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Retrospectivity and Human Rights in Indonesia: How can Irregularities be Resolved

Irsyad Dhahri S Subaeb *

To join the international community in committing protection to human rights, Indonesia consequently manifested the commitment through its constitution. However, there are still homework need to be done, including how to clarify the meaning of retrospective, also acknowledged as 'retroaktif', indicated in the Article 28f (1) of the 1945 Constitution. Three retrospective cases decided by the Constitutional Court were used to examine Indonesian practitioners' understanding on retrospective principle in line with human rights, they are cases of Masykar of Terrorism Law, Abilio Soares of Human Rights Court Law, and ex members of banned political Party-PKI in General Election Law. Through these cases, it is interestingly seen that retrospective issues of human rights were implemented variously according to the interests in national socio-political needs. This made retrospectivity issue within human rights still open to be discussed more in setting up Indonesian human rights.

Keywords: *retrospective, retroactive, Constitutional Court, Abilio Soares, Masykar Abdul Kadir, political Party-PKI*

I. Introduction

It is acknowledged that every human being inherently owns human rights without any discrimination by race, ideology, and belief. By this, human rights must be constantly protected, and in conjunction with the international human requirements. Having many human rights instruments that widely recognized and used by the international community, Indonesia is also involved in terms of human rights mutual cooperation. Consequently, through the second amendment of the 1945 Constitution, Indonesia manifestly puts the issue of human rights protection within the Chapter X of the Constitution.

However, protecting human rights in Indonesia is conducted in the way of normative behavior only and lack of efforts to actually protect the human rights, or implement human rights regulations and jurisdic-

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tions. Along with various cases left unfinished, poor performances of the protection in human rights issues are commonly faced under national human rights commitments. In addition, through court proceedings, definition and the meaning of human rights protection itself has not been generally agreed. Thus, it directly impacts in the community.

This is seen when a meaning of human rights is interpreted from the Article 28I (1) and 28J (1) of the Constitution. The Article 28 (1) states that "... the right not to be prosecuted on the basis of a retroactive law is a human rights that can not be reduced under any circumstances", while the Article 28J (1) states that 'every person shall respect the rights of others in the orderly life of society, nation and state'. These two articles play important roles in the sense of human rights application in Indonesia. The meaning of the Article 28I (1) which shows the principle of retrospective,¹ is implicating the understanding of protection in human rights as used in international law instruments and the Statute of Rome. However, an article from the same Human Rights chapter of the Constitution (the Article 28J) apparently reducing the understanding of this protection based on Indonesian situation where social-politic preferences are more important than legal and personal issues. Therefore, the consideration of retrospective as human rights needs to be outlined appropriately in order to collaborate with international characterization of human rights.

¹ A simple way to understand the term of 'retrospective' is to put it as the meaning of similar term 'retroactive' which is in Indonesian term, also know as '*retroaktif*'. I am using the term of retrospective rather than 'retroactive' after conducting several literatures and dictionaries of legal term reviews, 'retrospective' term is more suitable to be used as the translation of '*retroaktif*' known in Indonesian documents. Also, some *Indonesianist* scholars such as Ross Clarke, Simon Butt, and David Hansel who wrote many articles on Indonesian legal system use the same way of translation. In fact, there is acknowledged differences in the meaning of retrospective and retroactive defined by Elmer A Driedger that slightly presented in this article. However, to simplify the reading, this article could be understood by putting both terms in the same meaning and it does not indicate absolute differences between them. More about these terms can be found in Elmer A Driedger, '*Statutes: Retroactive Retrospective Reflections*' (1978) 65 *Canadian Bar Review*; See also Ross Clarke, *The Bali Bombing, East Timor Trials And The Aceh Human Rights Court- Retrospectivity, Impunity And Constitutionalism* (2008) In Lindsey, T (Ed) *Indonesia: Law and Society*, The Federation Press, p.430-55; Simon Butt and David Hansell, 'The Masykur Abdul Kadir Case: Indonesian Constitutional Court Decision No 013/PUU-I/2003' *Asian Law Journal*. 5

II. What is Retrospective Principle?

The term of 'retrospective' in regard to legislation as well as its general limitation and prohibition² has been discussed literally in legal discussions of most democratic countries.³ The prohibition and limitation of the retrospective principle that have been used as guidance in producing legislation can be traced back to the period of Ancient Greeks.⁴ Also, the issue of retrospective has been examined in the context (or otherwise) on the aspect of legal fairness,⁵ morality, and human rights.

