

Redesigning the Institutional Framework of Indonesia's Truth and Reconciliation Commission

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Abstract. TRCs are globally recognized as one of the means to resolve past gross human rights violations. As a country that has transitioned from an authoritarian to a democratic regime, Indonesia has committed to resolving the issue. One progressive effort was the enactment of Law No. 27 of 2004 on the Truth and Reconciliation Commission. However, the Law no longer applies after it was annulled by Indonesian Constitutional Court so that the commission has no normative basis at the law under the Constitution. This research seeks to answer three main problems, first, how the TRC is viewed by international law and the Indonesian constitutional system. Second, how are the dynamics of its arrangement in Indonesia. Third, what kind of ideal institutional design can be offered. This study used normative legal research with statutory, conceptual, and historical approaches to explain the problems and. The result shows that first, TRCs is consistent with the Indonesian constitutional system. Second, the ratio decidendi of the annulment of the TRC Law by the Constitutional Court because it does not guarantee justice for victims of past gross human rights violations. Third, several aspects that need to be redesigned from the new institutional model of a constitutional TRC are related to institutions, members, mechanisms for providing justice for victims, including amnesty for perpetrators and the opening of opportunities for appeals to a human rights court.

Keywords: Truth and reconciliation commission, human rights, constitutionality, Constitutional Court

Abstrak. Komisi Kebenaran dan Rekonsiliasi (KKR) telah diakui secara global sebagai salah satu sarana menyelesaikan pelanggaran hak asasi manusia berat di masa lalu. Sebagai negara yang mengalami transisi dari rezim otoriter ke demokrasi, Indonesia telah berkomitmen untuk menyelesaikan persoalan ini salah satunya melalui upaya progresif dengan pengesahan Undang-Undang Nomor 27 Tahun 2004 tentang Komisi Kebenaran dan Rekonsiliasi. Namun Undang-Undang a quo tidak lagi berlaku setelah dibatalkan keseluruhan oleh Mahkamah Konstitusi, sehingga KKR tidak memiliki dasar hukum di tingkat Undang-Undang. Penelitian ini bertujuan untuk menjawab tiga masalah utama: pertama, KKR dalam perspektif hukum internasional dan sistem Konstitusi Indonesia. Kedua, dinamika pengaturannya di Indonesia. Ketiga, desain institusional ideal KKR yang dapat ditawarkan. Penelitian ini menggunakan metode penelitian hukum normatif dengan pendekatan yuridis, konseptual, dan historis untuk menjelaskan permasalahan yang dikaji. Hasil penelitian menunjukkan bahwa pertama, KKR konsisten dengan sistem konstitusional Indonesia. Kedua, alasan pembatalan UU KKR oleh Mahkamah Konstitusi karena tidak menjamin keadilan bagi korban pelanggaran hak asasi manusia yang berat di masa lalu. Ketiga, beberapa aspek yang perlu dirancang ulang dari model institusional baru KKR terkait dengan kelembagaan, keanggotaan, mekanisme penegakan keadilan bagi korban, termasuk amnesti bagi pelaku, dan terbukanya peluang banding ke pengadilan hak asasi manusia.

Kata kunci: Komisi Kebenaran dan Rekonsiliasi, Hak Asasi Manusia, Konstitusionalitas, Mahkamah Konstitusi

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INTRODUCTION

In 2004, the President and the House of Representatives (DPR RI) enacted Law No. 27 of 2004 on Truth and Reconciliation Commission which previously mandated by Law No. 26 of 2000 on Human Rights Court and in line with People's Consultative Assembly Decree No. V/MPR/2000 on Strengthening National Unity and Integrity.¹ The establishment of Indonesia's Truth and Reconciliation Commission/ TRC is a form of the government's seriousness to resolve past gross human rights violations. However, some provisions in the 2004 TRC Law imply legal problems concerning victim's rights that subsequently led it to the Indonesian Constitutional Court.

The problematic provisions including: Art. 27 that implies that victim's rights to compensation and/or rehabilitation must be relied on the perpetrator's amnesty; Art. 29 para (2) which contradicts Art. 29 para (1) concerning amnesty based on victims' forgiveness; and Art. 44 which precludes victims to bring their cases to Indonesia's Human Rights Court if the TRC has taken on the cases. On Thursday, December 7, 2006, the Constitutional Court handed down its decision which surprisingly anulled the 2004 TRC Law.² The petitioners of the case were six non-government organizations and two victims of past human rights violations.³

Since the annulment of the Law by the Court, Indonesia does not yet have a new TRC Law and access to justice as the right of victims to obtain restitution, compensation, and rehabilitation must rely on the decision of *ad hoc* Human Rights Court. The Court's decision has a serious impact on the enforcement of human rights law, especially in dealing with serious crimes. Victims of past gross human rights violations whose cases were never heard in the Human Rights Court will never get their rights as victims. The back and forth between files and the winding road to the Human Rights Court

¹ Junaedi Saibih *et al.*, "The Analysis of Transitional Justice Initiatives and the Flaw of Prosecution on the Past Human Rights Violation in Indonesia (Tanjung Priok Case)," *Indonesian Journal of International Law* 20, no. 3 (2023), p. 494.

² Constitutional Court Decision No. 006/PUU-IV/2006, reviewing Law No. 27 of 2004 on Truth and Reconciliation Commission (*Truth and Reconciliation Case*). It is considered as one of the Court's *ultra petita* decisions, see Suwarno Abadi, "Ultra Petita dalam Pengujian Undang-Undang oleh Mahkamah Konstitusi," *Jurnal Konstitusi* 12, no. 3 (2016), p. 600, <https://doi.org/10.31078/jk1238>.

³ Vunny Wijaya, "23 Years of Reform and the Fate of Resolving Past Human Rights Violation Cases," *The Indonesian Institute* 15, no. 5 (2021), p. 31.

has had an even greater impact on victims and their families.⁴ In response to the problems at hand, there needs to be an effort to redefine and reevaluate the limits of amnesty, which means that perpetrators should not benefit from it over victims' rights to remedy or redress. It is in line with the order of the Constitutional Court's decision to establish a new TRC Law based on the principles of international human rights law and the 1945 Constitution.

The study on Indonesia's TRC, particularly in relation to the issue we examine, has been conducted previously. Safrin⁵ and Afif⁶ have researched on the urgency of re-establishing the TRC. Both underline the unfinished human rights issues that require additional means, in this case the TRC. Ahmad⁷ and Raden⁸ examined the future legal policy after the Constitutional Court decision No. 006/PUU-IV/2006, yet their arguments basically are in line with the Court's recommendations in the decision. Reyhan⁹ and Ali¹⁰ in their articles discussed the importance of new TRC Law as the legality of resolving past gross human rights violations, including as the basis for legality of the regulation of TRCs at the local level. Mustafa conducted a comparative study comparing TRC practices in Korea and Canada. Rochman,¹¹ highlighted the potential role of the TRC in resolving past gross human rights violations in Indonesia that have never been resolved. Human rights provisions in the 1945 Constitution and

⁴ Herlambang P Wiratraman *et al.*, "Taking Policy Seriously: What Should Indonesian Government Do to Strengthen Truth and Reconciliation Commission?" *Petita: Jurnal Kajian Ilmu Hukum Dan Syariah* 5, no. 1 (2020), p. 21, <https://doi.org/10.22373/petita.v5i1.93>.

⁵ Safrin Salam and Rizki Mustika Suhartono, "The Existence Legal Certainty of the Truth and Reconciliation Commission in Indonesia," *Musamus Law Review* 2, no. 2 (April 30, 2020), p. 76–85, <https://doi.org/10.35724/mularev.v2i2.2849>.

