

Prospect and Problem of the Transitional Justice in Indonesia after 32 years Political Injustice under the Soeharto Regime

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Introduction

Since Soeharto stepped down on May 20, 1998 due to a big wave of reformation, Indonesia has not been able to address its past political injustice, even after Soeharto's death on 2008. Despite the fact that the transitional government has enacted national laws and established the national human rights court and the truth commission, justice is still delayed and denied. In this regard, Suzannah Linton writes that "adopting laws that are riddled with loopholes and setting up hollow institutions administered without commitment to fundamental principles such as transparency, due process, justice and accountability will do more harm than good in Indonesia."²

This paper will examine the problems and the prospects of transitional justice in Indonesia from both the retributive justice and restorative justice perspectives. This paper will also examine the principles in both system of justice which may be useful in the development of standard of justice in Indonesia to solve the past abuses. This paper will argue that the failure of thirteen years of transitional justice in Indonesia due to neglect, impunity and lack of action on the part of the transitional governments added to the suffering of the victims and their families. However, all is not lost. This paper will also suggest that if the current Indonesian government is willing to pursue justice, the principles of restorative and retributive of justice will be useful guides in the setting up of a standard of justice in the country to deal with mass human rights violations in the past. The two theories can

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² Suzannah Linton, *Accounting for atrocities in Indonesia*, Singapore year book of international law and contributors, 2006,31

complement each other together with the current mechanisms of justice like the national human rights court. The principles from the two theories of justice is also in consonance with the reconciliation processes in Indonesia which is needed to attain a just and lasting peace in the country.

This paper is divided into four parts. The first part will discuss standard of justice for Indonesia. The second part will tackle the historical overview of the past atrocities under the authoritarian regime of Soeharto. The third part will describe Indonesian's human rights obligation under the international human rights treaties. The fourth part will discuss and makes analysis on impunity for the past wrongdoings due to the lack of acknowledgment and apology on the part of the perpetrators and the absence of support and programs of the subsequent Indonesian governments to heal the trauma of its people.

The last part is the analysis of the current state of transitional justice or the lack of it in Indonesia through the judicial sytem, and the aborted Indonesian Truth and Reconciliation Commission. This paper will then conclude that the unresolved problem of the past atrocities in Indonesia should be addressed through a mechanism which implements international standards of justice and that the main principles and tenets of retributive and restorative justice can be used as part of the process.

I. Standard of Justice : Bridging Punishment and Reconciliation

"I hope the government urges the attorney general to investigate all human rights violations, such as the tragedies of Semanggi I and II and other cases. The right or wrong must be declared in court. The House of Representative must make the recommendation to the President to establish the ad hoc human rights court. If there is an argument that this case

*cannot be brought to the court because there is no proof, that is absolutely a mistake.*³” Mrs. Maria Katarina Sumarsih

*“We do not know what human rights are. What we know is that what happened to us is what is called human rights.....We only ask that the government pay attention to us as victims of the conflict. If you ask us what are human rights we do not know. But we are its victims”*⁴ A victim from Aceh

The afore – quoted passages are examples of the desire of victims in Indonesia, for justice. Neither local government nor central government deal with victims and it has never established a healing processes as a part of national effort to solve past wrongdoings. Despite the fact that government develops two national mechanisms that can be used to solve human rights violations in Indonesia, namely national human rights court and truth and reconciliations commission, nevertheless the victim have never received remedy.

In doing so, the fate of the victims are much more uncertain, the national court failed to solve past atrocities and bring justice for victims, even the Truth and Reconciliations Commission has not yet been established, since the Indonesian Constitutional court annulled the law. Furthermore, as mentioned in the beginning of this paper Indonesia as a member of the United Nations and it has ratified and acceded to several key human rights instruments, the government has obligations to increase standard of human rights within its territory, particularly in dealing with human rights violation.

The government must answer this problem by developing a standard of justice based on international human rights standards. In this regard the national human rights court can be categorized as liberal peace approach. It promotes punishment for a solution in order to solve the past injustices. In other words, this idea believes that only through punishment, justice

³Maria Katarina Sumarsih is the mother of BR. Norma Irmawan (also known as Wawan), a student of Atmajaya Catholic University, Jakarta, who was one of the students shot dead by the military on 13 November 1998. It available at; <http://www.humanrights.asia/opinions/interviews/AHRC-ETC-052-2011>

⁴ The International Center for Transitional Justice, *Considering Victims the Aceh Peace Process from a Transitional Justice Perspective*, 2008, 19

can be achieved and this is an effective guarantee of non – recurrence in the future. In this sense, the liberal approach will strengthen supremacy of law. Reflecting upon past experiences, under supervision of the United Nations the perpetrators of gross human rights violations in post conflict societies were tried in international courts like the International Court Tribunal for Yugoslavia (ICTY) and International Court Tribunal for Rwanda (ICTR).⁵

