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Constitutional Court and The Past Conflicts in Post-Authoritarian Indonesia

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Abstract

The fall of the New Order authoritarian regime in Indonesia was marked by the changing landscape of conflict resolution. In a more democratic setting, "*Reformasi"* regime has installed democratic institutions including the formation of the Constitutional Court. While the newly established court was celebrated as relatively successful in terms of defending human rights, its role in resolving the abused past is questionable. The new Reformasi regime inherits wounds and scars from the abuse committed by the previous iron fist regime. This paper aims to analyze the Constitutional Court's roles as a conflict-resolution body in dealing with the past gross violation of human rights in the light of Indonesian transitional justice. In that regards, this paper assesses the Court's decisions and how far it could answer the victims' call for justice. This paper found that regardless of the Court's intentions, the court's decisions still require further executive or legislative policies. The nature of the court doesn't bring instant enjoyment for the "winning" party to be benefited from the decisions. In short, the importance for the victims of past abuse of power as stated in the Court's

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decisions still has not been translated into justice. At the same time, this also indicates how far the Court is able to resolve this kind of social conflict: "justice delayed, justice denied." In a more Galtungian's perspectives, there is a gap between meta-conflict to be deployed into original-conflict. This paper suggests that to overcome such issues, a bridge to reconnect the two should be built. In this context, the changing regime from New Order to Reformasi should be coupled with a holistic approach of transitional justice tools and mechanisms. More importantly, to urge the delivery of justice for those who suffered.

Keywords: Conflict-Resolution; Constitutional Court; Democracy; Human Rights; Judicial Review; Modality; Post-Authoritarianism; Trajectory.

I. INTRODUCTION

In essence, the law and all its institutions are a problem-solving forum whose end is to reduce, if not resolve, conflict. Responding to conflicts with "justice." For a judicial institution with such authoritative authority to interpret the Constitution, the problem goes even further: ensuring that the Constitution provides solutions to problems that arise, that the Constitution is "alive" and provides protection of human rights. Departing from this premise, this paper aims to examine the role, modalities, and trajectories of the Indonesian Constitutional Court in resolving the past conflicts.

There are literatures on the similar discussion of the Constitutional Court and its role in conflict resolution. Pozas-Loyo & Rios-Figueroa examine the role of Constitutional Courts in Colombia, Peru, and Mexico in conflict resolution.[1] They distinguish between mediator-like jurisprudence and arbitrator. The role of the mediator comes when the Constitutional Courts provide jurisprudence that informatively connects the common ground between interested parties. The function of arbitration, on the other hand, arises when the court expressly declares the winner and loser in a case. Another study, by Marcus Mietzner, examines the Indonesian Constitutional Court's role in resolving political conflicts and

[1] Andrea Pozas-Loyo and Julio Rios-Figueroa, "Constitutional Courts as Third-Party Mediators in Conflict Resolution: The Case of the Right to Prior Consultation in Latin American Countries," in *Institutional Innovation and the Steering of Conflicts in Latin America*, ed. Jorge P Gordin and Lucio Renno (Colchester: ECPR Press, 2017), 117.

consolidating democracy.[2] In his analysis, the Constitutional Court has succeeded in becoming a channel for political disputes through the judicial route as part of strengthening the consolidation of democracy.

From a slightly different perspective, there have been many studies discussing the derivation of the authority of the Constitutional Court, among others: as the guardian of the constitution, the final interpreter of the constitution, the guardian of democracy, the protector of citizens' constitutional rights, or the protector of human rights.[3] Arief Hidayat, the Chairman of the 2015-2017 Constitutional Court, further stated that the Constitutional Court is the guardian of (national) ideology, that is Pancasila.[4]

The aforementioned literatures provide the basis for this paper. The Constitutional Court, through its authority to interpret the Constitution, has a significant role in building a culture of peace, realizing reconciliation, and providing protection for human rights and the advancement of democracy. This paper aims to examine the modalities and trajectories of the Constitutional Court as a conflict-resolution institution as contained in its decisions. So what is being proposed here is not something completely new but more accurately referred to as "old wine in a new bottle." How the available jurisprudence provides a foothold as constitutional engineering ties together the role of the Constitutional Court in conflict resolution.

The question to be asked here is how far the Court can handle deeply rooted political-social violence in a half-hearted transitional justice Indonesia. Since the fall of the New Order regime in the late 1990s, no significant policies have been

[2] Marcus Mietzner, "Political Conflict Resolution and Democratic Consolidation in Indonesia: The Role of the Constitutional Court," *Journal of East Asian Studies* 10 (2010), https://doi.org/10.1017/S1598240800003672.

[3] Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia [The Idea of the Indonesian Rule of Law]," 2011; Janedri M. Gaffar, "Peran Putusan Mahkamah Konstitusi dalam Perlindungan Hak Asasi Manusia Terkait Penyelenggaraan Pemilu [The Role of Constitutional Court Rulings in the Protection of Human Rights Related to the Implementation of Elections]," *Jurnal Konstitusi* 10, no. 1 (May 2016), https://doi.org/10.31078/jk1011; Pan Mohamad Faiz, "Mengawal Demokrasi Melalui Tinjauan Konstitusi: Sembilan Pilar Demokrasi Putusan Mahkamah Konstitusi [Guarding Democracy through a Review of the Constitution: Nine Pillars of Democracy Constitutional Court Decisions]," ELSAM, published February 06, 2015.