⁶ Afif Alamsyah, "Urgensi Konstitusionalitas Pembentukan Komisi Kebenaran dan Rekonsiliasi," *Veritas* 6, no. 1 (March 31, 2020), p. 79–98, <https://doi.org/10.34005/veritas.v6i1.772>.

⁷ Ahmad Zainuri, "Politik Hukum Pasca Putusan Mahkamah Konstitusi Nomor 006/PUU-IV/2006 tentang Penghapusan Komisi Kebenaran dan Rekonsiliasi di Indonesia terhadap Korban HAM Berat di Masa Lalu" (Universitas Islam Negeri Maulana Malik Ibrahim, 2022), <http://etheses.uin-malang.ac.id/34784/>.

⁸ Raden Muhammad Arvy Ilyasa, Farrel Rivishah Raashad, and Jonasmer Simatupang, "Urgensi Rekonstruksi Pembentukan Komisi Kebenaran dan Rekonsiliasi," *Khatulistiwa Law Review* 1, no. 2 (November 8, 2020), p. 148–62, <https://doi.org/10.24260/klr.v1i2.102>.

⁹ Reyhan Rezki Nata and Jadmiko Anam Husodo, "Membentuk Kembali Komisi Kebenaran dan Rekonsiliasi di Indonesia," *Res Publica: Jurnal Hukum Kebijakan Publik* 7, no. 1 (November 15, 2023), p. 74, <https://doi.org/10.20961/respublica.v7i1.47646>.

¹⁰ Ali Abdurrahman and Mei Susanto, "Urgensi Pembentukan Undang-Undang Komisi Kebenaran dan Rekonsiliasi di Indonesia dalam Upaya Penuntasan Pelanggaran HAM Berat di Masa Lalu," *Padjadjaran Jurnal Ilmu Hukum (Journal of Law)* 3, no. 3 (January 1, 2016), p. 509–30.

¹¹ Muhammad Abdur Rochman, "Peran Potensial Komisi Kebenaran dan Rekonsiliasi (KKR) di Indonesia" (Universitas Jember, 2014), <http://repository.unej.ac.id/handle/123456789/58269>.

its relation with TRC has also been studied.¹² Furthermore, Herlinda¹³ studied on reforming the meaning of the TRC in terms of balancing in granting amnesty to perpetrators, and reconciliation by the commission is expected to focus on improving the dignity of victims.

This research is intended to complement previous studies by focusing on the normative foundations of international law and the historical context of the TRC in the constitutional amendment process. We then offer a new design for the TRC. To that end, this research addresses three main questions: *First*, how the TRC is viewed by international law and the Indonesian constitutional system? *Second*, how are the dynamics of the TRC arrangement in Indonesia? *Third*, how the ideal design of the TRC should be made in line with the constitutional principles?

METHODOLOGY

The research methodology used in this study is normative legal research by employing statutory approach, conceptual approach, and historical approach. Accordingly, we used secondary data consisting of primary and secondary legal resources. The primary legal resources include the 1945 Constitution of the Republic of Indonesia, Law No. 27 of 2004 on Truth and Reconciliation Commission, Constitutional Court Decision No. 006/PUU-IV/2006, Law No. 26 of 2000 on Human Rights Court, People's Consultative Assembly Decree No. V/MPR/2000 on Strengthening National Unity and Integrity, and Law No. 39 of 1999 on Human Rights. Some international human rights norms and standards especially the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social, and Cultural Rights (ICESCR), also used to gain an understanding of the international

¹² Naufal Rizqiyanto, *Kajian Ketatanegaraan: Transformasi Perspektif* (Pamekasan: Alifba Media, 2024), p. 7-30.

¹³ Herlinda Safira, Ulfah Sakinah SP, and Almas Rioga Pasca P, "Rekonstruksi KKR sebagai Bentuk Pertanggungjawaban Negara terhadap Korban Pelanggaran HAM Berat," *Jurnal Studia Legalia* 1, no. 1 (2022), p. 29-53, <https://doi.org/10.61084/jsl.v1i1.16>.

legal framework related to TRCs. Secondary legal resources include textbooks, journals, research that are relevant to this study.

The data were obtained through a literature study and were analyzed in a descriptive-qualitative manner. The analysis focused primarily on the 2004 TRC Law, the Constitutional Court Decision No. 006/PUU-IV/2006 that invalidated the Law, and the Bill of Rights of the 1945 Constitution. While the focus of analysis on the aspect of international legal framework is applied primarily to UDHR, ICCPR, and ICESCR. Other legal instruments both at the domestic and international level were used as complements.

RESULT AND DISCUSSION

Indonesia's Truth and Reconciliation Commission: International Law and Indonesian Constitutional Law System Perspective

TRC is official and nonjudicial body¹⁴ of a limited duration established to determine the facts, causes, and consequences of past human rights violations.¹⁵ By giving special attention to testimonies, TRC provides victims with recognition, often after prolonged periods of social stigmatization and skepticism. TRC can contribute to prosecutions and reparations through its findings and recommendations, assists divided societies to overcome a culture of silence and distrust, and helps to identify institutional reforms needed to prevent new violations.¹⁶

TRCs according to Priscilla, are defined as "...bodies set up to investigate a past history of violations of human rights in a particular country - which can include violations by the military or other government forces or by armed opposition forces".¹⁷ Priscilla

¹⁴ Or nonjudicial mechanism. See Bayu Dwi Anggono, Rian Adhivira Prabowo, and Yussele Nando Mardika, "Constitutional Court and The Past Conflicts in Post-Authoritarian Indonesia," *Constitutional Review* 9, no. 1 (May 31, 2023), p. 89, <https://doi.org/10.31078/consrev913>.

¹⁵ *Ibid.*

¹⁶ Eduardo González and Howard Varney, eds., *Truth Seeking: Elements of Creating an Effective Truth Commission* (New York: International Center for Transitional Justice, 2013), p. 9.

¹⁷ Priscilla B. Hayner, "Fifteen Truth Commissions 1974 to 1994: A Comparative Study," *Human Rights Quarterly* 16, no. 4 (1994), p. 597–655, <https://doi.org/10.2307/762562>.

formulates four elements of a TRC including:¹⁸ *first*, TRCs focus on the past. *Second*, TRCs do not focus on specific events, but seek to describe the totality of certain human rights abuses, or violations of international humanitarian law, at a particular time. *Third*, TRCs usually exist temporarily and for a pre-determined period of time, ceasing with the submission of a report of findings. *Fourth*, TRCs are usually equipped with some authority that allows the commission to have greater access to information, security or protection to explore sensitive issues, and greater impact on its report.

The central position of TRCs, referring to Teitel, in the context of disclosing past gross human rights violations is to address evidentiary issues. The scope of TRCs investigations is based on uncovering the facts of past human rights crimes committed in an organized and widespread manner. TRCs thus emerge as the primary mechanism elaborated to address crimes of state repression.¹⁹ TRCs' mandates are typically established through national legislation or executive orders with predetermined tasks that end when findings have been conducted and reported.²⁰ TRCs' mandates often reflecting international best practices in terms of scope and procedure.²¹ TRCs usually make recommendations on reparations, institutional reforms, and other measures to address the root causes of conflict or repression, which can influence national and international policy.

In the context of Indonesian law, referring to Art. 1 para (3) of the 2004 TRC Law, Indonesia's TRC is defined as an independent institution established to reveal the truth of gross human rights violations and to carry out reconciliation. The establishment of the TRC in Indonesia, besides was projected to resolve human rights' cases, cannot be separated from the normative context of international law governing human rights.²² Therefore, it is necessary to first elaborate on the normative aspects

¹⁸ *Ibid.*

¹⁹ Ruti G. Teitel, *Transitional Justice* (New York: Oxford University Press, 2000), p. 78.