Reflecting on the problems which emerged from the judicial processes in Indonesia, it is mainly the lack of credibility and weakness of proof during the trial procedures which contributed to the total failure of the courts to address human rights violations of the past. This is a major weakness of the retributive justice approach and add to that the lack of support of the government in the process. Archbishop Desmond Tutu in criticizing retributive justice said that it is vengeance or revenge and it does not have spirit of restoring relationship, it is not yet proven in Indonesia because the courts have been intended to fail.⁶

Regarding the past human rights injustice in Indonesia, different points of view from Daniel Philpott on punishment has some relevant points which are important to be considered. He states that “understood restoratively, punishment is a dimension of the justice that is embodied in reconciliation, animated by mercy, and aiming at peace. Restorative punishment figures prominently in the Jewish, Christian, and Islamic traditions and is the central concept of restorative justice.”⁷ Indeed, Philpott’s explanations answered two points which criticize against the liberal approach and he expressed that in the frame work of restorative justice the restorative approach will not sacrifice supremacy of law.

Furthermore, in terms of the possibility to set up a truth and reconciliation commission in Indonesia, it can be another alternative approach in giving the victims the

⁵ Daniel Phillipott, *Just and Unjust Peace An Ethic of Political Reconciliation*, Oxford University Press, 2012 at 207

⁶ David A. Crocker, *Retribution and Reconciliation, Report from the Institute and Public Policy*, 2000, 2- 3

⁷ Daniel Philpott, *Supra Note 4*, 208

justice they deserve. In order to be in synergy with the concept of punishment, Jennifer Liewellyn strongly mentions that “The TRC also embodied the principle of restorative justice through the public’s involvement in the process.....Approaching restorative justice, and not partial justice or a special kind of justice, offers different view of truth commissions, and their potential and significant transitional contexts.....the understanding of restorative justice as full justice means that truth commissions, in so far as they are restorative justice institution,...where prosecutions (domestic or international) are possible.”⁸

In order to achieve a better standard of justice for the past atrocities, Indonesia must evaluate its law enforcement, particularly the failure of the court and the gap between the law and the implementation as well as the absence of the government’s commitment under the international human rights obligations. Indonesia should reestablish standard of justice by combining retributive justice and restorative justice approaches because these theories complement each other. Jonathan Burnside, said that retributive justice and restorative justice have respective limitations. In the biblical law he said that “A limit to retribution is related to the perceptions of offenders. Perception in turn affect attitudes ... There are also limits to the goal of restoration in Biblical law...to the extent that the parties are unwilling to enter into the attitude of heart towards offenders...”⁹ Therefore, the Indonesian government has an option to combine both theories.

Amnesty International on the report concerning 40 truth commissions in various countries between 1974 to 2010, concluded that retributive justice and restorative justice can complement each other and should not be separated.¹⁰ In the report, AI stressed that “based on the distinction between “retributive” justice and “restorative” justice, some have

⁸ Jennifer Liewellyn, *Hand Book of Restorative Justice: Truth Commission and Restorative Justice*, Willan Publishing, (Gery Johnstone et al, eds 2006)

⁹ Gerry Johnstone et al, *Handbook of Restorative Justice*, Willan Publishing, 2007, 142 - 144

¹⁰ Amnesty International, *Commission Justice: Truth Commission and Criminal Justice*, 2010, p 5, Available at <http://www.amnesty.org/en/library/info/POL30/004/2010>

contended that countries have a choice in deciding “what kind of justice” they may pursue: that they may decide not to conduct criminal investigations and prosecutions of crime such as genocide, crimes against humanity and war crimes and rather concrete on truth seeking and community reconciliation processes.”¹¹

Indeed, in terms of resources for transitional justice in Indonesia, the support of law and civil societies are more than enough to develop standard of justice. Indonesia has international human rights law which strengthen its national legal system, it has national human rights court which can implement the law through prosecution. The pending TRC Law is on the way and the robust of civil societies which are engaging the government to give constructive input to them in order to solve the past wrongdoings. Civil society is also active in the national healing processes in the absence of the government. The only main problem is the lack of political will from the government itself.

Indonesia should develop its willingness to solve the past abuses on the four practices of the politic reconciliations, namely; acknowledgment, reparations, punishment and apology. With regard to the four practices of politic reconciliations, Daniel Philpott clearly states that “The practices complement one another, complete one another, and weave together. Each effects reconciliation uniquely and irreplaceably. A surfeit of one practice cannot make up for a deficit of another. Were one of them absent, so would be an important dimension of the justice of reconciliation.”¹²

II. Historical Overview; Past Atrocities under the Authoritarian Regime

Indonesia declared its independence on August 17, 1945. After that, Soekarno came to power as the first Indonesian President (known as the Old Era). During his tenure, Indonesia

¹¹Id

¹²Daniel Philpott, *Supra Note 4*, 171

started to develop its constitution, parliament, national laws and adopted the democratic system of government (called as *Democracy Terpimpin*) as a state official system. Despite the fact that Soekarno centralized the power under his authority, no mass violation of human rights were committed against the Indonesian people.¹³

