



## Application of Justice Theory in Legal and Rights Perspective Human Rights in Indonesia

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### **Abstract**

In various countries around the world, human rights are highly respected because basically every human being has the same rights, even though they have differences in various aspects. One of the theories of human rights (Human Rights) is the theory of justice. The purpose of this research itself is to find out implementation of Law and Human Rights in Indonesia as well to find out application of the theory of justice in law and human rights in Indonesia. The methodology used in this research is normative juridical which is sourced from secondary data, namely from statutory regulations and journals. The existence of the theory of human rights justice should have made law enforcers aware that in resolving a case or legal problem it must be fair and not biased, so as not to give rise to sentences that are blunt upwards sharp downwards. So you can understand that the theory of human rights justice and law, more precisely, the rule of law are closely related.

**Keywords:** *Law; Human Rights; Justice; Indonesia*

### **Introduction**

In modern times like today, everyone is certainly familiar with the words human rights or what we often know as human rights. Human Rights (Human Rights) themselves are rights that humans have solely because they are humans. Where every human being has human rights not because they were given to him by society or based on positive law, but solely based on his dignity as a human being himself. In various countries in the world, human rights (Human Rights) are highly respected because basically every human being has the same rights, even though they have differences in terms of skin color, gender, language, ethnicity, culture. The doctrine of human rights has now been universally accepted as a moral, political, and legal framework and as a guideline in building a world that is more peaceful and free from

fear, oppression and unfair treatment.<sup>1</sup>In Indonesia itself, issues regarding human rights are increasingly interesting to study, not only in Indonesia but also in other countries, issues regarding human rights are also increasingly interesting to study. Not only that, human rights and law will definitely give rise to problems, because basically law and human rights cannot be separated. Moreover, the relationship between human rights and the rule of law is definitely closely related to each other. In the understanding of the rule of law, guaranteeing the protection of human rights is considered a characteristic that absolutely must exist in every country that can be called rechtsstaat.<sup>2</sup>

Recognition and protection of human rights is one of the characteristics of a rule of law. The Indonesian state is a state based on law in accordance with the words of article 1 paragraph 3 of the 1945 Constitution "The Indonesian state is a state of law".<sup>3</sup>As a result of Indonesia being a country of law as stated in the 1945 Constitution of the Republic of Indonesia, efforts are therefore made to maintain and protect human rights by making these human rights part of national law or positive law.

The concept of the rule of law places the idea of protecting human rights as an important element. Taking into account the urgency of protecting human rights, the constitution must contain regulations on human rights so that there is a state guarantee for the rights of citizens.<sup>4</sup>The problem of upholding human rights always coincides with the problem of law enforcement, where this is one of the crucial things that people often feel and even complain about at this time. There are cases where the sentence imposed or the decision handed down by the judge is deemed unfair to the victims. Where this is definitely related to human rights itself. One of the human rights theories is the theory of justice.

There is no need to conflict between correct theory and correct practice. Conflict will only exist between right theory and wrong practice or between wrong theory and right practice. Because there is often a conflict between theory and practice, we need to seek and uphold the truth.<sup>5</sup>Basically, for Indonesia itself, upholding human rights law is a principle that is always firmly upheld. The Indonesian state is obliged to provide human rights protection for its citizens. However, in reality we still often see and encounter many forms of human rights violations occurring in Indonesia. This is what prompted us to research the application or reality of the theory of justice from a legal and human rights (Human Rights) perspective.

## ***Formulation of the Problem***

From the background explained previously, the problems that will be studied in this paper are:

1. What is the legal regulation of human rights in Indonesia?
2. How Application of Justice Theory in Law and Human Rights in Indonesia?

## ***Research Methods***

In this research, the method used is a normative juridical problem approach. This research is normative research that uses a statutory approach, analytical approach, conceptual approach and case

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<sup>1</sup> Aswandi, Bobi and Kholis Roisah. State of Law and Pancasila Democracy in Relation to Human Rights (HAM). 2019. Vol.1. Number 1. Pg 129.

