

Reconciling Human Rights Protection in Volatile Conditions

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Abstract—The 1945 Constitution of Indonesia has been amended to stipulate the protection of human rights. Yet, Indonesia still faces problems on its enforcement, existing legal system that has not provided satisfactory revealing poor enforcement of human rights, and laws related to human rights are overlapped creating legal uncertainties. Amid confused social-political changes, the Constitutional Court has found ways to resolve and improve disorders through applying inconsistencies within its decisions. Indeed, the Constitutional Court employed debates on perspectives of terrorism, gross violation of human rights, and the existence of Communism shadowed by the New Order power as considerations to decide conflicting cases amongst recent socio-political situations. Hence, the aspect of retrospectivity in constitution-based human rights justified flexibly to adjust with the needs of country's human rights protection.

Keywords—Indonesia, Retrospective, The Constitutional Court, Human Rights, Masykur.

I. INTRODUCTION

Human rights protections and awareness continue to progress along with the extensive concept of protections carried out globally. As human rights issues are immediately needed for the international development, many countries opt to bind themselves through international treaties. This is verified by frequent ratifications on international provisions to national laws. However, large ratifications are not assuring human rights devotion. Hafner-Burton and Tsutsui [1] exposed that ratification is sometimes regarded as a matter of window dressing in an attempt to manipulate the lack of human rights enforcement.

Meanwhile, Indonesia has accommodated human rights provisions within the 1945 Constitution and ratified several international instruments. Also, it has acceded the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) within the Law No. 12 (2006) and the Law No. 11 (2006). By this, Indonesia consequently has to continually promote human rights protection, incorporate relevant instruments into national law, and undertake periodic reports on Indonesian human rights activities as part of State Self-Reporting Mechanism.

Nonetheless, Indonesia still face some problems of human rights albeit various improvements have been made. Existing legal system has not provided satisfactory answers injustice revealing poor human rights enforcement [2]. Also, laws related to human rights issues are overlapped creating legal uncertainties. To fix the legal confusions, the 1945 Constitution was amended to establish a constitutional court in order to settle conflicts of legislation. Until now, the Indonesian Constitutional Court (the Court) has been working hard in improving and resolving disorders of human rights mistakes. This task is not easy considering Indonesia is constantly experiencing social and political changes.

This paper aims to show how the Court preserve Indonesian human rights enforcement through its decisions. Debates and considerations within the Court trials are all important to use in responding socio-political condition of Indonesia that has just experienced shifting from the New Order government to the Reformation era.

II. RESEARCH METHODS

Indonesia gained its independence on August 17 of 1945 and military power played a strong role in national policies while and ignoring local cultural identities [3]. Several years aftermath the independence, the Indonesian government, in 1959-1965, formed by triangular powers of government, military, and Indonesian Communist Party-PKI as the biggest components in national policy-makers [3]. Lobbies and influences of PKI were strong [4] that it almost succeeded in its military coup attempt on 30 September of 1930. The coup attempt thwarted and elevated Soeharto as the President in 1967. Since then, Soeharto ruled and banned PKI and its affiliated organizations. All people who allegedly have connections with PKI and Communism were arrested, imprisoned, (even) killed without trial [5]. During the 30 years of Soeharto's New Order, the positions of state officials or professionals must be decided and agreed by the military. This turned Indonesia to a monolithic system of government backed by powerful military forces.

Though, as absolute power tends to corrupt absolutely, Soeharto's long-standing dictatorship was allegedly indicted to corruption, collusions, and nepotism turned him forcibly demoted by 'the People Power' in 1998. This then was welcomed by pro-democracy euphoria and promises to re-

enforce human rights protection again echoed. Also, this opportunity was worthy used to strike denunciations to Suharto and his cronies on human rights violations in the past.

In fact, a quick transformation from the military-based government to democratic-spirited civilization is not merely run well in the government and society. The effects of long military-government in the past still strong, the turn over from military to civilian's leadership was not directed properly resulted in unstable situation of newly-born reformation [6]. Military forces are still required to be reestablished, particularly in areas where human rights conflicts are still prone causing dilemma by the society to whether continue (or not) demanded trials of those responsible in human rights violation of the past allegedly conducted by military force. Hence, the impact of military influences was still strong proven by all military defendants in an *ad hoc* human rights court trial against humanity in East Timor of 1999 were set to out of charges [7], [8].