²⁰ III Charles O. Lerche, "Truth Commissions and National Reconciliation: Some Reflections on Theory and Practice," *NSUWorks* 7, no. 1 (2000), <https://doi.org/https://nsuworks.nova.edu/pcs/vol7/iss1/1>.

²¹ United Nations, *Rule-of-Law Tools for Post-Conflict States: Truth Commissions* (New York and Geneva: United Nations, 2006), p. 47.

²² As the world-wide influence of international law in domestic law, Indonesia is one of countries that accepted international principles, see more Robert McCorquodale, "Defining the International Rule of Law: Defying Gravity?," *The International and Comparative Law Quarterly* 65, no. 2 (2016), p. 277, <https://doi.org/10.2307/24762354>.

that underlie the existence of this commission both at the level of international law²³ and national law, especially within the framework of the 1945 Constitution of the Republic of Indonesia and laws governing human rights.

The existence of TRCs in international law is not legally mandated in an explicit sense. However, the existence and underlying principles of TRCs are based on and influenced by international norms and practices.²⁴ In terms of written documents, several international instruments can be mentioned, including those related to international human rights norms, i.e., UDHR, which contains fundamental human rights principles that TRCs are intended to uphold, such as the rights to truth, justice and remedy. In addition, there are international covenants such as ICCPR and ICESCR, which are binding covenants and support rights that are of concern to the truth commissions. In terms of international criminal law, there is the Rome Statute of the International Criminal Court (ICC), and although TRCs are not part of the ICC's mandate, they often work alongside international criminal justice mechanisms. The ICC focuses on prosecuting serious crimes such as genocide, war crimes, and crimes against humanity, which a TRCs can complement by addressing broader historical suffering.

The UN itself has published and/or determined a number of principles and guidelines that relate to and justify the existence of TRCs, such as the UN Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity. These guidelines support TRCs in ensuring victims' rights to truth, justice and redress. There are also international standards that can be referred to, such as the Paris Principles of 2000 and the Montreal Principles of 2007. The former provides guidance on the establishment and operation of national or domestic human rights institutions, including TRCs, emphasizing independence, impartiality and the protection of

²³ Encompassing both soft and hard law. See Henry Aspan *et al.*, "Legal Mechanisms for Business Accountability: A Comparison of Soft and Hard Law in Indonesia," *Law Reform* 20, no. 2 (October 16, 2024), p. 361, <https://doi.org/10.14710/lr.v20i2.59273>.

²⁴ Merryl Lawry-White, "The Reparative Effect of Truth Seeking in Transitional Justice," *The International and Comparative Law Quarterly* 64, no. 1 (2015), p. 142, <https://doi.org/10.2307/43302006>.

human rights. The second focuses on victims' rights and standards for truth-seeking and reconciliation processes.

In the development of international relations driven by regionality, there are even regional human rights systems that do not exclude the establishment of TRCs at the domestic level to resolve cases of gross human rights violations. This can be exemplified by the existence of the European Court of Human Rights, which in fact often handles cases of human rights violations in which truth commissions may also play a role in domestic proceedings. There is also the Inter-American Commission on Human Rights which has advocated for the use of truth commissions in the Americas to address human rights violations and promote justice and reconciliation. In this position, although TRCs are not directly established or regulated by international law, their development and practice are justified by international human rights standards and practices. TRCs around the world are part of a broader justice and reconciliation framework that seeks to address and remedy human rights violations and promote societal healing.

In Indonesian legal framework, some of the main provisions governing human rights as well as the basis for the establishment of a TRC in Indonesia are the 2004 TRC Law, the 2000 Human Rights Court Law, the People's Consultative Assembly Decree No. XVII/MPR/1998 on Human Rights, and Law No. 39 of 1999 on Human Rights itself which *expressis verbis* in its preamble states the moral and legal responsibility to uphold and implement the UDHR as well as various other international instruments on human rights that Indonesia has accepted.

The basis for the establishment of Indonesia's TRC itself is contained in the 2000 Human Rights Court Law and the 2004 TRC Law. An explicit directive is given by the Human Rights Court Law, precisely in the closing provisions of Art. 47, which stipulates that gross human rights violations that occurred before the enactment of the Law do not rule out the possibility of resolution by a TRC. TRC is further regulated by law, in this case, the 2004 TRC Law. The elucidation of the Law also mentions the People's Consultative Assembly Decree No. V/MPR/2000 on Strengthening National Unity as another legal basis that assigns the establishment of a national TRC as an

extra-judicial institution whose number of members and criteria are determined by law. Thus, in the context of Indonesia's TRC, it was established based on a national legislative mandate, which in theory has a higher democratic legitimization than an executive order/decree.²⁵ At the constitutional level, i.e., the 1945 Constitution, the TRC first gained recognition through constitutional norms governing human rights.

The provisions of human rights at the level of Constitution is primarily found in Chapter XA on Human Rights of the 1945 Constitution, which consists of 10 articles and 24 paragraphs.²⁶ The TRC Law does not mention any of the articles in the chapter in its preamble (*konsideran*).²⁷ However, several provisions in the 1945 Constitution that are closely related to the content of the TRC Law reflected in Art. 28D para (1); Art. 28I para (2); Art. 28I para (4); Art. 28I para (5); also Art. 27 para (1).

The 1945 Constitution also provides a broader context for the protection of human rights and the disclosure of past gross human rights violations. This can be seen in the preamble of the Constitution, i.e., in the fourth paragraph, which states "...Subsequent thereto, to form a government of the state of Indonesia which shall protect all the people of Indonesia and all the independence and the land that has been struggled for...". Similarly, Art. 1 para (3) declaratively states that Indonesia is a state based on the rule of law where theoretically and practically its basic principles necessarily include human rights.²⁸ Historically, this position can also be seen in the idea of affirming Indonesia as a state based on the rule of law during the first amendment.

²⁵ Legislation in Indonesia, which is usually carried out by the House of Representatives and the President, will open up opportunities for participation, unlike if the establishment of a commission is only through a Presidential decree. See Zainal Arifin Mochtar, *Politik Hukum Pembentukan Undang-Undang* (Yogyakarta: EA Books, 2022), p. 175. Also see Maria Farida Indrat, *Ilmu Perundang-Undangan: Jenis, Fungsi, dan Materi Muatan* (Yogyakarta: Kanisius, 2022), p. 173.

²⁶ The content of rights within the chapter contains social, political, social, economic, and cultural rights. See Herlambang Perdana Wiratraman, "Hak-Hak Konstitusional Warga negara Setelah Amandemen UUD 1945: Konsep, Pengaturan dan Dinamika Implementasi," *Jurnal Hukum Panta Rei* 1, no. 1 (2007), p. 5. Asshiddiqie membuat empat kategorisasi: kategori pertama adalah hak-hak sipil, kategori kedua berisi hak-hak politik, ekonomi, sosial, dan budaya, kategori ketiga mencakup hak-hak khusus dan hak atas pembangunan, dan kategori keempat mengenai tanggung jawab negara dan kewajiban asasi manusia, lihat uraian lengkap dalam Jimly Asshiddiqie, *Pengantar Ilmu Hukum Tata Negara II* (Jakarta: Sekretariat jenderal dan Kepaniteraan Mahkamah Konstitusi RI, 2006), p. 104-110.

²⁷ The preamble to the TRC Law only mentions Art. 5 para (1) and Art. 20 of the 1945 Constitution of the Republic of Indonesia, which are the legal basis for the President's authority to propose draft laws and the legislative authority of the House of Representatives (DPR RI) and the President.

²⁸ See Rule of Law in Brian Z. Tamanaha, "A Concise Guide to the Rule of Law," n.d., <https://ssrn.com/abstract=1012051>, and A V Dicey, *Introduction to the Study of the Law of the Constitution* (London: The Macmillan Press, 1979), p. 26-25. Also see in the context of F. Julius Stahl's *rechstaat*, Jimly Asshiddiqie, *Konstitusi & Konstitutionalisme* (Jakarta: Sinar Grafika, 2011), p. 125.