After Soekarno stepped down, Soeharto came to power and develop his regime, known as the New Era, wherein countless Indonesian people, from Aceh to Papua provinces have been victims in various atrocities committed by State agents under his government. In 1965, Soeharto and the military “create a scenario” that members of the Indonesian Communist Party (PKI)¹⁴ and its sympathizers which close to Soekarno during the Old Era, conducted *coup d'etat* against Soekarno.¹⁵ Therefore, the New Era killed the member and the sympathizer and hundreds of thousands more arrested. The New Era categorized prisoners (called Tapol), into three; A prisoners were the most responsible in the alleged *coup d'etat* and could potentially face capital punishment, B prisoners were detained in concentration camps without trial and C were known as sympathizer who will be released gradually.¹⁶ Soeharto consolidated his power and centralized the government throughout Indonesia and he used military, intelligence agency, police and other components of the security sector to quash his opponents.¹⁷

¹³ Tim Lindsey et al, *Indonesia Law and Society*, the Federation Press, 2008, 7 - 9

¹⁴ Under the Old Era, PKI is the fifth biggest political party in Indonesia and it has good relation with Soekarno. Therefore after Soekarno stepped down, Soeharto oppressed and killed PKI's member in order to increase sympathy from USA and western countries.

¹⁵ Recently, the report of the National Commission on Human Rights (Komnas HAM) states that Soeharto is the most responsible person. Available at www.Komnas.go.id

¹⁶ Marlies Glasius, *Foreign Policy on Human Rights its Influence on Indonesia under Soeharto*, Oxford, 1999, 33 – 34. See also Decision of the Commander of Kopkamtib Kep. 28/KOPKAM/10/1968; Indonesia's Release Plan; A Policy of Deccit, Tapol Bulletin, No. 24, October 1977

¹⁷ For more information regarding Indonesia under the Soeharto regime, see John H. McGkynn et al., *Indonesia in the Soeharto Years : Issues, Incidents and Images* Jakarta, Lontar Foundation, 2005

From 1965 to 1998, various atrocities were committed against Indonesian civilians. The atrocities can be categorized into three segments¹⁸; first those which from 1965 to 1970, the Soeharto regime called pronounced a war against the Left which was the Indonesian Communist Party (PKI). At least two to three million people were killed by the security forces and many others were detained and disappeared.¹⁹ From 1980 to 1990, the regime conducted serious human rights violations against Indonesian Muslims communities, in which the regime called the Right Wing and 143 Muslims were killed.²⁰ Subsequently, from 1990 to 1998, the regime committed crime against the Indonesian pro–democracy activists. This group consists of human rights activist, students, labor unions and many other groups who consistently criticized the Soeharto regime.²¹

III. The Government Obligation for Human Rights

Recently, Indonesia has ratified and acceded to some important instruments of international human rights law, in order to strengthen its national human rights protection and enforcement. The human rights treaties and conventions which the country ratified is an expression of its willingness to abide international human rights standards and in case of non-compliance it is not only accountable to its people but also to the international community. Conversely, the Indonesians can hold their government accountable if it fails to protect human rights at home by invoking its international human rights obligations. As a member of

¹⁸ *The Commission for Disappeared and Victims of Violence (KontraS) and the International Center for Transitional Justice (ICTJ), Derailed Transitional Justice in Indonesia Since the Fall of Soeharto*, 2011, 94 -102

¹⁹Id, at 96

²⁰ There are two cases against Muslims under Soeharto regime, namely Tanjung Priok case which occurred on September 12, 1984, according to KontraS and ICTJ 98 people were killed, 96 arbitrarily detained and 58 faced unfair judicial process. Meanwhile on February 7, 1989 the military attacked Muslim village in Talangsari which caused 45 people killed, five raped, 88 disappeared, 36 tortured and 173 arbitrarily detained.

²¹ During that time, occurred four cases, *first*; the Central Jakarta office of the Indonesian Democratic Party (PDI) was attacked by a mass and involved security forces, as a result 14 people were killed. *Second*, it was about Enforced Disappeared Students Activists which occurred in 1997 – 1998. The armed forces disappeared 24 students and pro-democracy. *Third*, the armed forces shot the students who demanded Soeharto resignation, it caused the death of five students. *Fourth*, May riots on May 13 – 15, 1998, it caused hundreds of Indonesian Chinese subjected to rape without serious effort of the security forces to stop the crime

UN the Indonesian government's has obligation under article 55 and 56 of the UN Charter to promote universal respect for human rights, fundamental freedom regardless of various backgrounds of people.²² Indonesia ratified six important international human rights instruments, in which as a state party Indonesia has the obligation to increase human rights standard in its territory in accordance with these standards.²³

On the right to truth, justice and reparation, Indonesia has an obligation under International Covenant on Civil and Political Rights on effective remedy for human rights violations.²⁴ As a party to the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) Indonesia has the obligation to protect its citizens against torture and the duty to prosecute those who commit such acts.²⁵ In the same convention, Indonesia has also the obligation under article 14 of the Convention to ensure adequate compensation to victims of torture.²⁶ Moreover, as a state party, Indonesia has an

²² The UN Charter was signed on 26 June 1945 and came into force on 24 October 1945. Article 55 (c) states that universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion. Subsequently, article 56 states that All Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55.