In legal application, retrospective principle application is sometimes interchangeably used with other similar principle, namely 'retroactive' and 'ex post facto'. So, in-order to understand the concept of retrospective principle, the term should also be distinguished from those similar terms accordingly. This is important in order to have a clear picture of those terms used in a legal system.

There are many aspects of retrospectivity in legal term, and one of those aspects is that the principle is emerged from debates on legal fairness and the issue of justice matter in natural law. Consequently, moral implication of the principle is always being addressed and used as a basis to apply non-retrospective concept in human rights protection. Therefore, to give a strong position of human rights protection, the application of non-retrospective principle should be stated within the highest-level law of the legal system of democratic countries.

² Although non-retrospective principle has generally been recognized in general law system, there are wide discussions on the area on the exception to apply the principle in legislation, which will be discussed in different paper.

³ Aharon Barak, *Purposive Interpretation in Law* (Sari Bashi trans, Princeton University Press, 2005) 362.

⁴ The example of this can be seen in the democratic Athenian that has rules based on the model of *isonomia* ('equality of laws) to all manner of persons objected to any changes of laws that applied retrospective issue in it. See Charles Sampford, *Retrospectivity and the Rule of Law* (Oxford University Press, 2006) 9–10. See also Jerome Hall, *General Principles of Criminal Law* (Lawbook Exchange, 2nd edn, 2005) 9–11.

⁵ Sampford, above n4, 9.

A. Definition

To understand the retrospective principle, one should understand that a must conditions in achieving significant development of democratic system is to accommodate the context of rule of law. The rule of law, fundamentally based on the notion that no one is above the law to form fairness and justice for the whole citizens from any arbitrary power.⁶ Von Dicey added, that the rule of law supremacy should be in the form of certain, general, equal, prospective, clear, open and relatively stable.⁷ In the other opinion, the idea that laws should operate prospectively is a fundamental aspect of the rule of law.⁸

Etymologically, the word 'retrospective' (an adjective word meaning involving 'looking to the past') came from the Latin *retro* 'backwards' or 'into the past' and *spectare* 'to look'.⁹ In legal perspective, it describes legislation that looks to the past and governs legal consequences of events that occurred prior to its enactment. Others, however, argue that the meaning of the word when related to legislation enacted 'with a view to [dealing with] what has happened beforehand'.¹⁰ In legal literature, this term is the antonym of 'prospective' legislation enacted 'with a view to [dealing with] what is to happen in the future'.¹¹ As the explanation of retrospectivity in legal term, however, is not simple, there are many interpretations may arise from the consequence of understanding the term. Hence, many scholars have attempted to define

⁶ Maarten Vlot, 'Staying the Hand of Vengeance: The Rule of Law and International Human Rights' (2006) *Precedent* 46, 84, 47.

⁷ Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (1988) Melbourne University Press, 5.

⁸ See e.g. Joseph Raz, 'The Rule of Law and Its Virtue' in *The Authority of the Law: Essays on Law and Morality* (1979) Clarendon Press, 214; John Finnis, *Natural Law and Natural Rights* (1980) Clarendon Press, 270.

⁹ "Retro (back) + spectere (look)", Funk and Wagnolls Comprehensive Standard International Dictionary (Chicago: J.G. Ferguson, 1973) at 1077; '1. Looking back on, contemplating, or directed to the past. 2. Looking or directed backward ...' The Heritage Illustrated Dictionary of the English Language, 1111; and 'Looking backward; contemplating what is past; having reference to a state of things existing before the act in question' Black's Law Dictionary, at 1184. In *Martelli v. Martelli*, at 642, Lambert J. A described retrospective operation as 'an application which looks back.

¹⁰ Jeremy Waldron, 'Retroactive Law: How Dodgy was Duynhoven?' (2004) 10(4) *Otago Law Review*, 631-654.

¹¹ *Concise Oxford Dictionary* (Oxford University Press, 6th ed, 1976).

and describe the meaning of retrospective, and they are not in the agreement on the fix definition and the form of retrospectivity in legislation.