<sup>2</sup> Assiddiqie, J. (2012), Constitutional Law and the Pillars of Democracy, Ed.2, Cet.2, Jakarta: Sinar Graphics.

<sup>3</sup> Hidayat, Eco. Protection of Human Rights in the Indonesian Legal State. 2016. Vol.8. No.2. Matter 80.

<sup>4</sup> Asrun, A. Muhammad. Human Rights Within the Framework of the Ideal of the Rule of Law (Notes on the Struggle in Constitutional Court). 2016. Vol.4. Number 1. Pg 134.

<sup>5</sup> Zaini, Ahmad. Rule of Law, Democracy and Human Rights. 2020. Vol.11. Number 1. Pg 15.

approach. This research uses secondary data whose sources of legal materials are primary legal materials, secondary legal materials and tertiary legal materials. The data collection technique used in this research is library research. The data analysis technique used is qualitative. Where the data that has been obtained will later be collected and a final conclusion drawn.

## ***Results and Discussion***

### **1. Legal Regulation of Human Rights in Indonesia**

#### **a) Law Number 39 of 1999 concerning Human Rights**

Based on the definition contained in Law Number 39 of 1999, Human Rights are a set of rights that are inherent in the nature and existence of humans as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, the government, and everyone for the sake of honor and protection of human dignity. The essence of the concept of human rights is respect for a person's humanity without exception and without discrimination based on anything and for any reason, as well as recognition of human dignity as the noblest creature on earth. Therefore, the guarantee of human rights as contained in the 1945 Constitution has become increasingly effective, especially with the realization of Law of the Republic of Indonesia Number 39 of 1999, concerning Human Rights.

In the preamble and general provisions of Article I, it is explained that Human Rights are a set of rights inherent in the nature and existence of humans as creatures of Almighty God, and are His gifts which must be respected, upheld and protected by the state, law, government and everyone for the sake of honor and protection of human dignity. Apart from human rights, Law Number 39 of 1999 also contains basic human obligations, namely a set of obligations which, if not implemented, will not enable the implementation and upholding of human rights.

Law Number 39 of 1999 consists of 105 articles covering various basic laws, protection of human rights, restrictions on government authority. KOMNAS HAM is the implementing agency for the protection of human rights. In order to uphold the human rights of every person, basic human obligations are also regulated, including the obligation to respect the human rights of others, and as a consequence, every person must comply with the applicable laws and regulations. Apart from that, the government's obligations and responsibilities are also regulated to respect, protect, uphold and promote human rights which are regulated in statutory regulations and international law accepted by the Republic of Indonesia. In its implementation, there are obstacles, namely the dilemma between law enforcement and freedom, so that if it is not consistent it will be detrimental to the Indonesian people themselves.

#### **b) Law Number 26 of 2000**

Law of the Republic of Indonesia Number 26 of 2000 concerning Human Rights Courts states that "Human Rights courts are special courts located within the General Courts in regency or city areas whose jurisdiction includes the relevant District Court. The Human Rights Court has the duty and authority to examine and decide cases of serious human rights violations, which include:

- 1) The crime of genocide is any act committed with the intention of destroying or exterminating all or part of a national, racial, ethnic group and religious group.
- 2) A crime against humanity is an act committed as part of a widespread or systematic attack where it is known that the attack is directed directly against the civilian population.

Article 1 number 3 determines that what is meant by Human Rights Court or Human Rights Court is a Special Court for serious human rights violations. What is meant by a human rights court is not yet clear, although the explanation in Article 1 states that it is "quite clear". What is meant by a Human Rights Court as defined in Article 1 number 3 with Article 2 which determines that the Human Rights Court is a Special Court located within the General Court, and Article 4 which determines that the Human Rights Court has the duty and authority to examine and decide cases of human rights violations serious, then it becomes clear that what is meant by Human Rights Court is a court within the General Courts which is only tasked and authorized to examine and decide cases of serious human rights violations.

