or an appropriate combination of those, to ensure accountability, provide justice, provide relief to victims, promote healing and reconciliation, establish independent supervision of the security system, restore the trust in state institutions, and promote the rule of law following international human rights law".

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23 Soleman B. Ponto, *TNI Dan Perdamaian Di Aceh Catatan 880 Hari Pra Dan Pasca-MoU Helsinki* (Rayyana 2013), 102.

24 'Human Rights Council, Eighteenth Session, Agenda Item 3, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, A/HRC/RES/18/7, Distr.: General 13 October 2011, Resolution adopted by the Human Rights Council, 18/7, Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.

Even the association with the TRC at the national level would not necessarily negate the Aceh TRC. Article 229 of the Governing of Aceh Law states that the Aceh TRC is an inseparable part of the National TRC, and this article is used to criticize the validity of the Aceh TRC which is said as contrary to the principles of establishing legislation.<sup>25</sup> However, from the constitutionalism perspective of human rights and a victim-based approach, the fact that the national TRC that has not been established should not mean to negate the position, authority and role of the Aceh TRC. As stated earlier, the establishment of the Aceh TRC is a mandate of the Helsinki Memorandum that has to be carried out by the Indonesian government. The seriousness and commitment of the Indonesian government to Helsinki Memorandum is precisely tested in this context.

Apart from the debate regarding the existence of the Aceh TRC, there is an urgent need for regulations as the legal basis to resolve the problems of human rights violations in Aceh.<sup>26</sup> In this context, at least three (3) legal instruments can be considered to support the efforts to recognize, respect, protect and fulfill human rights, especially for victims of human rights violations and gross human rights violations in Aceh.

*First*, a regulation affirming the urgency to accommodate the protection of victims' rights through Government Regulations in lieu of Law (*Peraturan Pemerintah Pengganti Undang-Undang*). That is due to the following.

- (1) The legal basis for recognizing the process of the Truth and Reconciliation Commission at the national level has been annulled by the decision of the Constitutional Court. The absence of regulation can be overcome by the Indonesian government by establishing a new regulation covering the work of the Aceh TRC as mandated in the Helsinki Memorandum, the Law No. 11 of 2006 on the Governing of Aceh, and *Qanun* No. 17 of 2013 on the Aceh Truth and Reconciliation Commission.
- (2) The provisions in Law Number 11 of 2006, on the Governing of Aceh does not explicitly regulate the mechanism of the Aceh TRC, including the related institutions and the finance. The limited rules or legal vacuum can be the basis for hastening the legislative efforts that provide more protection for victims of gross human rights violations.
- (3) The President can use his constitutional authority as the power administrator responsible for affirming the political commitments of legislation that support the efforts to immediately fulfill victims' rights, as stipulated in Article 28I (4) and (5) of the 1945 Constitution of Republic of Indonesia.

*Second*, a regulation in the form of Presidential Regulation (*Peraturan Presiden*) is needed to ensure the institution of TRC in Aceh as an independent Special Work Unit under the Joint Secretariat of the National Human Rights Action Plan, established by Presidential

25 Zahlul Pasha Karim, 'Menilai Kesesuaian Qanun Komisi Kebenaran Dan Rekonsiliasi Aceh Dengan Asas-Asas Pembentukan Peraturan Perundang-Undangan' (2019) 11 JURISPRUDENSI: Jurnal Ilmu Syariah, Perundang-undangan dan Ekonomi Islam; Suhardi, 'Kajian Yuridis Tentang Kewenangan Menteri Dalam Negeri Mengawasi Dan Membatalkan Qanun Aceh' (2016) 1 Petita : Jurnal Kajian Ilmu Hukum dan Syariah; Qonita Royani Salpina, Rusjdi Ali Muhammad and Yenny Sriwahyuni, 'Kedudukan Memorandum of Understanding (MOU) Helsinki Dalam Pembentukan Undang-Undang Nomor 11 Tahun 2006 Tentang Pemerintahan Aceh' (2020) 3 Petita : Jurnal Kajian Ilmu Hukum dan Syariah.

