



# Violation of Human Rights in The Perspective of The Sociology of Law Judiciary in Indonesia

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## ABSTRACT

Protection of Human Rights (HAM) is one of the characteristics of the rule of law. Violation of the right to life is a serious Human Rights violation that is qualified as a crime against humanity and a crime of genocide. Indonesia has enacted UU No.26 Tahun 2000 on Human Rights Courts as the basis for establishing a retroactive Ad Hoc Human Rights Court. Settlement of past gross human rights violations through the courts has been conducted in the 1999 East Timor case and the Tanjung Priok case in 1984. Both cases were terminated "free" at the Cassation and Reconsideration. From the judicial sociology review, both Judges' decisions are in fact extraction of interpretations of legal norms, moral values and social interests that live in society and become the nation's view. The sociological legal perspective provides the view that the judicial settlement has not been able to provide a sense of justice and beneficiary as a legal objective, therefore a non-judicial resolution is required for other cases of gross human rights abuses, as adopted by the Public Prosecution Service together with other government elements and Komnas HAM

## INTRODUCTION

The Concept Of Human Rights (HAM) was born, grows and develops along with public awareness international about the importance of respect for the values fundamental contained in the HAM .[1] The conception of the then codification after the United Of Nations / United Nations (UN) managed to declare general statement of Human Rights (Universal Declaration of Human Rights) on 10 December 1948 and followed by International human RIGHTS conventions, namely the Convention on the rights Civil and Political rights; the Convention on the Rights Economic, Social and Crocodiles and other conventions and the Rome Statute 1998.

Various attempts to provides protection against Human RIGHTS in general and the violation of HAM weight category of crime against humanity require a long process related with the three main

variables, namely: the dynamics international; legal instruments that exist and the how to determine the approach against the legacy of the past. The presence of LAW No. 26 Year 2000 about Rights Court Human is the juridical basis the formation of the Court of Human Rights Human. This legislation is the mandate of Article 104 of the LAW No. 39 Year 1999 on Human Rights Human to check and break things (follow criminal) violation of the rights human weight. Today after 17 the year is legislation in the field of human RIGHTS is valid, the public and in particular victims and families survivors/heirs of the victim awaits completion of cases of human RIGHTS violations heavy became one of the campaign promises pair Jokowi Kalla, this is what being in the spotlight institutions/human RIGHTS activist.

In the records of enforcement law, there are only 3 (three) cases gross human RIGHTS violations that are processed up to the Court of

human RIGHTS in Indonesia: the Case of East Timor 1999 and the Case of Tanjung Priok 1984 handled by Ad Hoc human RIGHTS court on the The Central Jakarta district court as well as cases of gross human RIGHTS Violations Abepura 2000 handled by the Court of human RIGHTS on the The Court Negeri Makassar. Though all the accused on the third case is declared "free" from all the demands of the law in the level of cassation and review. Worries some observers and human RIGHTS activists if the government of Indonesia no seriously finish the case of gross human RIGHTS violations occur in running jurisdiction the national, then the International Criminal Court (ICC) will take over the jurisdiction of the national.

The will of the human RIGHTS activist and from the survivors/heirs of the victim and the pressure of the human RIGHTS institute International/foreign complete case of severe violation of human RIGHTS through the judicial namely Ad Hoc human RIGHTS court for the case gross human RIGHTS violations that occur before the year 2000 and the Court Human RIGHTS for human RIGHTS violations the weight that occurred after the year 2000 there can also unanimously accepted because the resolution of the case gross human RIGHTS violations through the trial in the Court of human RIGHTS "imposed" will culminate in the the verdict of "free".

Judges of the Court of human RIGHTS declare an offender gross human RIGHTS violations proved guilty with a minimum of 2 (two) tool a valid proof, whereas in the practice is very difficult or not easy to obtain and collect evidence that valid to prove the occurrence of the events of the gross human RIGHTS violations and the defendant as the culprit. The issue of tempus delicti already expired and the existence of witnesses- a key witness many have already died the world and the unknown existence/his place of residence include evidence that is in locus delicti has been damaged and may impossible to find or at least already experiencing changes along the passage of time can not be avoided given the legal process of gross human RIGHTS violations is very long.

