Journal of Law Science
Volume 5, No. 4, 2023
e-ISSN 2684-9658 pp. 167-173
www.iocscience.org/ejournal/index.php/JLS

Harmonization of the rome statute in the establishment of a human rights court in Indonesia

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ARTICLE INFO

Keywords:

Court of Human Rights;
Harmonization;
Rome Statute;

Article history:

Received Sep 26, 2023;
Revised Sep 27, 2023;
Accepted Oct 13, 2023;
Online Oct 30, 2023.

ABSTRACT

The establishment of a Human Rights Court is necessary as there are gross violations of human rights in a country including Indonesia. Indonesia has harmonized the Rome Statute which is considered as the spearhead of the establishment of the Human Rights Court in Indonesia so that law enforcement against gross violations of human rights can be implemented. Therefore, this study aims to analyze and find out about the form of legal harmonization in the Human Rights Court in Indonesia and how the implementation and enforcement of law in the Human Rights Court in Indonesia. The type of research used is normative using a statutory approach and a case approach which is then analyzed descriptively and qualitatively. The results showed that the Harmonization of the Rome Statute in the establishment of the Human Rights Court in Indonesia was carried out partially or there were differences or deviations from the Rome Statute, namely in the Human Rights Court in Indonesia only regulates crimes against humanity, genocide, and the Ad Hoc Human Rights Court established under the Human Rights Court Law. The form of implementation and enforcement in cases of gross violations of human rights in the Human Rights Court in Indonesia has not been running properly because there are still several cases of gross violations of human rights that have not been handled until now.

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1. Introduction

All aspects of life are regulated by law so that law cannot be separated from human life. So to talk about law we cannot separate this matter from human life. The complexity of human life demands legal regulation to maintain social order. This understanding is based on the state's efforts to regulate the differences and similarities of persons with rights and obligations in the community as citizens. Discussing people with rights certainly provides enjoyment and flexibility to individuals in exercising them and obligations provide limitations and burdens to individuals (Mertokusumo, 2008). In other words, discussing people with rights and obligations will certainly not escape discussing the context of human rights that deserve attention from the state.

The fulfillment of human rights is a necessity for a country that places the law as the commander in chief. The role of law in guaranteeing human rights will certainly suppress or minimize the occurrence of forms of violation of human rights themselves. Forms of violations of human rights are very authentic with the occurrence of crimes / criminal acts (general criminal acts and special criminal acts) as the cause of the birth of violations of human rights.
In the fulfillment of human rights to provide protection and legal certainty, Indonesia has embodied the fulfillment of human rights in various positive laws. However, the enforcement and protection of these human rights are still not enough. The enforcement and protection of human rights in Indonesia progressed when on November 6, 2000, Law No. 26/2000 on Human Rights Courts (hereinafter referred to as Human Rights Courts) was passed by the House of Representatives of the Republic of Indonesia and then promulgated on November 23, 2000 (Abidin, 2014). The Indonesian Human Rights Court is a special court for gross violations of human rights (Smith & DKK, 2008).

Law No. 26/2000 on Human Rights Courts explicitly states that it is the law that created the Human Rights Courts in Indonesia that are authorized to try perpetrators of gross violations of human rights. In addition, there are Ad Hoc Human Rights Courts that are authorized to try gross violations of human rights in the past. The Human Rights Court is a specific term for certain cases, such as crimes of genocide and crimes against humanity (Smith & DKK, 2008). The establishment of the Human Rights Court was not only mandated by Law No. 26/2000, but was also prompted by the international community's distrust of Indonesia's judicial system in light of the connection between perpetrators of serious crimes who are state agents. Examples of cases include the Semanggi, Talangsari, Tanjung Priok, mysterious shooters, abduction of activists in 1998, Papua, Aceh, and Timor Leste cases, which have special nuances due to the abuse of power and strong indications of involvement of the Indonesian government.

