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Retroactive Policies in Law Enforcement Related to Serious Violations of Human Rights in Indonesia

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Abstract: The purpose of this research is to know and understand the existence of legality principles in the prevailing laws and regulations in Indonesia, restorative policies in law enforcement against human rights violations in the context of law in Indonesia, and to find ideal legal concepts in law enforcement against violation human rights. The type of research that will be used belongs to the normative legal research group, namely legal research on legal principles, legal systematic, legal synchronization, comparative law and legal history. So, research or study of legal norms that are the content of the legal system.

Keywords: Human Right, Restorative Policies, Law Enforcement.

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I. INTRODUCTION

One of the identities of a constitutional state is the guarantee and protection of human rights which should be respected and upheld by state administrators and all citizens, without exception. The concept of human rights has always been a topic that is always discussed in fact in the life of the nation and state. Human rights issues relating to human life are an important element of the administration of a country in order to ensure that they fulfill human rights protection. However, fulfilling human rights protections is still a scourge that is often debated.

In criminal law, there are several principles which have become the basis for the application of the provisions contained therein. These principles are the principle of legality, the principle of non-retroactive, the principle of law can be retroactive, the principle of active nationality, the principle of territoriality. and various other principles.

The principle of retroactivity is a legal principle that can be applied retroactively, which means that the newly created law can be applied to criminal acts that occurred in the past as long as the law regulates the act, for example for gross human rights violations which are based on Article 1 section (1) of Law of the Republic of Indonesia Number 1 of 1960 on the Criminal Code (hereinafter referred to as Law No. 1 of 1960), regulates that "*An act cannot be punished, except based on the strength of the existing criminal legislation*".

II. STATEMENT OF THE PROBLEM

1. How is the existence of the legality principle in the laws and regulations of Indonesian law?
2. What is the restorative policy in law enforcement against human rights violations in the context of Indonesian law?
3. What is the ideal concept in the Retroactive policy against gross human rights violations?

III. THEORETICAL FRAMEWORK

A. Theoretical Basis

1. Rule of Law Theory

In Indonesian literature, the term rule of law is a direct translation of the rechtsstaat, it was stated by Soetandijo (Fuady, 2011, p. 179). Besides that, the term rule of law is also used which is also meant as a rule of law. Even though the three terms are different, the aim is the same, namely to limit the occurrence of arbitrary abuse of power, so that human rights are protected.

The rule of law theory essentially means that the law is supreme and an obligation for every state administrator, or government to obey the law (subject to the law), there is no power above the law, everything is under the law (under the law). rule of law), with this position there should be no arbitrary power (misuse of

power) In addition, there is a view which adds that the essence of a rule of law includes (1) legality (rule of law) and for that it is necessary, (2) independent judiciary, (3) guarantee of human rights, and (4) good governance. The last two elements are stated as guarantees of human values that are inward and outward (between countries).

Law is a very broad and abstract concept, therefore Immanuel Kant's statement is correct, that "*noch suchen die juristen eine definition zuechrem begriffe von recht*", no jurisman can provide the most precise definition of law. Law has too broad an aspect, thus giving a definition of law depends a lot on which aspect we see it (Effendy, Ali, & Lolo, 1991).

a. Rechtsstaat Concept

The rationale behind the emergence of rechtsstaat is the demand for people's freedom (*liberte du citoyen*), not state freedom (*gloire de e'etat*). The purpose of rechtsstaat was to maintain legal order (*rechts orde*), which at that time was related to the principle of ownership (*Privaat eigendom*) and self-liberty (*persoonlijke vreijiheid*). Thus the state is a servant of society who is assigned and trusted to maintain order (Budiardjo, 1985, p. 25). Such an idea was finally able to move the people to end the absolute monarchy system that had been going on since the 1500 - 1700s in Europe.

At the end of the 19th century, the limitation of state power was implemented by means of a written constitution, which explicitly guarantees the human rights of citizens, as well as regulates the separation of state powers, so as to minimize the possibility of abuse of power. The juridical formulation and principles are hereinafter referred to as rechtsstaat. Thus, the constitution is the embodiment of the highest law that must be obeyed by the state and even government officials. Government by laws, not by man, the rule of law is not the rule of man (government based on the law, not by someone).

b. Concept of the Rule of Law

According to Hadjon (1998), the difference between the concept of rechtsstaat and the rule of law lies in: first, the concept of rechstaat is born of a struggle against absolutism, so that its character is revolutionary. On the contrary, the concept of the rule of law develops evolutionarily. This can be seen from the contents or the rechtsstaat criteria and the rule of law criteria. Second, the rechtsstaat concept rests on a controversial legal system called Civil Law or 'Modern Roman Law', while the concept of 'the rule of law' rests on a legal system called 'common law'. The third "characteristic of 'civil law' is administrative, while the characteristic of 'common law' is 'Judicial'. Such differences in characteristics are due to the background of the king's power. In Roman times, the dominant power of the king was to make regulations through decrees. This power is then delegated to administrative officials so that administrative officials make written directions for judges on how to decide on a dispute. So large is the role of State Administration that it is not surprising that in the continental system a new branch of law has emerged called "administrative droit". and the essence of administrative droit is the dispute settlement institution between the State Administration and the people.