The efforts of the government to dolaw enforcement by asking accountability for crimes humanity gross human RIGHTS violationsthrough

court of Human Rights as done against cases of gross human RIGHTS violations in Timor-Timur, Tanjung Priok and Abepura turned out to not meet the expectations the people of Indonesia, especially for the victim and his family. Judicial is still far from the spirit of the values of justice, distrust on the procedure the law court of human RIGHTS pose thinking and insistence of the various parties to the settlement of enforcement legal gross human RIGHTS violations future then can be pursued through update the criminal justice system gross human RIGHTS violations with do a comparison and adaptation corresponds to the provisions of the Rome Statute of the Year 1998 and the law of the International Criminal Court (ICC) in the Hague as well as prevailing in several countries.

The formation of a set of regulations on Human Rights, The national human RIGHTS commission and apparatus enforcement and institutional judicial human RIGHTSwas not able to finish cases of gross human RIGHTS violations that allegedly occurred both in judicial and non-judicial even has been in the spotlight the world international particularly related to with the issue of alleged human RIGHTS violations weight occurred in the Province of Papua and West Papua that intersect also with the issue of Papuan separatist Independence and integrity of the sovereignty of The REPUBLIC of Indonesia. So according to the saving read question critical is how the completion of the non-judicial gross violations of human RIGHTS past and step line by the Prosecutor's office in the completion of the non-judicial above gross human RIGHTS violations of the past in Indonesia viewing angle the study of socio-legal, in particular from the perspective of the sociology of the judiciary.

## **METHOD**

Writing this using the method of qualitative analysis-descriptive. Qualitative studies considered to be more relevant to use to study the problems of the issue the law in this writing, because shades of qualitative research is try to do the construction against the reality of the law and further understand the reality of the law.

Making procedures and data collection in this study conducted in two ways: by studying the

literature and interviews with key informants such as lawyers, and prosecutors and service providers finance. Data analysis technique begins with an examination of the data done the collected data then conducts direct and directed interviews and then analyzes the data qualitatively, the data obtained is systematically compiled and then analyzed qualitatively in the form of rules. The process of legal analysis is linked to the theoretical framework to be able to answer the formulation of the problem under study.

## **RESULTS AND DISCUSSION**

### **A. The Completion Of The Non-Judicial against human RIGHTS Violations The Weight Of The Past In Review Of Sociology Of The Judiciary.**

Indonesia as a country the law has not been optimally produce the verdict of the court HAM Ad Hoc or permanent significantly reflects a sense of justice as well as the efforts of the termination of the eye the chain of impunity, as a form of the efforts of law enforcement for the participants. Gross human RIGHTS violations the category of crimes against humanity, not only is the domestic affairs of a country, but be the attention of the public international framework for break the chain practice impunity. This is due to the gross human RIGHTS violations category crimes against humanity is a form of crime to be enemies with the people human (*hostis humanis generis*) , so it can be enacted universal jurisdiction over perpetrators by setiap negara, anytime and anywhere.

The prosecution against responsible for human RIGHTS Violations The weight of the category of crimes against humanity in court international must pay attention to the sovereignty and / or jurisdiction of the state of the offender or the state region Gross human RIGHTS violations category against humanity carried out. It thus due to the judicial the international nature of the complementary over the judiciary (HAM) national. Becomes a problem and discussion, in terms of crime humanity has done the investigation but because of the constraints of related proof as consideration not to do investigation and prosecution, then efforts completion gross human RIGHTS violations with take the path of non-judicial

(out of court settlement) to be worthy of note that the enactment of the judicial top international actors Gross human RIGHTS violations category crimes against humanity, can rule out some basic principles in criminal law, among others, the principle of *ne bis in idem*, principles expired, and others.

