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MAKING HUMAN RIGHTS A CONSTITUTIONAL RIGHT

A Critique of the Constitutional Court's Decision on the Judicial Review of the Truth and Reconciliation Commission Act and Its Implications for Settling Past Human Rights Abuses

ELSAM
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Making Human Rights A Constitutional Right: A Critique of the Constitutional Court's Decision on the Judicial Review of the Truth and Reconciliation Commission Act and Its Implications for Settling Past Human Rights Abuses

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Menjadikan Hak Asasi Manusia sebagai Hak Konstitusional: Pandangan Kritis atas Putusan Mahkamah Konstitusi terhadap *Judicial Review* UU KKR dan Implikasinya bagi Penyelesaian Pelanggaran HAM di Masa Lalu

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I
INTRODUCTION

On December 7, 2006, the Constitutional Court finally gave its decision on two petitions for a judicial review of Act No. 27/2004 on the Truth and Reconciliation Commission (from hereon referred to as TRC Act), but it came up with different decisions. The *first* decision was on case No. 006/PUU-IV/2006, stating that the Constitutional Court accepted the petition of the petitioners. It declared that the TRC Act conflicted with the 1945 Constitution and that the TRC Act did not have any binding force. On the other hand, the Constitutional Court's *second* decision, No. 020/PUU-IV/2006, stated that the petitioner's petition was not accepted, because of the fact that the law on which the petitioner's request was based, was not binding legally.[1]

The decision of the Constitutional Court to scrap the TRC Act surprised many parties. It is perceived as ironic, considering the efforts that the victims have put into demanding accountability for past abuses through the only recognized legal framework available to them, namely, the TRC Act. This Act is a legal pillar upholding the demand for political commitment on the part of the government not to avoid its responsibility for past abuses, as well as to ensure that the same tragedy does not recur in the future.

Nevertheless, the contents of the said Act did not fully satisfy the sense of justice of the victims. Because of this, together with other actors and concerned activists, they asked for a *judicial review*. Their attempt to improve the Act focused particularly on three important points: the articles on amnesty, on giving compensation that depends on amnesty, and on the character of the TRC as a substitutive mechanism for a court.

The Constitutional Court, however, seemed to have a different perspective. Although it only answered one petition among all the others - the one that particularly

[1] In its decision on case No. 20/PUU-IV/2006, the Constitutional Court stated that the TRC Act has been declared not to have any legally binding force, a decision which acquired legal strength since it was taken up at a Plenary Session open to the public (*vide* Art. 47 Act No. 24/2003 on the Constitutional Court). Consequently, the petition of the petitioners lost its object (*objectum litis)* so that the petition of the petitioners must be declared not acceptable (*niet ontvankelijk verklaard*) because the law that was considered to have lost its constitutional right to exist no longer has a legally binding force

relates to the provision on compensation (Article 27) - in its decision, the Court precisely indicated that Act No. 27/2006 on the TRC Act should state on the whole that it did not have a legally binding force. Because nullifying Art 27 has implications on the entire law, the TRC Act cannot be implemented.

Declaring the TRC Act null and void cancelled the mandate contained in this law to uncover truth, resolve past Human Rights abuses, and bring about reconciliation. This mandate was determined through a Decree of the People's General Assembly (TAP MPR) in 2000, as part of the "reform agenda". This means that the TRC is not only desired by a group of victims or simply meant to forgive the perpetrators, but it expresses, on the one hand, the national will to resolve past Human Rights abuses, and on the other, to put into order life in the future.

The annulment of the TRC Act also automatically stopped the process of forming the TRC that had already been delayed for two (2) years. While the process of selecting its members had already reached the final stage, neither had President Susilo Bambang Yudhoyono made his choice from among the candidates. This matter was considered by the Chairperson of the Constitutional Court Jimmy Assidiqie as a "technical problem."

The decision of the Constitutional Court made the victims, who had been courageously pursuing the cause of uncovering the truth and attaining justice, to lose their spirit once more. Meanwhile, the perpetrators are cheering because one of the mechanisms to uncover past crimes would not be in effect, at least formally. For the government, the annulment of the TRC Act comes as a relief because it would not need to allocate a budget to set up the TRC and to provide compensation to the victims. This annulment is felt more oppressive because it came up amidst the persistent culture of impunity in the country.

The Constitutional Court's decision is final and binding; it means that nothing can be done to appeal it or to carry out other legal efforts, in spite of the fact that the Constitutional Court decided on something that was not appealed by the petitioner (*ultra petita*). Such an act is a violation of legal values and principles that apply universally.

The decision has been handed down, and discussion of its pro's and con's persist. Indeed we should respect the Constitutional Court's decision as coming from a constitutionally authorized government institution. However, this does not mean that we do not need to question its "validity." The Constitutional Court's decision appears to violate legal principles and to lose the spirit behind the formation of the TRC Act itself. Moreover,

if we consider the implications of the annulment of the TRC Act for the victims, especially those in Papua and Aceh who have the formation of a TRC on their agenda, questioning the "validity" of the decision becomes more significant.

II

RETRACING TRC DYNAMICS

A. The Context and Legal Bases for the Formation of the TRC in Indonesia

The legal bases for the establishment of the TRC in Indonesia are very strong because of at least two factors that are mutually supportive: *first*, its formation is based on the law, and not just on a presidential decision or some other equivalent policy; *second*, the TRC Act itself was formed on strong legal ground, that is, the People's General Assembly (TAP MPR) Decree No. V/ 2000 on the Consolidation of National Unity and Integrity. This decree recommended the establishment of a National Truth and Reconciliation Commission as an extra-judicial institution that is responsible for maintaining truth by revealing abuse of power and past Human Rights violations, and for effecting reconciliation. The purposes and objectives of this People's General Assembly decree are: to identify problems, to create conditions for reconciliation, and to determine policies to establish national unity. Awareness and commitment to put unity on a stable basis should be realized through concrete steps, among which is the formation of a National TRC and the formulation of national ethics together with a future vision for Indonesia. [2]

Besides this, the formation of a TRC was mandated by Act No. 26/2000 on Human Rights Courts as one of the ways to resolve past Human Rights abuses.[3] It stipulates that the TRC is a mechanism that is meant to resolve past serious Human Rights abuses. This

[2] The roles and functions of the TRC as mandated in the MPR Decree V/2000 are clarified in the Introduction, part B, 'Purposes and Objectives', which on the whole states that "The decree on consolidation of national unity and integrity in general has as its purposes and objectives to identify existing problems, to determine desired conditions to achieve national reconciliation, and to determine policy directions as a guide to the stabilization of national unity and integrity". "Serious awareness and commitment to consolidate unity and national integrity must be shown in real actions, in the form of a Truth and National Reconciliation Commission, together with the formulation of national ethics and a vision for the future of Indonesia."