The main consideration was that if the rule of law is explicitly recognized in the body of the Constitution (*batang tubuh*), human rights would also be firmly guaranteed.²⁹ The urgency of a TRC as part of human rights enforcement further emerged in the discussion of the second amendment which specifically formulated broader provisions on human rights in the Constitution. This is intended, among other things, to build a fundamental foundation of human rights court and reconciliation efforts with past human rights violations.³⁰

The Art. 27 para (1), Art. 28D para (1) and Art. 28I para (2) further have become a touchstone in the case of judicial review of the 2004 TRC Law in the Case No. 006/PUU-IV/2006 (Truth and Reconciliation Case). The Constitutional Court in the case granted the petition. The Court's decision in fact not only declared that the articles in the TRC Law that were tested are unconstitutional, namely Articles 1 para (9), 27, and 44, but the Court also annulled the Law with the *ratio decidendi* that other articles were closely related to the articles tested so that by annulling these articles it would be impossible for the Law to be operationalized. The Court's decision also means that the Indonesia's TRC institutional position no longer has a normative basis at the statutory level.³¹

The case, which will be further discussed in the next chapter, contributes to the methodological guidance for this paper. The Court, in its reasoning, agreed that the articles tested in the TRC Law were contrary to human rights principles accepted by international community. The Court's position raises the question of how human rights are actually constructed in the 1945 Constitution? Does the Indonesia's Constitution fully absorb the human rights principles recognized by the international

²⁹ For example, this was conveyed by Khofifah Indar Parawansa from Fraksi Kebangkitan Bangsa (F-KB)/the National Awakening Party faction and Harjono from Fraksi Partai Demokrasi Indonesia Perjuangan (F-PDIP)/the Indonesian Democratic Party of Struggle faction in the 4th of Ad Hoc Committee III of the Working Committee of the People's Consultative Assembly of the Republic of Indonesia (Panitia Ad Hoc III Badan Pekerja Majelis Permusyawaratan Rakyat Republik Indonesia/PAH III BP MPR-RI), October 10, 1999. See Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun Sidang 1999* (Jakarta: Sekretariat Jenderal MPR-RI, 2008), p. 400-403.

³⁰ *Ibid.*, p. 271. For example, Rachlan Nashidik, one of the representatives of the Indonesian Legal Aid Association in the Public Hearing of the Ad Hoc Committee I on February 17, 2000, also gave an example of South Africa where the reconciliation process is directly regulated by the constitution which regulates the process of truth seeking and reconciliation.

³¹ The Constitutional Court's Decision No. 006/PUU-IV/2006, p. 124-125.

community? What is the *ratio legis* of the TRC Law and the *ratio decidendi* of the Court in the Truth and Reconciliation Case.

The wider accommodation of human rights norms in the 1945 Constitution during the amendment process was based on several factors. *First*, it was recognized that the regulation of human rights in the 1945 Constitution (pre-amendment) was still limited, only as residual norms,³² while at the same time the world had established international human rights standards, and Indonesia was among the countries that adopted them through regulations under its Constitution.³³ On that basis, it is necessary to embody human rights more fully in the Constitution itself. This reason, for example, was conveyed in the 2nd Meeting of Ad Hoc Committee III of the Working Committee of the People's Consultative Assembly of the Republic of Indonesia (Panitia Ad Hoc III Badan Pekerja Majelis Permusyawaratan Rakyat Republik Indonesia/PAH III BP MPR RI) by Vincent Radja from F-KKI³⁴ "...human rights issues need to be emphasized in detail in the 1945 Constitution so that the Indonesian nation, which has the philosophical basis of Pancasila (the fundamental principles of the state), can be more civilized".³⁵ Then Asnawi Latief from F-PDU³⁶ "...the ninth is the expansion of human rights. Because what is stated in our 1945 Constitution is very limited to the Universal Declaration of Human Rights. We realize that human rights were born after this Republic was born".³⁷

Second, there is a growing awareness to perfect the Indonesian constitutional system with what is commonly practiced in modern constitutional systems, namely the existence of a clear division of powers, checks and balances, protection of human

³² It was also applied on regional power arrangement. See Ahmad Farhan Hamid and Saripudin, "Kewenangan Daerah dalam Negara Kesatuan Republik Indonesia," *Jurnal Konstitusi dan Demokrasi* 2, no. 1 (June 30, 2022), p. 44, <https://doi.org/10.7454/jkd.v2i1.1203>. For more discussion on the shifting of constitutional rights before and after amendment, see Moh. Mahfud MD, 2017, "Konstitutionalisme dan Konstitusi di Negara Republik Indonesia", Jakarta, Makalah, disampaikan pada Program Sosialisasi "Pemahaman Hak Konstitusional Warga Negara" diselenggarakan oleh Pusdiklat Mahkamah Konstitusi dan Forum Silaturahmi Keraton Seluruh Nusantara, p. 3.

³³ Prior to the amendment of the 1945 Constitution, MPR Decree No. XVII/MPR/1998 on Human Rights was issued.

³⁴ Fraksi Kesatuan Kebangsaan Indonesia/Indonesian National Unity Faction.

³⁵ Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun Sidang 1999*, *Op.cit.*, p. 22.

³⁶ Fraksi Perserikatan Daulat Umat/United Daulat Umat Faction.

³⁷ *Ibid.*, p. 24.

rights, including to build the basis of the rule of law. For example, Agun Gunandjar Sudarsa from F-PG³⁸ stated, "The Golkar Party faction proposes that the scope of material for the amendment of the 1945 Constitution be directed to the inclusion of important materials that are considered to regulate modern constitutional life which has characteristics: *First*, good governance. *Second*, the rule of law. *Third*, democracy. *Fourth*, the implementation of the principle of checks and balances. And *Fifth*, upholding human rights".³⁹ The same matter was also emphasized by Bagir Manan in the ninth meeting of PAH I BP MPR RI, December 16, 1999 on the agenda of a public hearing with experts that modern constitutions always contain human rights.⁴⁰

Third, strengthening the democratic system. Human rights in the debate on the amendment of the 1945 Constitution were argued to be inseparable from democracy. Asnawi Latief from F-PDU in the Plenary Session of the tenth MPR RI General Assembly on October 16, 1999 stated, "...our faction is of the opinion that respect and protection of human rights is one of the prerequisites for the establishment of democratic life...".⁴¹ In the sixth meeting of PAH I BP MPR RI, the F-KKI faction through Antonius Rahail shared view in the introduction to the deliberation of the meeting that "As a democratic country, human rights must be recognized, protected, and implemented consistently".⁴² Similarly, Valina Singka Subekti from F-UG⁴³ "...so it is understandable why human rights are not fully contained in the 1945 Constitution, besides the 1945 Constitution was made several years before the statement of human rights was accepted by the UN (in 1948). Therefore, amendments to the 1945 Constitution should prioritize the expansion of human rights by providing detailed rules on human rights. Because democracy is actually the essence of upholding human rights. There is no democracy without human rights".⁴⁴ Thus said Hamdan Zoelva from the PBB faction "...For our faction the issue of human rights

³⁸ Fraksi Partai Golongan Karya/Work Group Party Faction.

³⁹ *Ibid.*, p. 87.

⁴⁰ *Ibid.*, p. 329.

⁴¹ *Ibid.*, p. 643.

⁴² *Ibid.*, p. 120.

⁴³ Fraksi Utusan Golongan/Group Representative Faction.