In this regard, Dicey (2007, p. 42) argues that the characteristics of a rule of law include:

1) supremacy of law, in the sense that there should be no arbitrariness, so that a person can only be punished if he violates the law;
2) equality before the law, the sense of equal standing before the law; and
3) human rights, in the sense of guaranteeing human rights by law and court decisions.

2. Human Rights Protection Theory

Human rights are rights that humans have because they are human (Howard, 2000, p. 1). The concept of human rights makes differences in status such as race, gender and religion irrelevant politically and the law demands equal treatment regardless of whether the person concerned fulfills the obligations towards his community (Howard, 2000, p. 1).

One of the characteristics of the rule of law is the guarantee of protection of human rights by the state to citizens. The meaning of the guarantee of protection here is that the state has an obligation to promote, protect, guarantee, fulfill, ensure human rights (Pratiwi, Cekli Setya, 2013).

3. Law Enforcement Theory

Law enforcement is an effort to bring the ideas of justice, legal certainty and social benefits into reality. So law enforcement is essentially a process of embodying ideas.

Law enforcement is the process of carrying out efforts to uphold or function legal norms as a guide for actors in traffic or legal relations in public and state life.

Factors affecting law enforcement according to Soekanto (2004, p. 42), namely:

a. Legal Factors

In the practice of law enforcement in the field, there are times when there is a conflict between legal certainty and justice, this is because the conception of justice is an abstract formula, while legal certainty is a procedure that has been determined normatively.

In fact, a policy or action that is not completely based on law is something that can be justified as long as the policy or action is not against the law. So in essence, law enforcement includes not only law enforcement, but also peace maintenance, because law enforcement is actually a process of harmonizing the values of principles and real patterns of behavior aimed at achieving peace.

b. Law Enforcement Factors

The legal function, mentality or personality of law enforcement officers play an important role, if the regulations are good, but the quality of the officers is not good, there is a problem. Therefore, one of the keys to success in law enforcement is the mentality or personality of the law enforcer.

c. Supporting Facility or Facility Factor

Factors or supporting facilities include software and hardware, one example of software is education. The education received by the police today tends to be practical in conventional matters, so that in many cases the police experience obstacles in their objectives, including knowledge of computer crime, in special crimes which have been given authority to prosecutors, this is because juridical, the police are considered incapable and unprepared. Although it is also realized that the duties that the police must carry out are vast and numerous.

d. Community Factors

Law enforcers come from society and aim to achieve peace in society. Every member of the community or group at least has legal awareness, the problem that arises is the level of legal compliance, namely high, moderate, or insufficient legal compliance. The degree of community legal compliance with the law is one indicator of the functioning of the law in question.

e. Cultural Factors

Based on the concept of everyday culture, people talk about culture so often. Culture, according to Soerjono Soekanto, has a very large function for humans and society, namely to regulate people so that people can understand how they should act, act, and determine their attitudes when they relate to other people. Thus, culture is a basic line of behavior that establishes rules about what to do and what is prohibited.

4. Legal Protection Theory

Legal protection is providing protection to human rights that have been harmed by other people and this protection is given to the community so that they can enjoy all the rights provided by law or in other words, legal protection is a variety of legal measures that must be provided by law enforcement officials to provide a sense of security, both physically and mentally from disturbances and various threats from any party (Rahardjo, 2000, p. 74).

Legal protection is the protection of dignity and dignity, as well as recognition of human rights possessed by legal subjects based on legal provisions from arbitrariness or as a collection of rules or rules that will protect one thing from other things. With regard to consumers, it means that the law provides protection for the rights of customers from something that results in the fulfillment of these rights (Hadjon, 1998, p. 25).

5. Legal System Theory

According to Hartono (1991, p. 38), the legal system has a very broad aspect, not only limited to laws or other written regulations. But broader than that, law has many aspects and consists of many other components or elements, such as legal philosophy, sources of law, jurisprudence, customary law, law enforcement, legal services, the legal profession, legal institutions, legal institutions, legal procedures and legal mechanisms, procedural law, legal education, legal behavior of the public and legal officials, or the behavior of the legal profession, legal awareness, and so on. All that is what builds the legal system, namely the relationship and influence of influences one another between the various components or elements mentioned above. Which aspects or elements are considered the most important, depending on the legal philosophy adopted by the legal system in question.

A legal system consists of three elements that have certain independence. The elements that make up the legal system are (Bruggink, 1996, p. 141):

a. Ideal element. This element is formed by the meaning system of the law which consists of rules, rules and principles. This element is called the legal system by jurists. for sociologists of law there are other elements.

b. Operational element. This element consists of all organizations and institutions that are established in a legal system which includes the job developers who function within the framework of an organization.
c. The actual elements. This element is the whole of decisions and concrete actions related to the system of meaning and law, both from office developers and from members of society in which there is a legal system.

6. Theory of Justice

Justice is a result of decision making that contains truth, is impartial, can be accounted for and treats every human being to an equal position before the law. The realization of justice can be carried out within the scope of the life of the state community and the life of the international community shown through impartial attitudes and actions and giving something to others which is their right. The word justice in English is justice which comes from the Latin language justitia. The word justice has three different meanings, namely:
a. attributively means a quality that is fair or fair (synonym of justness);
b. as an act means the act of carrying out the law or action that determines rights and punishments or punishments (synonym for judicature); and
c. people, namely public officials who have the right determine the requirements before a case is brought to court (synonym judge, jurist, magistrate).