[3] Article 47, Act No. 26/ 2000 on Human Rights Courts in which Article 47, Section (1) states that: 'Any serious Human Rights abuses that occured before this Act comes into force can be settled by the Truth and Reconciliation Commission; and Section (2) states that the commission as mentioned in section (1) is formed by an Act.

stipulation also affirms that there are two avenues to resolve them: by *ad hoc* Human Rights trials, and by a TRC.

In 2001, Act No. 21/ 2001 on Special Autonomy for the Papua Province clarified the importance of setting up a Truth and Reconciliation Commission.[4] The Papua TRC's tasks would be to clarify the history of Papua; to establish unity and integrity in the Republic of Indonesia; to formulate and to determine steps for reconciliation that includes revealing the truth, admitting mistakes, requesting an apology, granting forgiveness, peace, law enforcement, amnesty, rehabilitation, or other useful alternatives that would give a sense of justice in society so as to maintain the unity and integrity of the nation.[5]

An important moment occurred in 2004, with the ratification of Act No. 27/2004 on the TRC. This Act mandated revealing the truth, solving past Human Rights abuses, and reconciliation. The TRC in this Act is a National TRC because it is located in the capital city of the country and has territorial jurisdiction throughout Indonesia. The formation of the TRC based on this Act rested on the consideration that serious Human Rights abuses which occurred before the enforcement of Act No. 26/2000 on Human Rights Courts should be investigated in order to uncover the truth, uphold justice, and build a culture that respects human rights so as to bring about reconciliation and national integrity. Revealing the truth is also in the interest of the victims and/or their family or heirs getting compensation, restitution, and/or rehabilitation.[6]

In 2006, Act No. 11/2006 on the Aceh Government, mandated the establishment of a TRC-Aceh and Human Rights Courts in Aceh. The formation of the TRC-Aceh was meant to settle past Human Rights abuses in Aceh, and is part of the Indonesian TRC. [7] The mandate to set up Human Rights Courts and a TRC-Aceh is a continuation of the Helsinki peace agreement and is part of the agreements between the Government of the Republic of Indonesia and the Free Aceh Movement.[8]

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[4] Act No 21/2001 on Special Autonomy for Papua Province, in the section on Human Rights, Article 45 stipulates that to promote, protect, and respect Human Rights in Papua Province, the government shall form a represenative agency of the National Commission for Human Rights, Human Rights Courts, and a Truth and Reconciliation Commission in Papua Province in accordance with regulations. In Article 46 it is stated that the objective of establishing the commission is to achieve stabilization in national unity and integrity.

[5] See Article 46 and its description in Act No. 21/ 2001 on Special Autonomy for Papua Province.

[6] See consideration in Act No. 27/ 2004 on the Truth and Reconciliation Commission, items a and b.

[7] See Article 229 Act No. 11/2006 on Aceh Government.

[8] See *Memorandum of Understanding (MOU)* between the Government of the Republic of Indonesia and the Free Aceh Movement, in the section on Human Rights. The memorandum states that a TRC in Aceh will

Based on the objectives and ideas behind its establishment, therefore, the TRC is not merely envisioned as an institution for resolving past Human Rights abuse cases individually, but also for a much larger objective, towards the future interests of the country. This means that the TRC is established as a mechanism that is able to give a certain understanding of what happened in the past, identify the victims and perpetrators, and take steps to respond to past occurrences legally as well as politically; to make reparation to the victims, and to become a catalyst for the reconciliation process. On the national level, the outcomes from the TRC will guide the direction and reformation policies that would point the nation towards the future.

B. TRC ACT and the Choice of Judicial Review

Act No. 27/2004 on the TRC was formulated to complement the limitation of Act No. 26/2000 on Human Rights Courts to resolve past Human Rights abuses throughout Indonesia, particularly in Aceh and Papua. However, the emergence of the TRC Act gave rise to various pro and con perspectives. On one side, there are those who think that the existence of the TRC - as a complementary mechanism to the court - will provide clear guidance to reveal truth and to settle past Human Rights abuses. On the other side, there are those who think that it will become a tool for impunity or "white washing" for some actors of Human Rights abuses because this Act is considered as siding with the perpetrators and not with the victims.

With all the debates on the good and bad aspects of the TRC Act, it was realized that there are some items in the Act that do not accommodate the expectation of the "ideal TRC" as it was originally envisioned. In particular, some items in this TRC have implications on fulfilling the victims' Rights such as the clause on *amnesty* given to the perpetrators as a prerequisite for granting compensation, restitution, and rehabilitation to the victims. Another item that draws attention is a decision stating that any settlement performed through the TRC cannot be reverted through a trial. These regulations are considered contrary to the fulfillment of the victim's Rights and a violation of international law, especially when the TRC is interpreted as a substitute for a trial, not complementary to one.

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be set up by the Indonesian TRC tasked with formulating and deciding steps for reconciliation, 15 August 2005.

Based on various analyses and considerations about some regulations in the TRC Act, some Non -Governmental Organizations (NGOs), victims and organizations of victims submitted for judicial review some articles in the TRC Act that are considered contradictory to the constitution.[9] The choice to file the suit with the Constitutional Court was meant to restore to the TRC its intended functions, not to 'destroy' the TRC itself. It In other words, the suit's objective was to straighten out the TRC mechanism so that it would be fairer, side with the victims, and keep the possibility open to charge the perpetrators through a trial.[10]

The sued regulations are Articles 27, 44, 9 (1), articles related to the resolution of cases, which are, successively: compensation, restitution and rehabilitation of the victims; the TRC as a substitute for a trial; and regulations on amnesty. These regulations are not connected with the basic mandate of the TRC, that is, to reveal the truth. What is being fought for is a TRC that does not become a mechanism to constrain the victims' Rights, or to close off the possibility of suing the perpetrators while even giving amnesty to them, but a truth-revealing mechanism based on respect for the victims' Rights.

[9] The petitioners for a *judicial review* are ELSAM, KontraS, Imparsial, LBH Jakarta, Solidaritas Nusa Bangsa, LPKP 65, LPR-KORB, and two individuals, Raharja Waluya Jati and Tjasman Setyo Prawiro.

[10] See the right to examine material about Act No. 27/2004 on the Truth and Reconciliation Commission, 25 April 2006.

III

ANALYSIS OF THE DECISION OF THE CONSTITUTIONAL COURT

Of three petitioned articles for review, only the annulment of Art. 27 was finally granted by the Constitutional Court. The Court rejected the petitioners' appeal to review Art. 44 on the relationship of the TRC and the court, and Art. 1 (9) on amnesty. In their argument, the petitioners saw that the formulation of article 44 placed the TRC as a substitute for a Human Rights Court and because of this, it should be annulled. Responding to this opinion, the Constitutional Court viewed the TRC more as an alternative for the victims and therefore cannot be regarded as a substitute mechanism. With respect to Article 1 (9), the Court was of the opinion that the article does not regulate norms, but only contains some definitions; therefore, it does not need to be reviewed.

Although they accepted only one of three articles proposed for review, i.e. Art. 27, the Constitutional Court acted further by declaring the whole Act null and void. It considered that if Article 27 is nullified, the said Act cannot be put into operation. For the sake of the greater public interest, the Court then decided to cancel the whole act although it went way beyond what the petitioners put on appeal.