The scope of the breach Human RIGHTS formulated in the ACT No.26 Year 2000 on the Court Human RIGHTS in Article 1 number 2, that gross human RIGHTS violations is violation of human RIGHTS as referred to in LAW No.26 Years 2000 of the Court HAM. Type gross human RIGHTS violations included in the crime genocide .While the formulation of the severe human RIGHTS violations in the form of crimes against humanity . In serious human RIGHTS violations future then apply the principle of retroactivity of this, deviate in criminal law has been that the principle of legality. Twelve LAW No.26 Year 2000 on Human RIGHTS court adheres to the principle of retroactive that can be applied in order to protect the human rights of it's own.

The house of Representatives can act as the party proposed the formation of the Court Ad hoc human RIGHTS based his proposal on the aspirations of the people regarding the alleged occurrence human RIGHTS violations weight bounded on the *tempus delicti* specific that occurred before the enactment of Act No. 26 2006 about the human RIGHTS Court. Observing this, it can be understood that in substance, the structure and culture background the formation of the Ad Hoc human RIGHTS Court depicts the political and sociological quite thick.

The competence of the relatively Court Ad hoc human RIGHTS determined through The decision of the President on the proposal of the PARLIAMENT the position is located in the general court concerned. The proposal of the house of representatives of the based on the alleged human RIGHTS violations weight occur or *tempus delicti* before the LAW No. 26 Year 2000 on the Court Human RIGHTS apply. As is the case in gross human RIGHTS violations of the past for the Case of Tanjung Priok and Case East Timor, with the publication of Decree Of The President About The Amendments To The Decree Of The President No. 53 Of 2001 On The Formation Of The Court Of

Human Rights Man Ad Hoc Committee On The Judiciary Negeri Jakarta Pusat which stipulates the establishment of the Court Human Rights Ad Hoc Committee On The The Central Jakarta District Court as a Court of competent jurisdiction check out and decide cases Human Rights violations the weight of what happened in East Timor in jurisdictions Liquica, Dilli, and Soae in April 1999 and September 1999, and the occurred in Tanjung Priok on the moon September 1984.

The verdict is "free" from all law suits on appeal and a reconsideration of the Judges the level of Cassation and Review of the Back to 2 (two) cases severe human RIGHTS violations, namely, Timor East and Tanjung Priok in the law has force of the law and technically judicial caused not the fulfillment of the principal elements in serious human RIGHTS violations. This paper does not discuss more regarding the matter of the review juridical-normative and not trying delegitimize the third verdict such, however, try to discuss it with the corner of the different perspective, namely from the perspective of sociology of justice.

The study of sociology judicialmuch influenced thinking theory the realism of the law in the United States; the legal theory of the sociological; legal theory and critical legal theory natural among others, pioneered by Oliver Wender Holmes; K.Llewellyn ; John Chipman Gray; Charles Sanders Peirce; John Dewey and Benjamin Nathan Cordozo. The flow law sosiologisetidaknya can be summarized with the essence of thought on the anyway in the two postulates, namely, First, the law is the result social forces and tool social control, human personality, social environment, economic circumstances, business interests, the idea that are valid, emotions common (is the shaper of the law and the results of the law in the life). Second, the approach is pragmatic and behaviour of institutions-social institutions (the pressure on the ruling the court and other actions law).

The verdict of the Court against thecases of severe human right violations then for the case of East Timor and Tanjung Priok factually in the landscape of the political transition and atmospheric changes of political regime new order supported by armed forces at once suspected as the main actors in the the events of the gross human RIGHTS

violations the past. Atmosphere spirituality the people of Indonesia still in the euphoria of the reform, but structurally, the organs of the executive the criminal justice system violations HAM weight is still a product past the buildings of thinking a little or a lot is still oriented on the creed of political stability and economic growth as a commander above the law.