Dennis C Pearce gives a general description of retrospective legislation definition. Pearce defines, a law is considered as a retrospective legislation if it impairs an existing person's rights or obligations.¹² This means, an (new) applied law that impairs or take away any person's rights enjoyed in the past, will be considered retrospective. This definition is generally depicting legislations addressing any decreased rights to legally act in the past. John Preble who mentioned that a retrospective legislation is that which alter direct legal consequences of past events gives similar to this definition.¹³

Both Pearce's and Preble's definitions are quite comprehensive because the term used in the definition refers to all existing legislations. In Pearce's, it mentions rights and obligations which are in fact, become the most important aspects in the application of a [new] law. When a new law changes the existed rights or obligations, the issue of retrospectivity is used. Pearce's definition can be used to describe the fact that during 1980's, many legislations, especially tax regulation were reformed in the USA, and they were retrospectively removed tax shelters of those investments enjoyed before the reformation.

Another definition is given by Lord Goddard, who says: "An act is retrospective if it provides that anything done before the Act, or if a Penalty were inflicted for having acted in this way or any way or any other capacity before the Act came into force".

There are still many definitions mentioned by legal scholars. To those existed definitions, Sampford categorizes and divides them into broad and narrow definitions.¹⁴ The broad definition in his category is

¹² D C Pearce, *Statutory Interpretation in Australia* (Butterworth, 2nd ed, 1981) 49 in Sampford, *Ibid*, 23. Sampford categorize this definition in broad classification and thought that this definition might no longer being used even by Pearce as the retrospective has been developed and this definition was omitted in the past decade.

¹³ John Prebble, Rebecca Prebble and Catherine Vidler Smith, 'Legislation with Retrospective Effect, with Particular Reference to Tax Loopholes and Avoidance' (2006) 22 *New Zealand Universities Law Review* 17.

¹⁴ Sampford, above n4, 17-19. For example, it criminalizes actions previously deemed permissible or alters penalties for such actions.... See also, Geoffrey De Q. Walker, *The Rule of Law: Foundations of Constitutional Democracy* (1988) Melbourne University Press, 242

those definitions describe views that any law which has association with the past action or has an influence on the legal status or 'legal consequences' of past activities, considered as retrospective. The narrow definition category is those definitions that do not consider retrospective on laws, which are oriented towards future use.

Both categories of broad and narrow definitions of 'retrospective' are deemed essentially unusable because they show legal uncertainty in justifying such legislation.¹⁵ In the broad definition, all legislation, including that which is clearly not retrospective, can be considered retrospective, as it will 'alter the right and obligation of a person'; while under the narrow definition, no laws will be considered retrospective as laws are assumed to naturally act prospectively. Therefore, Sampford attempts to use different expression of verb and the object wording rather than 'rights' or 'obligations'. He notes:

"... Laws are retrospective ... [when] they attach new consequences to actions or events that have already occurred. At the time, such actions ... did not have the legal consequences... The legal consequences were created after the acts were performed or the relevant event occurred."¹⁶

As mentioned above that in legal literatures, the principle of retrospective is usually interchangeably used with similar principle of 'retroactive' and '*ex post facto*', there is a need to distinguish between those terms.¹⁷ To distinguish the understanding of retrospective law and retroactive law, Driedger explains:

"... A retroactive statute is one that operates as of a time prior to its enactment. A retrospective statute is one that operates for the future only. It is prospective, but it imposes new results in respect of a

¹⁵ Sampford, above n4, 21.

¹⁶ Sampford, above n4, 23.

¹⁷ Although in some legal academic literature both retrospective and retroactive legislation are considered legitimate and usable under certain conditions, much legislation have put the term of *ex post facto*, as merely forbidden, although it is still possibly considered applied. See Makoto Usami, 'Retroactive Justice: Trials for Human Rights Violations under a Prior Regime' in Burton M Leiser and Tom D Campbell (eds) *Human Rights in Philosophy and Practice* (Ashgate, 2001) 4. Text available <<http://www.asef.org/go/subsite/ccd/documents/usami.pdf>> at 17 June 2010.

past event. A retroactive statute *operates backwards*. A retrospective statute *operates forwards*, but it looks backwards in that it attaches new consequences *for the future* to an event that took place before the statute was enacted. A retroactive statute changes the law from what it was; a retrospective statute changes the law from what it otherwise would be with respect to a prior event."¹⁸