²³International Human Rights Instrument that have been adopted by Indonesia; Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT), International Covenant on Civil and Political Rights (ICCPR), Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), International Convention on the Elimination of All Forms of Racial Discrimination (CERD), International Covenant on Economic, Social and Cultural Rights (CESCR) and Convention on the Rights of the Child (CRC). See; <http://www.unhcr.ch/tbs/doc.nsf/NewhvVAlSPRByCountry?OpenView&Start=1&Count=250&Expand=80#80>

²⁴ ICCPR, Article 2 (3) Each State Party to the present Covenant undertakes : (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by person acting in an official capacity; (b) To ensure that any person claiming such a remedy shall have his rights thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the state, and to develop the possibilities of judicial remedy; (c) To ensure that the competent authorities shall enforce such remedies when granted

²⁵ The Convention against Torture and Other Cruel Inhuman or Degrading Treatment of Punishment (CAT), UN General Assembly Resolution 39/46, 10 December 1984, entered into force, 26 June 1987, UN, Treaty Series , [vol. 1465](#), p. 85.

²⁶ CAT, Article 14 (1) Each State Party shall ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible. In the event of the death of the victim as a result of an act of torture, his dependants shall be entitled to compensation.

obligation to comply with the Covenant, concerning effective judicial remedy and prevent torture.²⁷

In the domestic level, Indonesia has an obligation under the 1945 Constitution of the Republic of Indonesia (called as UUD 1945), particularly article 28 concerning human rights.²⁸ Indonesia also has several national laws which are relevant to this matter, namely law number 39 of 1999 on Human Rights and law number 26 of 2000 on the establishment of human rights court. Previously, it has law number 27 of 2004 on Truth and Reconciliation Commission (TRC), but this law was declared invalid by the Indonesian Constitutional Court (MK) in 2006. The Indonesian Parliament is still drafting the new one.

Ideally, Indonesia is capable of establishing a justice system in accordance with international human rights standard. However, the wait for justice has been long and that until today impunity remains. No perpetrators have convicted by the National Human Rights Court.

IV. Impunity for the Past Abuses

A. Absence of Acknowledgment and Apology

²⁷ CAT, Article 2 (1) Each state party shall take effective legislative, administrative, judicial or other measures to prevent acts of torture in any territory under its jurisdiction. (2) No exceptional circumstances whatsoever, whether a state of war or a threat or war, internal political instability or any other public emergency, may be invoked as a justification of torture.

²⁸ UUD 1945, Article 28 paragraph (1) The rights to life, to remain free from torture, to freedom of thought and conscience, to adhere to a religion, the right not to be enslaved, to be treated as an individual before the law, and the right not to be prosecuted on the basis of retroactive legislation, are fundamental human rights that shall not be curtailed under any circumstance. (2) Each person has the right to be free from acts of discrimination based on what grounds ever and shall be entitled to protection against such discriminative treatment. (3) The cultural identities and rights of traditional communities are to be respected in conjunction with progressing times and civilization. (4) Protecting, promoting, upholding, and the full realization of human rights are the responsibilities of the state, foremost of the government. (5) To uphold and protect human rights in accordance with the principles of a democratic and law-based state, the implementation of fundamental human rights is to be guaranteed, regulated, and laid down in laws and regulations

The basic problem of transitional justice in Indonesia is the absence of acknowledgment and apology as a first step to solve the past abuses. Since Soeharto stepped down in 1998, Indonesia has selected four presidents; B.J Habbibie (1999 – 2000), Abdurrahman Wahid (called as Gus Dur) (2001 – 2003), Megawati Soekarno Putri (2003 – 2004) and Susilo Bambang Yudhyono (2004 – present). These presidents failed to recognize and acknowledge the past gross human rights violations of the Soeharto regime. Only Gus Dur who had delivered an apology and acknowledgment to the indigenous peoples of Papua, nevertheless he was impeach by the Parliament and Megawati as the next president did not recognize the acknowledgment.²⁹

In contrast, during the thirteen years of political reform, systematic efforts in Indonesian politics have been rigorous to forget the past atrocities, for instance in 2010 Soeharto was promoted as the hero of nation by the Prosperous Justice Party (PKS), a political party which established after political reform.³⁰ It is unfortunate for the Indonesian people that their government is denying them history and truth while the progressive move of the international community and other countries are towards reconciliation, acknowledgement and truth telling. The Indonesian government should learn that acknowledgment of victims of past atrocities is very important. For instance, Kevin Rudd, the Australian Prime Minister apologized to the aborigines for the past wrong doings of the Australian majority in a Sorry Day to the Aborigines.³¹ Germany delivered state apologies towards the Jews after the Holocaust³², and South Africa's last apartheid president F.W. de Klerk and President Nelson

²⁹ See Human Rights Watch, *Indonesia: Abdurrahman Wahid's Human Rights Legacy*. Available at: <http://www.hrw.org/news/2001/07/26/indonesia-abdurrahman-wahids-human-rights-legacy>

³⁰ See news article on this issue at "Soeharto deserve to be hero despite sinking the country in debt", <http://www.thejakartapost.com/news/2010/10/25/suharto-deserves-be-hero-despite-sinking-country-debt-pks.html>.