Currently, Law Number 14 of 1970 has been declared invalid and replaced with Law Number 4 of 2004 but it turns out that later this Law was also declared invalid and replaced with Law Number 48 of 2009. Judicial power in The General Court environment is implemented by the District Court as the Court of First Instance which is located in the Capital City of the City or Regency area and the High Court as the Court of Appeal which is located in the Provincial Capital City (Article 3 in conjunction with Article 4 in conjunction with Article 6 of Law Number 2 In 1986), even though Article 3 paragraph (1) stipulates that Human Rights Courts are located in city or regency areas, it can be seen that specialization (differentiation/specialization) only exists in District Courts, meaning that the establishment of Human Rights Courts only exists in District Courts. . However, in Law Number 26 of 2000 there are no provisions regarding how to establish an ad hoc Human Rights Court, namely by Presidential Decree as specified in Article 43 paragraph (2). The general explanation of Law Number 26 of 2000 states that the establishment of the Human Rights Court was carried out based on the following considerations:

- 1) Serious violations of human rights are "extraordinary crimes" and have a broad impact, both at the national and international levels and are not criminal acts regulated in the Criminal Code and cause losses, both material and immaterial which result in feelings of insecurity, both for individuals and society, so it needs to be immediately restored in realizing the supremacy of law to achieve peace, order, tranquility, justice and prosperity for the entire community.
- 2) In cases of serious human rights violations, special investigation, inquiry, prosecution and examination steps are required, namely:
  - a) An investigation is required by forming an ad hoc team, ad hoc investigators, ad hoc public prosecutors and ad hoc judges.
  - b) It is necessary to confirm that the investigation is only carried out by the National Human Rights Commission, while investigators have no authority to receive reports or complaints as regulated in the Criminal Procedure Code;
  - c) Provisions regarding certain time limits are required for conducting investigations, prosecutions and examinations in court;
  - d) Provisions regarding the protection of victims and witnesses are needed;
  - e) Provisions are needed that emphasize that there is no expiration date for serious human rights violations.

Enforcement of human rights to resolve past serious human rights violations in Indonesia in the reform era is based on Law Number 26 of 2000 concerning Human Rights Courts. Article 43 paragraph 2 of the Law states that the establishment of an Ad Hoc Human Rights Court must be carried out by presidential decree (keppres) so that Presidential Decree Number: 53 of 2001 was issued, which was updated with Presidential Decree Number 96 of 2001. The renewal of the Presidential Decree was carried out because the government considered Presidential Decree Number 53 of 2001. 2001 has a jurisdiction that is too broad (it does not specifically limit the area and time when the event occurred). With Presidential Decree Number 96 of 2001, the court's jurisdiction was narrowed, to just three regions,

namely Liquica, Dili and Suai. An incident was limited to occurring between April and September 1999. Meanwhile, the Locus and tempus delicti case of Tanjung Priok occurred in September 1984.<sup>6</sup>

Article 4 of Law Number 26 of 2000 states that the Human Rights Court has the duty and authority to examine and decide cases of serious human rights violations. According to Article 7 of Law Number 26 of 2000, serious human rights violations include crimes of genocide and crimes against humanity. Based on Article 5, Indonesia only applies the principle of active personal jurisdiction, while the right to apply passive personal jurisdiction, let alone the principle of universal jurisdiction, is not used as provided by international law.

The provisions in this article are only intended to protect Indonesian citizens who commit serious human rights violations committed outside territorial boundaries, in the sense that they are still punished in accordance with the Law on Human Rights Courts. Meanwhile, Indonesian citizens who are victims of serious human rights violations outside the territory of the Republic of Indonesia do not receive protection by the Government of the Republic of Indonesia. Based on this article, it can also be seen that Indonesia is not serious about eradicating international criminal acts that violate human rights.<sup>7</sup>The ad hoc Human Rights Court in the East Timor case and other cases of human rights violations have become a fact about the failure of institutions and human rights law enforcement officials in upholding their professionalism and independence, failing to interpret cases of human rights violations, searching for, presenting and assessing the facts, applying the law, and hand down its decisions. Ultimately, the entire legal process for human rights violations is not a mechanism to prosecute, but to end them.