26 There is a study stating that the Aceh TRC works not only based on the National TRC but also other legal regulations in the field of human rights. The legal formulation offered in the study is that the Aceh government is expected to have the courage to take legal action to conduct a material test, in particular article 229 (2) of Law No. 11 of 2006. Zaki Ulya, 'Politik Hukum Pembentukan Komisi Kebenaran Dan Rekonsiliasi Aceh: Re-Formulasi Legalitas KKR Aceh' (2017) 2 Petita : Jurnal Kajian Ilmu Hukum dan Syariah <<http://jurnal.ar.raniry.ac.id/index.php/petita/index>>.



Regulation No. 75 of 2015 as amended by Presidential Regulation No. 33 of 2018.<sup>27</sup> The Presidential Regulation bridges the government administrative barriers that are technically related to nomenclature, finance, and administration in governance.

*Third*, a legal instrument in the form of Presidential Instruction (*Instruksi Presiden*) to or implement a restorative justice approach and to prioritize the protection of victims' rights in Aceh. Such instrument is important not only for the operationalization of its national policies, but also for following up and synergizing the recommendations of the Aceh TRC, both to the ministries, the heads of non-ministry government institutions, the organizer of health social security; and regional leaders (both the governor and the regent mayor).

Based on Law No 12 of 2011 on the Formation of Laws and Regulations, the President has the authority to issue the three (3) legal instruments mentioned above, although Government Regulation in lieu of Law would require the approval of the House of Representatives for it can be a Law. The issuance of these regulations is important to encourage and support the efforts for the recognition, admiration, protection and fulfillment of human rights.

In relation to the issue above, the Constitutional Court on 7 December 2006 in the Decision No. 006/PUU-IV/2006 declared Law No. 27 of 2004 on the Truth and Reconciliation Commission as having no binding legal force. The Court states that the TRC is ideally directed to regulate the process of truth-seeking, granting restitution, and/or rehabilitation, as well as consider the amnesty as part of the mechanisms of alternative dispute resolution. The Court argues that legal and political policies are necessary for realizing this process that is in line with the 1945 Constitution of the Republic of Indonesia and human rights instruments in general. It is important to note that only four months before the verdict, the President has ratified Law No. 11 of 2006 on the Governing of Aceh. Article 229 (1) of the Law regulates the Aceh Truth and Reconciliation Commission as a formula for truth-seeking and reconciliation,

It can be argued that the establishment of Aceh TRC as a truth commission at the local level is in line with the suggestion of the Constitutional Court in its decision as mentioned in the above paragraph. Article 229 of Law No. 11 of 2006 as a legal basis for the establishment of the Aceh TRC reflects the decision which suggested alternative solutions to solve the problems of gross violations of human rights. Although there is no possibility for the Aceh TRC to work with the national TRC (at least up to the writing of this article), the government can strengthen the Aceh TRC by using government political policies through rehabilitation and amnesty, as suggested by the Constitutional Court.

Considering the suggestion of the Constitutional Court for the political policy mechanism, this article see the need to formulate the Aceh TRC in a Presidential Regulation. The logical flow of this suggestion can be put in order as as follow,

1. The Aceh TRC is a legal entity considering its legal basis of its existence which is Article 229 (1) of Law No. 11 of 2006 on the Governing of Aceh.
2. The establishment of a TRC in Aceh is a state legal policy through the law, which is in

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27 This is interpreted as the institutional concept of the Aceh TRC, that is independent and non-structural to strengthen peace, help the realization of reconciliation between the perpetrators of human rights violations and victims, and recommend comprehensive reparations for victims of human rights violations. Khairil Akbar, 'Politik Hukum Pembentukan Komisi Kebenaran Dan Rekonsiliasi Aceh' (2017) Vol 2 Lex Renaissance, 210.

line with the suggestion the Constitutional Court as well as Article 47 (2) of Law No. 26 of 2000 on Human Rights Court;

3. The TRC in Aceh is not legally affected by the cancellation of Law No. 27 of 2004 considering its establishment which was based on by Law No. 11 of 2006. However, the Commission can only work if supported by political policies;
4. There are barriers, obstacles, and problems in the custom of government administration regarding the implementation of the Law. It is at this point that the President as the highest government administrator according to the 1945 Constitution has to use his constitutional authority to so that the implementation of the TRC work in Aceh can be carried out;
5. The President, as the highest state administrator according to the 1945 Constitution, can decide on the scheme of the TRC institutional formation in Aceh as an independent Special Work Unit under the Joint Secretariat of the National Human Rights Action Plan, that was established based on Presidential Regulation No. 75 of 2015, as amended by Presidential Regulation No. 33 of 2018.