Although Driedger's distinction between 'retrospective' and 'retroactive' is plausible, and has been used by some legal scholars, Driedger recognized that this definition differences still appeared difficult to understand well and apply in legislation. Driedger therefore states that to reduce the difficulty in defining whether legislation is 'retrospective' or 'retroactive', a different question should be used in each instance at the very beginning. To determine whether the legislation is retroactive or not, the question to be asked is: 'Is there anything in the statute to indicate that it must be deemed to be the law as of a time prior to its enactment'? For retrospectivity, the question to be asked is: 'Is there anything in the statute to indicate that the consequences of a prior event are changed, not for time before its enactment, but henceforth from the time of enactment, or from the time of its commencement if that should be later?'¹⁹

B. Retrospective and Retroactive Principles in Indonesia

A similar legal principle embedded in the concept of rule of law of Indonesia is known as '*prinsip retroaktif*'. Although it has been explained above on the differences between retrospective and retroactive principles, to understand Indonesian context of '*retroaktif*', one should not refer to Driedger's opinion, as Indonesian literatures only recognize the principle of '*retroaktif*'. The question remains whether the explained retrospective principle is similar to retroactive principle applied in Indonesia.

In Indonesia, retroactive principle is connoted as the *Principle of Legality*, stating 'No one can punish a deed unless a rule in the legislation had existed before the deed is done'. There is no legal explanation

¹⁸ *Ibid.*, 268–269.

¹⁹ *Ibid.*, 269.

of whether this principle is legally acting and interpreted as the principle of retroactive. However, most literatures translate the principle of legality as the principle of retroactive. Also, according to ELSAM, the principle of legality consists of (1) legislation, (2) retroactive, (3) *lex certa*, and (4) analogy.²⁰This principle could be legally and practically ignored in connection with certain crimes.

Similar to the purpose of retrospective in legal system, this principle is also used to achieve due process of law; non-retroactive principle has been applied as well. Having this understanding, as well as understood by most Indonesian scholars, above-explained retrospective principle is considered similar to retroactive principle applied in Indonesia.

Non-retroactive protection is implemented in the concept of human rights, however, when it is linked with past violations of human rights, Atmasasmita states that there are still debates on the legal status of retroactive especially in the context of how national reconciliation program should be conducted by the government, due to changes in legal system and political conditions. Many consider past violations of Indonesian human rights should be taken internationally and put them in the same position as crimes mentioned in trials of Nuremberg, Tokyo, Yugoslavia, or Rwanda. This apparently will compensate a big deal to Indonesian politic and legal system, as the International Criminal Court will apply accordingly.

To examine the applied retrospective (or retroactive) principle in Indonesia in accordance with the protection of human rights, this article is also presenting retrospective-oriented cases that have been decided by the Constitutional Court (MK).

C. Retrospectivity and Indonesian Human Rights

Indonesian human rights development is genuinely affected by situations of poverty, culture, national stability and orders that strongly mixed within the process of democratic changes and consolidations.²¹Herbert

²⁰ ELSAM (2005), *Asas Legalitas Dalam Rancangan KUHP 2005*, Lembaga Studi dan Advokasi Masyarakat (ELSAM), 6

²¹ Eldridge, cited in Jeff Herbert, 'The Legal Framework of Human Rights in Indonesia' in Timothy Lindsey, (ed) (2008) *Indonesia, Law and Society*, Federation Press, 456.

stated that this picture could be seen from the national system that is simply resulting from the development in post-Soeharto's regime to responses of public demand and international influence. The issue of Soeharto's period is usually denoted with the system that has been weighed down from the outset by vested interests keen to evade culpability of disturbing backlog of gross violation committed under military commands associates.

In line with past violence and the matter of human rights, the issue of retrospective is important to be comprehended to see and the whole picture of the problem. In academic legal institutions, retrospectivity is a bit difficult to conduct, because some cloudy phrases such as 'characterization of a crime against humanity,' 'a violation to human rights principles', 'repugnant to the common principles of justice', 'against public rights', etc., has to be understood significantly and in order to suit the principle.²²

In Indonesia, the issue of retrospective in human rights is also getting popular and frequently discussed. It is because more problems related to issues of violence in the past being revealed. In fact, the term of retrospective in the constitution is a burden and a bit demanding as not everyone, especially those human rights activists, is happy with the insertion of human rights articles and retrospective in it. The Amnesty International described the situation of insertion idea of retrospective principle in the constitution amendment as a potential 'backdoor' for those responsible in massive human rights violations, as well as Indonesian Legal Aid and Human Rights Association who termed the amendment as 'disturbing'.²³

²² Bryan Smith, 'Retroactive Law and Vested Rights' (1928) *Texas Law Review* VI(4) Hein online. He said: "Such expressions, though useful perhaps to the judge who is anxious not to be caught in error in his law, give little information to the lawyer who may be concerned to know what the court will do in another case."