³¹ See Australian Prime Minister Kevin Rudd apology speech; <http://www.youtube.com/watch?v=aKWfiFp24rA>

³² Jennifer Lind, *Sorry States Apologies in International Politics*, Cornell University Press, 2010, 93 - 95

Mandela's apology on behalf of the African National Congress (ANC) as part of the South African reconciliation process.³³

In terms of acknowledgment, Daniel Philpott states that "acknowledgment is the action by which a political official or body of officials, speaking on behalf of the political order, recognizes victims as having suffered a political injustice, as having been wounded by this political injustice, and as being full citizens again."³⁴ Whereas on apology he states that "an apology requires the perpetrator to admit that he performed the deed, recognize that it was wrong, displayed regret for having done it, communicate this regret to the victim, accept responsibility for it, and pledge not to repeat it."³⁵

With respect to the problem of acknowledgment in Indonesia, it is caused by the absence of contrition of the former offenders. The acts of contrition should be impartial, in contrast partial contrition happened because some of the former offenders become members of parliament and the former high ranking military officials would be candidates for the next presidential election in 2014, they need support and sympathy from the constituents. Contrition is important, but it should be managed in a proper way, because contrition without reconciliation, justice and remedy would be nothing and it would end up as a meaningless ideology which can be politically motivated. Indonesia should learn from Germany when it apologized to its victims and did some concrete acts of providing justice and various remedies to victims.³⁶

B. The State Failure to Lead Trauma Healing Project

³³ Daniel Philpot, *Supra Note 4*, 198 - 199

³⁴ *Id.*, at 181

³⁵ *Id.*, at 198

³⁶ Jennifer Lind, *Supra Note 31*, 181 - 186

In order to deal with the victim's wound the Indonesian government established two independent commissions, which are the National Commission on Violence Against Women against Women (*Komnas Perempuan*) and the Witness and Victim Protection Agency (*Lembaga Perlindungan Saksi dan Korban* or LPSK). However, in the last five years, the two commissions were not really effective and the commissions also to take a significant role in providing healing for victims. The Asia Human Rights Commission commented on this matter;

“Even though the LPSK is charged by the law with providing witnesses and victims with restitution or compensation through the courts, families and victims are often denied that aspect of the right to remedy. For example, the Tanjung Priok massacre case has been turned down by the Supreme Court and no perpetrators of the extra-judicial killings, enforced disappearances, torture cases, unfair trials and arbitrary arrests and detentions have been punished. Consequently, no reparations were accorded to the families and victims.”³⁷

Ideally, the thirteen years of transition was more than enough for the transitional government to end impunity, conversely thirteen years is too long for the victims waiting for justice and what is due them. The transitional period caused more trauma and wounds for the victims, there is no healing, the state was unable and unwilling to lead the national healing project, and even time cannot heal the wounds and scars of the victims. In terms of trauma or wound not healed by time, Judith Herman expresses that; “resolution of the trauma is never final; recovery is never complete. The impact of traumatic event continues to reverberate throughout the survivor's lifecycle (...).”³⁸“Up until now, the victims' conditions are getting worst, because the government failed to address remedies for the victims and their families and go after the perpetrators. This is the primary wound. Subsequently, the secondary wound is that there is no guarantee against the non-repetition of the abuses. Victims are facing

³⁷ The ASIA Human Rights Commission (AHRC), INDONESIA: Lack of effective witness and victim protection. It available at <http://www.humanrights.asia/news/ahrc-news/AHRC-STM-029-2010>

³⁸ Judith Herman, MD, Trauma and Recovery *The Aftermath of Violence – from domestic abuse to political terror*, Basic Books, 1999, 211

various threats from the perpetrators and their supporters, due to the lack of the protection and certainty of the law.³⁹

V. Picture of Transitional Justice in Indonesia

A. Failure on the Part of the Judicial System

This part describes how judicial system failed to prosecute former offenders of the past atrocities. Many factors caused the failure of the judiciary and the prosecution services to deal with the past atrocities and some of them are: the lack of knowledge about human rights on the part of the judges and prosecutors' the absence of political support from the government, the lack of witness protection and lack of international human rights standard under then Indonesian justice system.⁴⁰ In this sense, David Cohen makes a strong argument towards the human rights court in Indonesia. He states that;

“The problem with the Jakarta trials is that most of these conditions have not been obtained. Indeed, the process has been fundamentally flawed from moment that the attorney general's (AG) office took over the investigation following its acceptance of the report of the Commission of the inquiry (KPP HAM) appointed by National Human Rights Commissions (Komnas HAM). These flaws have resulted in a series of failures that has prevented the trial process, viewed as a whole, from providing the kind of accountability that many Indonesians NGOs and the international community have demanded.”⁴¹