B. History of Human Rights Development

The idea of human rights arose in the seventeenth and eighteenth centuries AD, apparently as a reaction to the absurdity of the kings and feudal lords of that era towards the people they ordered or the humans they employed. Human society in the past consisted of two layers. large, the upper strata, the minority who have rights and the lower layers, the majority who have obligations.

It is estimated that the history of human rights first emerged from Europe. John Locke, a 17th century philosopher, argued the existence of this natural human right. Natural rights which are often referred to as human rights or human rights include the right to life, the right to own and the right to freedom (Team, 2015).

Human rights in Indonesia are also recognized, respected and guaranteed by The 1945 Constitution of the Republic of Indonesia (hereinafter referred to as The 1945 Constitution). In the preamble and in the articles in The 1945 Constitution, it is already stated regarding the guarantee of human rights, it's just that the emphasis is different.

Indonesia as a constitutional state based on Pancasila and The 1945 Constitution, constitutionally adheres to the principle of guaranteeing, respecting and protecting human rights. Based on the principle of harmony and harmony in human life as an individual society, the State recognizes and upholds human rights, which are known to the people as originating from their nature as individuals as well as social beings who get very real guarantees in the preamble of The 1945 Constitution and the Trunk of his Body and in various other statutory regulation products (Naning, 1983, p. 28).

C. Law and Human Rights

The law is a set of norms indicating what should be done or what should happen. From the point of view of the working process, we see the regeneration of legal norms. This process is usually called the concretization process, where religious norms with a more general content are derived to be more specific. Thus, the division of law is seen as a tiered arrangement (Stuffenbou). With the science of dogmatism, the operation of the law is then connected with the problem of law application, interpretation, construction and law enforcement and so on (Rahardjo, 2000, p. 48). Atmasasmita (2010, p. 113) stated that:

"Law and law enforcement in this reform era cannot be separated from the behavior of the ruling political elite. The relationship between law and law enforcement in politics can only occur in a country that cannot be democratic where transformation. The rule of law, promotion of law and protection of human rights (hereinafter referred to as Human Rights) are sidelined. Law enforcement in the transitional era must not recede because in the academic world jurisprudents always say "even though the sky is about to collapse the law must still be enforced."

Thus, one of the important consequences of the recognition of basic rights by the Government of the Republic of Indonesia and all Indonesian people is to make it happen in the form of laws and regulations as signs for the creation of legal certainty and legal justice. The essence of law formation is in regulating the behavior of community members and law enforcement officials so that it is hoped that there will be legal certainty, legal protection and legal justice in upholding human rights.

According to Moh. Mahfud M. D. (2001, p. 127), human rights are defined as rights inherent in human dignity as creatures created by God and these rights are subordinate to humans from birth to the earth so that these rights are innate (natures) not a gift from humans or the state.

D. Concept of Serious Human Rights Violations

1. Universal Concept of Serious Human Rights Violation

Even though there is no generally agreed definition, there is some agreement among experts that the definition of human rights violations is a violation of the obligations of the state that arises from international instruments. Violation of the state in its obligations can be done either by its own actions or due to negligence. Meanwhile, other formulations related to human rights violations are actions and negligence of the state against international legal norms (Marzuki, 2011b, pp. 68-69).

In line with this, according to Cherif Bassiouni in Riyadi (2012, p. 107) that an act against international law can qualify as an international crime if it meets three factors, namely:

a. the act violates very significant international interests;

b. the act violates the shared values of the world community;

c. said act involves more than one country or crossing national borders, either because of the perpetrator or the act itself.

So far, the boundaries that can be categorized as gross human rights violations that violate the norms of international law are still guided by what has been established by the International Law Commission on the draft for the implementation of crimes against crimes for peace and the safety of mankind.

2. Concept of National Gross Human Rights Violations

Juridical, gross human rights violations in Indonesia are based on Article 104 of Law of the Republic of Indonesia Number 39 of 1999 on Human Rights (hereinafter referred to as Law No. 39 of 1999). Based on the explanation of Article 104 section (1) of Law No. 39 of 1999 state that "*what is meant by "gross violations of human rights" are mass murder (genocide), arbitrary or extrajudicial killings, torture, enforced disappearance, enslavement, or systematic discrimination*". From the explanation of Article 104 section (1) of Law No. 39 of 1999, it is clear that the types categorized as gross human rights violations refer to several types used in the Geneva convention, namely acts of genocide, arbitrary murder, torture, enslavement or acts of discrimination.

Furthermore, based on Article 7 of Law of the Republic of Indonesia Number 26 of 2000 on the Human Rights Court (hereinafter referred to as Law No. 26 of 2000), there are only two crimes adopted from the Rome Statue of 1998, namely crimes of genocide and crimes against humanity. Meanwhile, international crime offenses other than the two types of crimes adopted by the law, such as war crimes and crimes of aggression, were not adopted. Adoption was carried out to ensure that there was accountability for international crimes that occurred in Indonesia. If the crime is included in Jus Gogens, then every country has the responsibility to try it.