²³ Rajiv Chandrasekaran, in Ross Clarke, *ibid*, 4. As a description on the existence of debates behind the insertion of retrospective principle in the Constitution, in 23 April 2000, the Constitutional Commission of the House of representative Constitutional Amendment Ad Hoc Committee deleted some human rights articles proposed to be put in the amended 1945 Constitution by reason of repetition. This action believed to be proposed by those who wish to erase the whole human rights articles, because it has already presented in a special human rights law. On the other, it was reported that during the process of amendment, political interventions play a big role, for instance in the issue of 'non-retrospective' term, the Amendment Committee's meeting report

Yet, retrospective should be clearly defined in Indonesian legal system and literatures in order to minimize the problem of past human rights violation issue. A way to understand this retrospective principle is to see the implementation of the principle applied in cases of retrospectivity. Hence, the discussion of retrospective and human rights issue is presenting cases of retrospective decided by the Constitutional Court, they are the case of Masykur Abdul Kadir in Terrorism Law, case of Abilio Soares in Human Rights Court Law, and the case of ex members of banned political party (Indonesian Communist Party-PKI) will be analyzed.²⁴

III. Retrospective Cases in Indonesia

A. The Case of Masykur Abdul Kadir

Masykur Abdul Kadir, or simply Masykur, a freelance guide in Bali, who was sentenced 15 years under the charge of helping

shows that the proposal was proposed by the Fraction of 'Golongan Karya', the ruling class political party of Soeharto's New Order, that supported by the Fraction of Military (although the Fraction's speaker doesn't admit to begin the proposal). The proposal to insert the non-retrospective issue in the constitution was allegedly conducted under the reason those fractions fear to be prosecuted by the newly reformation government regime in connection with their past activities of human rights violations. The military fraction was even allegedly reported threatens some of legislative members by saying that if the non-retrospective article is not stated in the constitution, the military will conduct a military chaos provocations in Aceh, Maluku and West Papua. More on this in Denny Indrayana, *Amendment UUD 1945: Antara Mitos dan Pembongkaran*, translated from 'Indonesian Constitutional Reform 1992-2002: An Evaluation of Constitution-Making in Transition,' PhD Thesis (2007) pp 234-6; See also Ross Clarke, *The Bali Bombing, East Timor Trials And The Aceh Human Rights Court- Retrospectivity, Impunity And Constitutionalism* In Tim Lindsey (ed) *Indonesia: Law and Society*, (2008) on the report made by Slobodan Lekich of Associated Press; See also Kompas, Tuesday, 27 April 2004.

²⁴ Several international scholars have analyzed retrospectivity and human rights in relation with Masykur, Soares and ex member of Indonesian Communist Party cases. Their contributions are respected in this article. Clarke even stated that what is important in seeing retrospectivity in Indonesia that it is disturbing that a constitutional provision such as art 28I(1) could make its way into the Constitution through 'oversight' or 'deception', because in any country, constitutional amendment should be scrutinised and treated with the utmost respect. See Clarke, *ibid*, 7.

Imam Samudra in the plot of the Bali bombing, challenged the validity of the Law No. 16 (2003)²⁵, one of regulations used to charge him, to the Constitutional Court. The unconstitutionality of the law No 16 (2003) is proposed because it against the Article 28I (1).²⁶ By this proposal, Masykur proposed that the Law No. 6 (2003) is invalid because the law is not existed when the bombings happened. Besides, the Article 1(1) of the Criminal Code is also prohibiting this kind of action under the principle of legality.

The Constitutional Court judges agreed that the law No. 16 (2003) is unconstitutional, however, whether or not to avoid negative reactions that might arise from victims' families who felt irritated by attack, foreigners, and internationals spectators, Indonesian Minister of Justice and the Constitutional Court Chief Justice, almost in the same time, immediately announced that the court's decision applies prospectively. This means Masykur and other Bali bomb convicted would remain in prison and could not use this decision as a basis to have an appeal in the Supreme Court. So, Masykur is charged based on the law that declared invalid, and based on another retrospective law.²⁷

B. The Case of Abilio Soares

This case is linked with historically event when the decolonization took place in East Timor in April 1974, following the political change in Portuguese.²⁸ This was then responded by the establishment

²⁵ The Law No 16 of 2003 is originally formed as Government Regulations in Lieu of Law (*Peraturan Pemerintah sebagai Pengganti Undang-undang (PERPU)*) that passed on by the authority of the president in emergency situation six days after the Bali bombings took place.