After Soeharto's departure from power, the reformist groups, which participated in the successful overthrow of the Soeharto regime declared seven points of reformation and one of them is justice for the past atrocities. However, at that time, Indonesia's judicial system was

³⁹ Related the Primary and the secondary wounds, see the explanation by Daniel Philpott, *Supra Note 23*, 33 - 47

⁴⁰ Derailed Transitional Justice in Indonesia Since the Fall of Soeharto, *Supra Note 17*, 46 - 54

⁴¹ David Cohen, *Intended to Fail The Trials before the Ad Hoc Human Rights Court in Jakarta*, the International Center for Transitional Justice, 2003, 3

not capable to accommodate the demands of justice. Most of the system is the Soeharto's legacy, in which the court system was corrupt and it did not have assurance of fair trial. Under Soeharto, the courts have been used to prosecute countless opponents in whatsoever circumstances.⁴²

In 2000, the transitional government accepted public demand by issuing Law No 26 of year 2000 concerning Human Rights Court and Law No 39 of year 1999 concerning Human Rights. The National Commission on Human Rights has a mandate to investigate allegations past human rights violations.⁴³ Several fact-finding teams have been established to investigate the past atrocities, for instance the joint fact-finding team for the events of May 1998. The team claimed that more than 1000 people were subjected to violence and rape.⁴⁴ In the end of investigation, the team made a recommendation to the government;

“...the government must immediately follow up cases relating to the sequence of violence events that culminated in the May 13 – 15, 1998 riots.In this series, Chief Operational Commander Sjafrie Sjamsoeddin must be held accountable. In the case of abductions, Lieutenant General Prabowo and all actors involved must be brought before a military court.⁴⁵

After that, the National Commission established several investigation teams to look into other past human rights cases, namely; the Independent Commission for the Investigations of Violence in Aceh, the Investigation Team for the case of Trisakti and Semangi, the Investigation team for Tanjung Priok case, the Investigation team for Talangsari Lampung,

⁴² Derailed Transitional Justice in Indonesia Since the Fall of Soeharto, *Supra Note 17*, 46 - 54

⁴³ Law No 26 of Year 2000, Article 18 paragraph 1 Inquiries into cases of gross violation of human rights shall be conducted by the National Commission on Human Rights

⁴⁴ Derailed Transitional Justice in Indonesia Since the Fall of Soeharto, *Supra Note 17*, 18

⁴⁵ *Laporan Tim Gabungan Pencari Fakta Peristiwa Tanggal 13 – 15 Mei 1998; Ringkasan Eksekutif* (Report of the Joint Fact Finding Team on the Events of 13 – 15 May 1998: executive summary, October 23, 1998, 24

the Investigation team for the Enforced students activist in 1998, the Investigation team for the Mysterious Killing and the Investigation team for the Massacre of 1965 – 1966.⁴⁶

From 1999 to 2002, Indonesia in cooperation with the United Nations established the Ad Hoc Human Rights Court for East Timor in Jakarta. At least twelve people were indicted who were involve in the past atrocities.⁴⁷ Sadly, due to the lack of international human rights standard, lack of evidence and lack of international support, all of the perpetrators were acquitted by the court. Indeed, the Indonesian Supreme Court only convicted Erico Guterres, as the commander of militia (called *merah putih*), ten year imprisonment, but he was finally released by the Supreme Court.⁴⁸

From 2003 to 2005 Indonesia held the Ad Hoc Human Rights Court for Tanjung Priok case which occurred on September 12, 1984. Fourteen military armed forces were brought to the court.⁴⁹ During the trial, the military offered money, motorcycle and other valuable things to victims, in order to change their testimony in the court and withdraw the previous statements made to the Public Prosecutor. As a result, the court acquitted all the perpetrators and most of the victims without remedy.⁵⁰

Aside from the two ad hoc human rights courts, the Indonesian government also established the permanent human rights court for Abeupra, Papua for the violations which occurred in on December 2000. It was called permanent court because the case occurred after

⁴⁶ Available only in Bahasa, See, [http://www.komnasham.go.id/component/content/article/67-pelanggar-ham/1761-kasus-1965-1966-komnas-ham-nyatakan-ada-pelanggaran-ham-berat-](http://www.komnasham.go.id/component/content/article/67-pelanggar-ham/1761-kasus-1965-1966-komnas-ham-nyatakan-ada-pelanggaran-ham-berat)

⁴⁷ The Commission for Disappeared and Victims of Violence' Monitoring Trialreport; <http://www.kontras.org/data/Matrix%20Putusan%20Pengadilan%20HAM%20di%20Indonesia.htm>

⁴⁸ The Commission for Disappeared and Victims of Violence' monitoring report; <http://www.kontras.org/data/Matrix%20Putusan%20Pengadilan%20HAM%20di%20Indonesia.htm>