A deeper look at this surfaces two weaknesses – if not mistakes - in the Constitutional Court's decision, which has fatal implications on the concept of the truth commission. The weaknesses are of two different limitations. They are (1) a mistake in the understanding of the idea behind a truth commission, and (2) a deviation in the laws of procedure applied in the Constitutional Court's judgment that ended up declaring the whole act null and void. The Constitutional Court's failure to comprehend as a whole the concept behind the truth commission can be found in the court's decision on Art. 27 and 44. Meanwhile, the deviation in the rules of procedure can be found in the court's judgment that brought about the decision to annul the whole act because it does not have a legally binding force.

A. The Constitutional Court's Failure to Understand the Whole Idea of the Truth Commission

This failure to understand can be traced from the Court's consideration leading to its decision in reviewing Art. 27 and 44. Two prominent ideas come across with the Constitutional Court regarding the TRC as a political policy to settle problems in this country's past through reconciliation.[11] On account of this, **reconciliation** became **the main objective** in establishing the TRC. Besides this, the Constitutional Court considered the Truth Commission as **an alternative way to resolve cases,** that is often referred to as ADR (Alternative Dispute Resolution) between parties, related to civil law. A more detailed explanation follows:

Art 27: TRC Act as a Means of Reconciliation

In their consideration, the Constitutional Court applied the reconciliation paradigm in their evaluation of the petition to review Art 27. The Court stated that lawmakers had already decided to make a reconciliation policy – as a way of resolving serious Human Rights abuses that occurred before the existence of the Act on Human Rights Courts – by casting it in Act No. 27/2004 on the TRC. Thus, the TRC Act is not only a political decision but also a legal mechanism.

According to the Constitutional Court, the formulation of Art. 27 that makes the granting of compensation and rehabilitation depend on the giving or not giving of amnesty to the perpetrators, shows a contradiction. This contradiction comes up because there is pressure upon the perpetrators based on their individual criminal responsibility. [12] This perspective is clearly contradictory to the nature of past Human Rights abuses, which were not approached within the framework of individual relationships between perpetrators and victims. Then, according to the Constitutional Court, the fact that Human Rights abuses occurred is sufficient basis for the state to have the legal obligation to provide compensation, rehabilitation and restitution, without any conditions whatsoever. The Constitutional Court supports this by acknowledging universal practices and usages in promoting justice in the

[11] See the Constitutional Court decree No. 006/PUU-IV/2006, page 119-122.
[12] See the Constitutional Court decree MK No. 006/PUU-IV/2006 page 121.

settlement of serious Human Rights abuse. The requirement for granting amnesty is precisely an act of negligence on the part of the law to provide protection and justice as guaranteed in the Constitution; therefore, the Constitutional Court considered that this article does not have any legally binding force.

According to the Constitutional Court, with the paradigm of the TRC as a tool for reconciliation, there are two important starting points, namely, the occurrence of Human Rights abuse, and the existence of a victim. This point of emphasis is central in looking at the TRC, so that the Constitutional Court deemed that if it is cancelled, it will affect and make the whole act inoperative. So, although this argument seems to be in accordance with that of the petitioners, both parties have different points of emphasis.

For the petitioners, the TRC is not only a means of reconciliation, but one that provides a victim-centered perspective. It implies the centrality of revealing the truth because it is from this point that the process of reconciliation starts and goes underway by itself. [13] This difference is clearer in the consideration described in other parts of this writing where the idea of revealing the truth is precisely lost from the Constitutional Court's decision to render the whole act null and void.

Article 44, the TRC is an Alternative Dispute Resolution (ADR): Human Rights Abuses Resolved as Civil Cases?

The wrong interpretation of the idea behind the TRC as stated in Act No. 27/2004 is also seen in the Constitutional Court's consideration on the appeal to review Article 44. Article 44 of TRC Act states, "*Serious Human Rights abuses that have been uncovered and resolved by the Commission cannot be forwarded to the Ad Hoc Human Rights Court.*"

The Constitutional Court in its consideration stated that the TRC is a mechanism for alternative dispute resolution which, if successful, will close off the possibility of resolving it through legal mechanisms. Such resolution of Human Rights abuses, according to the Constitutional Court, is accepted internationally such as in South Africa and even in customary law so that it cannot be considered as justifying impunity; therefore, it is not against the Constitution.

[13] See the Constitutional Court Decree No. 006/PUU-IV/2006 pages 4-6.

Such an opinion is clearly a misleading interpretation since it is not based on the general concept that is commonly used and made as a guideline by academics and practitioners[14] regarding alternative dispute resolution (ADR). This application of the concept of ADR on the TRC is obviously a big mistake because the absolute competence of ADR has to be a civil dispute in which the parties have previously concurred that should a disagreement arise among them, it will be investigated through an ADR mechanism.

ADR, which is translated into Indonesian as *alternatif penyelesaian sengketa,* is an institution to resolve disputes or disagreements through a procedure agreed on by the parties involved, that is, an extra-judicial settlement conducted through consultation, negotiation, mediation, conciliation or expert evaluation. The resolution of a dispute or disagreement that occurs or may occur in relation to a particular law is settled by arbitration or alternative dispute resolution.[15]

The word "alternative" in this case emphasizes the meaning of "other than the court".[16] Dispute or disagreement (*perdata*) can be resolved by parties through alternative dispute resolution based on good will by setting aside litigation through a Government Court. The resolution of the dispute or disagreement through alternative dispute resolution is directly conducted by parties at a meeting not lasting more than 14 (fourteen) days, the result of which is put in written form.[17]

The TRC is not an idea that comes out of a relationship to civil law, but is a transitional mechanism to resolve serious Human Rights abuses that have occurred in a country.[18] Therefore, the Truth and Reconciliation Commission is an institution tasked with resolving serious Human Rights abuse cases in the past by: revealing the truth,

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[14] Hadimulyo, "*Mempertimbangkan ADR: Kajian Alternatif Penyelesaian Sengketa Di Luar Peradilan",* Lembaga Studi dan Advokasi Masyarakat, Jakarta, January 1997; Budhy Budiman, "Mencari Model Ideal Penyelesaian Sengketa, Kajian Terhadap Praktik Peradilan Perdata dan Undang Undang Nomor 30 Tahun 1999", www.uika-bogor.ac.id/jur05.htm; Wirawan, S.H., Sp.N, "Menyelesaikan Perdata Secara Singkat", *Pikiran Rakyat*, 18 October 2004.

[15] Article 1 number 10 Act No. 30/1999. However, most academicians view ADR from two different perspectives: *First*, ADR includes various ways of resolving disagreement other than the judicial process, either based on a consensus approach such as negotiation, mediation, conciliation or not based on a consensus, such as arbitration. The other view is based on only on consensus, and arbitration is not included as ADR.