E. Retroactive Principles and Scope

The principle of retroactivity is the opposite of the principle of legality, namely the principle of the time limit of the validity of criminal law. The direction on the legality principle is no criminal act, and also no crime, except on the basis of the strength of the regulations that govern it, before the act is committed (*nullum delictum nulla poena sine praevia lege*) (Moeljatno, 1987, p. 25). The principle of legality (non-retroactivity) is the main principle used in the application of criminal legislation in Indonesia, as based on Article 1section (1) of Law No. 1 of 1960.

From the description of the explanation of the legality principle above, it can be concluded that the retroactive principle is the principle of the retroactive application of criminal law. In other words, a person's actions before the existing legal rules and provisions can be charged with the law issued after the act has been committed.

The application of the retroactive principle cannot absolutely be enforced without basis. International law only applies the retroactive principle to limited cases of gross human rights violations which are classified as crimes against humanity on the following grounds (Setiyono, 2010, p. 329):

1. The application of the principle of non-retroactivity (legality) only applies to ordinary crimes as ordinary crimes that occur in the jurisdiction of a country. So that serious human rights crimes that are classified as extra ordinary crimes can apply the retroactive principle.
2. The principle of retroactivity does not apply to perpetrators of gross human rights violations as extra ordinary crimes, if there is already an international humanitarian law regulation that regulates and is accepted by the law of a country. This means that there are laws that regulate before the act is committed.
3. There has been jurisprudence in IMTN (International Military Tribunal Nurembreg in 1946), ICTR (International Criminal Tribunal For Rwanda 1994) and ICTY (International Criminal Tribunal For Former Yugoslavia 1993.

F. The Existence of the Principle of Legality in the Rule of Law

The principle of legality (legaliteitsbeginsel) is the main principle that becomes the basis for every government and state administration in all countries of law, especially those in law states that adhere to the Civil Law System. According to Van Wijk, in his book Hoofdstuken van Administatief Rechts, argues that the application of the principle of legality was originally introduced in tax collection by the State, which is reflected in the prevailing adegia in England No Taxation Without Representation, or in America with the motto "*Taxation Without Representation is Robbery*". It can be understood that tax collection or collection can only be done after there is a law that regulates it. This principle is behind the birth of the principle of "*de heerschappij van de wet*" (statutory power), which means "*dat het bestuur aan de wet is onderworpen*" (That the government must obey the law) or "*het legalitsbeginsel houdt in dat alle (algemene) de burgers bindende bepalingen op de wet mocten berusten*" (the legality principle dictates that all provisions that bind citizens must be based on law). This legality principle is a principle that applies in a rule of law which is often formulated in a typical way in the phrase "het beginsel van wetmotigheid van bestuur" (the principle of government based on law).

IV. DISCUSSION

A. The Existence of the Principle of Legality in the Laws and Regulations in Indonesia

The principle of legality is the principle that applies the law to things that occur after the regulation is implemented (Soedarto, 1990, p. 22), as based on Article 1section (1) of Law No. 1 of 1960. The principle of legality in Indonesian national law is the main principle used in the application of laws that have long been recognized and applied as contained in the Law No. 1 of 1960. However, it turns out that even this legality principle can be overridden as based on Article 1section (2) of Law No. 1 of 1960, regulates that "*If there is a change in legislation after the act has occurred, then the lightest provision must be used for the defendant*" meaning that if indeed the statutory regulations a new or later punishment which will be expected if indeed the act contained in the new or later legislation is more profitable for him. This means that it is the same as declaring the retroactive effect of a statutory regulation.

Even though it deviates from the legality principle, this deviation can indeed be justified because it is a deviation that is beneficial to the person concerned (the defendant). In other laws and regulations that stipulate the right to human beings are The People's Consultative Assembly Decision of the Republic of Indonesia Number XVII/MPR/1998 on Human Rights, but in it there is no confirmation of the principle of legality but appears in Article 28 I of The 1945 Constitution where it is combined with rights. Other human rights, such as the right to life, the right not to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be personally recognized before the law, and the right not to be prosecuted on the basis of retroactive law are rights human rights that cannot be reduced in any way. Based on Article 4 of Law No. 39 of 1999 regulates that:

"The right to life, the right to not to be tortured, the right to individual freedom, to freedom of thought and conscience, religion, the right not to be enslaved, the right to be recognized as an individual and equal before the law, and the right not to be prosecuted retroactively under the law are human rights that cannot be derogated under any circumstances whoever."

Furthermore, Article 18 section (2) of Law No. 39 of 1999 regulates that:

"Every person may not be charged or held guilty of a penal offence for any act or omission which did not constitute a penal offence under prevailing legislation, at the time it was committed."

With regard to the right to be prosecuted on a retroactive legal basis, this is where a dilemma begins with regard to the application of Law No. 39 of 1999 and the Law No. 26 of 2000. These two laws were enacted and promulgated on 23 September 1999 and 23 November 2000. Subsequently an ad hoc Human Rights Court was formed by applying these laws to those accused of being the perpetrators of serious human rights crimes such as the East Timor case which occurred in the previous time. If it is analyzed at the time when it came into effect and its application, it is precisely what happened before the enactment of the two laws mentioned above. This was a problem at that time because the Indonesian human rights court retroactively imposed a law.