The human rights legal process that has been carried out provides inspiration that law enforcement cannot be analyzed separately from the making of human rights law, its law enforcement institutions, and its implementation by people implementing the law at the inquiry, inquiry, prosecution and court levels. All three are related and must be explained comprehensively. Human rights law products, institutions implementing human rights law, and people implementing human rights law because there are elements of a series of law enforcement that influence each other whether there is a fair, just and transparent legal process in handling cases of human rights violations.

## 2. Application of Justice Theory in Law and Human Rights in Indonesia

The figures who developed this theory of justice were Ronald Dworkin and John Rawls. Dworkin's theory is very much based on the obligation to treat citizens equally in a country. There are two important things that can be seen, namely the existence of justice (*fairness*) and similarities. First, everyone has the same right to the same freedoms for everyone. Second, economic and social inequality must be arranged in such a way as to produce the greatest benefits for those who are most disadvantaged and provide a system of equal access and equal opportunities.<sup>8,9</sup>

According to Rawls, in society, every individual has the same rights and freedoms. However, these rights and freedoms are often not enjoyed together. For example, everyone has the right to education, but this right cannot be enjoyed by everyone because of poverty. Apart from that, another example is the right to life which is owned by everyone, but this right is increasingly eroded and cannot be enjoyed by everyone because of the increasing number of murder cases that occur and result in other people losing their lives.

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<sup>6</sup> Marzuki Suparman, 2012, Human Rights Court in Indonesia legalizes impunity. Erlangga. Jakarta.

<sup>7</sup> Wahjoe Oentoeng, 2011, International Criminal Law Development of International Crime & enforcement process. Erlangga. Jakarta.

<sup>8</sup> Dr. Serlika Aprita, SH, MH and Hj. Yonani Hasyim, SH, MH (2020). Law and Human Rights. Bogor: Mitra Discourse Media. Matter. 73.

In Rawls's view, every person has rights that are based on the non-negotiable concept of justice, even though this is related to the issue of the welfare of society in general. For this reason, justice will be realized if it is based on the principles of each person's original position. In this situation each person will be assumed to choose two basic principles of justice. The first principle is that everyone will be given the same broad rights. The second principle is equality which is based on fair competition and is only justified if it benefits the party who has the most to lose. If there is conflict between the two, equal freedom must be won from equal opportunity.

The choice of these two principles, according to Rawls, will emerge because the contracting parties are in a state of ignorance or ignorance of various facts that will determine our position in society.<sup>9</sup> Justice is an inseparable part of the ideals of law itself. As part of social values, justice has a very broad meaning. Justice according to Thomas Aquinas' concept is equality. According to him, justice is related to what a person should receive according to proportional equality.<sup>10</sup>

Based on Thomas Aquinas' concept of general justice, the essence of justice aims to direct humans to general virtue (*bonum commune*). Therefore, justice is also called a general virtue (*virtus generalis*).<sup>11</sup> Article 1 number 6 of Law No. 39 of 1999, states that: "Human Rights Violations are any actions of a person or group of people including state officials, whether intentional or unintentional or negligence which unlawfully reduces, hinders, limits and/or revokes human rights. a person or group of people who are guaranteed by this law, and do not receive a fair and correct legal solution, based on the applicable legal mechanisms. In the definition above, it can be interpreted that the perpetrators of human rights violations may be committed by individuals or groups of people. Likewise with victims, and generally in cases of human rights violations victims have difficulty getting justice."<sup>12</sup>