[16] Takdir Rakhmadi, S.H., LLM, "Kata Pengantar" in *Mempertimbangkan ADR: Kajian Alternatif Penyelesaian Sengketa di Luar Peradilan*, ELSAM, Jakarta, January 1997.

[17] Article 1 Number 10, Article 2, Article 6 (1-2) Act No. 30/1999 regarding Arbitration and alternative dispute resolution, Lembaran Negara (LN) 138, 1999. See also Supreme Court Act No. 2/2003 regarding Mediation outside the court.

[18] Refer to Article 3 Act No. 27/2004 regarding the TRC formulation: "The *TRC mechanism is one of the mechanisms to resolve serious Human Rights abuses that occurred in the past, outside the court, to create peace and unity in the country, and to effect national reconciliation and unity through mutual understanding.*"

acknowledging the victims as victims, providing reparation to the victims, as well as reforming the institutions considered responsible for Human Rights abuses in the past to ensure their non-recurrence in the future; however, no punishment is handed down to the perpetrators.[19]

The maximum effort that can be taken by this institution is to identify the perpetrators and reveal their names to the public (*naming names*). But usually it is limited to those most responsible for the abuse. In fact, even the perpetrators – especially those who are cooperative with the commission – will receive amnesty.[20]

The existence of a Truth and Reconciliation Commission will hopefully confirm the fact that even though there is a court to resolve serious Human Rights abuses that occur in a country,[21] a Truth and Reconciliation Commission is still needed. These two institutions work together to solve serious Human Rights abuse cases, since each of them has its own characteristic. Because of this, their relationship is complementary.[22]

The complementary characteristic of the TRC can be seen from the stipulation in Article 47 (1) Act No. 26/2000 and the general explanation, which state:

> Serious Human Rights abuses that occurred before the enforcement of this Act may be resolved by the Truth and Reconciliation Commission.
>
> The Truth and Reconciliation Commission has no authority to decide on serious Human Rights abuses which have already been decided on by an *ad hoc* Human Rights Court. Therefore, the decision of the Truth and Reconciliation Commission or an *ad hoc* Human Rights Court is final and binding.

From the above stipulations, at least two conclusions can be drawn: (1) The commission works first of all to reveal the truth and to carry out the resolution process. If the case can be resolved,[23] the said case will end with the Commission; (2) But if the case cannot be resolved, it will be forwarded to the *ad hoc* Human Rights Court. Only at this time would the *ad hoc* Human Rights Court start working.

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[19] Ifdhal Kasim, "Apakah Komisi Kebenaran Itu?", *Briefing Paper*, ELSAM, 2000.

[20] A.H Semendawai, "Relasi Antara KKR dan Badan Peradilan di Indonesia: Mencari Format Hubungan Ideal untuk Pemberian Keadilan Bagi Korban", *Working Paper*, ELSAM, Jakarta, 2005.

[21] See Article 43 Act No. 26/2000 regarding Human Rights courts.

[22] A.H Semendawai, *op cit*.

[23] The case is considered closed if the perpetrator opens up to the crime; confesses guilt and apologizes to the victim; the victim accepts the apology and the rights for reparation are fulfilled; then the President gives amnesty to the pepetrator.

There are at least four general characteristics of several Truth and Reconciliation Commissions in the world at this time. ***First***, the TRC's focus of investigation is past crimes. ***Second***, its aim is to get a comprehensive picture of Human Rights abuses and violations of international law at a certain period of time, and does not focus on one case only. ***Third***, its period of duty is limited, usually ending after its report is completed. ***Fourth***, the Truth and Reconciliation Commission has the authority to access information from any institution, and to provide legal protection for witnesses.

Based on the above explanation it is obvious that the Constitutional Court's legal opinion that the Truth and Reconciliation Commission is an alternative way of resolving past Human Rights abuses is not founded on strong and appropriate legal references. This opinion of the Constitutional Court based on the false assumption that serious violation of Human Rights - which has become the absolute sphere of authority of the Truth and Reconciliation Commission – happened because there is a consensus or an agreement on the part of the victims regarding what was done by the perpetrators.

The Constitutional Court's opinion that the TRC and ADR are the same is very dangerous, especially because there are significant characteristic differences between the two mechanisms. This misperception can result in a sense of unease (*onbehoaglijk*) in society.[24]

B. A Mistake in the Application of the Laws of Procedure (*Non Ultra Petita Principle*)

A careful look into the Constitutional Court's decision also reveals a fundamental mistake in the application of the Laws of Procedure, specifically related to the deviation from the *non-ultra petita* principle in the laws of procedure. The Constitutional Court believes that granting an unrequested petition is not a violation of the *non-ultra petita* principle. This is related to the Constitutional Court's decision stating that although only the petition regarding Article 27 TRC Act was granted, since the whole operationalization of the TRC Act depends and has its source on the accepted Article, therefore by declaring that Article 27 TRC Act conflicts with the 1945 Constitution and does not have a legally binding force, all stipulations in the

[24] Djoko Prakoso, S.H, *Masalah Pemberian Pidana Dalam Teori dan Praktik Peradilan*, Ghalia Indonesia, Jakarta, [what year?], page 37.

TRC Act become impossible to implement. Fundamentally the laws of procedure related to the review of acts vis-a-vis the 1945 Constitution involves public interest, with juridical consequences that are *erga omnes*, so that it is a mistake to see it as *ultra petita*, a known concept in civil law.[25]

The Constitutional Court's decision that exceeds the petitioners' (*ultra petita*) request is a serious violation of the Constitutional Court Act and of a cardinal principle in the laws of procedure. ***First***, it is a serious violation of the Constitutional Court Act because there are no rules or regulations in the Constitutional Court Act that allow the Constitutional Court to make a decision exceeding the petition. The Constitutional Court Act only regulates the procedure for decision making and the decision format. It has no regulation whatsoever regarding authority over *ultra petita.*[26]

Using the Korean Constitutional Court Act as a reference is also a big mistake because juridically Indonesia does not submit to the laws of other countries. Moreover, the Constitutional Court in their statement does not mention that the Korean Constitutional Court has used the regulation to solve cases in an *ultra petita* way. Thus, a national law of a country, in this case the Korean Constitutional Court Act, cannot be used arbitrarily as a reference or principle in another country's decision-making. It is different from precedent, principle, regulation and jurisprudence of international law which, according to custom, have become sources of international law or international customary law.[27] Moreover, deviation from the *non-ultra petita* principle is forbidden by international jurisprudence.