Based on the foregoing, it can be clearly stated that the application of these two laws to individuals who were convicted as perpetrators of serious human rights crimes in the East Timor case was illegitimate and must be dismissed. However, there is a provision that is rather strange and raises a question mark on Law No. 39 of 1999 which allows for an exception to the principle of legality, but that possibility is placed in the explanation of Article 4 the third sentence of Law No. 39 of 1999 state that "*The right not to be prosecuted under the retroactive law can be excluded in cases of gross human rights violations classified as crimes against humanity*". The problem is the binding nature of an explanation of a law itself which actually has a positive binding legal force. If that is the case, the substance as stated in the explanation should not be included in the law, but a separate article must be made in the law or a wrong paragraph in the law must be made.

The principle of legality, namely the principle of the time limit of the validity of criminal law. The principle of legality is neither a criminal act nor a crime, except on the basis of the strength of the laws and regulations that have regulated it, before the act is committed (Moeljatno, 1987, p. 25). Referring to the provisions of the legality principle, an action can be said to be a criminal act if:

1. Mentioned or included in written statutory regulations. This means that the actions of a person that is not listed in the law as a criminal act, cannot be charged by the law. So with this principle, unwritten law has no power to apply.
2. Legislation (legal rules and provisions) must be in place before the occurrence of a criminal act. This means that the law cannot be applied retroactively. As a consequence, an act of a person committed before the issuance of a valid statutory regulation cannot be charged with a law issued after the act has been committed.

According to Farid (1995, pp. 144-147), he suggested that the nullum delictum principle be based on the Indonesian nation's weltenschauung. The principle of legality must be understood according to the legal values of the Indonesian nation itself, sourced from the laws that live in society and formulated in clear and firm legal provisions. If this is enforced, a balanced understanding of the law will automatically ensure legal protection and legal certainty. In understanding the formal-material principle of legality, the main concern is the law itself. The basis for this understanding is very important considering that only through legal products in the form of laws can every right of the community be reduced or taken if there is a violation of the law. However, this does not mean the non-recognition of legal provisions under the law. Legal provisions that are under the law are still recognized as long as their contents and materials are based on law and do not contradict the law regarding the applicable customary law and life in society in this view is still recognized as long as its enforceability is indicated by law and its contents are not against the law. This recognition must still be maintained considering that most Indonesians are subject to customary law. Therefore, to accommodate this, the understanding of the principle of legality must be formal in the sense that its existence is recognized in a particular society and bases itself on national law.

The form of this legal provision itself can vary, in the form of statutory regulations or unwritten law. In unwritten law, it must be seen whether there is a clear parameter regarding the presence or absence of an act that is prohibited by the customary community. This parameter can be seen from the first, whether or not the community supports the law; second, the existence of customary institutions as law enforcers; third, the existence of sanctions and enforcement of sanctions for violations that occur. The basis for the enforcement of this unwritten law may not be based on material understanding but must refer to the provisions of the applicable laws. For example, in the case of the local adat research (Balinese moral offenses), the enforcement of this customary law is still based on Article 5 section (3) point b of Emergency Law of the Republic of Indonesia Number 1 of 1951 on Temporary Actions for Implementing Unitary Structure, Power and Agenda of Civil Courts (hereinafter referred to as Emergency Law No. 1 of 1951) juncto Article 5 section (1) of Law of the Republic of Indonesia Number 48 of 2009 on The Judicial Powers. This is where the importance of a new understanding of the principle of legality must be based on a reminder of the importance of maintaining the principle of legal certainty and the principle of justice in a way that is realized.

B. Retroactive Policies in Law Enforcement Against Human Rights Violations in the Context of Indonesian Law

1. Retroactive Principles in Human Rights Construction

The idea of human rights was discussed before the independence of the Indonesian State, namely at the time the Committee for Preparatory Efforts for Indonesian Independence (BPUPKI). However, there are differences among the committees to include human rights provisions in the constitution. Supomo argues that the state does not need to guarantee human rights because according to him:

a. Human rights are considered excessive;
b. is imagined to have a negative impact and
c. as individual rights, always under the common interest.

According to (Marzuki, 2011a), that:

"HAM does not require grund-und Freibeitsrechtbe guarantees from the individual contra staat, because the individual is nothing but an organic part of the staat that organizes the staat, and vice versa by politics that stands outside the environment of a person's atmosphere of independence."

According to Atmasasmita (1996, pp. 52-53), that the application of the retroactive principle in gross human rights violations is still a dilemma due to several reasons, namely:

a. Human rights violations are new events in the history of the Indonesian nation and there is no or no regulation in the laws and regulations that were in force at that time in Indonesia
b. Serious human rights violations are not synonymous with violations of applicable criminal laws and regulations and for this reason the prohibition on the interpretation of analogy still applies.

c. The retroactive enforcement of the Law on Human Rights Courts with material content regarding criminal provisions, on the one hand, violates legal principles, does not apply retroactively, however, if the legal principle is not retroactive, it means that the Law No. 1 of 1960 is enforced against gross human rights violations. This means that gross human rights violations are considered the same as ordinary crimes (Ordinary Crime). Such a method would of course have an unfortunate impact, namely that it could invite the formation of an ad hoc International tribunal for East Timor. The statutes of the ad hoc tribunals of Rwanda, and the former Yugoslavia, affirm that if national human rights violations view human rights violations as ordinary crimes, then international courts will replace national courts even if the Rome Statute does not recognize such a provision.

d. The application of the retroactive principle requires a very strong justification, both from the point of view of philosophical, juridical and sociological considerations.