The culturally, social unrest arising due to factor the impact of the economic crisis of the year 1997 still bear fruit crush- crush of the fulfillment of the rights of the economy as the scarcity and rising prices food (groceries) and the reduction of FUEL and Electricity subsidies and colored with the political turmoil in the region and the issue of disintegration which though can be muted with policy autonomy area, but still leaves problems afflicting social cohesion with the emerging issues of ethnicity, Religion, Race and Inter-Group (SARA). Malfunctions to the second component the legal system of the identified by Lawrence Friedmann in the theory of "legal system", be the main factors that affect the reality of enforcement legal gross human RIGHTS violations future then, even if the legal instrument specialized products legislation in the field of human RIGHTS, namely LAW No. Thirty nine Year 1999 on human RIGHTS and the LAW No. 26 Year 2000 on the Court HAM has been promulgated as an element of the substance of the law (legal substance), the legal system may not function optimally because the two components namely the structure of law and legal culture less support.

Settlement of the matters alleged gross human RIGHTS violations of the past through the judicial in Court Ad Hoc human RIGHTS first level, the level of the appeal and the level of cassation shows the dynamics of the interests of social, moral life and interpretation legal norms of society that is reflected in the Verdict The judge.According to the Figures the thought of the realism of the law in the United States, Oliver Wendell Holmes stated that the behavior of the Actual (patterns of behavior) Judge, determined by : 1). Norms the law and its interpretation; 2). Moral life; 3). social interests. More further, Holmes stated, the Decision of the the court is based on what can be done the court, not based on the thought-thinking of deduction abstract

of general rules and basics thinking ideological is not clear. Thus the Verdict of the Judge in the case of gross human RIGHTS violations past the true is the extraction of interpretation of legal norms, moral values and social interests that live in the society and became a glance the nation.

### **B. The Completion Of The Non-Judicial against human RIGHTS Violations The Weight Of The Past In Review Of Sociology Of The Judiciary.**

Thinking the law of the sociological of Benjamin Nathan Cardozo, revealed that the law should be adjusting to change-changes in society. Standard a standard that is recognized community as well as the forecast value- nilaiobyektif is a the unity and consistency in the law, despite the absence of a decision the subjective nature of the judge. Social forces have the influence of the instrumental to the formation of the law (logic, history, custom, usefulness, moral standards). View Cardozo quite right used to understand the problem of settlement of the case gross human RIGHTS violations of the past which has a political dimension, social and historical. For example The events of the Year 1965/1966 cases that alleged crimes of humanity against supporters of the Communist Party Indonesia (PKI) that is done by the Military and community groups after the events of the murder of officer high of the Army on September 30, 1965. At least almost all cases the alleged gross human RIGHTS violations future then have a charge of similar, so regardless of the consideration technical judicial which became the basis such cases have not been eligible done The investigation by the Attorney general, can also be considered from the angle of view the sociological law with refer to the Ruling of the Court of human RIGHTS Ad Hoc on 2 previous case, to determine the choice of an alternative the settlement of such cases in addition to through the court.

Alternative completion gross human RIGHTS violations of the past through national reconciliation. Street non judicial fixed bound on the principle of basic principles of the settlement of the case the case of gross human RIGHTS violations that impunity is not justified, with four key pillars, namely the Right Of Justice, the Right to the truth,

The right to reparation and Guarantees ketidakberulangan, the disclosure of actors and options responsibility and liability the provision of compensation, restitution and rehabilitation to the victims/expert heirs of the victim's family be dependents of the state. Bids the completion of the cases of human RIGHTS violations the weight of the past through the outside the court (out of court settlement) be the options given experience the completion of the case gross human RIGHTS violations of the past for the case of East Timor in 1999 and the Case of Tanjung Priok 1984 believed to be not optimal and not effective moreover, the defendants on the third the case was disconnected "smoke", regardless of the jurisdiction in the proof should be considered the difficulty of obtaining and collect sufficient evidence to make light of the occurrence of the events of the gross human RIGHTS violations the past and the defendants as the culprit.