⁴⁴ *Ibid.*, p. 142

should be included in this Constitution as should be done by other modern democracies...".⁴⁵

Tracing the debate on the establishment of human rights provisions in the new Constitution and its relation to Indonesia position in accepting human rights principles, the emerging opinions reveal that Indonesia is in a position to accept human rights principles agreed by international community. Although the issue of universalism and particularism has been raised, this reveals the weakness of the emphasis on particularism, which was used by the authoritarian regime as a means of legitimizing power and past human rights violations. For example, Slamet Effendy F-PG stated in the 42nd Meeting of PAH I BP MPR RI, June 12, 2000, "...We see that this particularistic view is very anthropological and, in the past, especially during the reign where violence was the controller of a country where power was exercised authoritatively, it was more nuanced to the process of maintaining power to last, but ignored the protection of human rights".⁴⁶

Given this historical-juridical background, Indonesia's Constitution essentially accepts universal human rights principles, which in turn justifies the TRC as a constitutional means to upholding human rights. Constitutional support for the TRC cannot be separated from the context of the amendments that made the Indonesia's Constitution an instrument for the transformative shift from an authoritarian regime to democracy. Within the framework of transitional justice, this falls under the category of constitutional justice; the role of constitutionalism in periods of political transition. Teitel argues that constitutionalism in times of transition bridges radical political change by reconciling dichotomous understandings of the relation between law and politics.⁴⁷ The focus of the Constitution's role in this transition is to establish and uphold a democratic constitutional system.⁴⁸ Teitel further underscores the significant difference of the role of constitutional principles in static and transitional socio-political contexts, "In ordinary times, constitutionalism often appears in conflict

⁴⁵ *Ibid.*, p. 166.

⁴⁶ *Ibid.*, p. 327.

⁴⁷ Ruti G. Teitel, *Transitional Justice*, *Op.cit.*, p. 210.

⁴⁸ *Ibid.*

with simple democracy, but during times of transition, constitutionalism plays a unique role in facilitating the move to a more liberal regime".⁴⁹

The amendment of the 1945 Constitution, and in particular the accommodation of human rights into the Constitution, was a response to multidimensional problems (legal, social, economic, and political) and the public's demand for fundamental change under the keyword "*reformasi*" which included: amendments to the 1945 Constitution; abolishing the dual function of the Indonesian Armed Forces (ABRI); eradicating corruption, collusion, and nepotism; overcoming and restoring the economy from a prolonged crisis; granting the widest possible autonomy to the regions with a fair and sustainable financial balance between the national and regional levels; and upholding the rule of law and human rights.⁵⁰ In line with Teitel, the constitutionalism that Indonesia has built through amendments to the 1945 Constitution from 1999 to 2002 not only lays the foundation for a more modern constitutional system that is compatible with human rights principles, but also dispels the dichotomy between law and politics. Here, the law, i.e., the Constitution, has become a vehicle for political change. The TRC itself is part of this Indonesia transitional constitutionalism project.

The Dynamics of Truth and Reconciliation Commission in Indonesia

The urgency of transitional justice is a manifestation of the demands for justice for victims of past gross human rights violations to be achieved in a transition of government (transitional justice).⁵¹ Based on the report of the UN Secretary General, the idea of transitional justice as follows:⁵²

"The notion of "transitional justice" discussed in this report encompasses the full range of processes and mechanisms associated with societal efforts to come to terms with the legacy of past large-scale abuses, to ensure accountability, deliver justice, and achieve"

⁴⁹ *Ibid.*

⁵⁰ Sekretariat Jenderal MPR-RI, *Risalah Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 (1999-2002) Tahun Sidang 1999*, *Op.cit.*, p. 586.

⁵¹ Fadli Andi Natsif, "Perspektif Keadilan Transisional Penyelesaian Pelanggaran Hak Asasi Manusia Berat," *Jurisprudentie : Jurusan Ilmu Hukum Fakultas Syariah dan Hukum 3*, no. 2 (December 1, 2016), p. 83–97, <https://doi.org/10.24252/jurisprudentie.v3i2.2817>.

⁵² United Nations Security Council "The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies," Report of the Secretary General, 23 August 2004, UN Doc. S/2004/616, p. 6.

reconciliation. These may include judicial and non-judicial mechanisms, with varying degrees of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissal, or a combination of these..."

Indonesia itself in prosecuting past gross human rights violations, has used court mechanisms as well as non-judicial channels. The judicial route is regulated in the 2000 Human Rights Courts Law. Meanwhile, non-judicial arrangements have been implemented on the basis of a follow-up to Art. 47 para (2) of the Law, by establishing a TRC which is subsequently regulated in the 2004 TRC Law. This provision, as mentioned above, is also a mandate from People's Consultative Assembly Decree No. V/MPR/2000 on Strengthening National Unity and Integrity. The spirit to be built is the ability and encouragement to get out of the shadows of the dark past faced by victims through the applicable laws and regulations with the acknowledgment of mistakes that have been made and accompanied by mutual forgiveness in the framework of national reconciliation.⁵³

Amnesty, as mentioned in Chapter III number 4 of the People's Consultative Assembly Decree, is one of the steps after the recognition of the truth. However, granting amnesty to perpetrators of gross human rights violations is actually considered contrary to general international principles. In 1992, the UN General Assembly expressly rejected the granting of amnesty for gross human rights violations by adopting the Declaration on the Protection of All Persons from Enforced Disappearance.

The TRC is a means to apply the concept of restorative, reparative and reconstructive justice. In contrast to courts that focus on pro-justicia (prosecution and punishment), TRC's place more emphasis on revealing the truth about an event so that victims and families of victims have the right to know, and become a lesson for the general public so that it does not happen again, as well as an alternative solution if the court fails to perform its judicial role.⁵⁴ This is because reconciliation only sees the agreement and

⁵³ See Chapter III number 4 of People's Consultative Assembly Decree No. V/MPR/2000 on Strengthening National Unity and Integrity.

⁵⁴ Suparman Marzuki, *Politik Hukum Hak Asasi Manusia* (Yogyakarta: Erlangga, 2019), p. 189.

benefits of both perpetrators and victims. However, when departing from the original purpose of the TRC, compensation, restitution and rehabilitation can actually be given to victims, their families and heirs if the truth has been revealed and the perpetrators have admitted their actions. Regardless of whether or not the perpetrators receive amnesty from the president.

The fulfillment of victims' rights in the form of compensation, restitution and rehabilitation is supposed to be given to victims in the next regulation when the perpetrators have found the truth and the perpetrators have admitted their guilt. The granting of amnesty for perpetrators should be separated from the granting of rehabilitation for victims. Amnesty for the perpetrators is left to the president with the consideration of the victims that the perpetrators have admitted their guilt. It is the point when the petitioners of the Truth and Reconciliation Case questioning provisions of Art. 27 and 29 of the TRC Law, the case when the Constitutional Court anulled entirely the Law.⁵⁵

Another cause is Art. 44 of the TRC Law that emphasizes that victims who have resolved cases through *non-judicial* channels cannot re-submit the same cases to the Court, which the petitioners of the Truth and Reconciliation Case considered to limit victims' rights to seek the truth. This provision contrasts with the government opinion during the case hearing, which stated that the provision does not close victims from obtaining justice. Instead, it provides an alternative for victims to choose which path they want to follow.⁵⁶ The Court reasoned the provision is considered to have eliminated the state's obligation to prosecute perpetrators. Meanwhile, Art. 28I para (4) of the 1945 Constitution indicates that the state is obliged to provide a legal mechanism for victims to seek justice. The TRC is not a complement or substitute for the judiciary, but is a separate institution that victims of gross human rights violations can choose whether to use non-judicial or judicial channels.

