

RECOMMENDATIONS FOR THE RESOLUTION OF GROSS VIOLATION OF HUMAN RIGHTS ISSUES IN INDONESIA

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Abstract - This article delves into Indonesia's challenges in prosecuting human rights violations, emphasizing obstacles posed by time passage and a lack of credible witnesses. The Non-Judicial Settlement Team, established by Presidential Decree, aims to redress historical injustices. The author, an independent forensic expert, proposes an extraordinary policy to overcome evidence hindrances. Drawing on Gustav Radbruch's legal philosophy, the study advocates prioritizing justice over procedural formalism, aligning with the government's efforts to acknowledge, rehabilitate, and retribute victims. It stresses the urgency of addressing severe human rights breaches promptly, emphasizing alignment with ethical principles in legislation. The article concludes by asserting the necessity of addressing severe human rights breaches promptly, emphasizing the alignment of positive legislation with ethical principles. The proposed extraordinary policy and victim-centered approaches resonate with Radbruch's belief that legal norms should adapt to complex situations, reflecting a commitment to ethical principles.

Keywords: Human Rights; Settlements; Legal Philosophy; Extraordinary Policy; Justice.

INTRODUCTION

On January 11, 2023, the President of the Republic of Indonesia, Joko Widodo, made a declaration as the Head of State of the Republic of Indonesia acknowledging the occurrence of gross violations of human rights in various incidents since the establishment of the state. This was signalled after Joko Widodo received and read a report from the Non-Judicial Settlement Team for Human Rights Violations at the Presidential Palace. This team formed as an effort to resolve past gross violation of human rights tragedies in Indonesia based on Presidential Decree Number 17 of 2022 concerning the Formation of the Non-Judicial Settlement Team for Gross Violation of Human Rights. The team is directly accountable to the President, and is headed by Mahfud MD as the Coordinating Minister for Political, Legal, and Security Affairs, and Makarim Wibisono as the chair of the steering team and the executive team.

Continuing from the statement, President Joko Widodo also expressed regret and sympathy for the tragedy, and conveyed that the government will endeavor to take further steps and resolve cases of past gross violation of human rights, with plans to issue a special Presidential Instruction involving 17 ministries and non-ministerial government institutions, as well as other non-executive independent institutions, to address gross violation of human rights issues based on Non-Judicial Settlement Team for Human Rights Violations recommendations, without neglecting the judicial resolution aspect as well.

The events of gross violation of human rights highlighted in this academic work include a total of 12 incidents: 1) The G30S/PKI events of 1965-1966; 2) The Mystery Shootings (Petrus) events of 1982-1985; 3) The Talangsari Incident in Lampung in 1989; 4) The Rumoh Geudong and Pos Sattis Incidents in Aceh in 1989; 5) Forced Disappearance Incidents in 1997-1998; 6) The May 1998 Riots; 7) The Trisakti and Semanggi I - II Incidents of 1998-1999; 8) The Murder of Sorcerers Incident in Banyuwangi



in 1998-1999; 9) The Simpang KKA Incident in Aceh in 1999; 10) The Wasior Incident in Papua in 2001-2002; 11) The Wamena Incident in Papua in 2003; and 12) The Jambo Keupok Incident in Aceh in 2003.

This moment provides a glimmer of hope, especially for the victims, their families, and advocates of human rights who have felt that the government has never cared about their voices. Therefore, the realization by the Indonesian government, manifested in the form of inter-agency commitments along with other institutions, is a promising step towards resolving the human rights polemics in the country.

Formally and procedurally, efforts to address gross violation of human rights can be pursued in two forms: judicial and non-judicial. Judicial efforts entail enforcing the law according to applicable procedural laws, where perpetrators will be prosecuted and sentenced through court proceedings examined by judges based on existing legal provisions. The second effort is non-judicial, which includes apologies to the victims, material and immaterial compensation efforts, such as restoring the constitutional rights of victims as citizens. Furthermore, non-judicial steps can also take the form of national policy-making to prevent similar gross violation of human rights from occurring again in Indonesia.