Second, it is a serious violation of a cardinal principle in the laws of procedure, i.e. the *non-ultra petita* principle, or the principle "*governing the Court's judicial process, which does not allow the Court to deal with a subject in the disposition of its judgment that the parties to the case have not,*

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[25] See the Constitutional Court Decree No. 006/PUU-IV/2006, pages 124-125. As a matter of fact, the expert of Indonesian civil law, Prof. Dr. Soedikno Mertokusumo has repeatedly said that "judges are not allowed to adopt foreign institutional laws of procedure (except when they are already incorporated in the law); aside from this, judges are not allowed to create rules that are generally binding (Article 21 AB). Judges are not allowed to accept or use civil laws of procedure that are not regulated in our positive law (not incorporated in the rules). Even if Article 28 Act no.4/2004 states that judges should delve into the rules in the community, it means the material law (the law that regulates substantial rights and responsibilities), not formal law (the law that regulates formal rights and responsibilities). Even so, in exploring and discovering their laws, judges cannot just make a "break-through", because there is a method or rules of the game to be followed". For the complete text see "Gugatan *Actio Popularis* dan Batas Kewenangan Hakim", *Hukumonline*, 27 November 2006.

[26] See Articles 45 to 49 Act No. 24/2003 regarding the Constitutional Court of the Republic of Indonesia.

[27] Considering item c The People's General Assembly Decree No. XVII/1998 on Human Rights and Act No. 39/1999 on Human Rights.

in their final submissions, asked it to adjudicate[28] and "*to ensure that the Court does not exceed the jurisdictional confines spelled out by the parties in their final submissions*". The Constitutional Court, therefore, should be"*strictly limited to the consent given by the parties to a case*". [29]

This serious violation is the second one committed consciously by the Constitutional Court. The first *ultra petita* decision was when it accepted the request of material examination of the Judicial Commission Act. In its decision, the Constitutional Court declared that the Judicial Commission cannot supervise Constitutional Judges, a matter which was not actually requested by the petitioners.[30]

That the proposition stated by the Constitutional Court canceling the whole Act is outside the petitioners' request, on the grounds that it includes the interest of the wider community, as well as brings about judicial consequences that are broader than the petitioners' interests as individuals, is a very subjective proposition and is not based on clear criteria or guidelines.[31] Because it is not sufficient to understand what is meant by public interest merely legalistically or formally, but should be integrated according to the method on which it is legally based, so that the term public interest becomes clear and fulfills the sense of social justice.[32] Otherwise public interest would be interpreted by the Constitutional Court as "the interest of a small elite group concerned with maintaining the *status quo*,[33] as frequently occurred during the reign of Soeharto.

It is important to note that when we begin saying that the purpose of law is the public interest, the law does not have any choice except to guarantee public interest, while protecting the interests of individuals so that justice might be carried out[34] in a balancedway.[35]

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[28] *Asylum, Judgment*, *I.C.J. Reports 1950*, p. 402. See also Nancy A. Combs, Daryl A. Mundis, Ucheora O. *Onwuamaegbu*, Mark B. Rees, and Jacqueline Weisman, "*International Courts and Tribunals*", http://www.abanet.org; Document A/CN.4/SR.2645, *Summary record of the 2645th meeting, Extracted from the Yearbook of the International Law Commission* 2000 Document vol. I; The Swiss Supreme Court, *Bank Saint Petersburg PLC, St. Petersburg v. ATA Insaat Sanayi ve Ticaret Ltd., Besiktas Istanbul*, 2 Mar 2001, 4P.260/2000/rnd, *Bull. ASA* 3/2001, 531-538, "*May and Must Arbitrators Supply their Own Legal Grounds*?"

[29] *Separate Opinion of Judge Buergenthal*, www.esil-sedi.org/english/pdf/Ochoa-RuizSalamanca.

[30] *Hukumonline*, "Putusan MK tentang UU KKR Dianggap *Ultra Petita*", 11/12/06

[31] The definition of public interest is so important in national life and in practice public interest conflicts with individual interest, so that a clear definition is needed.

[32] Satjipto Rahardjo, in Maria S. W. Soemardjono, Kebijakan Pertanahan antara Regulasi dan Implementasi, 2001, *Kompas*, Jakarta.

[33] LBH APIK, "Usulan Revisi PERDA DKI Jakarta No.6 Tahun 1993 tentang Pramuwisma", *Position Paper* : http://www.lbh-apik.or.id/perda%2011.htm.

[34] Sunarno, "Tinjauan Kritis terhadap Kepentingan Umum dalam Pengadaan Tanah untuk Pembangunan",

Moreover, related to the importance of the TRC in resolving past serious Human Rights abuses for the sake of the whole Indonesian nation,[36] is the prevention of similar Human Rights abuses such as that experienced by the victims who petitioned for the judicial review of Act No. 27/2004 to the Constitutional Court.[37] Ironically, such public interest, which referred to the interests of the Republic of Indonesia, was used by the Constitutional Court to stop the effort to resolve past violations following the guidelines stated in the TRC Act. [38]

This phenomenon will likely go on because the Constitutional Court has such a habit and teaches other judicial institutions to make *ultra petita* decisions. The point is that the Constitutional Court has given a lesson on how to be inconsistent with the laws of procedure that were actually made binding by the parliament (with the government).[39]

Indeed, what the Constitutional Court did is a negative precedent and taboo for a judicial institution. The reason is that the *ultra petita* decision made by the Constitutional Court disregarded the principles, rules and jurisprudence that are applied and acknowledged nationally and internationally. The worst part is that the Constitutional Court's decision is substantially legally weak.

C. Recommendation of the Constitutional Court Regarding the Politics of Reconciliation: the Constitutional Court as a Policy Maker?

Together with the annulment of the whole TRC Act, the Constitutional Court recommended that the Government can take many other ways to serve its purposes, among others, by

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http://www.umy.ac.id/hukum/download/narno.htm.

[35] Huyber, in Maria S. W. Soemardjono, *op cit.*

[36] The Truth Commission is special in its coverage, size and mandate; even so, many commissions attempt to achieve some or all of its objectives: 1. Give meaning to the Victims' Voice individually, 2. Rectify the history related with big and serious Human Rights violations; 3. Education and public knowledge; 4. Investigate Systematic Human Rights abuses towards institutional reform; 5. Provide assessment on the Impact of Human Rights abuses on the victims; 6. Make perpetrators take responsibility for their crimes. For the complete text, see **"**Tujuan Penting Komisi Kebenaran", www.elsam.or.id.

[37] In the Constitutional Court Decree No. 006/PUU-IV/2006, page 18-21, the Constitutional Court Judge states that the (individual) petitioner has the capacity as a petitioner for the right to examine material of Act No. 27/2004 on the Truth and Reconciliation Commission. Therefore, it can be inferred that the (individual) petitioner can be included as a victim of serious Human Rights abuse and can become the object of the TRC as written in article 43, Act No. 26/ 2000.

[38] See The Constitutional Court decree No 006/PUU-IV/2006, page 120.