One of the essence of the settlement is how reveal the truth and provide compensation to the victim or the victim's family as well as build a reconciliation to the integrity of the nation, according to the principle of deemed realistic to be grip though not satisfy all parties, rated the most realistic as a solution. Principle the principle of the completion of the contemplated is:

- a. The principle of completion done with not based on a case by case basis, but look at the roots of the problem as the issue of political regimes has committed an offense active with 'delict by commission' or any tax with 'delict by ommission' against its own people.
- b. The motive of the disclosure the truth as part the integral of the settlement does not intended as a eksepresi revenge can trigger a defensive stance from related parties as a person. Crime performed regime done by and on behalf of the institution, so that the mention of the fact that personal concerns specific not the goal, but rather only the fact that as far as possible prevented so as not to cause the effect revenge and the effect of attitude defensive not resolve the problem.

- c. The process of completion done through the disclosure of the truth in a transparent and accountable followed by reconciliation efforts and recovery in accordance with the the principle of 'restorative justice'. The settlement process should be considered equally important with the results of the wish achieved, so semangat openness, involvement society, and the victim or the heirs should seen as a process that an absolute must do to up to the completion of the a really thorough.

Law enforcement in the field Human RIGHTS in accordance with the provisions of Article 19, paragraph (1) letter g ACT No. The 26-Year 2000 about the human RIGHTS Court, the authority of the Attorney general as The investigator and the Prosecutor General case gross human RIGHTS violations of the past is in order to follow up any results of the investigation Commission HAM. However embossed polemic the completion of the cases of human RIGHTS violations the weight of the past between the Attorney general with the national human RIGHTS Commission. The prosecutor's office Supreme opinionated if the results of the investigation of the national human RIGHTS Commission enhanced to the stage of Investigation then the Prosecutor's office requires Ad Hoc human RIGHTS court. Mechanism the formation of the Court of human RIGHTS Ad Hoc for the completion of the case gross human RIGHTS violations of the past before the entry into force of the LAW Court HAM. Then The Attorney General find the evidence enough that there has been a violation of HAM weight of the past, then based on the results of the findings The DPR issued a recommendation the formation of the Court of human RIGHTS Ad Hoc to the President. As never happened in the government President Gus Dur and Megawati Sukarnoputri in the case of violation HAMBerat past The case of East Timor in 1999 and The Case Of Tanjung Priok 1984.

The resolution of the case gross human RIGHTS violations of the past enough public attention and become a burden on the nation's history be homework every the government and the President who have been served since the reformation but until now it has not been met with

the settlement. Path selection resolution through peace "islrah" never be the hope as an alternative form of settlement gross human RIGHTS violations through Truth and Reconciliation commission (TRC) but then, the LAW No.Twenty seven Year 2004 on the Commission Truth and Reconciliation cancelled by a Court Decision The constitution on December 7, 2006 before the commission can complete the tasks mandated.

There are currently 6 case gross human RIGHTS violations of the past agreed upon by the Attorney general and The national human RIGHTS commission to be completed in Non-Judicial or through the reconciliation of Cases 1965-1966; A Mysterious Shooting 1982-1985; Events Talangsari in Lampung 1989; Disappearances forcibly, the Tragedy of May 1998 and Trisakti, Semanggi I and Clover II. There are still some the parties have not agreed with the completion of the cases of human RIGHTS violations weight with the path of reconciliation with the survivors/heirs of the victim gross human RIGHTS violations of the past. The attorney general initiate Team formation Committee of the Truth and Reconciliation which was originally co-chaired by the Prosecutor's office Supreme and the national human RIGHTS Commission that its formation by the institution the government, among others, the Army The National Indonesia; Intelligence Agency The National Police Of The Republic Of Indonesia Ministry of Law and Human RIGHTS as well as the Ministry Coordinator Political, Legal and Security.