The enactment of Law No. 26/2000 and the establishment of the Human Rights Court are conscious efforts by the Indonesian state to provide support for the enforcement and protection of human rights by the ideals of the rule of law. External pressure (the international community) and awareness of the importance of protecting human rights are important milestones to make the lives of the nation and state change for the better (Papua, 2017). The emergence of human rights laws and courts in Indonesia cannot be separated from the strong influence of Indonesia's position as a member of the international community, both because of its involvement in international treaties and its membership in international organizations, which have codes of conduct that must be adhered to.

Facing conditions that cannot always be controlled by the State (Indonesia) in the field of law, it is necessary to harmonize the law. legal harmonization usually results from the process of legal transplantation (Aristeus, 2018). Etymologically, transplantation is also called grafting (Muhdlor, 2016). In the legal paradigm, transplantation is a legal grafting carried out by a country with other countries that have different legal systems and social realities (Aristeus, 2018). Watson also mentioned that legal transplantation is "*As the moving of a rule or a system of law from one country to another*"(Mosquera Valderrama, 2004). Frederick Schauer defines legal transplantation as "*the process by which laws and legal institutions developed in one country are then adopted by another*."(Aristeus, 2018) However, legal transplantation does not merely adopt the written rules of law from one country to another, but also institutionally.

The transplantation of the Rome Statute is a big and advanced step taken by a country because the Rome Statute seeks to place human rights as the main place in the legal framework of the International Criminal Court (ICC) (Irving, 2019). On the other hand, the Rome Statute also protects the rights of states that are members of the ICC and the Rome Statute directly regulates victims, establishes a Trust Fund for victims, provides the possibility to demand reparations from perpetrators of serious human rights crimes and contains detailed provisions regarding the rights of the accused to ensure procedural justice (Irving, 2019).

This phenomenon of legal harmonization or transplantation also occurred in the birth process of Law No. 26/2000 on Human Rights Courts in Indonesia. The birth process is allegedly related to the Rome Statute. This will then be described in this paper to find a conclusion about the extent of the influence of the Rome Statute in the formation of Law No. 26

of 2000 and how harmonization has occurred. Based on this background, this paper aims to find out and analyze the form of legal harmonization in the Human Rights Court in Indonesia and how the implementation and enforcement of law in the Human Rights Court in Indonesia with the title "Harmonization of the Rome Statute in the Establishment of the Human Rights Court in Indonesia".

2. Method

This research is a type of normative juridical research to examine the Harmonization of the Rome Statute in the establishment of the Human Rights Court in Indonesia, then this research uses the type of statutory approach and case approach. To obtain legal materials, the techniques used are document studies and literature studies which include searching, collecting, and grouping legal materials relevant to the research. Furthermore, the legal material is researched, analyzed, and developed in a methodical discussion and is associated with the theme of writing and the formulation of the problems raised in this study. The analysis technique used in this research is a qualitative descriptive analysis technique in analyzing legal materials by collecting all legal materials obtained, then inventoried, classified, and then analyzed to describe existing legal problems.

3. Analysis and Results

Indonesia, which is in a developing stage, demands implications for the fulfillment of laws that guarantee the rights and obligations of individuals and society, as well as institutions that can carry out the guarantee of these rights. Fulfillment of this is done by the state in various ways, including through the mechanism of legal politics, which is an activity to achieve legal goals in society by determining a choice regarding the goals and methods to be used (Rahardjo, 2014).

Legal politics is one of the mechanisms to achieve state goals (MD, 12 C.E.). In addition, legal politics also determine a choice regarding the goals and means to be used to achieve legal goals in society (Fitriana, 2015). However, these goals are often deemed insufficient to guarantee the current social, economic, and political conditions. Therefore, the mechanism of legal politics does not rule out the possibility of the state seeing or adopting a law that is effective in other countries to be applied in Indonesia either in the context of the results of state research or the results of the ratification of an international convention which in the level of legal doctrine is referred to as harmonization or legal transplantation or grafting.