⁵⁵ Pros and Cons appears after the Court's decision, including further progress in regional human rights cases such as Aceh. See Khairil Akbar, "Politik Hukum Pembentukan Komisi Kebenaran dan Rekonsiliasi Aceh," *Jurnal Lex Renaissance* 2, no. 2 (July 24, 2017), p. 201, <https://doi.org/10.20885/jlr.vol2.iss2.art11>.

⁵⁶ Constitutional Court Decision No. 006/PUU-IV/2006.

The discourse on the TRC Law also extends to Art. 1 para (9) of the law which explicitly states that amnesty is granted to perpetrators of gross human rights violations. This provision actually violates the principles of international community law. The General Assembly of the United Nations explicitly rejected the granting of amnesty to perpetrators of gross human rights violations by adopting the Declaration on the Protection of All Persons from Enforced Disappearance, stating that those responsible for these crimes should not be held accountable "*shall not benefit from any special amnesty law or similar measures that might have the effect of exempting them from any criminal proceedings or sanction.*"⁵⁷

These are foundation reason for the Constitutional Court invalidated the entire TRC Law, considering that the articles tested by the petitioners were the core of the law. The implication of the Court's decision is that with the loss of the TRC's existence as an independent institution, justice for victims of gross human rights violations to seek the truth is difficult to fulfill. This is certainly an obstacle to the fulfillment of responsibility for perpetrators and justice for victims, although at the end of its decision, the Court ordered to immediately re-establish a constitutional TRC law, as stated in its suggestions or recommendations:

*"By declaring that the truth and reconciliation commission Law does not have binding legal force in its entirety, it does not mean that the Court has closed efforts to resolve past gross human rights violations through reconciliation efforts. There are many ways that can be taken, among others, by realizing reconciliation in the form of legal policies (laws) that are in harmony with the 1945 Constitution and universally applicable human rights instruments, or by carrying out reconciliation through political policies in the context of rehabilitation and amnesty in general."*⁵⁸

Indonesia's Constitutional Court has continuously played a significant role in the context of the Truth and Reconciliation Case in implementing transitional justice, which began with the transitional constitution through the amendment process. The Constitutional Court itself is essentially one of the results of the amendment to the

⁵⁷ Suparman Marzuki, *Op. Cit*, p. 42.

⁵⁸ Herlambang Perdana Wiratraman, "Dampak dan Implementasi Putusan Mahkamah Konstitusi Yang Memutuskan Pembatalan Undang-Undang No. 27 Tahun 2004 Tentang Komisi Kebenaran dan Rekonsiliasi Terhadap Mekanisme Hukum dan Akses Keadilan Korban Bagi Penyelesaian Pelanggaran Hak Asasi Manusia Berat" (Surabaya: Lembaga Kajian Konstitusi Universitas Airlangga, 2007), p. 8.

1945 Constitution as a consequence of the expansion of constitutional rights, which are currently enshrined in Chapter XA of the new Constitution. If the prospective function of the Constitution during the transition period is to facilitate the change of political regime from authoritarian to democratic, then according to Teitel, the courts, particularly the Constitutional Court, are entrusted with the institutional burden of fostering understanding or transformation towards a rule-of-law system.⁵⁹

The enumeration of constitutional rights, which also serves as the basis for justifying the constitutional foundation of the TRC in Indonesia, does not necessarily have practical implications for the rule of law. Teitel argues that liberal political systems tend not to rely on institutional arrangements, such as the enumeration of constitutional rights, but rather on the actual enforcement of the principles of the rule of law.⁶⁰ The Constitutional Court plays a critical role in advancing the transformation of the Constitution into a liberal democratic constitutional system⁶¹ or in other words, the Court was established to uphold the principles of the new Constitution. The context of Indonesia's Constitutional Court in fact demonstrates this point, whereby the Court is positioned as the final interpreter of the Constitution and the protector of human rights.⁶² This role was clearly played by the Court in the Truth and Reconciliation Case which conveyed a signal that the resolution of past gross human rights violations must be in line with constitutional rights principles, while at the same time being consistent with international human rights standards.

⁵⁹ Ruti G. Teitel, *Transitional Justice*, *Op.cit.*, p. 22.

⁶⁰ *Ibid.*, p. 23.

⁶¹ *Ibid.*, p. 23.

⁶² Pan Mohamad Faiz, "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia," *Indonesia Law Review* 6, no. 2 (August, 2016), p. 159. <https://doi.org/10.15742/ilrev.v6n2.230>, other discussion on human rights protection by the Constitutional Court see Leli Tibaka, "The Protection of Human Rights in Indonesian Constitutional Law after the Amendment of the 1945 Constitution of the Republic of Indonesia," *Fiat Justitia* 11, no. 3 (September, 2017), p. 279. <https://doi.org/10.25041/fiatjustitia.v11no3.1141>, for constitutional interpretation see Nor Fadillah, "Analisis Metode Penafsiran Mahkamah Konstitusi dalam Perumusan Putusan Nomor 91/PUU-XVIII/2020 terkait Pengujian Formil Undang-Undang Nomor 11 Tahun 2020 tentang Cipta Kerja," *Lex Renaissance* 7, no. 4 (October, 2022), p. 727. <https://doi.org/10.20885/JLR.vol7.iss4.art4>, also discussed by Liana Nasir, Syamsul Rijal, and muhammad Aksan Akbar, "Kedudukan Putusan Mahkamah Konstitusi Dalam Pembentukan Undang-Undang di Indonesia," *USM Law Review* 8, no. 2 (2025), p. 623.

Since the Court's judgment handed down in 2006 Indonesia still does not have a new TRC Law. It is still in drafting process,⁶³ in which one of big issues is the new arrangement of the commission so that it does not again cause difficulties in the process of seeking justice.⁶⁴ Nevertheless, the state's responsibility towards victims of gross human rights violations in the context of organizing public welfare, where the state is obliged to respect, fulfill, and protect the rights of its citizens must be realized immediately.⁶⁵ The dynamics of the TRC in Indonesia are summarized in the following table.

Table 1.

The Dynamics of the Indonesia's TRC before the enactment of TRC Law to after the Constitutional Court Decision

Before TRC Law	Under TRC Law	After the Constitutional Court's Decision
<p>1. Court mechanism was only legal mechanism in resolving past gross human rights violations (based on the 2000 Human Rights Courts Law).</p> <p>2. The 2000 Human Rights Courts Law regulates and mandates an alternative channel (non-judicial mechanism) to resolve past gross human rights violations: explicitly Art. 47 para (2) of the Law mentions the establishment of TRC.</p>	<p>1. In October 2004, the Law No. 27 of 2004 on Truth and Reconciliation Commission was issued to further implement the Art. 47 para (2) of the 2000 Human Rights Court Law. Indonesia for the first time has national TRC.</p> <p>2. TRC in accordance to the 2004 TRC Law is defined as an independent body established to reveal gross human rights violations and to carry out reconciliation.</p>	<p>1. In December 2006, the Constitutional Court decided that the 2004 TRC Law was unconstitutional and annulled it. The annulment of the Law initially sparked by the unconstitutionality of Art. 27 of the Law which are fundamental provision to the Law.</p> <p>2. As a result of the annulment of the 2004 TRC Law by the Court, Indonesia's national TRC had no legal basis. Therefore, non-judicial mechanism in resolving past gross</p>

⁶³ CNN Indonesia, "Jokowi: RUU Komisi Kebenaran dan Rekonsiliasi dalam Proses Pembahasan," Cnnindonesia.com, August 16, 2022, <https://www.cnnindonesia.com/nasional/20220816111330-20-835178/jokowi-ruu-komisi-kebenaran-dan-rekonsiliasi-dalam-proses-pembahasan>.

⁶⁴ Junaidi Saibih, *et al.*, "The Analysis of Transitional Justice Initiatives and The Flaw of Prosecution on The Past Human Rights Violation in Indonesia (Tanjung Priok Case)", *Op.cit.*, p. 175.