In practice, these two efforts are not interchangeable but complementary. In other words, the ideal resolution of gross violation of human rights in Indonesia should be through judicial means. Once judicial efforts have been implemented based on existing procedural laws, non-judicial efforts can then be undertaken as complements and refinements from the state to the victims.

One of the lingering questions in the minds of the general public is: why is it so difficult to resolve gross violation of human rights cases in Indonesia?

Addressing this issue, the author will outline specific reasons depicting the difficulties experienced by the Prosecutor's Office in resolving such cases. The Attorney General of Indonesia, Prof. Burhanuddin, highlighted the obstacles to prosecuting gross violation of human rights in Indonesia, primarily focusing on the issue that evidence from the National Human Rights Commission investigations is deemed insufficient to elevate cases to the investigative stage.

1. To provide further illustration, consider the process of designating suspects in cases of gross violation of human rights (in this context, crimes against humanity). What is required is evidence as believed in the Criminal Procedure Code, including firsthand witness testimony from individuals who directly experienced, felt, and heard the events. However, in reality, due to the occurrence of gross violation of human rights tragedies decades ago, the situation arises where factual witnesses have passed away, leaving only documents of questionable validity and hearsay witnesses. This scenario makes it difficult to establish a convincing case of widespread and systematic crimes against humanity. Consequently, judicial efforts become challenging to implement. Furthermore, with the hindrance of judicial efforts, it becomes practically impossible to carry out non-judicial efforts, as traditionally, non-judicial efforts are only initiated after judicial efforts have been exhausted.

The problem statement

The Republic of Indonesia grapples with persistent challenges in confronting and resolving instances of gross violations of human rights, as the nation bears witness to a history marked by a succession of tragic incidents extending across several decades. The gravity of these violations is underscored by the profound impact on individuals, communities, and the broader societal fabric. Despite recent initiatives undertaken by the government, the quest for justice and accountability encounters formidable impediments, particularly within the framework of judicial prosecution.

One noteworthy response to this pervasive issue is the establishment of the Non-Judicial Settlement Team for Human Rights Violations, a pivotal component in the government's strategy to address historical transgressions. The significance of this team lies in its distinctive role as a mechanism designed to navigate the complexities surrounding past human rights violations. Its creation is anchored in Presidential Decree Number 17 of 2022, a directive reflecting the state's commitment to redress historical injustices.

Functioning within the overarching government structure, the Non-Judicial Settlement Team operates as an instrumental body directly accountable to the President of the Republic of Indonesia.



Under the astute leadership of figures such as Mahfud MD, the Coordinating Minister for Political, Legal, and Security Affairs, and Makarim Wibisono, who serves as the chair of both the steering and executive teams, the unit plays a crucial role in formulating strategies and action plans to address the identified gross violations of human rights.

From the vantage point of Gustav Radbruch, a renowned legal philosopher, the endeavors of the Non-Judicial Settlement Team in Indonesia can be scrutinized through the lens of justice, human rights, and legal philosophy. Radbruch's influential ideas, particularly his concept of legal positivism and the theory of legal principles, provide a theoretical foundation to assess the team's collaborative approach in addressing gross violations of human rights.

By aligning with the findings of the National Human Rights Commission investigations, the Non-Judicial Settlement Team exhibits a commitment to acknowledging the realities of past injustices. In the spirit of Radbruch's theory, which emphasizes the importance of legal principles in shaping the law, the team's alignment with established human rights principles underscores its dedication to transcending mere legal formalism. The harmonization of inter-agency commitments, involving a diverse range of ministries, government institutions, and independent bodies, reflects a recognition that the resolution of human rights issues demands a holistic and collaborative response.