In this research, specifically legal harmonization that will be studied is the form of harmonization or legal transplantation or grafting in the Rome Statute which provides the juridical basis for the birth of regulations on human rights and the Human Rights Court in Indonesia. If traced further from the beginning of its birth until the enactment of regulations on human rights and human rights courts, one can see how important or how much influence the Rome Statute has in the political struggle that gave birth to laws or regulations on human rights and human rights courts in Indonesia.

Regulations on human rights in Indonesia are set out in Law No. 39/1999 on Human Rights. Meanwhile, the regulation on the Human Rights Court which was established based on Article 104 paragraph (1) which requires the establishment of a Human Rights Court for human rights violators (ZULFA, 2012), was passed Law Number 26 of 2000 concerning the Human Rights Court. The history of the birth of Law No. 26/2000 on Human Rights Courts is quite strict. The provision on the Human Rights Court was born as a result of an intervention by the United Nations (UN), which considered that there were indications of gross human rights violations that occurred in Timor-Timor and the UN wanted the violators to be tried by the ICC (Saptohadi, 2013). However, given national sovereignty and the fact that most of the violators are state elites, Indonesia wants the violators to be tried in Indonesia and will establish provisions regarding human rights violators.

In addition to this intervention, several reasons are used as the basis for the birth of the provisions on the Human Rights Court, namely the existence of several crimes against humanity that occurred in Tanjung Priuk, DOM in Aceh, Papua, and others that will not be

discussed too far. Furthermore, the provisions of Law No. 26/2000 on Human Rights Courts after further study based on the concept of legal politics turned out to harmonize or transplant several provisions in the Rome Statute (Nusantara, 2021). This can be found in several rules in the Rome Statute which are also contained in the provisions of Law No. 26/2000 on Human Rights Courts, including: (a) The concept of gross human rights violations contained in Law No. 26/2000 on Human Rights Courts largely adheres to the concept of human rights violations in the Rome Statute. (b) The definition of the crime of genocide in Article 8 of Law No. 26/2000 on Human Rights Courts is the same as the definition of the crime of genocide in Article 6 of the Rome Statute. (c) The definition of crimes against humanity in Article 9 of Law No. 26/2000 on Human Rights Courts is the same as the definition of crimes against humanity contained in Article 7 paragraph (1) of the Rome Statute. (d) Both Article 9 of Law No. 26/2000 on Human Rights Courts and Article 7(1) of the Rome Statute do not explain the meaning of widespread or systematic attack in both articles. (e) The command responsibility mechanism contained in the Rome Statute is the same as the form of responsibility in Law No. 26/2000 on Human Rights Courts.

In addition to some similarities in the concepts contained in the Human Rights Court Law and the Rome Statute, there are also differences from some of the provisions contained in the Human Rights Court law which are not found or deviate from the Rome Statute or not all provisions contained in the Rome Statute are adopted or transplanted in Law Number 26 of 2000 concerning Human Rights Courts, including: (a) The Human Rights Court in Indonesia only recognizes 2 (two) types of crimes against humanity, including the crime of genocide and crimes against humanity itself, while the Rome Statute recognizes 4 (four) types of crimes against humanity, namely crimes against humanity, genocide, military crimes, and aggression. (b) The application of the principle of non-retroactivity in the Rome Statute which is overridden in the enactment of Law Number 26 of 2000 concerning the Human Rights Court which applies the principle of retroactivity.

In addition to the similarities and differences between the Rome Statute as a harmonized or transplanted law in the establishment of the Human Rights Court Law, several provisions seem to be erroneous, including regarding command responsibility in the Rome Statute which explicitly states that commanders who commit omissions and are held accountable are "criminally liable", while in the Human Rights Court Law Article 42 paragraph (1) uses the diction of the words "can be held accountable for criminal acts"(Juwana, 2021). This means that the concept of command responsibility is an attempt to hold military leaders responsible for the actions of their subordinates within the jurisdiction of their authority (Ervita, 2017).