Some experts are of the view that the application of the retroactive principle is contrary to the legality principle adhered to by all countries and legal systems. The principle of legality stipulates that a legal provision can only be applied for a future period of time and cannot be applied for a period of time that has passed. Meanwhile, some other legal experts are of the view that the application of the retroactive principle can be enforced if indifference demands so. It has a strong foundation in national and international legislation.

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

2. The Principle of Retroactivity in the Construction of Criminal Law

According to Philip Jones in Fuady (2011, p. 180), explaining that the prohibition of retroactive provisions of criminal law, states that:

"There's the further danger that the creation of new crimes under the guise of developing old law will promote uncertainty concerning the extent of the legal rule and when he does not violate the law it will never be certain if the law can be made later, after the act has occurred."

Thus the retroactive principle is considered inconsistent with the concept of rule of law, one of which is legal certainty. The principle of retroactivity is considered to create legal uncertainty and therefore will reduce the concept of rule of law. The rejection of the application of the retroactive principle in criminal law is also based on the reason that the retroactive principle is actually contrary to justice and opens up potential arbitrariness from the authorities. Without thinking too far, everyone will certainly be able to ask whether it can be said to be fair, if someone commits an act which at the time the act is committed is still considered legal or does not violate the law and is subject to punishment based on the regulations that come out after the act is committed.

Based on the application of the retroactive principle, it is considered that it does not provide the possibility for people to know what to do or what not to do. With the application of the retroactive principle, this can be seen clearly when referring to historical facts, which have shown some arbitrary practices. And this is what then gives birth to the four problems described above, namely reflecting the principle of lex talionis, human rights violations, legal uncertainty and injustice. Those are the reasons put forward by those who reject the application of the retroactive principle in criminal law. However, even if this principle is to be applied in criminal law, its application must meet rigid and limitative criteria, including:

a. There is a correlation between the Emergency Constitutional Law (*staatsnoodrecht*) and criminal law. The retroactive principle can be applied if the state of emergency is only temporarily active and in a limited (abnormal) jurisdiction with the principles of emergency law (abnormal recht), therefore the nature of the placement of this principle is only temporary and in a limited jurisdiction, given a criteria the validity period and the nature of case handling are clear (case by case);

b. The retroactive principle is not allowed to contradict Article 1 section (2) of Law No. 1 of 1960, which is imperative in nature, meaning that the nature of the emergency is enforced by the retroactive principle which is justified by legislation on the grounds of exceptionality, is not in a situation that is detrimental to a suspect/defendant.

c. The substance of the retroactive rules must still pay attention to the lex certa principle, namely the substantial placement of a rule in a firm manner and does not cause multiple interpretations, so that it is not used as a means for the authorities to commit an act that is categorized as abuse of power.

Law enforcement practices for gross human rights violations occurred before the promulgation of the human rights court law, there were several serious human rights violations on trial such as gross human rights violations in East Timor after the popular consultation in 1999, the Abepura Papua case and etc. Although it must be admitted that the trial process of these cases fell short of the expectations of the community because it

did not touch the main perpetrators, the legal sentences were too light and there was no restitution or compensation for the victims.

3. The existence of the Retroactive Principle in Indonesia

According to Arief, Barda Nawawi (1998, p. 10), he sees a shift in the principle of legality by emphasizing the development or recognition towards the principle of material legality based on the provisions in Article 15 section (2) of Law of the Republic of Indonesia Number 12 of 2005 on Ratification of the International Covenant on Civil and Political Rights (ICCPR), in the case that the provisions in the ICCPR are an exception to the non-retroactive provisions of the convention. The statement that emerges is whether the material legality principle is the same as the retroactive principle. The principle of material legality in its application in Indonesia has a legal basis, namely Article 5 section (3) point b of Emergency Law No. 1 of 1951 and then it is responded to in Article 1 section (3) of the Draft Bill of 2004 on the Criminal Code, which respect the laws that live in society.

Based on the statutory order, of course Law No. 39 of 1999 and Law No. 26 of 2000 are contradicting Article 28 I section (1) of The 1945 Constitution. If so, can the principles of international law override the democratic law and non-derogable rights provisions in the provisions international humanitarian law can override a country's constitution (Atmasasmita, 2001, p. 147).

Efforts to achieve justice in the enforcement of human rights are dynamic processes that take a long time. These efforts are often also dominated by forces fighting within the general framework of the political order to actualize it. In upholding human rights, what is urgent at that time to be actualized is how to safeguard demands for past human rights violations and provide signs so that they will not be repeated in the future.

The affirmation of human rights in every form of legislation in Indonesia as mentioned above, is a manifestation of government legal politics in implementing the essential values contained in human rights. A paradigm shift from an authoritarian government system to a governance system that tends to be democratic is now clearly visible from the characteristics of the legal products it produces.

4. The existence of Human Rights Courts in Law Enforcement Against Human Rights Violations

The term Human Rights Court itself, for the first time is formally based on Article 104 section (1) of Law No. 39 of 1999 regulates that "*to prosecute gross violations of human rights, a Human Rights Courts is established within the General Courts*".