In Indonesia itself, there are many cases of human rights violations that have occurred. The problem of human rights violations did not suddenly come to the surface, but was born from the monitoring of activists who have high concern and concern for the fate of our fellow nation's children. Those who are oppressed arbitrarily by powerful government officials without going through legal process. One of the activists who dedicated himself to the struggle for human rights and monitored cases of human rights violations until the end of his life was Munir Said Thalib. This man of Arab descent, a graduate of the UNIBRA Law Faculty, was born in Malang, East Java on December 6 1965 and is an Indonesian activist and human rights fighter who is respected by NGO activists. Munir's murder is a warning to human rights defenders in Indonesia that their work makes them vulnerable to threats and impunity exists for those responsible for past human rights violations, including torture, extrajudicial killings and enforced disappearances of human rights defenders. The Indonesian government has an obligation under international and national law to ensure that all people suspected of committing human rights violations are brought before the law in court that meets international standards of justice.<sup>13</sup>

Historically there have also been cases of acts of violence committed by groups of people in Papua which have had different names. Starting from the National Police calling it an Armed Criminal Group (KKB), the TNI uses the terms Armed Separatist Group (KSB) or Free Papua Organization (OPM),

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<sup>9</sup> Ibid, Pg. 74.

<sup>10</sup> Srisusilawati, P., & Eprianti, N. (2017). Application of the principles of justice in mudharabah contracts in sharia financial institutions. *Law and Justice*, 2(1):12-23.

<sup>11</sup> Arum, G. A. (2019). Concept of Justice (Iustitia) Perspective of St. Thomas Aquinas and its Relevance for The meaning of Sila V Pancasila. *Lumen Veritatis: Journal of Philosophy and Theology*, 10(1):25.

<sup>12</sup> Nurlaly Darwis SH, M. (2013). Law Enforcement to Obtain the Right to Justice. *Scientific journals Aerospace Law, Faculty of Law, Suryadarma University*, 3 (2), 4.

<sup>13</sup> Anis Kusmita Eka Wardani, Drs. Parwata, M. Hum, and Mrs. Siti Sumardiati, M. Hum. (2014). Munir Human Rights Fighter Figures 1988-2004. *Humanities e-Journal Edition 1*, 1-11.

which are essentially the same, namely a group of fighters who want to separate themselves from Indonesia.<sup>14</sup>

Moh. Mahfud MD as Coordinating Minister for Political, Legal and Security Affairs through Press Release No: 72/SP/HM.01.02/POLHUKAM/4/2021 on April 29 2021, emphasized that organizations and people in Papua who commit violence are still categorized as terrorists . The acts of violence and causing fear carried out by the KKB in Papua are considered to be categorized as a form of terrorism and have fulfilled the elements of a terrorist crime as intended in Article 1 point 2 of Law Number 5 of 2018.<sup>15</sup>

Instead of being a form of protecting national security and guaranteeing public security, it actually becomes an opportunity for abuse of power against innocent citizens, whether intentionally or unintentionally or for political reasons, which then becomes a threat to its own people. Rather than focusing on prioritizing a repressive approach, the government should be able to find an ideal formulation to resolve the KKB problem in Papua by touching the root of the problem.

### **Conclusion**

The development of human rights in Indonesia has experienced ups and downs which can clearly be seen through the periodization of Indonesian history starting from 1908 until now. Experts usually divide the stages of development of human rights into three generations according to groupings according to areas that are considered to have similarities. First generation human rights include civil and political rights; Second generation human rights include rights in the economic, social and cultural fields; and Third generation human rights include individual and collective rights, including the concept of the right to development. In Rawls's view, every person has rights that are based on the non-negotiable concept of justice, even though this is related to the issue of the welfare of society in general. In Indonesia itself, there are many cases of human rights violations that have occurred. The problem of human rights violations did not suddenly come to the surface, but was born from the monitoring of activists who have high concern and concern for the fate of our fellow nation's children. Those who are oppressed arbitrarily by powerful government officials without going through legal process. One of the activists who dedicated himself to the struggle for human rights and monitored cases of human rights violations until the end of his life was Munir Said Thalib and the human rights violations were the massacre of 8 PT employees. East Palapa Telematics (PTT) by the Armed Criminal Group (KKB) in Beoga District, Puncak Regency, Papua.

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