The process of law enforcement on cases of gross human rights violations using criminal law instruments is not easy to implement because it is more political than legal(Hiariej, 2010). According to Binsar M. Gultom (Former Human Rights Judge at the Jakarta Ad Hoc Human Rights Court), in many countries, there may be a refusal to investigate and prosecute cases of gross human rights violations in the past, including Indonesia(Gultom, 2012). This can be seen from the attitude of the authorities who openly protect their citizens who are involved in crimes against humanity. The form of protection can be seen in the deliberate non-application of existing laws and regulations or the different interpretations of these crimes so that they differ from the provisions referred to in human rights legislation. This means that various methods are used to create impunity for perpetrators of serious human rights crimes. This is an unexemplary habit that must be stopped immediately so as not to damage the future of the nation. This can be seen from the example of past cases of gross violations of human rights in Indonesia, which seem to be covered up.

In practice, since the enactment of the Law on Human Rights Courts on November 23, 2000, a mechanism for resolving cases of gross violations of human rights has been established, starting from the investigation stage up to the submission by the National Human Rights Commission and then at the judicial stage through the Human Rights Court and the Ad Hoc Human Rights Court (for cases that occurred before the enactment of Law No. 26 of 2000). However, there are still many cases of alleged gross human rights violations whose law

enforcement is unclear or has not yet been tried through the Human Rights Court. The cases of gross human rights violations in Indonesia recognized by the Government of Indonesia as stated by President Jokowi include: (Indonesia, 2023): (a) The events of 1965-1966; (b) Mysterious shootings in 1982-1985; (c) Talangsari incident in Lampung in 1989; (d) Rumoh Geudong and Pos Sattis incidents in Aceh in 1989; (e) The 1997-1998 enforced disappearance incidents; (f) The May 1998 riots; (g) Trisakti and Semanggi I and II incidents in 1998-1999; (h) Murder of witch doctor in 1998-1999; (i) Simpang KKA incident in Aceh in 1999; (j) Wasior incident in Papua in 2001-2002; (k) Wamena incident in Papua in 2003; (l) Jambo Keupok incident in Aceh in 2003.

Based on the 12 cases of gross human rights violations in Indonesia recognized by the Government above, there has been no settlement until now. However, there are 3 cases of gross human rights violations in the past that have been resolved, namely the East Timor Incident after the Referendum (1999), the Tanjung Priok Incident (1984), and the Abepura Incident, Papua (2000).

In the East Timor incident, Suparman Marzuki stated that in the East Timor case trial, there were several problems, in the East Timor Ad Hoc Human Rights Court as most of the Ad Hoc Judges lacked competence in international human rights law. For the Tanjung Priok case, Suparman Marzuki also saw several weaknesses, including weaknesses in the prosecutor's indictment, the atmosphere of the trial was not conducive, and the decisions of the judges of the Tanjung Priok Human Rights Court contradicted each other (Marzuki, 2016).

In the Abepura case, the judges rejected the claim for the merger of the compensation case with the restitution, compensation, and rehabilitation claims because the laws and regulations did not regulate the procedure for compensation claims in cases of gross human rights violations. Unanimous decision/dissenting opinion by one member of the panel (Firdiansyah, 2021).

In addition to the previously mentioned cases of gross human rights violations, there was a 2014 case of gross human rights violations in Paniai, Papua(Sucahyo, 2022). In this case, there was 1 (one) defendant and the case was that the defendant was not proven legally and convincingly, committing gross human rights violations so the defendant was acquitted of all charges. The panel's decision contained a dissenting opinion from 7 judges, 2 members of the panel of judges said that he should be held responsible and 5 other members stated that the defendant should not be held responsible.