Therefore, the military still blamed for the past human rights violation which remains unsolved [9]. Another rights-related confusion was the application of Terrorism Act that conflicted to civil rights. It is believed that the law was passed without substantial studies and apparently empowered by foreign pressures [10]. Under the Terrorism Law, the understanding of human rights stated in the 1945 Constitution blurred. The Art. 28I (1) of the 1945 Constitution '... the right not to be tried under a law with retrospective effect are all human rights that cannot be limited under any circumstances' displays non-retrospective principle that has to be understood in political perspective rather than legal, especially when it is associated with human rights conflicts in the past [11]. This was shown when the definition of the principle was debated by judges, government, and experts in a Court trial of a case testing the law of Terrorism.

Having volatile conditions and difficult enforcement of human rights especially when dealing with conflicts of military actions in the past, injudicious enactment of terrorism law [12] among foreign pressures [13], and the issue of Communism in recent democratic movements, the Indonesian government was forced to take extra cautions in enforcing strict rule of law in order to accommodate aspects related to human rights.

Thus, it is important to study a retrospective-related case of human rights, and for this purpose, three cases describing past events conflicting with the meaning of human rights protection mentioned in the constitution selected. The cases have been processed and decided by the Court where debates need to be studied to see how the Indonesian Government through the Court defend human rights issues although by insisting inconsistencies. Those cases are the case of Masykur Abdul Kadir against Terrorism Act, Abilio Soares Case against Human Rights Court Act, and the case of Ex-members of Banned PKI and its political organizations against General Election Act.

A. *The case of Masykur Abdul Kadir against the Terrorism Act*

In September 2002, Masykur Abdul Kadir (Masykur) got acquainted and helped Sutomo to find accommodation and rental vehicle. On November 21, 2002, shortly after the Kuta

bombings in, the police arrested Sutomo, later known as Imam Samudra, the notorious Bali bomber who sentenced to death, and Masykur under the charge of helping Imam Samudra in the plot of the bombing. The court sentenced him 15 years despite no apparent evidence linking him to the bombing. Therefore, Masykur filed the legitimacy of Law No. 16 (2003) about the Bali Bomb against the Art. 28I (1) of the 1945 Constitution as a retrospective application as well as against the Art. 1 (1) of the Criminal Code on the Legality Principle. The Court in its decision confirmed that Law No. 16 (2003) is unconstitutional. However, the Minister of Justice and Human Rights and the Chief Justice of the Court (almost at the same time) announced that this decision is prospective.

B. *Abilio Soares and Human Rights Court Act*

On August 14, 2002, based on the Law No. 26 (2000) on Human Rights Court, Abilio Jose Osorio Soares (former Governor of East Timor) was sentenced 3 years under the conviction of murders and tortures against civilians during April-September of 1999 in East Timor. Since the Human Rights Court Law applies to past events as the Art. 51 '...this law is effective on the date of the stipulation...', Soares proposed the retrospective application of the law against the Art. 28I (1) of the 1945 Constitution. The Court decided that the Human Rights Court Law is unconstitutional, but rejected Soares's proposal.

C. *Former Members of Banned PKI and the General Election Act*

On February 24, 2004, 35 ex-members of banned PKI and its affiliated organizations appealed the objection toward the application of Art. 60 (g) of the Law No. 12 (2003) on General Election. The law prohibited ex-members of banned Indonesian Communist Party (PKI) and the whole of mass organizations to be the member of Indonesian legislative of all levels. Despite of past cruelties and violation of humanity conducted by the Communist Party, the judges approved the proposal under the reason of Human Rights compliment.

III. RESULT AND DISCUSSION

All three cases describe past events and human rights violation-related activities decided by the Court in line with protecting human rights. Although those cases are similar in the form of issues and objectives, the Court decided different submission of consideration indicating inconsistencies.

The Court decided Masykur's case against the Terrorism Act. to support non-retrospective application based on the 1945 Constitution. Contrariwise, the court rejected the non-retrospective application in Soares' case against the Human Rights Court Act to support human rights protection. Indeed, in the case of ex-members of PKI that banned by the New Order regime, the court did not put the case into the non-retrospective issue thru the core subject of the case was retrospectivity. In fact, the court ignored still-valid prohibition on PKI by accepting ex-members' proposal. Hence, the Court has simply performed another inconsistency.