[39] In the rules of procedure for criminal cases, there is a regulation stating that "The punishment given in the decision of a review cannot exceed the punishment that had been handed down in the previous decision." (Article 266 (3) Act No. 8/1981).

promoting **reconciliation** in the form of judicial policies (laws) which are in accordance with the 1945 Constitution and Human Rights instruments that are in force universally, or by bringing about **reconciliation** through political policies within the framework of **rehabilitation and general amnesty.**

This opinion exceeds the mandate and authority of the Constitutional Court. This can be seen from the following arguments:

> The Constitutional Court is one of the agents of judicial authority, besides the Supreme Court as mentioned in Article 27 (1) and (2) of the 1945 Constitution of the Republic of Indonesia. The Constitutional Court is bound to the general principles of enforcing independent judicial authority, free from the authority of other institutions in upholding law and justice.[40]

The problem occurred later because in the above-stated decision of the Constitutional Court, in fact in many of their decisions, the Constitutional Court judges often manifest a narrow legal perspective. "Too formal and legalistic. Only sees the mistake based on whether or not there are provisions for it in the law."[41] Even more, it tends to act without looking at the will of the constituents, in this case the Indonesian people as a whole.[42] On one hand, the Constitutional Court binds itself to the Constitution and at the same time frees itself from the principal owners of the Constitution, the people themselves. As a matter of fact, the interests of the constituents should be the objective of all constitutional measures.[43]

Another problem is related to the misleading logic of the Constitutional Court's constitutionalism as '*the guardian of the constitution*" and "*the sole interpreter of the constitution*" which frequently makes the Constitutional Court seem to have a particular interpretive authority and cannot be wrong. Moreover it is not only the institution that suffers from this, but persons in the institution as well. Often comments from the chairperson of the constitution become a polemic, since such excessive comments are made on cases that have

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[40] Article 24 C (1), 1945 Constitution states that the Constitutional Court has the authority to judge on the first level and the last, where its decision is final; maintain government stability, and correct past experiences related to the form of government caused by multiple interpretations of the Constitution.

[41] *Kompas* "Putusan Mahkamah Konstitusi Masih Terus Dikritik", 29 July 2006.

[42] The explanation of the government, represented by the Minister of Justice and Human Rights Hamid Awaluddin in "Ikhtisar tentang latar belakang dan motif pembuatan undang-undang KKR", 23 May 2006; explanation of the People's Council of Representatives represented by Akil Mochtar, S.H., M.H "Mengenai proses pembentukan UU KKR di DPR RI", 23 May 2006.

[43] Zainal Arifin Muchtar, "Konstitusionalisme Populis", *Inovasi Online* , Vol.6/XVIII/March 2006.

not yet been investigated juridically by the institution. The comments become personal conclusions prior to institutional analysis.[44] This problem is clearly seen from the opinion given by the Constitutional Court that:

> .....there is no legal certainty, either in its normative formulation or in the possibility of applying the norms in the field, to achieve the expected reconciliation. In considering the above explanation, the Court thinks that the principle and aim of the TRC, as mentioned in Article 2 and Article 3 of the Act *a quo*, cannot be realized because it has no legal guarantee. *(rechtsonzekerheid)*.

The Constitutional Court's opinion conflicts primarily with the opinion of international legal experts that to carry out the duties of a Truth and Reconciliation Commission, supporting regulations are needed. These supporting rules should guarantee that the Commission is able to access all data from various institutions, have a sufficient operational budget, human resource support and other appropriate facilities.[45] In relation to the process of setting up a Truth and Reconciliation Commission in Indonesia, the Government is currently looking into 42 candidates for the TRC, 21 among whom will be selected to form its membership. So, the Constitutional Court's concern and consideration are excessive, for a case that has not yet been investigated and examined, either juridically or in practice.

In relation to the Constitutional Court's consideration that states:

> .....there are many ways that can be taken for this, among others, by promoting **reconciliation** in the form of judicial policies (laws) which are in accordance with the 1945 Constitution and Human Rights instruments that are in force universally, or by bringing about **reconciliation** through political policies within the framework of **rehabilitation and general amnesty**.

This opinion of the Constitutional Court has entered the domain of political policy, which properly belongs to the Government and the House of Representatives (DPR) as the

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[44] For example the statements about the election of TRC members that has to wait for the Constitutional Court's decision before the president submits the names of the TRC candidates to the Representatives (DPR), *Kompas*, 7 August 2006.

[45] A.H Semendawai, *op cit*. See also *Hukumonline*, "LSM Minta Aturan Kerja Dibuat oleh KKR yang akan Terbentuk Aturan Pelaksana UU KKR", 28 March 2006.

legislators. Moreover, the Constitutional Court's opinion may result in the giving of "*blanket amnesty*". This is so because in general, amnesty is granted to whoever are considered to have committed serious Human Rights abuses, without paying due attention to the strict conditions that are supposed to be followed when amnesty is given, which are:[46]

1. Before amnesty is granted, the truth must be uncovered.
2. Amnesty cannot be granted to perpetrators of crimes against humanity and genocide;
3. Amnesty must be given according to the people's will.

Therefore, the Constitutional Court's legal opinion exceeded their authority (*extended mandate*) as an institution with authority to judge on the first and last level, wherein their decision is considered final; to maintain stability in the government; and also to correct past constitutional experience caused by multiple interpretations of the constitution. All of these that fall under the Constitutional Court's authority have been violated in this decision.

[46] Jose Zalaquett, "*Handling Past Human Rights abuses: Resolution Principles and Political Hurdles*", as published in the Journal *Dignitas* Vol. I, 2003, ELSAM, Jakarta.

IV

IMPLICATION OF THE CONSTITUTIONAL COURT'S DECISION

At first glance the Constitutional Court's decision gives the impression of heroism in respecting justice by upholding the constitution. In fact, several international institutions responded positively, viewing the decision as a step forward in applying several Human Rights instruments on the international level as standards for examining the articles under review.[47] This decision also points to the tendency to use contextual interpretation on the part of the Constitutional Court, a tendency that was already seen in previous decisions, like the Constitutional Court's decision on the Electricity and Water Resources Act.[48]

Although giving a decision that goes further than what has been petitioned looks like a progressive step, the decision in fact is a backlash in the effort to improve the legal framework in the endeavor to uphold justice. The backlash is at least related to three important aspects in establishing the TRC. *First*, the decision implies the loss of a space for the victims of past Human Rights abuses to narrate their stories, because the Constitutional Court's decision leaves a legal hiatus in carrying out the government's obligation as mandated in the Assembly Decree No. V/2000. *Second,* the Constitutional Court's decree provides more space for the prevailing tradition of impunity. It strengthens some wrong perspectives in understanding the TRC, for example, regarding the TRC as an instrument for reconciliation in national politics, or as an alternative dispute mechanism for cases such as a civil dispute between some parties, known as ADR.

A. The Loss of A Legal Framework for Victims' Narratives: Giving Space Once Again for the State to Deny Its Responsibility for Past Violence

[47] Indonesia: "*Constitutional Court Strikes Down Flawed Truth Commission Law: Decision Presents Opportunity to Address Legacy of Impunity"*, Immediate Release, *International Center for Transitional Justice* (ICTJ), 8 December 2006.

[48] This approach invites continuous debate; some experts think that using a contextual approach is actually a form of *re-crafting* the constitution. As such, the Court has exceeded its authority not only as *the guardian of the constitution* but even went further in rewriting and giving a new interpretation to the constitution.