The big question that arises then is, if the defendants in these cases are acquitted, then who should be responsible for the gross human rights violations that occurred? This is even though the facts revealed during the trial were that gross human rights violations had occurred. With the acquittal of all defendants, the court is considered a failure and the trial does not meet the standards of an international court(Lembaga Studi dan Advokasi Masyarakat (ELSAM), 2022). Another view is that the court was deliberately set up to fail from the beginning. In addition to acquitting the defendants, the court also failed to fulfill the rights of victims, namely the rights to compensation, restitution, and rehabilitation, which are explicitly stated as victims' rights under Law No. 26/2000. The court's failure has resulted in the non-achievement of justice for victims of gross human rights violations in Indonesia (Firdiansyah, 2021).

The process of law enforcement for gross human rights violations if not handled properly and seriously can lead to assumptions that Indonesia is unwilling and unable to resolve cases of gross human rights violations fairly. Legal instruments regarding law enforcement for gross human rights violations also need to be strengthened, and it is also necessary to consider ratifying the 1998 Rome Statute. If there is no seriousness of the Government of Indonesia in implementing the settlement of various cases of gross human rights violations that occurred within the national jurisdiction properly, it is feared that there will be a takeover by the jurisdiction of the International Criminal Court (ICC) of gross human rights cases in Indonesia. The takeover is possible as stipulated in Article 17 paragraphs (2) and (3) of the 1998 Rome Statute(Gultom, 2012). In the explanation of Article 17 paragraph (2) of the 1998 Rome Statute(Utama et al., 2020), if one of the conditions is that the national court system of a country is unwilling, the ICC can exercise its jurisdiction. Furthermore, the provisions of

Article 17 paragraph (3) of the 1998 Rome Statute explain that the ICC will consider the indicators of incapacity (unable) (Utama et al., 2020).

Meanwhile, each case of past human rights violations has experienced several obstacles in its resolution, including 1) the lack of investigation by the Attorney General's Office; 2) the lack of establishment of an Ad Hoc Human Rights Court; 3) the annulment of Law No. 27/2004 on the Truth and Reconciliation Commission by the Constitutional Court; 4) the lack of courage and goodwill from the president; 5) differences in the wishes of victims regarding the mechanism for resolving cases; and 6) the apathetic attitude of the public towards resolving cases of human rights violations By knowing these obstacles, it is hoped that it can provide an overview to the Government of Indonesia to resolve cases of gross human rights crimes in Indonesia that have not been processed until now.

4. Conclusion

Law No. 26/2000 on Human Rights Courts is a legal transplant from the Rome Statute that is not fully (partially) implemented. This can be seen, among others, from the existence of several provisions enacted in Law No. 26/2000 on Human Rights Courts, which differ or deviate from the Rome Statute. Regarding the form of transplantation adopted in the Human Rights Court law, including the definition of crimes against humanity, the definition of the crime of genocide, and the Ad Hoc Human Rights Court established under the Human Rights Court law. Meanwhile, the provisions of the Rome Statute that are different from the provisions contained in the Human Rights Court Law include the exclusion of provisions on war crimes and crimes of aggression, applying the principle of retroactivity, and differences in the definition of words in the form of command responsibility.

The implementation and enforcement of the Human Rights Court in Indonesia has not been as fully implemented as it should be, as shown by the number of cases that have not been resolved through the Human Rights Court and the unclear status/progress of the handling. In addition, 3 (three) cases that have been tried through the Human Rights Court have not been able to realize a sense of justice for the victims, among others, as indicated by the Human Rights Court's decision to finally acquit all defendants and has not realized the fulfillment of victims' rights such as compensation, restitution, and rehabilitation.

In this research, there are limitations in the harmonization of the Rome Statute in the formation of human rights institutions in Indonesia, namely that it has not been implemented properly so that it has not been able to overcome law enforcement against serious human rights violators in Indonesia. Therefore, to overcome this problem, it is necessary to carry out further research on the obstacles in the process of law enforcement for serious human rights violations in Indonesia in the hope of being able to overcome law enforcement as it should be.

Acknowledgments

On this occasion, the author realizes that this research could be completed thanks to the support and assistance from various parties. For this reason, the author would like to thank all parties who directly or indirectly contributed to completing this paper. Finally, I hope this research can provide benefits

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