⁶⁵ Herlinda Safira, Ulfah Sakinah SP, and Almas Rioga Pasca P, "Rekonstruksi KKR Sebagai Bentuk Pertanggungjawaban Negara terhadap Korban Pelanggaran Ham Berat," *Op.cit.*, p. 29.

<p>3. The 2000 Human Rights Courts Law was initially a legal instrument mandated by People's Consultative Assembly Decree No. V/MPR/2000 on Strengthening National Unity and Integrity to establish legal instrument that facilitates truth seeking, resolving past human rights violations, to achieve national reconciliation.</p>	<p>3. In the implementation of its function, TRC used non-judicial mechanism.</p>	<p>human rights violations through the TRC is closed.</p> <p>3. The Court ordered the law makers (the House of Representative/DPR and the President) to made a new TRC Law that in line with the Constitutional principles and international human rights law. However, since the decision was handed down in 2006, Indonesia still does not have a new TRC Law.</p>
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The Ideal Design of a Constitutional Truth and Reconciliation Commission in the Resolution of Past Gross Human Rights Violations

The discussion above explains that the Indonesian TRC was established with two broad concepts, namely truth-seeking and reconciliation between victims and perpetrators of past gross human rights violations. The existence of the TRC is actually to reveal facts about the truth of past gross human rights violations, so that truth-seeking becomes the main goal before reconciliation.⁶⁶ The realization of reconciliation can be carried out if the truth has been revealed and the victim can forgive, or the perpetrator can be punished by applicable law. Therefore, disclosure of the truth and an apology by the perpetrator should be something that is natural to do, not an extraordinary action that can remove the main factor for obtaining amnesty by the president.

In consideration of the Constitutional Court's decision No. 006/PUU-IV/2006, the Court ordered the legislators to re-establish the new TRC Law with a concept that does not violate international law and the 1945 Constitution. The interests of victims must be prioritized in resolving past gross human rights violations. In the invalidation of

⁶⁶ Syarif Nurhidayat, "Peluang Rekonsiliasi Pelanggaran Hak Asasi Manusia Masa Lalu melalui Mekanisme Kebijakan Politik Pemerintah Daerah", *Jurnal Penelitian Universitas Kuningan* 12, no. 01 (2021), p. 57.

Art. 27 of the TRC Law by the Court, it is based on the assessment that the granting of amnesty as a condition for victims to obtain their rights violates the 1945 Constitution and international law. The court's consideration can be interpreted in two ways in granting amnesty, First, amnesty is not a requirement for victims to obtain their rights, but rather disclosure of the truth is the main requirement. Second, not all perpetrators of past gross human rights violations should receive amnesty for reasons of national reconciliation. Therefore, to realize the design of resolving past gross human rights violations by the TRC, there must be a redesign in granting amnesty and providing victims' rights. A balanced approach to the protection and provision of victims' rights with the realization of national reconciliation needs to be an important norm in the new TRC Law. It is important to ensure that victims' rights are fully recognized by the TRC without reliance on amnesty. This can be achieved if lawmakers can involve civil society at large, victims, human rights activists, community organizations that focus on human rights issues, human rights experts, etc. in the process of forming the new law. Thus, the process of truth-telling and reconciliation can be achieved without compromising the principles of justice and human rights guaranteed by the constitution and international law.⁶⁷

The ideal formulation of the new Indonesia's TRC is as follows: *First*, redesign the institution and membership of the commission. The institution of the TRC should be independent in terms of structure, authority, and membership.⁶⁸ The membership of the TRC comes from elements of society with academic backgrounds and human rights activists who are free from political intervention. Members/former members of political parties, members/retired TNI/Police and/or public officials are not allowed to be part of the commission membership. The restriction on members/former members of political parties is intended to realize full institutional independence. TNI/Polri members/retired are restricted from becoming members of the TRC

⁶⁷ Naufal Rizqiyanto, *Loc.cit.*

⁶⁸ The independent concept in question consists of several characteristics, among others: *First*, minimizing the authority of the House of Representative of the Republic of Indonesia in choosing the leadership of independent state institutions. *Second*, the granting of independent authority. *Third*, affirmation of non-partisan provisions. See Rizki Ramadani, "Lembaga Negara Independen di Indonesia dalam Perspektif Konsep Independent Regulatory Agencies," *Jurnal Hukum Ius Quia Iustum* 27, no. 1 (January 1, 2020), <https://doi.org/10.20885/iustum.vol27.iss1.art9>.

because past gross human rights violations were committed by the state through members of the TNI/Polri.⁶⁹ There is a possibility of hindering the disclosure of the truth. Meanwhile, public officials are closer to practical political interests so they must be limited.

Second, the redesign of the provision of rights for victims of past gross human rights violations. In Art. 27 of the TRC Law, victims' rights can be granted after the perpetrator has obtained amnesty. The granting of rights to victims is actually a form of compensation from the government for violations that have been committed. compensation itself is defined as an effort to compensate for the losses suffered by victims.⁷⁰ Damages can be seen from the facts of the truth-seeking process. Therefore, there is no correlation between the granting of amnesty and compensation. Such an arrangement will lead to the opening of new wounds for victims and difficulties in realizing national reconciliation. Therefore, in the new TRC Law, victims' rights can be granted after disclosure without waiting for amnesty.⁷¹

Third, the redesign of the granting of amnesty to perpetrators by the president. According to Art. 28 para (1) of the TRC Law, amnesty is granted after forgiveness by the victim and peace between the victim and the perpetrator. However, Art. 29 para (2) of the law stipulates that if the perpetrator has apologized and has revealed the truth, but the victim does not forgive, the recommendation to grant amnesty is decided by the TRC. Art. 29 para (2) indirectly collides with the provisions in Art.28 para (1) of the law, which explicitly requires an apology from the victim.⁷² Such an arrangement results in the deprivation of victims' rights and is contrary to the provisions of Articles 28H (2), 28I, and 28J of the 1945 Constitution.⁷³ Therefore, in the

⁶⁹ National Human Rights Commission Statement Number: 062/Humas/KH/XII/2020.

⁷⁰ Muchamad Iksan *et al.*, "Fulfilling the Restitution Rights of Crime Victims: The Legal Practice in Indonesia," *Academic Journal of Interdisciplinary Studies* 12, no. 4 (July 5, 2023), p. 152, <https://doi.org/10.36941/ajis-2023-0101>.

⁷¹ Luke Moffett, *From Truth to Repair: Implementing Truth Commissions' Recommendations on Reparations* (Belfast: Queen's University Belfast, 2020), p. 5.

⁷² Uti Ojah Egbai and Jonathan O Chimakonam, "Protecting the Rights of Victims in Transitional Justice: An Interrogation of Amnesty," *African Human Rights Law Journal* 19, no. 2 (2019), p. 609, <https://doi.org/10.17159/1996-2096/2019/v19n2a3>.

⁷³ Ricky Tongam Marpahala Siahan, Candra Perbowati, and Ahmad Saleh, "The Retroactive Principle in Law No. 26 of 2000 Concerning the Court of Human Rights," *Constitutionale* 1, no. 2 (December 27, 2020), p. 139–48, <https://doi.org/10.25041/constitutionale.v1i2.2118>.

new TRC Law, the TRC can submit recommendations for amnesty to the president and amnesty can be granted by the president if there is peace between the parties and on the basis of a request from the victim.⁷⁴

Fourth, the redesign of appeals on past gross human rights violations cases that have been resolved by the TRC to the Human Rights Court. Art. 44 of the TRC Law stipulates that if the case has been resolved by the commission, it cannot be submitted to the Human Rights Court.⁷⁵ The Indonesia's TRC arrangement is a further directive from the 2000 TRC Law, which when referring to the settlement mechanism in the court is still available for appeal. In addition, the TRC is only an alternative resolution, not the only resolution institution, so it needs an appeal in it and the facts obtained can be added to the appeal trial.⁷⁶ For this reason, in the new law, parties who do not accept the results of the commission's determination can file a case to the Human Rights Court.⁷⁷

Table 2.