The process of establishing a human rights court begins with the amendment to The 1945 Constitution as the highest legal basis, then successively was followed by:

a. Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 of 1999 on the Human Rights Court;

b. Law of the Republic of Indonesia Number 39 of 1999 on Human Rights;

c. Law of the Republic of Indonesia Number 26 of 2000 on the Human Rights Court;

d. Presidential Decision of the Republic of Indonesia Number 53 of 2001 on Establishment of Ad Hoc Human Rights Court on the District Court of Central Jakarta;

e. Presidential Decision of the Republic of Indonesia Number 96 of 2001 on Amendment to Presidential Decision Number 53 of 2001 on Establishment of Ad Hoc Human Rights Court on the District Court of Central Jakarta.

Punishment for human rights violations can not only provide a sense of justice for victims and families of victims of human rights violations but also require compensation, rehabilitation and restitution.

The issue of enforcing human rights law for perpetrators of human rights crimes also has many obstacles both politically and economically, so there is still good will from the system and power holders. Law enforcement in the field of human rights is part of law enforcement in Indonesia as a whole. Rule of law and enforcement of justice are two sides of the same coin. In this regard, protection of human rights is constitutional protection which is part of the law in Indonesia. In the rules and law enforcement, there is also regulation and enforcement of human rights. Implementation of the enforcement of human rights law to achieve justice requires the operation of four factors in the formation of the legal system, namely:

a. the existence of laws and regulations;

b. the existence of law enforcement officials, institutions and apparatus

c. there is support for equipment or infrastructure as well as; and

d. the existence of a community as a place of law enforcement. In its implementation, it must be seen both juridical, philosophically and sociologically.

C. Ideal Concept in Retroactive Policy Against Serious Human Rights Violations

1. Conceptions and Principles of Human Rights

Human rights are forever a moral right, so it is necessary to make clear that some demands are carried out with laws that are not considered human rights and many human rights which are not legally enforced but remain human rights.

It seems that the differences mentioned above need to be thought deductively to draw a conception of the nature of human rights. According to (Nasution, 1996) as follows:

a. Human rights are a type of rights that exist. Thus, human rights are not synonymous with rights themselves. Human rights are classified into types of moral rights even though they are also recognized as legal rights.

b. When talking about human rights, if the word human has power, then those rights cannot be equated with rights that are found in animals, angels, companies or even the state. In other words, human rights are more exclusive as human privileges.

c. Although theoretically every moral right can become a human right, at one time and in a certain place, not everything that is moral or morally constitutes a right is considered a human right. Perhaps this will be more revealed if a declaration of rights is not justified for humans. Many things are not justified for humans but only a few in a sufficiently meaningful and relevant way to take into account a formal declaration of things which are not allowed for humans.

d. If human rights are needed, they are the right justification or reason to act or avoid taking action.

e. Human rights are seen as general rights that are distinguished from special rights that derive from special relationships with other people, whether in the form of agreement, status or kinship. This view comes from a question that Felix Cohen raised to his fellow philosopher shortly after World War II. “What rights can a person be justified, not because he is my brother, my neighbor, a colleague, a religious friend, or a compatriot, but simply because he is human. There are particular difficulties in how this question is formulated. The answer can vary depending on whether we take the term human as a purely biological characteristic, or we perceive it as something normative.

f. Human rights are always seen as something fundamental (fundamental).

Jean Pictet in Setiyono (2010) explained that in the Universal Declaration of Human Right there are several principles of human rights that apply in general, including the following:

a. Principle of inviolability, which is a principle which states that every individual has the right to be respected by others, physical and moral integrity, and characteristics that cannot be separated from his personality.

b. Principle of non-discrimination, which is a principle which states that every individual has the right to get the same needs regardless of differences in gender, race, ethnicity, social status and so on.

c. Principle of security, which is a principle which states that every individual has the right to security protection and a person cannot be held accountable for an act he does not commit.

d. Principle of liberty, which is a principle which states that everyone has the right to enjoy individual freedom or independence.

e. Principle of social well-being, which is a principle which states that everyone has the right to enjoy pleasant living conditions (comfortable without interference).

In line with the development of human rights in the world, instruments for upholding human rights have also developed to ensure the enforcement of human rights in the form of international treaties, conventions and declarations not only focusing on human rights in general but also appearing special instruments in human rights such as instruments on prevention. discrimination, self-determination.

2. Serious Human Rights Violations and Human Rights Courts

The definition of normative human rights violations as based on Article 1 point 6 of Law No. 39 of 1999, explain that:

“Human rights violation means any act of person or groups of persons including the state apparatus, both intentional and unintentional or neglect, limit and or revoke the human rights of an individual or group of persons guaranteed by this Law, and do not obtain, or it is feared do not obtain fair and total legal settlement under the prevailing legal mechanism.”

From the description of the Article above, it can be said to be a violation of human rights if:

a. There is an element of actions committed by individuals or groups including state officials.

b. The act is done either deliberately or unintentionally or due to negligence which is against the law.

c. These actions are intended to reduce, prevent, limit and or revoke the human rights of a person or group.

d. Victims of human rights violations, both individuals and groups of people, do not receive, or are feared that they will not receive a fair and correct legal settlement, based on the applicable legal mechanism.

Referring to the normative laws and regulations in Indonesia (Law No. 39 of 1999 and the Law No. 26 of 2000) there is no definition/meaning of what is meant by the term gross human rights violations. Both laws only contain classifications that are included in the term gross human rights violations, this is based on Article 104 section (1) of Law No. 39 of 1999. Meanwhile, based on Article 7 Law No. 26 of 2000, regulates that massive human rights violations cover:

a. genocide;

b. crimes against humanity.