In essence, the Non-Judicial Settlement Team serves as a bridge between the documented injustices and the governmental machinery responsible for redress. Radbruch's theory posits that legal norms must be in line with justice, and the team's role as a bridge aligns with this principle by striving to create a connection between the legal framework and the broader ethical imperative of addressing historical human rights abuses. The collaborative and multi-faceted response signifies a departure from a rigid legal positivism that may have hindered progress, embracing instead a more principled and justice-oriented approach.

Based on this dilemma, the author is interested in examining the issues surrounding the prosecution of gross violation of human rights in Indonesia, obstructed by the aforementioned reasons. In this academic work, the author intends to present original ideas based on their experiences as an independent forensic criminal expert who has often handled and studied human rights cases. The author's ideas are articulated in the following series of discussions.

DISCUSSION

1. Gross Violation of Human Rights

Before delving into the substance of gross violation of human rights, it is prudent to carefully examine the concept and definition of human rights first. For the purpose of this academic work, all relevant aspects of human rights and its instruments will be interpreted based on the understanding and exposition as stipulated in the prevailing legal regulations in Indonesia as well as those recognized internationally.

Regarding human rights itself, the definition will be derived from Article 1 paragraph (1) of Law Number 39 of 1999 on Human Rights, which states:

"Human Rights are a set of rights inherent in the nature and existence of humans as creatures of God Almighty and are His bestowed gifts that must be respected, upheld, and protected by the state, the law, the government, and every individual for the dignity and protection of human dignity."

The aforementioned definition is derived from the understanding of human rights embraced by the United Nations in the United Nations Declaration of Human Rights (UNDHR), which in English translation reads as follows:

"Human rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion, or any other status. These rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education and everyone is entitled to access to these rights, without discrimination."

Based on these two definitions, the author can conclude that human rights also possess the following fundamental characteristics:



1. Human rights are inherently part of every individual and do not need to be granted or inherited.
2. Human rights apply universally to all individuals regardless of gender, race, religion, ethnicity, political beliefs, or social background.
3. Human rights cannot be violated, and individuals are not allowed to restrict or violate the rights of others.

From this, it can be concluded that human rights are rights that automatically exist for everyone, without exception, and need to be protected and respected by everyone, including the state.

Throughout its history, human rights have undergone significant development, leading to the recognition of crimes categorized as crimes against humanity or human rights violations. These crimes and violations of Human Rights are regulated worldwide, including in Indonesia, through laws such as Law Number 39 of 1999 concerning Human Rights and Law Number 26 of 2000 on Human Rights Courts. Furthermore, after gaining an understanding of human rights, the author moves on to the paradigm of human rights violations, as defined in Law Number 39 of 1999 on Human Rights, which states:

"A human rights violation is any act by an individual or group of individuals, including state officials, whether intentional or unintentional, or due to negligence, that limits and/or revokes the human rights of an individual or group of individuals guaranteed by this law, and does not receive, or is feared not to receive, a fair and proper legal resolution based on applicable legal mechanisms."

According to Peter R. Baehr, the concept of human rights violations can be viewed through the theory of vertical-horizontal effects. He suggests that the vertical understanding of human rights aims to protect individuals or groups from government intervention and injustice. Conversely, the horizontal aspect refers to fellow citizens, where it is the government's duty to protect the rights of its people. Thus, it can be concluded that human rights violations are violations of human rights committed by individuals or states against the human rights of other individuals without legal basis or justification.

Human rights violations are further categorized into two categories: Human Rights Violations and Gross Violation of Human Rights. Article 1 paragraph 2 of Law Number 26 of 2000 on Human Rights Courts stipulates:

"Gross violation of human rights are human rights violations as referred to in this law."

Furthermore, Article 7 of Law Number 26 of 2000 on Human Rights Courts states that:

"Gross violation of human rights include:

- a. Genocide crimes;
- b. Crimes against humanity."