Veritably, the court has taken remarkable considerations in enforcing human rights protection of the cases by

considering the situation of Indonesia and debates through a socio-political perspective. The following discussions are how the court decided inconsistencies decisions as a way out to settle different perspectives on human rights defined by representatives of the government, members of legislative, and experts presented within trials. The discussions also show how different perspectives of human rights existed as the expression of disorder legal system.

The case of Masykur against the Terrorism Act shows that the protection and enforcement of human rights must be performed separately according to the purpose of law and politics. Debates within the trial revealed dichotomies on how to define the term of terrorism when it is associated with the protection of human rights. Hence, the court agreed to defined terrorism as is legally defined as an extraordinary crime on human rights regardless of it is conducted with or without religious-aims. To political need, the Terrorism Act has been enforced as a quick response to US pressures of 'war on terrorism' and effort to adjust with international anxieties, especially from Bali bomb victims and families, to settle action in prosecuting and sentencing perpetrators of the bomb plot while protecting human rights. Consequently, Masykur had to bear the politically-effect of the situation. Thus Masykur trial was a confirmation of how the Indonesian government protecting the constitutional human rights among weights from international views.

It is obvious that the Court's decision on Masykur is an ultimate alternative to adjust matters of legal and politics properly. Clearly, the Court was appreciated by legally delivering the decision to support human rights in accordance with non-retrospective provisions and rejecting an Act of Terrorism No. 15 (2003) on Bali Bombing. To adjust foreign pressures, the Indonesian Minister of Justice and the Chief Justice of the Court instantaneously announced the progressiveness of the decision. Although this action created criticism within Indonesian legal system politicization [14], the government's effort to provide a good relationship in the eye of international human rights as well as participating in trending 'war on terrorism' has gained a reputation. This is a quite applicable action within unfavourable situation when Indonesia, in one side, has to support Bush's war on terrorism as series of a terrorism tragedy of 9/11 and in another side to prevent religious-mind objections from Indonesian people on the accusation of the terrorist attributed to Islam.

Moreover, the Court has vigorously delimited definition of terrorism detaching a religion to avoid justification of emotional behavior [15] and emphasized the case as a human rights issue by blaming the hastiness of the eliminated terrorism regulation. The elimination of the Bali Bomb Terrorism Act was a correct as the law had shown conflict with non-retrospective protection from the beginning of the enactment caused by the existence of Art. 64 stating that the Act may be applied retroactively to control past events of 'certain crimes' determined by a law or government regulation. Beside its retrospectivity, the law has created an opportunity for authority abuse by the government and legislators to subjectively outline actions of 'certain crimes' [16].

Thus, the Court has generally taken a blameless decision in the case of Masykur based on the situation where

Indonesia attempted to develop an image of human rights enforcement afterward Bali bombs without damaging the Indonesian legal system.

The unconformity of law and politics in relation to the protection of human rights is also noticed in the case of Soares. Unlike Masykur's, Soares' proposal to denounce the non-retrospective application in Art. 43 of Law No. 26 (2000) on the Human Rights Court was rejected (also) by the reason of human rights protection. Hence, the meaning of the protection was examined ensuing uneasy assessment of the Indonesian human rights enforcement.

To define a comprehensive understanding of human rights, Indonesia has finally put the protection within a strategic position of Indonesian legal system. However, although new chapter of human rights provision was added to the 1945 Constitution for stronger formulation, the implementation on the definition of the human rights especially who should enjoy the protection still unclear and denoted dissimilarities [17]. To this, the court performed worthy consideration on an effort to find elucidation among socio-political situation. To Masykur case, the point of the protections is equally supplementary to both defendant and victims, whilst Soares proposal was underscored by the political situations where demands on justice for the violation in the past was high and subordinated Soares' interest. In wide observed trials, the point of rights protection on the defendant's and the victim' of Masykur was noticed and respected. Therefore, the court decided proportionately. On the contrary, Soares's proposal was appealed under the situation of the human rights court was demanded to show solemnity decision to sentenced any perpetrators responsible for violation occurred in East Timor. Soares was the only left as all other military defendants were freed [18].

Moreover, to satisfy international densities demanding significant esteem on human rights protection, the Court had deliberated the new enacted Human Rights Court Act which was imposed as a verification of Indonesia's willingness to punish all responsible persons of human rights violation in the past. Although this means to dismissed non-retrospective principle.

On the other hand, the court has also accomplished debates and clarified the interpretation on gross human rights violation in Indonesian human rights by using the Statute of Rome to justified charge on Soares although the Statute is not formally ratified by Indonesia [19].