Redesign of truth and reconciliation commission

Law No. 27 of 2004 on Truth and Reconciliation Commission	Redesign new norm	Description
Art. 27 Compensation and rehabilitation as referred to in Article 19 may be provided if the amnesty petition is granted.	Art. 27 Compensation and rehabilitation as referred to in Article 19 may be provided if disclosure of the truth has been made.	The amnesty provision was changed from being based on the approval of the amnesty request to being based on the disclosure of the truth.

⁷⁴ The granting of amnesty must be limited, one of the limitations being the consent of the victim. this is done to end tensions between perpetrators and victims of past gross human rights violations. See Innocent Muramuzi, "Peace for Peace Model of Amnesty (PEPEMA)," *International Journal of Advanced Multidisciplinary Research and Studies* 3, no. 3 (2023), p. 78–88.

⁷⁵ Saivol Virdaus, Nasrulloh Ali Munif, and Zainal Arifin, "The Urgency of the Truth and Reconciliation Commission" *Atlantis Press*, November 23, 2021, p. 563, <https://www.atlantis-press.com/proceedings/iclhr-21/125963820>.

⁷⁶ Amnesty International Publications International Secretariat, *Indonesia Submission to the UN Human Rights Committee* (2013; London: Amnesty International Publications, n.d.), p. 36.

⁷⁷ This effort draws on South Africa's regulation and implementation of the truth commission. See Abdul Munif, "Contested Actors around the Initiation of a Non-Judicial Settlement Mechanism for Past Gross Human Rights Violations: A Socio-Legal Study of the PPHAM Team," *The Indonesian Journal of Socio-Legal Studies* 3, no. 1 (September 2023), p. 5, <https://doi.org/10.54828/ijsls.2023v3n1.1>.

<p>Art. 32 para (1)</p> <p>The selection and election of Commission members are based on high qualifications of expertise and moral integrity and fulfill the following requirements:</p> <ul style="list-style-type: none"> a. an Indonesian citizen; b. physically and mentally healthy; c. authoritative, honest, fair, and impeccable behavior; d. at least 30 (thirty) years old; e. loyal to Pancasila and the 1945 Constitution of the Republic of Indonesia; f. having knowledge or concern in the field of human rights; g. not being a member of the Indonesian National Army or the Indonesian National Police; h. willing to renounce membership of political parties, community organizations, or non-governmental organizations; and i. not having been involved in human rights violations. 	<p>Art. 32 para (1)</p> <p>g. not having status from or having been a member of a political party, member or retired of the Indonesian National Army (TNI) and/or the Indonesian National Police (Polri), as well as public officials.</p>	<p>letter g is replaced and letter h is deleted.</p>
<p>Art. 28</p> <p>(1) In the event that the perpetrators and victims of gross human rights violations that occurred prior to the enactment of Law No. 26/2000 on Human Rights Courts have forgiven each other and</p>	<p>Art. 28</p> <p>(1) In the event that the perpetrators and victims of gross human rights violations that occurred prior to the enactment of Law No. 26/2000 on Human Rights Courts have forgiven each other and</p>	<p>Consent to amnesty by the victim is one of the prerequisites for the commission to make a recommendation to the president.</p>

<p>made peace, the Commission may make a recommendation to the President to grant amnesty.</p> <p>(2) Mutual forgiveness and reconciliation as referred to in paragraph (1) must be followed by the disclosure of the truth about the occurrence of the gross human rights violations that have been committed.</p> <p>(3) The statement of peace as referred to in paragraph (1) must be set out in a written agreement signed by both parties and the chairperson of the Commission.</p>	<p>made peace, and the victims or the victims' families who are their heirs have given their consent to grant amnesty to the perpetrators, the Commission may make a recommendation to the President to grant amnesty.</p> <p>(2) Mutual forgiveness and reconciliation as referred to in paragraph (1) must be followed by the disclosure of the truth about the occurrence of the gross human rights violations that have been committed.</p> <p>(3) The statement of peace as referred to in paragraph (1) must be set out in a written agreement signed by both parties and the chairperson of the Commission.</p>	
<p>Art. 29</p> <p>(1) In the event that the perpetrator and victim forgive each other, the recommendation for consideration of amnesty shall be decided by the Commission.</p> <p>(2) In the event that the perpetrator admits his/her guilt, acknowledges the truth of the facts, expresses regret for his/her actions, and is willing to apologize to the victim or the victim's family who are his/her heirs, but the victim or the victim's family who are his/her heirs are not</p>	<p>Art. 29</p> <p>(1) In the event that the perpetrator and victim forgive each other and the victim or the victim's family who are his/her heirs have agreed to grant amnesty to the perpetrator, the recommendation for consideration of amnesty shall be decided by the Commission.</p> <p>(2) In the event that the perpetrator admits his/her guilt, acknowledges the truth of the facts, expresses regret for his/her actions, and is willing to apologize to the victim or the victim's</p>	<p>Amendment of the provision stating that the commission cannot make a recommendation for amnesty without the consent of the victim's family, who are his/her heirs.</p>

<p>willing to forgive, the Commission shall decide on the recommendation for amnesty independently and objectively.</p> <p>(3) In the event that the perpetrator is not willing to acknowledge the truth and his/her guilt and is not willing to apologize for his/her actions, the perpetrator of gross human rights violations shall lose the right to amnesty and be submitted to an ad hoc human rights court.</p>	<p>family who are his/her heirs, but the victim or the victim's family who are his/her heirs are not willing to forgive, the Commission shall not make a recommendation for amnesty and shall be referred to an ad hoc human rights court.</p> <p>(3) In the event that the perpetrator is not willing to admit his/her guilt and truth and is not willing to regret his/her actions, the perpetrator of gross human rights violations shall lose the right to amnesty and shall be referred to an ad hoc human rights court.</p>	
<p>Art. 44 Serious human rights violations that have been disclosed and resolved by the Commission cannot be brought before an ad hoc human rights court.</p>	<p>Art. 44 Serious human rights violations that have been disclosed and resolved by the Commission may be appealed to an ad hoc human rights court.</p>	<p>There is an appeal from the commission's decision.</p>

On this basis, the redesign of the new TRC Law must prioritize the rights of victims or their heirs. Amnesty is prohibited in cases of gross human rights violations as stipulated in international law, however, if amnesty is to be granted it must be with the consent of the victim or their heirs.

CONCLUSION

The truth and reconciliation commission, known as one of the means of resolving past gross human rights violations, is not only justified and justified in the context of international law but also accommodated by the Indonesian constitutional system itself. This can be traced in the human rights provisions of the 1945 Constitution where

the background of its formulation during the amendment process mentioned the importance of the existence of a truth and reconciliation commission. The existence of Indonesia's truth and reconciliation commissions as non-judicial institutions has created dynamics among the public. The emergence of several controversial articles that were later overturned by the Constitutional Court actually eliminated the opportunity for victims of gross human rights violations to seek justice. The idea of bringing back the truth and reconciliation commission still raises debates, especially regarding the concept of dispute resolution in the commission.

The ideal design of the future Indonesia's truth and reconciliation commission that is constitutional in resolving past gross human rights violations is to redesign the institution and membership of the commission, redesign the granting of rights to victims of past gross human rights violations, redesign the granting of amnesty to perpetrators by the president and redesign the appeal of past gross human rights violations cases that have been resolved by the commission in court.

COMPETING INTEREST

There is no any conflict of interest in the publication of this article.

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