Referring to the explanation provided in Article 7 of Law Number 26 of 2000 concerning Human Rights Courts, it is clarified that genocide crimes and crimes against humanity referred to in the article are in accordance with the Rome Statute of the International Criminal Court, commonly known as the 'Rome Statute'.

As for minor human rights violations, they encompass violations other than genocide crimes and crimes against humanity. Examples include physical and/or psychological torture, intimidation, restriction of individual freedom, gender discrimination, disability discrimination, discrimination against children, and other forms of discriminatory behavior that fall under the categories of injustice and racial and ethnic discrimination.

The term "genocide" itself originates from two words: "geno" and "cide." "Geno" or "genos" comes from ancient Greek, meaning race, ethnicity, or nation. Meanwhile, "cide" or "cedere" comes from Latin, meaning to kill. In Article 8 of Law Number 26 of 2000 on Human Rights Courts, the definition of genocide is provided, stating that it includes any act committed with the intent to destroy or exterminate, in whole or in part, a national, racial, ethnic, or religious group, by:

- a. Killing members of the group;
- b. Causing serious physical or mental harm to members of the group;
- c. Imposing living conditions on the group that would result in their physical destruction, in whole or in part;
- d. Imposing measures intended to prevent births within the group;



- e. forcibly transferring children of the group to another group.
- H. Victor Conde fundamentally asserts that gross violation of human rights entails systematic, serious, and widespread violence committed by state authorities against norms related to human rights, such as apartheid, racial discrimination, murder, slavery, mass killings, violence or torture related to religion (persecution), which victims find difficult to recover from.
- Meanwhile, crimes against humanity are defined as follows:
 "Crimes against humanity are acts committed as part of a widespread or systematic attack knowingly directed against a civilian population, including:
- a. Murder;
 - b. Extermination;
 - c. Enslavement;
 - d. Forced deportation or displacement of the population;
 - e. Arbitrary deprivation of liberty or other severe deprivation of physical freedom in violation of fundamental rules of international law;
 - f. Torture;
 - g. Rape, sexual slavery, forced prostitution, forced pregnancy, enforced sterilization, or other forms of sexual violence of comparable gravity;
 - h. Persecution against a particular group or collectivity based on political, racial, national, ethnic, cultural, religious, gender, or other universally recognized grounds prohibited under international law;
 - i. Enforced disappearance of persons; or
 - j. Apartheid."

Furthermore, Article 7(1) of the Rome Statute defines crimes against humanity as:

"For the purpose of this statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."

Article 7(2)(a) of the Rome Statute elaborates that:

"Attack directed against any civilian population" means a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack."

These provisions from the Rome Statute indicate that crimes against humanity are acts committed as part of a broad, systematic attack directed against civilians, with the knowledge of such an attack. Such attacks against civilians involve a series of actions, including multiple acts against any civilian population, in line with or as a continuation of a state or organizational policy to carry out such an attack.

Thus, the elements of crimes against humanity are as follows:

1. One or more acts, with no requirement for multiple criminal acts. Any single act can suffice as an alternative. For instance, when someone commits murder directly targeting civilians as part of a widespread and systematic attack, it is sufficient to fulfill the element of crimes against humanity.
2. Carried out as part of an attack, where the concept of attack correlates with the notion of "attack" which does not necessarily require a military character. An attack can be understood as an act that violates the law, whether accompanied by physical violence or not. Attacks without physical violence include discriminatory policies, apartheid, and deportation.
3. Widespread or systematic, theoretically interpreted as the cumulative effect of a series of inhuman acts of unusual magnitude, referring to the broad range of victims. Systematicity, on the other hand, is evidenced by the pattern of crimes, which involves non-incident repetition of the same criminal acts and organized regularity.
4. Directed against civilians, which can be interpreted as direct targeting, intended solely for those present at the scene. The definition of civilians limits the potential targets of crimes to local



inhabitants but does not exclude the possibility of individuals from outside the area who happen to be present at the scene.