The case of ex-members of former PKI and its affiliated organizations has not pertained to non-retrospective issue and implication of the principle was not mentioned either in the proposal nor the Court decision. As a matter of fact, the case is a retrospective-related concern as it conveyed legal events in the past and no contrary law prohibited (in that time) [20]–[25]. In another way, becoming a member of PKI or any other mass organizations affiliated with PKI was not violating any laws before it was banned by the New Order regime. Under Soeharto's regime, the membership consequently turned to be a violation of the law. It was not clear whether the retrospectivity matter was (or not) neglected, but the problem is literally simpler when it is overviewed in the matter of the retrospectivity.

During the court process, the trial was treated by facts of historically cruelties conducted by the Communist towards Indonesian people and strict militaries activities in controlling the Communist-PKI. Here, the presentation on PKI cruelties were not impressing extensively to Judges in the court, on the contrary, it was outranked by voices of new political changes of reformation expecting more submissions on human rights.

It is because the proposal was filed within the reformation-euphoria time so that activities depicting substitution New Order products were cherished. Soeharto's New order policies were assumed enacted without human rights concerns, including the prohibition on PKI, be annulled. The 1966 MPRS Decree on the ban to PKI was overlooked and influenced by 'change everything related to the New Order'. By this, eight of nine judges of the court accepted the ex-members of PKI proposal under the name of human rights.

The Court decision was a way of conformity of social support on the excitement to be in Reformation era. This job was not easy as the court was required to clarify the legal conflicts while muffling objections in the atmosphere of human rights reformation.

Right now, the existence of communism in Indonesia once again questioned. The matter of PKI as a political organization and Communism in the past re-evaluated. Both PKI's descendants and anti-communist supported by the government blamed each other. The point of emphatic restorative consideration was upheld to determine who were the victims in the matter of PKI existence in Indonesia. PKI's descendants claim to be political victims of the discriminated against the New Order as they were banned to all access in the country utterly against political and civil rights [26], [27]. On the other side, anti-communism society describes the existence of *bête noir* Communism has to be eliminated bearing in mind cruelties and brutal action directed toward Indonesian people [28]. As alerts and warnings on PKI and Communism's reborn are high, they are pondered as '*api dalam sekam*', an expression refers to a flame inside the rice chaff that although does not show smokes, the blaze still assumed exist within [29]. The expression is depicting claims on Communism threads and danger if tolerable to be applied in the country.

Consequently, if only the same case proposed to the Court right now, the decision might be different as reformation idea has shifted [30] from its origin alongside with the spirit to establish substantial protection of human rights. National political environment and democratic pathways have grown turning various political interests in winning the participation. The political liberalization and presence of religious movements have involved within the democratic atmosphere becoming commodities to enforce human rights protection. By now, amid negative connotations on the performance [31], court activities is the last fortress in preserving human rights protection.

IV. CONCLUSION

As mandated by the 1945 Constitution and the Law No. 8 (2011), the Court authorized to interpret the 1945

Constitution as the sole interpreter of the Constitution and a foundation of the nation in guarding the democratization process. Therefore, the Court is enabled by principles that free from influences of others. A difficult task of the court is to solve complicated problems in connection with the confusion of laws and constitution. Repeated amendments or composing without comprehensive proficiencies on the constitution were assumed to be the reason for the confusion [32]. Therefore, the Court has managed to cunningly answer the questions on the lack consistent of both constitution and laws texts and substances through inconsistencies, also to bring the definition of reformation back on track. It is because many confused on dislikes to Soeharto and his cronies as reformation resulting actions that crossing the line.

By this, the Court judges have taken courageous judicial activism by making breakthroughs amid uncertain law enforcement in the country. The action to discovered human rights application amid indeterminate socio-political conditions cannot be cogitated as a judicial adventure and should be appreciated as a way to settle the governmental performance.

Nevertheless, as multiple criticisms have been addressed to the court on inconsistencies judicial activism [33], Indonesian government should aware of it as there are tendencies of excessive power of the court to decide uncommon application in the legal system [34]. This is shown when the court 'self-tested' the Art. 50 of the Court Law and declared it unconstitutional whereas the article's spirit was to prevent excessive power. The consideration of the court was that the court is a state-owned institution whose powers and authorities are determined by the constitution so it shall not be regulated by the rule of laws below the Constitution.

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