⁴⁹ Derailed, *Supra Note* 17, 48

⁵⁰ See for instance; the Asian Federation against Involuntary Disappeared (AFAD); The Political Reality at the Human Rights Tribunal of Tanjung Priok case. Available at; http://www.afad-online.org/voice/april_04/newsfeature_politicalreality.htm

the government enacted the law No 26 of year 2000.⁵¹ Nonetheless, it has similar problems with the previous ad hoc courts, in which the National Commission on Human Rights' inquiry report recommended to prosecute 25 police officers, nevertheless the Attorney General only charged two seniors police officer.⁵² The judges did not consider all testimonies and others evidence which would prove that serious human rights violations were committed in Abepura.⁵³

The main failure problem of Indonesian human rights court is that the government does not have real commitment to solve the past atrocities. It seems from the inquiry process in the National Commission on Human Rights, the government failed to give strong political support in order to make sure that former high ranking military officials would obey with the commission examination processes. Moreover, there is a big gap between provisions of the constitution and the national law and the trial processes. Likewise, the Parliament, which is responsible to monitor judicial processes, was not present in the series of processes.⁵⁴ In sum, the government is not making an effort to strongly support national human rights court which it established. As David Cohen states that the courts were intended to fail, the court were only created due to international and national pressure.

B. Analysis of the Indonesian Truth and Reconciliation Commission

In 2006, the group of human right NGOs (applicant) in Indonesia submitted judicial review to the Indonesian Constitution Court (MK) against Law No 27 of year 2004 on the

⁵¹ Law No 26 of year 2000, Article 43 paragraph (1). Gross violations of human rights occurring prior to the coming into force of this Act shall be heard and ruled on by an ad hoc Human Rights Court. Paragraph (2). An ad hoc human rights court as referred to in clause (1) shall be formed on the recommendation of the House of Representatives of the Republic of Indonesia for particular incidents upon the issue of a presidential decree. Paragraph (3) An ad hoc human rights court as referred to in clause (1) is within the context of a Court of General Jurisdiction.

⁵² Derailed, *Supra Note 17, 49*

⁵³ Id

⁵⁴ Law No 26 of year 2000, Article 43 Paragraph 2 An ad hoc human rights court as referred to in clause (1) shall be formed on the recommendation of the House of Representatives of the Republic of Indonesia for particular incidents upon the issue of a presidential decree.

Truth and Reconciliation Commission (hereinafter “Truth Commission Law”). The applicant demanded that MK must repeal several articles in the truth commission law, namely;

- a. 'Amnesty' means the clemency bestowed by the President as Head of State upon the perpetrator of a gross violations of human rights, taking into consideration of the People's Legislative Assembly.⁵⁵
- b. Compensation and rehabilitation may be awarded only when a request for amnesty is granted.⁵⁶
- c. Compensation and rehabilitation thus may not be awarded in many situations, for example; when perpetrators are not identified, or fail to apply for amnesty, or are not forgiven by victims, or are not deemed worthy by the President or the House of Representatives.⁵⁷
- d. Lack of clarity in the Truth Commission Law as to when restitution – the preferred method of reparation where possible under international law – may be awarded.⁵⁸
- e. The case of gross violations of human right that has been resolved by the commission cannot be brought before The Ad Hoc Court of Human Rights.⁵⁹

However, in MK’s judgment, it annulled the entire content of the law. This law shows that the position of victims and perpetrators are not equal, article 27 strongly express that victim’s rights is dependent on the grant amnesty for perpetrator. In other words, if the government refuse to grant amnesty, it means that the government also refuse victim’s rights. This law has treated and interpreted amnesty in very bad manner and it was incompatible with international human rights standard.

The revocation of the Law No 27, was a good news because blanket amnesty has been canceled, however, the wholesale annulment of the law is also negative because until now no commission has been established yet. It means that Indonesia has only its national human rights courts which are failing as a sole mechanism to deal with the past atrocities. Moreover, the revocation has also delayed the implementation of two local truth and reconciliation

⁵⁵ Truth Commission Law, Article, 1 (9)

⁵⁶ Truth Commission Law, Article 27

⁵⁷ Truth Commission Law, Article 25 - 28

⁵⁸ Truth Commission Law, Article 27

⁵⁹ Truth Commission Law, Article 44

commission in Aceh and Papua, because the TRC in those provinces are binding to the law No 27 of year 2004.⁶⁰

As a result of the revocation of the reconciliation law, the Law and Human Rights Department published the new draft of reconciliation law.⁶¹ However, its content it has similar problems with the old law, accordingly the draft will not answer the real problem for transitional justice in Indonesia. At least three articles have been considered to be major problems:

- 1) The commission is not mandated to deal with cases that occurred before November 25, 2000.⁶² It means that the TRC does not have jurisdiction to examine the case which occurred under Soeharto regime.
- 2) There is no guarantee that the recommendation of the commission will be use for the disclosure of information as it is not certain that the commission report will be made public and the possibility of perpetrators being given amnesty, in exchange for testimony before the commission, has not been ruled out.⁶³
- 3) There is no article regarding definition of perpetrators.