5. Knowledge, where the element of intent is crucial. Intent and knowledge are essential elements to ascertain whether the perpetrator has the *Mens Rea*, or guilty mind, to commit crimes against humanity.

2 Jurisdiction of Human Rights Courts

According to Article 4 of Law Number 26 of 2000 on Human Rights Courts, it is stated that:

"The human rights court is tasked with examining and adjudicating cases of gross violation of human rights."

Referring to the provision above, it is understood that the jurisdiction of the Human Rights Courts pertains to gross violation of human rights. In this context, it refers to Article 7 of Law Number 26 of 2000, where the Human Rights Courts have the authority to adjudicate genocide crimes and crimes against humanity.

With the declaration acknowledging the occurrence of gross violation of human rights in Indonesia by the President of the Republic of Indonesia, it provides an indication that these specific 12 tragedies fall within the jurisdiction of the Human Rights Courts if the crimes committed by subordinates are genocide crimes and/or crimes against humanity.

Efforts to Resolve Gross Violation of Human Rights Cases in Indonesia

Regarding the polemic surrounding the resolution of gross violation of human rights cases in Indonesia suspected of lacking sufficient evidence, the Author presents an idea as follows:

Firstly, in cases of gross violation of human rights that have been delayed in their legal enforcement for decades, an extraordinary policy can be implemented regarding the standard of evidence. If the classical procedural law relies strictly on Article 184 of the Criminal Procedure Code, perhaps an alternative mechanism can be devised with the aim of resolving the hanging issues of gross violation of human rights due to the hindrance of evidence that does not meet the standards of Article 184. The inability to gather evidence leads to the stagnation of cases, and leaving cases unresolved is not beneficial. Therefore, the main objective now is more towards efficiency, justice, and fairness in the current context, rather than merely procedural formalism. Thus, the cases should not be left pending and unfinished.

For instance, in cases where key witnesses are difficult to find due to the absence of factual witnesses, it may be necessary for the sake of justice, certainty, and the utilization of law, that testimony from hearsay witnesses still holds relevance and contributes. This is based on efficiency factors and cannot be denied because the events occurred decades ago, making it impossible for some witnesses or perpetrators to still be alive, thus obtaining factual witnesses seems very difficult, if not impossible. Therefore, adjustments may be made in determining the perpetrators so that the case can be elevated to trial in court, to create a decision that best accommodates and considers the human aspect of the victims, their families, and the struggle of other gross violation of human rights advocates who have been waiting for justice for decades.

With this approach, in the Author's opinion, it can accelerate the resolution of obstructed gross violation of human rights cases more quickly and efficiently within the judicial realm. If resolved in court, non-judicial efforts should also be immediately undertaken.

Secondly, in situations where judicial efforts seem very difficult and impossible to implement, the focus can be shifted to non-judicial avenues, without being preceded by a judgment from judicial institutions. This is considering that the goal is to uphold justice for the victims. In the context of non-judicial efforts, the priority is a declarative statement of regret, sympathy, and apology from the state which has acknowledged the occurrence of gross violation of human rights. Therefore, the government, as the representative of the state, will provide efforts prioritizing justice for the victims, such as the restoration of constitutional rights for victims as citizens, restoration of the victims' reputations, conducting censuses and data collection of human rights violation victims, and the reintegration of victims into society, not forgetting efforts to build a memorial as a sign that the



state acknowledges, regrets, and pays special attention to the victims. In addition to victim-based recovery, the state must then create a national policy to prevent the recurrence of gross violation of human rights tragedies in the future, such as creating legislative regulations that can serve as instruments to promote the implementation of human rights in Indonesia to be more effective.

From Gustav Radbruch's perspective, the shift to non-judicial avenues in situations where judicial efforts are deemed difficult aligns with his philosophy that justice is a fundamental principle that legal systems should uphold. The prioritization of a declarative statement of regret, sympathy, and apology from the state acknowledges the occurrence of gross human rights violations, reflecting a commitment to acknowledging past injustices. Radbruch's emphasis on justice as an essential element in law aligns with the idea that such acknowledgments contribute to the restoration of moral and ethical balance within society.