The approach of non-judicial via reconciliation still be pros and cons. Party counter-sighted that the choice of the path of reconciliation in the early that negated the judicial process first and certainly will not obtain the truth of the material above a legal event, because reconciliation is a form of alternative case resolution gross human RIGHTS violations of the past once there is the conclusion that the case- such cases are difficult to be solved. President Jokowi wants The attorney general's office to establish communication strong with the national human RIGHTS Commission to get the best solution of the completion of the cases of human RIGHTS violations the weight of the past as delivered Teten Masduki, Staff Special Communications Team President.

The Great, The Coordinating Minister For Polhukkam, the Head of the BIN, the Chief of police and The MILITARY commander with the Minister of Law and human RIGHTS associated with the settlement discussions gross human RIGHTS violations in the past. The national human RIGHTS commission assessed beyond its authority because the investigation already resolved by the Commission HAM. The commitment of the Attorney general, H.M Prasetyo to resolve the case gross human RIGHTS violations of the past that there has been no settlement be a manifestation of political will as the implementation of Nawa Cita President Jokowi.

Committee Revealer Of Truth and Reconciliation slowly start working mengaudiensi victim and the families of the victims of violations HAM weight of the past. Disclosure the truth will be a priority committee. The attorney general said the disclosure of the truth gross human RIGHTS violations is the first step in the stages of the settlement of the case. This step followed by the disclosure of the regret. Not yet determined the form of rekonsiliasinya whether the request sorry or a statement. In its development Menkopolhukam after holding several times seminars and study forming the Council of Harmony National (DKN), which consists of the elements The government, the national human RIGHTS Commission, representatives of community leaders, religious leaders, Academics and human RIGHTS Activists. Board National harmony that will formed has a duty to prepare a road map, a plan of the road the completion of the non-judicial above 6 (six) cases of violations of human RIGHTS Heavy, with a focus first on cases of alleged human RIGHTS violations The Events Of The Year 1965/1966 Cases.

## CONCLUSION

The solution to the gross human RIGHTS violations of the past that belongs to the category of crimes against human happen before the LAW No.The 26-year 2000 about the human RIGHTS Court promulgated apply the principles of retroaktifdan is the competence of the Ad Hoc human RIGHTS Court to prosecute him. By considering the law review sociological and sociology judicial above The verdict of the "smoke"

of the Judges Ad Hoc human RIGHTS court in the level of Cassation and Review on 2 (two) cases of gross human RIGHTS violations past East Timor and Tanjung Priok, it can be understood that the verdict the essence is the extraction of the interpretation of the norms legal, moral values and the interests of social life in society and became a glance the nation.

The construction of the Court of human RIGHTS Ad Hoc is politically charged and sociological than juridical. Though found the presence of obstacles juridical technical and normative above proof 6 (six) cases of gross human RIGHTS violations the past. First post the cancellation of the of the LAW No.27 2004 about the Commission of Truth and Reconciliation (TRC) has been cancelled by the Constitutional Court on the December 7, 2006. This is into consideration strong work on the completion of the non judicial. Step Prosecutor's Office pursue the completion of the non judicial together all elements the government and the national human RIGHTS Commission, an attempt to break the the burden of the past of the nation and to the progress of the nation, the consideration of sociological be the first reference and main to knit harmony nations through the completion of the non judicial with the formation of the Committee and of the Council of National Harmony as mandated in the ACT No. 26 year 2000 on the Court HAM.

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Dalam UU No. 26 Tahun 2000 tentang Pengadilan HAM disinggung mengenai dasar yuridis digunakannya prinsip retroaktif ini. Landasan yang digunakan adalah Pasal 28 huruf j ayat (2) yang berbunyi bahwa dalam menjalankan

hak dan kebebasannya setiap orang wajib tunduk kepada pembatasan yang ditetapkan dengan undang-undang dengan maksud semata-mata untuk menjamin pengakuan serta penghormatan atas hak dan kebebasan orang lain dan untuk memenuhi tuntutan yang adil sesuai dengan pertimbangan moral, nilai-nilai agama, keamanan, ketertiban umum dalam suatu masyarakat demokratis.

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Muladi.. "Tujuan Penegakan Hukum Pidana dan

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