Based on the foregoing reasons, it is important for Indonesia to evaluate the draft of the truth and reconciliation commission, otherwise the draft will face similar problems with the old law, which maybe revoked again by the Constitutional Court. Furthermore, the legacy of impunity in Indonesia actually is not only political injustices committed by the by Soeharto regime, Indonesia must establish reconciliation commissions which are appropriate to reconcile the communities within the country, for instance the victim of the 1965 massacre of the Indonesian muslims (called as Nahdlatul Ulama), because Soeharto regime segregated the

⁶⁰ See for instance Papua in the Joint report of the International Center for Transitional Justice (ICTJ) and the Institute of Human Rights Studies (ELSHAM Papua), *The Past That Has Not Passed : Human Rights Violation in Papua Before and After Reformasi*, 2012. It is available at <http://ictj.org/publication/past-has-not-passed-human-rights-violations-papua-and-after-reformasi>. Meanwhile in Aceh the government has enacted law No 11 of year 2006 on the Government of Aceh, its law mandates the government to establish the Truth and Reconciliation Commission and the establishment of the commission should refer to the national TRC

⁶¹ See the news article for this issue at; In Geneva, Indonesia Promises more action on human rights, <http://www.thejakartapost.com/news/2012/09/21/in-geneva-indonesia-promises-more-action-human-rights.html>; Speaking at the UNHRC's headquarters in Geneva, Switzerland late on Wednesday, Representative of Indonesian Permanent Mission to Geneva Edi Yusuf said that "the government was working to finalize the bill on a truth and reconciliation commission."

⁶² The New Draft of Truth Commission Law, Article 1 (4)

⁶³ The New Draft of Truth Commission Law, Article 7 (d)

communities and used one community to oppress another community.⁶⁴ Indonesia should learn from countries' experiences, for instance the Gacaca court, regardless its weaknesses; such system can be adopted in Indonesia to reconcile the communities, as in Rwanda the Gacaca reconciled Hutu and Tutsi.⁶⁵ Furthermore, in order to develop national TRC, Indonesia should also learn from South Africa, Guatemala, Peru, Timor Leste and Morocco, in which these countries have similar experiences with Indonesia but faced the problem head on through various TRCs.⁶⁶ For instance East Timor, its transitional government under the United Nations supervision set up the Truth and Reconciliation (CAVR - the Portuguese acronym) and use this mechanism in villages through the culture of local tribes, the tribal reconciliation system made an exception for gross violation of human rights, because this was only reconciliation among the villagers who were involve in the conflict.⁶⁷

VI. Conclusion

The progress of transitional justice in Indonesia is quite slow. Thirteen years after Soeharto stepped, the succeeding Indonesian governments failed to address the past atrocities through the various mechanisms. Notwithstanding, there are some positive points which have been conducted by the transitional governments. It has established national human rights courts and it is still drafting the TRC law, the ratification of several keys human rights instruments. But, the government is failing to strengthen its judicial system, such as the

⁶⁴ See news article on this issue at; Apology for 1965 purge victims not necessary: GP Anshor. It is available at <http://www.thejakartapost.com/news/2012/08/15/apology-1965-purge-victims-not-necessary-gp-anshor.html>. Responding to the groups, NU deputy chairman As'ad Said Ali said that all Indonesians should forget the 1965 purge. "PKI members killed many of NU's ulema. Yet, we never demanded [PKI members] be brought to trial for what they had done," he said. "It is better for us to forget and forgive what has happened in the past."

⁶⁵ Phil Clark, *The Gacaca Courts Post – Genocide Justice and Reconciliation in Rwanda*, Cambridge University Press, 2010

⁶⁶ Priscilla B Hayner, *Unspeakable Truths Transitional Justice the Challenge of Truth Commissions*, Taylor & Francis, 2010, 27 – 44

⁶⁷ See for instance; the Report of the International Center for Transitional Justice, the CAVR and the 2006 Displacement Crisis in Timor Leste, 2012. It is available at <http://ictj.org/publication/cavr-and-2006-displacement-crisis-timor-leste-reflections-truth-telling-dialogue-and>

Attorney General and the courts because of the lack of adequate standard of justice from these institutions. International standard of justice can be developed and supported by retributive justice and restorative justice, meaning the national human rights court must be supported by the government, the mandate of the National Commission on Human Rights must be enhanced and the Attorney General must be evaluated in order to develop its professionalism and knowledge of human rights law and practice.

In terms of the Truth and Reconciliation Commission, the government cannot delay it anymore, because in the period of transition, the TRC is very important. Amnesty International in the previous chapter states that reconciliation processes in 40 countries have taken significant contribution to solve the past abuses. However the main problem of Indonesia's TRC are actually amnesty, remedy and the truth itself, thus the next Indonesian TRC should be developed in the standard of international human rights law. The mechanism of local TRCs for instance in Aceh, Papua and also the TRC to reconcile the communities should be reflected in the new TRC Law. Moreover, the government should change its behavior and it should show political will in implementing a justice system which will benefit the Indonesian people especially those who are still clamoring for justice for the past atrocities committed against them. If Indonesia is aspiring to be a leader in the international community, its rule of law should be strong. It should face its ugly history and learn from it otherwise history will repeat itself.

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