The Constitutional Court's decision really surprised many parties, including the victims who were the petitioners for the material review. On one hand, the decision confused and hurt them because it took away the opportunity for fulfilling their rights as victims, an opportunity which had been legally created with the ratification of the TRC Act.[49] For society in general, the decision also returned to the drawing board the effort to push the state to show a concrete commitment to respond to the demand for justice vis-a-vis various past Human Rights abuses which up to the present have not been formally acknowledged. Therefore, the objective to protect the next generations from the possibility of the same evil recurring in the future will be more difficult to realize.

As it is well-known, the important consideration that formed the basis of this decision is the supremacy of legal guarantee. The Constitutional Court's decision to declare the TRC Act as null and void comes from the lack of legal guarantee, which in turn is due to the weak formulation of the articles in the TRC Act in general. Among others, these include the unrealistic time frame for taking the decision to give compensation and rehabilitation (Article 28, TRC Act), the absence of legal guarantees for the actors that choose this mechanism because the relation between court mechanisms and the TRC is not clearly stated. Besides these, some operational obstacles on the technical level are also described further in the Court's consideration. As said by the chairman of the Constitutional Court, the fact that up to this time the president has failed to perform his obligation to form a commission was also one of the factors that the Court considered in declaring the Act null and void.[50]

Instead of defending the victims' interests as petitioners, this decision in fact disappointed the victims of past Human Rights abuses who keep asking for justice. The idea of establishing this Act cannot be separated from the effort to provide a legal guarantee to the victims that the government is committed to solving problems related to past Human Rights abuses. Because of this, it is no exaggeration to say that the existence of the Act gave the victims new hope that their narratives would be listened to. Some of them will find it more difficult to hope for any further action on the part of the government if the Act is

[49] This was also revealed in an interview with the Department of Justice and Human Rights Subdirectorate head with one from the city media. See *Koran Tempo*, 8 December 2006, "Undang-Undang Komisi Kebenaran Dicabut."

[50] See *The Jakarta Post*, "Govt pledge to settle rights abuses questioned", 9 December 2006.

annulled.[51] Similar comments also came up from different quarters, including government people, members of the House of Representatives, and communities in defense of Human Rights as soon as the Constitutional Court's decision was handed down. Some parties even think that the decision drives back to point zero the efforts to demand accountability for past violation of Human Rights.[52]

The hope that the victims pinned on the existence of this Act is not exaggerated, particularly if we refer to the ups and downs that went into the formation of the Act. The idea of a truth commission first appeared in 1998, together with the transition in the political scene. The process of institutionalizing the idea began when it was decreed as one of the items on the national reformation agenda in 2000. Four more years were needed to concretize this political commitment into a more operational regulation with the birth of Act No. 27/2004 on the Truth and Reconciliation Commission.[53] As a member of the House of Representatives said in a meeting, one of the fundamental ideas contained in the Act is giving justice to the victims of past Human Rights violations. Justice is achieved by the complete revelation of past occurrences.[54] It is hoped that such uncovering of the truth can lead to a process of reconciliation. It is likewise hoped that this action will prevent the same evil and cruelty from recurring in the future.

Providing a formal space for victims to tell their narratives is fundamental, considering that up to this time the demand for justice for cases of serious Human Rights abuse that happened before the Human Rights Act in 2000 was established and those that happened after it, and that almost all of these stopped due to the very tight and limiting legal procedures for admitting evidence. Apart from this, the concept behind the TRC and the acknowledgement of the victims' narratives have an important implication for the existence of a state obligation to restore the Rights of victims of past Human Rights abuses, as admitted generally in the practice of states in the world.

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[51] See the interview with Si Pon, in "MK dinilai Mengecewakan', *Media Indonesia*, 9 December 2006.

[52] Some people regard this decision as excessive. See AM Fatfa's comments in *Media Indonesia,* 9 December 200; see also the commentary of Mualimin Abdi, Department of Justice and Human Rights Subdirectorate Head, in *KoranTempo*, 8 December 2006; also the comments of Asvi Warman Adamin in *Kompas*, Asmara N's comments, etc.

[53] Three points that have been debated from the beginning are the ideas of *truth, justice,* and *reconciliation.* To see the ups and downs in realizing this idea in the constitutional domain, see Zainal Abidin, "*Progress Report* Pembentukan KKR*,"* Documentation Manuscript, ELSAM, 2005.

[54] See Sidharto Danusubroto's explanation before the Constitutional Court assembly, in the Constitutional Court Decree No. 006/PUU-IV/2006, pages 114-115.

B. The Loss of Enthusiasm to Uncover the Truth and the Persistence of the Practice of Impunity

The decision to nullify Act No. 7/2004 mainly took off from the view of the Constitutional Court that its whole operationalization depends on, and originates from, the cancelled article, i.e., Article 27. This article regulates the granting of rehabilitation and compensation which depends on amnesty, and which, according to the Constitutional Court, puts aside legal protection and justice according to the constitution.[55] In other words, Article 27 is the core of related regulations; with this article not in effect, almost all other regulations within this law would not be operational and would be impossible to implement.

This is not the end of it. In its judgment, especially in relation to the petition to annul Article 44, Act No. 27/2004, the Constitutional Court considers the TRC as an *alternative dispute resolution* that would resolve Human Rights disputes amicably and if it is successful, the possibility of settling the dispute through a court is closed off.[56] Therefore, closing off recourse to a legal process through this mechanism is a logical consequence and is not impunity as expressed by the petitioners. Besides this, it can be clearly seen in the Constitutional Court's consideration that it perceives that the aim of the TRC is to achieve national reconciliation.[57]

It is precisely on this point – that the spirit behind the mechanism of the TRC is the granting of rehabilitation and compensation to the victims - that the Constitutional Court's wrong view of the TRC is founded. This point of view actually distances the TRC from its essence as a mechanism for uncovering the truth. This admission of the truth will later then the nation to the obligations related to the recovery of the victims' Rights. This understanding is also implied in the slogan "there is no reconciliation without truth being revealed" as expressed when it was first discussed in the House of Representatives.

The centrality of uncovering the truth was voiced by the victims in order to break down the tendency to make the discourse on 'reconciliation' the main point in discussing the concept behind the truth commission. With reopening the process of institutionalizing the TRC, the idea of reconciliation was put forward and promoted by various parties, such as

[55] See the decision of the Constitutional Court No. 006/PUU-IV/2006, page 122.
[56] See the decision of the Constitutional Court No. 006/PUU-IV/2006, page 123.
[57] See the decision of the Constitutional Court No. 006/PUU-IV/2006 , page 130.

government officials, military officers and academicians. This idea was for the first time formally institutionalized with the formation of the National Reconciliation Team during the Habibie government.[58] A similar view was also developing in various initiatives for reconciliation put forward by military officials at that time, such as Tri Sutrisno, with his idea of *islah* (settlement of a dispute) in response to the demand from the victims to reveal the truth behind the Tanjung Priok incident. This concept later proved to be divisive, causing sharp differences among the victims, and finally made the resolution of the Human Rights abuses in the Tanjung Priok incident more difficult and complex.