²⁶ The Article 28 I (1) states: The right to live, the right to be protected from torture, right to be protected from interrogation, right to believe and to be conscientious, right of religion, right to be protected from enslavement, right to be recognized as an individual person before the law, and the right to be protected from being charged on the basis of a law that is applied retroactively are human rights that must not be diminished in any circumstances.

²⁷ Masykur was also charged under the Law No. 15 (2003) which has retrospective application article in it. The Article 46 of this law states that this law may be applied retrospectively to certain case prior the promulgation of this law, which its implementation will be stated in a law.

²⁸ Mangadar Situmorang, *Intrastate Conflicts and International Humanitarian In-*

of *Uniao Democratica Timorese* (UDT), *Associacao Popular Democratica de Timor* (Apodeti), and *Association of Timorese Social Democrats* (ASDT), later known as the *Frente Revolucionaria de Timor-Leste Independente* (Fretilin) in East Timor. As each party had political preferences, internal armed conflicts occurred, including when *Fretilin* declared the independence of East Timor. In 1975, Indonesian military, after getting 'a green light' from US President Ford and Foreign Minister Kissinger,²⁹ entered the territory and proclaimed East Timor as Indonesia's twenty-seventh province³⁰ and starting military action that against human rights.³¹

The Nature of case is that Abilio Jose Osorio Soares (ex Governor of East Timor Province when it is still under Indonesian territory) was charged for allegation in serious human rights violations during April - September of 1999. By this, he was sentenced three years imprisonment under the Law No. 26 (2000) of the Human Rights Court Law. However, by retrospectivity, Soares proposed that law, specifically the Article 43 (1) is contrary to the Constitution.

tervention: Case Studies in Indonesia, (Doctor of Philosophy, Curtin University of Technology, 2007) 94.

²⁹ Meeting with Ford and Kissinger in Camp David in 1975, Soeharto at the time described that Indonesia, as unified nation without any territorial ambition will not commit aggression against other countries, found that Ford and Kissinger had given a green light to enter the territory. Ford replied by: "We will understand and will not press you on the issue." Minister Kissinger added: "You appreciate that the use of U.S.-made arms could create problems... It depends on how we construe it; whether it is in self-defence or is a foreign operation. It is important that whatever you do succeeds quickly. We would be able to influence the reaction in America if whatever happens after we return. This way there would be less chance of people talking in an unauthorised way... We understand your problem and the need to move quickly... Whatever you do, however, we will try to handle in the best way possible... if you made plans, we will do our best to keep everyone quiet until the President returns home." John G Taylor, in Ben Kiernan, *Genocide and resistance in Southeast Asia : Documentation, denial, and justice in Cambodia and East Timor* (Transaction Publishers, 2007) 106.

³⁰ Mangadar Situmorang, *Ibid.*, 95.

³¹ Based on the report of KPP HAM-Komisi Penyelidikan dan Peleanggaran Hak Asasi Manusia/Investigation Commission on Human Rights Violence 2000, it is believed the number of violence in East Timor was began since Indonesian military entered the region in 1975, who at the same time formed and promoted civilians to be armed forces, known as *Wanra-Perlawanan rakyat*/Civil resistance

The Constitutional Court realized that the Human Rights Court Law was a retrospective law, however, it rejected Soares's proposal.

C. The Case of ex members of banned Political Party (PKI)

Similar to the second case above, this case is also linked to the history of Indonesia timeline before the independence. In 1913, the Communism entered Indonesia, brought by Sneevliet, a Marxist-Lenin political activist.³² Sneevliet successfully implanted the Marxism through transportation labor organization, *Vereniging van Spooren Tramsweg Personeel* (VSTP) and its newspaper, and brought those companies to radicalism.³³ The organization then widely developed later on and known as Indonesian Communist Party (PKI). Elsewhere, many former rebels were forced to sign up in joining PKI or its affiliated groups³⁴ (which somehow, might not know that they are affiliated to PKI) to prove their loyalties to the Republic of Indonesia, or as the consequence in receiving some financial and farming tools aids. In 1965, PKI was reported allegedly plot the murder to army's high rank officers, but it was not taken seriously.³⁵ On 30th of September 1965, a group of military officers from the air force and Sukarno's praetorian guards launched an action said to defend the Great Leader of the Revolution,³⁶ known as *G30S PKI* (September 30th Movement of PKI). In this action, most senior military officers, except a second level officer, Major-General Soeharto³⁷ were kidnapped and killed. In areas of Java, Bali and Suma-

³² State Secretariate of Republic of Indonesia, 'Gerakan 30 September Pemberontakan Partai Komunis Indonesia- 30 September Movement The Indonesian Communist Party's Rebellion' (1994), Departemen Pendidikan dan Kebudayaan- Education and Culture Department of Republik of Indonesia, 7.