Thus, normatively, a second amendment to Presidential Regulation Number 75 of 2015 is required. This can be done by adding two articles between Articles 5 and 6. The proposed formulation of the article is as follows.

#### *Article 5A*

- (1) In the Joint Secretariat of RANHAM, a Special Work Unit is formed, that has the role in supporting the respect, protection, fulfillment, enforcement and promotion of human rights through alternative solutions to the resolution of human rights violations in the form of truth and reconciliation.*
- (2) The Special Work Unit, as referred to in paragraph (1), conducts the duties and functions of the commission formed by the law, that is to seek truth and reconciliation in relation to the process of truth-seeking, granting restitution, and/or rehabilitation, as well as amnesty considerations.*
- (3) In conducting its duties and functions, the Special Work Unit is independent.*
- (4) The membership structure, the procedures for appointment and dismissal, and the financial administration of the Special Working Unit shall be regulated by a Ministry Regulation, which organizes the governance in the field of Law and Human Rights, as the leader of the Joint Secretariat of RAN-HAM.*

#### *Article 5B*

- (1) The sources of Funding for the implementation of the Special Work Unit are:*
  - a. State budget,*
  - b. Regional budget,*
  - c. domestic and / or foreign grants.*
- (5) Further provisions concerning the management and accountability of funding for the implementation of the Special Work Unit shall be regulated by a Minister Regulation*

*a Ministry Regulation, which organizes the governance in the field of Law and Human Rights, as the leader of the Joint Secretariat of RAN-HAM, after hearing the considerations of the Minister organizing the domestic sector of the governance and the Minister organizing the finance sector of governance.*

The proposed provisions above are relevant to weigh the legal products of the Presidential Regulation as a bridge and, at the same time, the foundation of the operation of state institutions to ensure that the Aceh TRC could work optimally and is supported by the law of politics of the national government.

The recommendation, using a governance system approach, is important to examine the Indonesian government's political commitment to the actual position and conduct of the Aceh TRC. The commitment can also be measured by the extent to which it affirms a government administration system is providing more access to justice for victims and their families.

### **Conclusion**

Efforts to respect, protect, and fulfill the human rights of the victims of gross human rights violations in the past can be made by judicial and non-judicial mechanisms. In non-judicial legal mechanisms, nationally, it is carried out based on the paradigm of 'Human Rights Based on Constitutionalism', relying on the constitutional rights of citizens, exploring legislation to strengthen the position of related state institutions especially the National Human Rights Commission, the Witness and Victims Protection Agency (*Lembaga Perlindungan Saksi dan Korban*), the National Commission of Women (*Komnas Perempuan*). This should also be done by strengthening the political commitment of the Central and Regional Governments.

The Aceh TRC has faced difficult barriers due to a number of institutional constraints as well as instruments that strengthen administrative reparations. This article has shown how both the Central Government and the Government of Aceh do not conduct the process of truth-telling and official recognition. The protection program has not been accessible in its implementation, such as for the victims of sexual violence. Such reparation programs do not acknowledge "victims", instead only adopt the category of "civil society affected by conflict" as stated in the Helsinki Memorandum.

The current *pro-justitia* work of the National Human Rights Commission and the initiatives carried out by the Aceh TRC can mutually strengthen, especially in the context of encouraging truth-telling strategies that are vital and fundamental for the victims. The roles of the two institutions are not negated since they have a different legal basis. It should be kept in mind that the approach in the process of resolving human rights violations, that is victim-based justice, is far more important. Obviously, it is inappropriate that the limitations or the lack of laws and regulation would actually eliminate human rights as human rights are the fundamental rights guaranteed in the 1945 Constitution of the Republic of Indonesia.

Hence, the commitment outlined in the Helsinki Memorandum has become an important foothold despite the limitations of the Constitutional Court's solution, the constraints of the financing mechanism, and the issues of institutional recognition and governance. The affirmation of political commitment, especially through legislation, as explained in these policy briefs (Perppu, Perpres and Inpres), is related to the efforts to advance "state institutions to conduct the mandate of human rights constitutionalism," as ordered by Article 28I paragraph (4) and (5) of the 1945 Constitution of the Republic of Indonesia.

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