The proposed efforts by the government, acting as the representative of the state, to prioritize justice for the victims resonate with Radbruch's view that legal norms should serve the broader principles of justice. The restoration of constitutional rights for victims, the rehabilitation of their reputations, and efforts like conducting censuses and data collection of human rights violation victims signify a commitment to rectify past wrongs and restore the dignity of those affected. Radbruch's legal philosophy would appreciate these actions as a manifestation of justice taking precedence over strict legal formalities.

The emphasis on victim-based recovery, including the reintegration of victims into society, aligns with Radbruch's concern for the human aspect of legal matters. Radbruch believed that legal principles should be sensitive to human needs and ethical considerations. Efforts to rebuild lives and facilitate the healing of victims correspond with Radbruch's idea that justice must be humane and considerate of the individuals affected by legal processes.

The proposal to build a memorial as a symbolic gesture further acknowledges the state's responsibility and expresses regret for past injustices. Radbruch, who considered legal principles in the context of broader ethical values, would likely see such gestures as important steps toward reconciling the state with its citizens and demonstrating a commitment to justice beyond mere legalistic measures.

Moreover, the call for the creation of national policies to prevent the recurrence of gross human rights violations aligns with Radbruch's vision of law evolving to meet changing ethical standards. The suggestion to create legislative regulations as instruments for promoting human rights implementation in Indonesia reflects a proactive approach to preventing future tragedies, embodying Radbruch's idea that legal norms should adapt to serve justice in evolving societal contexts.

CONCLUSION

Based on the discussions presented in this study, the following conclusions emerge

Firstly, the subject of severe human rights breaches, albeit controversial, is an undeniable reality that needs immediate attention to provide justice for the victims. Gustav Radbruch's legal theory stresses the importance of aligning positive legislation with ethical principles to address egregious human rights breaches promptly in the sake of justice. Radbruch's assertion that legal standards should be based on principles of fairness is in accordance with the importance emphasized in the initial conclusion. Acknowledging historical wrongs and giving importance to addressing them demonstrates a dedication to ethical principles in legal systems, a viewpoint that aligns with Radbruch's philosophy.

Secondly, the proposal for an extraordinary policy regarding the standard of evidence in cases delayed for decades aligns with Radbruch's notion that positive law should adapt to ethical principles. Radbruch's legal philosophy acknowledges the evolving nature of law in response to changing ethical standards. The emphasis on efficiency, pragmatism, and fairness over strict procedural formalism reflects a commitment to justice that transcends rigid legal structures. This approach resonates with Radbruch's belief that legal norms should serve justice and adapt to the complexities of specific situations.

Thirdly, advocating for non-judicial efforts in cases where judicial resolution is deemed difficult aligns with Radbruch's perspective that justice should prevail over legalistic adherence. The focus on



victim-based recovery, preventive measures, and state supervision reflects a commitment to ethical principles beyond traditional legal processes. Radbruch's philosophy, emphasizing justice as a fundamental principle, would support the idea of seeking alternative avenues to address human rights violations when strict adherence to judicial resolutions proves challenging.

The proposed pragmatic approach and consideration of alternative mechanisms, even when faced with evidentiary challenges, align with Radbruch's emphasis on legal norms serving justice and fairness. The acknowledgment that justice should prevail over strict procedural formalism, especially in complex cases, resonates with Radbruch's view that legal principles should adapt to the ethical demands of the situation.

In summary, the conclusions drawn in this academic work demonstrate a commitment to justice, ethical principles, and the integration of flexibility within legal frameworks. Radbruch's perspective on the interplay between positive law and justice aligns with the proposed approaches to address gross human rights violations in Indonesia, emphasizing the need for adaptability, efficiency, and a holistic commitment to ethical principles.

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