³³ *Ibid.*

³⁴ Kompas (online), 'Semua Tapol dan Napol harus dibebaskan (All political prisoners have to be freed), Wednesday 27 May 1998 <<http://www.seasite.niu.edu/Indonesian/Reformasi/Chronicle/Kompas/May27/semu01.htm>>

³⁵ See e.g. Helen-Louise Hunter, *Sukarno and the Indonesian Coup: The Untold Story* (2003), Praeger Security International, 1.

³⁶ Adrian Vickers, *A History of Modern Indonesia* (2005) Cambridge University Press, 156.

³⁷ Vickers noted that this might Soeharto was allegedly involved in the movement plan, however, according to Hunter, Soeharto's name was even included in the generals 'assassination list'. See Helen-Louise Hunter, *Ibid.*, p 1.

tra, immediate reactions of anti-Communist outraged, while in Sumatra's plantation areas, PKI organized squatter movements and agitated against foreign companies, as well as in strongly Muslim areas.³⁸ It is Approximately 40,000 was killed around the plantations and one-fifth of all the killings occurred in Sumatra.³⁹

Having those cruelties, Soeharto and his faction of military, therefore launched the action to stop the PKI's movements.⁴⁰The organization and its affiliated organizations are also banned, till today.

The Nature of the case was when 35 people who were ex members of banned Indonesian Communist Party(PKI) proposed to the Constitutional Court concerning the enactment of the Article 60 (g) of Law No. 12 (2003), which contains the prohibition to former members of banned political organization, including its mass organizations, to become the member of legislative institutions.

Eight out of nine Court's judges agreed to accept the proposal by reasons of anti-discrimination, human rights and the political rights. In this decision, the rights of those ex members were respected, but past actions related to the organization they affiliated in - which is an important aspect in the retrospectivity - were ignored.

D. Court's Decisions and Human Rights

The trial processes of the three retrospective cases above show how Indonesian human rights protection understood by lawyers, government officials, legislative members, scholars and judges. The following notes of court's processes indicate facts on human rights in Indonesia.

As it is mentioned above that retropectivity and the retrospective cases implicate other issues in Indonesian legal terms, the case of Masykur shows that the concept of human rights protection concerning non-retrospective issue in terrorism law was actually conducted under socio-political preferences. There, indications of generalizing terrorism definition were made to legitimize Bali bomb trials and to disregard

³⁸ Vickers, above n38, p 158.

³⁹ *Ibid.*

⁴⁰ *Ibid.*, p 157.

retrospective issue.⁴¹ Indeed, Terrorism Law No. 15 (2003) as general terrorism law and the Law No. 16 (2003) are legally contradicted between one to each other, because the Article 64 of the Law No. 15 (2003) states that the law can act retrospectively, (which is also against the Constitution) while the Law No. 16 (2003) that enacted to punish Bali bombers, decided invalid because it was a retrospective law.⁴² This uncommon action (because common procedures to make a good regulation were not applied) and the actions to contradict against the constitution were even supported by government officials, legislative members, and scholars. Their opinions show their understanding on retrospectivity and their ways to choose the position in defending ideas.

Further, Abilio Soares' proposal admitted to be based on a retroactive issue, and the Article 43 of Law No. 26 (2000) was decided against the Constitution. Therefore, the rejection to Soares' proposal revealed irregularities. First, from the viewpoint of legal aspects, the Law No. 26 (2000) was retrospective and is indicating uncertainty,⁴³ however, is continually used to the basis of in charging sensitive issues such as crimes against humanity. Having accused Soares with crimes against humanity by this law, the judges indicate a clear statement on the exception to a non-retrospective application. This is a positive turn point, however the judges fail to fix the Article 28I (1) on as suggestion to modify the

⁴¹ The definition and understanding mentioned by judges, government officials, and legislative members mentioning that terrorism is a crime against humanity that exclude from non-retrospective application in the Constitution are popular. However, there are no (yet) national regulations stating terrorism as a crime against humanity. However, social rages and emotions were circling within the process of Bali bomb trials, including national perspective, seemingly influenced judges to bring definition of terrorism in this perspective.