Such a wrong perception was further strengthened by the Constitutional Court's recommendation, which became the final part in its consideration to declare those articles null and void. In its recommendation, the Constitutional Court proclaimed several ways that can be taken to reach reconciliation such as through political policies using the framework of rehabilitation and general amnesty. Even though it appears wise, tossing out this idea has fatal implications on upholding justice in past Human Rights abuses. Through this suggestion, the importance of revealing the truth as demanded by the victims is set aside as the main idea behind the formation of a truth commission. Conversely, it strengthens the understanding of reconciliation from the perspective put forward by the government and the political elite in the past. Besides this, the call for general amnesty opens wide the way to granting *blanket amnesty*, which many people fear might emerge with such a concept of national reconciliation.

With such a schema, it is no exaggeration to say that the Constitutional Court's decision provides room for the persistence of impunity. Impunity seems to have become a banal social practice, as banal as evil, violence and law-breaking itself, which then becomes a culture. The culture of impunity is something that encrusts, and will go on for years. For a simple example: in almost 15 cases of serious Human Rights abuses in East Timor, Abepura, and Tanjung Priok that were prosecuted through Human Rights Courts, one by one the perpetrators have gone scot-free. Where the existence of victims is acknowledged, it stops there without resulting in anyone being pinpointed as having had any involvement in the

[58] Although this team was formed together with the National Commission for Human Rights, both have different emphases. For the government, reconciliation lies more in the effort to give amnesty to perpetrators, while the National Commission for Human Rights regards the centrality of revealing the truth in achieving reconciliation. See ELSAM, (2004)," Menelusuri Dinamika Wacana Kebenaran, Keadilan dan Rekonsiliasi," ELSAM Documentation Manuscript, Jakarta, 2004, page 10

incident. Finally, in the Tanjung Priok case, for example, the granting of compensation and rehabilitation for the victims has become uncertain with the release of all the accused who went on appeal to a higher court.

These cases do not include other serious Human Rights abuses whose legal status is still unclear, such as the cases of Wasior and Wamena, and the tragedies of May, Trisakti and Semanggi.[59] So, it is not an exaggeration if many observers and academicians, both here and abroad, frequently mention these as directly or indirectly helping prolong such a culture of impunity.[60]

[59] Based on information from the Working Group monitoring the Human Rights Court in Jakarta, the Attorney General has stated that the Wasior and Wamena cases are not up to standard to merit an investigation. Therefore, it is highly probable that the legal process for both cases has stopped forever.

[60] In his investigation on aspects related to the process followed by Human Rights Courts, both from the capacity of the upholders of the law such as the judge and the prosecutor and from the investigation of the case, Cohen stated that this institution is meant to fail in its search for justice. See David Cohen, "Intended to Fail," *Working Paper Series*, International Center for Transitional Justice (ICTJ), New. York, 2003. See also Suzannah Linton, "Putting Things into Perspective: The Realities of Accountability in East Timor, Indonesia, and Cambodia", 3 *Maryland Series in Contemporary Asian Studies* 2005 (182). From a comparative perspective, Linton sees that the mechanism for accountability in Indonesia, just as in the two other countries, is more part of the transitional justice 'industry', and that the interweaving of global and domestic interests has not yet shown any results. This situation describes a weak state faced with international agendas and having to fulfill international obligations; authoritarian realities are still current in the concerned countries, with the result that the fulfillment of accountability is far from a reality.

V

CONCLUSION

It would seem that the decision of the Constitutional Court is the culmination of a long journey of pushing the country to a commitment with regards to violence, violations and crimes against Human Rights in the past. Ironically this action was carried out precisely by manipulating the very same expressions and ideas of the victims who were trying to look for protection from the constitution as their last recourse.

The legal procedure and the constitutional review sought by the victims completely back fired. Even more ironic, the final decision giver - the Constitutional Court - while strengthening the constitutional rights of the victims, buried them on the grounds of public interest, and a recommendation for political reconciliation. It is not surprising that the opinion has emerged which views the Constitutional Court's position benefits the government, which has stalled in its commitment to form a truth and reconciliation commission. It also strengthens the questioning of the impartiality of the CC as a *superbody* with unlimited authority to interpret the constitution. In other words, as an institution that should ideally be independent of any political interests, the Constitutional Court in fact has given its support to the continuity of the past regime, which wants to bury deeply the idea of searching for justice for past crimes against Human Rights.

All of this makes clear that the effort to seek justice for the past has been put far away from important governmental agenda, the nation, and also civil society. It leaves an agenda that cannot be bargained with by civil society and the victims to keep seeking justice over violations of Human Rights that occurred in the past.

The Constitutional Court's decision has shown once again the drama of a politically obsolete law that does not accommodate human rights. In these times human rights are no longer merely moral norms, but rather universal legal guides that are even higher in rank than a constitution itself. Consequently, in a country, all kinds of legal systems, whether material or formal, including a constitution, follow the concepts and principles of human

rights. In a time of transition, the fulfillment of the rights of victims cannot be bargained with. Constitutional courts with regards to cases and policies underlying them, beginning from their substance up to laws of procedure and their perspectives, are only ethically legitimate – seen from the political ethics that form the basic moral principles of the state and the laws of a country – insofar as they respect human rights, particularly the rights of victims.

Therefore, at present there is an urgent agenda that should be immediately thought about, especially in relation to past Human Rights abuses:

1. The annulment of the TRC Act definitely has serious implications on the settlement of past Human Rights abuses in Aceh and Papua, which depend on the formation of a national mechanism. Therefore other legal efforts to fill this void should be immediately thought out. The idea of the Constitutional Court to start discussing a new TRC Act is far from realistic and not too operational. On the contrary, it leaves a new burden on the efforts to resolve past crimes, efforts that have taken years to pioneer.
2. The Constitutional Court's view of the TRC Act also reflects a lack of understanding and the urgency of resolving the past. This decision provides a breath of relief for the government to further stall its obligation to fulfill its political commitment to settle past crimes, a commitment that has already been expressed in the national reformation agenda, TAP MPR Decree No. V/2000. Therefore, the worry that public amnesia over the harshness and cruelty of the past may keep spreading in society is not exaggerated. Because of this, efforts to uncover the truth and to prevent 'public amnesia' must be continued.
3. The decision on the TRC has caused uneasiness among the victims, who have regarded the existence of the TRC Act as a hope that justice would be granted them, for what they have experienced in the past. Not only has the decision taken away protection for those who continue their efforts to uncover the truth, it has also made the victims vulnerable to one-sided violent acts from other groups in society. This has been reported from different regions where

victims work to reveal the truth.[61] Therefore, the government must immediately take the necessary steps to protect the victims from further assault in their efforts to demand justice.

[61] As reported through the ELSAM network, to protect the victims, their identities and a more detailed description of the events are kept secret.