Courts against human rights are resolved in a human rights court, which is a special court under general courts. The process of completing a human rights court is the stage of investigation, investigation and prosecution.

Human Rights Courts are domiciled in the level I (province) and level II (district/city) areas whose jurisdiction covers the jurisdiction of the general court concerned. The Human Rights Court has the duty and authority to examine and decide cases of serious human rights violations. The Human Rights Court also has the authority to examine and decide cases of human rights violations by Indonesian citizens who are located outside the territorial borders of the Republic of Indonesia.

3. The Ideal Concept of Retroactive Policy in Indonesia

Provisions that are closely related to the existence of an ad hoc human rights court are provisions regarding the retroactivity of a criminal regulation. The form of an ad hoc human rights court based on Article 43 of Law No. 26 of 2000 applies to certain locus and tempus delicti refers to the form of an ad hoc international court, which among other things allows the retroactive principle to be applied. This retroactive principle is the most debated provision because it is considered contrary to the legality principle in criminal law.

The enactment of this retroactive policy has become the most controversial principle, based on Article 43 section (1) of Law No. 26 of 2000, regulates that "*massive human rights violations that occurred prior to the promulgation of this Law, were examined and decided by the ad hoc Human Rights Court*".

Although the principle of retroactivity has been allowed to occur, its implementation should still be as bite and quantitative as possible. The limitations that need to be used when applying the retroactive principle have been written by several previous researchers. However, there are several things that need to be kept in mind and emphasized when applying the retroactive principle.

For the description above, the ideal concept for retroactive policies both in criminal law and in the concept of human rights are as follows:

a. Clarify the substance in the provisions of the law regarding the application of the retroactive principle with respect to qualifying offenses.

b. To hasten the judicial process for perpetrators, although there is no set time limit for withdrawal of serious human rights crimes as is the customary international practice, the distance to withdraw is not limited because it will be naturally limited, as found in the German Nuremberg Trial which took place in 1930 and was tried in 1945. The gross human rights violations in Tokyo occurred in 1937 and were tried in 1945. Likewise with the court of the Former Yugoslavia where there was a gross human rights violation in 1991 and was tried in 1999. Serious human rights violations in Rwanda occurred in 1990 and tried in 1995 because there was an incident the death of the President of Rwanda in 1994.

c. Serious human rights cases are laden with political interests, and state and law enforcement officials must be able to master the material of serious human rights crimes. This aims to separate between legal facts and political facts. In addition, it is useful to avoid inappropriate and inappropriate judicial practices.

d. Align human rights and basic human obligations as an effort to seek justice.

e. The principle of retroactivity can be applied to extraordinary crimes (extra Ordinary Crime) with unclear legal rules such as gross human rights violations at the time when Law No. 39 of 1999 and Law No. 26 of 2000 was not yet born.

The retroactive principle can be applied if the imposed limitations are clear in a statutory regulation, both local laws in this case national and international legal rules, so that there are no longer long debates and pros and cons in enforcing the retroactive principle. made clear. However, the application of the retroactive principle must be limited and used when the State is in an urgent or emergency situation. Because human rights are natural rights that need to be protected.

The retroactive policy is none other than safeguarding the benefit of society because if there are two contradictory principles, such as the legality principle with the retroactive principle, Islam is taught that the least harm that must be taken is the gross human rights violations that have occurred in Indonesia, such as the case of Tanjung Priok, and In other cases that have occurred, rules such as of Law No. 26 of 2000 have been made to try these human rights violations.

Serious human rights violations are extra ordinary crimes, which in law, the court system in Indonesia is included in a special court under the general court. This crime is a crime against humanity that must be prevented for the wider benefit. If it is related to the theory of punishment in a broad sense, any form of human

rights violation must be sanctioned so that the deterrent effect on the perpetrator and the effect of preventing others, because human rights are a basic human need that must be protected by law.

The retroactive policy of serious human rights violations in the past became a dilemma at that time because human rights violations were a new event in the history of the Indonesian nation and there was no regulation in the laws and regulations in force in Indonesia at that time. So that gross human rights violations are not identical to violations of the applicable criminal law, and for that reason the prohibition on analogy interpretation still applies if the retroactive application of the Human Rights Court law with material criminal provisions violates legal provisions or ignores legal principles. That is, Law No. 1 of 1960 must be enforced against gross human rights violations where gross human rights violations are considered the same as ordinary crimes (Ordinary Crimes).

This is where the retroactive policy was enforced because of gross human rights violations including Extra Ordinary Crimes, so that at that time of Law No. 26 of 2000 was enacted due to domestic political influence and pressure from the international community.

V.CONCLUSION

1. The existence of the legality principle in the laws and regulations of law in Indonesia still needs to be maintained, because the essence of the legality principle is to create legal certainty and justice.
2. Retroactive policies in law enforcement against human rights violations in the context of Indonesian law need to be done to uphold justice because there are benefits that are general (public) or greater than protecting the rights of perpetrators who are partial (individual).
3. The ideal concept in the retroactive policy against gross human rights violations is to clarify the substance in the provisions of the law regarding retroactive enforcement with respect to extra ordinary crimes.

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