⁴² See proceeding minutes in the case of Masykur Abdul Kadir in <http://www.mahkamahkonstitusi.go.id/>.

⁴³ Besides, although Indonesian legal system has attempted to accommodate values of international human rights, Amnesty International considers that there is still uncertainty in the law of the Court of Human Rights Act, for example, the Article 5 states that the Human Rights Court has the authority to hear and determine cases of gross violations of human rights committed by residents Indonesia country within or outside the territory of Indonesia, has the potential for inconsistent because it does not provide the opportunity for universal jurisdiction to prosecute under international law. This was seen when this law applies to suspects of human rights violations in East Timor, which is not the territory of Indonesia.

article. Politically, the ignorance to this modification can alternatively benefit to the court to use this article in flexible ways. Assumably, the Constitutional Court took the matter of the interpretation in the Constitution is not merely based on legal aspects, but also politically.

Second, still from Soares' case, the consideration of the Law No. 26 (2000) stating that human rights are basic rights given by the nature, and possessed by human beings that should be protected, respected, maintained, and should not be ignored, reduced or taken away by anyone apparently represent communal meaning, because Soares's personal rights was not accommodated properly.

Third, there was uncertainty on how to find a fix term and definition of crimes against humanity. During this time, the definition and description of crimes against humanity were taken from the Statute of Rome, which has not officially been ratified by Indonesia. By this, it will be difficult to use the Statute of Rome as the source of authentic definition of crimes against humanity.

Although the case of former PKI members, was not titled retrospective, the case was certainly alarming retrospectivity because the case was concerning the status of legal membership within a valid organization before it is legally banned. In different way, it can be said that the involvement of those members were conducted when the membership was not prohibited. Therefore, when the accusation is made in connection with the status of membership, [that has been void along with the organization ban], it is definitely included as retrospective issue.

Thus, the accusation to the membership status of a void organization was not correct, which made the court process in trying the opinions behind the political banning was mislead. Nonetheless, if the banning to the organization was correctly addressed, the court also considered ignoring past government's policy and reasons behind the enactment.

V. Closing Notes

Having these notes that are excerpted from Constitutional Court decisions on retrospective cases, the understanding of retrospective principle mentioned in the 1945 Constitution can be made accordingly. By

this, the Constitutional Court's decision is indirectly functioning as a solution on this clarity problem and interestingly providing definition of retrospective in human rights. However, this clarity still need to be discussed further because:

In the case of Masykur and Abilio Soares, the statement on the meaning of the principles mentioned in the Article 1 (1) of the Criminal Code and the Article 28I(1) of the 1945 Constitution, especially the notion of '.... can not be reduced under any circumstances' actually not in the point of clear rejection to any enactment contrary to the principles.

Also, the words of 'human rights...' in the Article of 28I (1) of the 1945 Constitution is narrowed by the Article 28J (1) (2) stating that any rights obtained from the constitution should be subjected to others' rights, and shall subject to restrictions set out by the law. By this, any problems arise from the need to protect one's rights tend to have another debates again and human rights terms has to be redefined again, because the court expressed divergent decisions when decide cases of Masykur and Soares.

In the case of former PKI members, the notion of retrospective was not answered, leaving the problem of PKI's allegation in committing inhumanity crimes in the past unsolved. This signifies reconciliation processes concerning PKI's victims still difficult to begin.

Evidently, the matter of legal-political issues are still above the human rights commitments shown from signs to forget and disregard ban reasons (somehow believed to be proclaimed by Soeharto's regimes to conceal the allegation of his relationship with PKI)⁴⁴ on PKI organization. Political situation in current reform era which trying to remove all things related to Soeharto (including policies in his period), might influenced judges of the Constitutional Court to accept the petition of former members of PKI. Indeed, this court's decision did not express the statement on the status and validity of People's Assembly Decree of No.XXV/MPRS/1966 concerning the ban.

⁴⁴ See Soebandrio: *Kesaksianku tentang G30S*, Chapter IV, Forum Pendukung Reformasi Total (originated from the University of Michigan) 2000.

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