[4] Arief Hidayat, "Negara Hukum Berwatak Pancasila [State of Law with Pancasila Character]," Speech Delivered in Jakarta, November 14, 2019, https://www.mkri.id/index.php?page=web.Berita&id=16801.

taken to tackle the issue. As concequence, the victims still suffer from a long traumatized past, and no perpetrator is punished for the crimes committed. For this reason, the term post-authoritarian regime was deliberately chosen not only to refer to a period of time but also to target the residual scars that linger and must be settled in a democratic rule of law Reformasi era.

Then, how the Court contributes to the untying nation's murky image of the inherited wound from the past? In the light of broad theoretical spectrum of conflict resolution, ethical,[5] structural,[6] or peace studies[7] are commonly agreed with the significance of the role of law. However, a new regime with more democratic and human rights friendly setting doesn't always warrant that social transformation would smoothly be commenced, as will be presented in the case of Indonesia.

This paper argues that there are modalities from the jurisprudence of the Constitutional Court decisions that can be used as a starting point to emphasize its role as a breaker of a social conflict. But of course, no system is completely perfect. As Horrowitz said: "Not even the most careful design of a constitutional court can guarantee that it will become a bulwark of law and guarantor of human rights".[8] The challenges of the human rights and democratic situation, public trust in institutions, are homework to answer: despite having modalities, can the Court indeed function as a conflict-resolution institution. Therefore, based on the background above, the following questions can be asked are how is the modality as conflict resolution institution cemented through the Court's decisions? and what is the trajectory of the Constitutional Court in conflict resolution in the future?

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5 Axel Honneth, *The Struggle for Recognition: The Moral Grammar of Social Conflicts* (Cambridge: The MIT Press, 1995), 129.

6 Nancy Fraser, "Rethinking Recognition," *New Left Review* 3 (2000): 117-8.

7 Johan Galtung, "Institutionalized Conflict Rsesolution, A Theoretical Paradigm," *Journal of Peace Research* 2, no. 4 (December 1965), https://www.jstor.org/stable/422861.

8 Donald L. Horowitz, "Constitutional Courts: A Primer for Decision Makers," *Journal of Democracy* 17, no. 4 (2006): 125–37, https://doi.org/10.1353/jod.2006.0063.

II. DISCUSSION

2.1. Constitutional Court and Conflict Resolution Body

2.1.1. Institutionalized Conflict-Resolution Body: The Theoretical Landscape

According to Axel Honneth, conflict stems from "misrecognition" that determines one's status as a full human being. At that point, the marginalized groups experience marginalization (disrespect) on personal, legal, and social levels.[9] Meanwhile, Nancy Fraser argues that a social conflict is a form of structural oppression from one group to another. The two then debated how to transcend the conflict.[10] Honneth, who is often classed as an ethical thinker, argues that conflict remedies should be carried out with acknowledgment in the personal, legal, and solidarity domains. Fraser, on the other hand, emphasizes an approach to changing the legal structure to end conflict and ensure participation parity. Honneth and Fraser clash over which come first, the ethical approach or structural change. Even so, it is safe to conclude that the two have actually agreed that a legal approach can contribute to conflict resolution.[11]

In line with Honneth and Fraser, Galtung also conducts a conflict taxonomy. Galtung stated that violence is the actualization of conflict. Violence can broadly be divided into two: those that are personally targeted and those that involve a systematic structural action.[12] Both have the potential to eliminate entities that are considered "enemies". The difference is that personal violence only involves individuals, while structural violence is actions that occurs so pervasive due to power imbalances and the aftermath of which results in unequal life opportunities.[13] According to Galtung, conflict resolution institutions are a kind of solution provider machine. So the machine is tasked with recognizing problems

[9] Honneth, *The Struggle for Recognition*, 131-9.
[10] Fraser, "Rethinking Recognition." 120.
[11] Nancy Fraser and Axel Honneth, *Redistribution or Recognition? A Political-Philosophical Exchange* (New York: Verso, 2003), 9, 112.
[12] Johan Galtung, "Violence, Peace, and Peace Research," *Journal of Peace Research* 6, no. 3 (1969), https://www.jstor.org/stable/422690.
[13] Peter Lawler, "A Question of Values: A Critique of Galtung's Peace Research," *Interdisciplinary Peace Research* 1, no. 2 (October 1989), https://doi.org/10.1080/14781158908412711.

and providing projections of what is the point of interest, as well as determining which parties are benefited and harmed by the decision.[14] The conflict resolution process itself is referred to by Galtung as "meta-conflict" which is different from its factual form or "original-conflict". Conflict resolution for Galtung is when the decisions taken from the meta-conflict have a real impact on the resolution of the original-conflict.[15]

From Fraser, Honneth, and Galtung above, it can be concluded that for a judicial institution to be called a conflict resolution, it is: (1) to carry out a constitutional interpretation to provide inclusive protection of human rights (recognition & redistribution from Fraser & Honneth); and (2) so that the decisions taken are as acceptable as possible to the parties to the dispute (meta-conflict & original-conflict from Galtung).

Of course, resolving a conflict and structural violence (from Galtung) is never easy. Apart from that, there are also institutional weaknesses. Basically, the Constitutional Court does not directly decide on a concrete problem. This is due to the limitations of the Court to accept cases that are Constitutional Complaints and Constitutional Questions, and only to review the norms of the Act against the 1945 Constitution. Thus, the resolution of problems in the Constitutional Court is not only meta, but still requires follow-up executions by the Constitutional Court. This issue will be discussed separately later.

2.1.2. Justifying Constitutional Court as a Conflict-Resolution Body

The focus of this paper is to see how legal mechanism is able to conduct role as a means of conflict resolution: through independent judicial authority, which represents the rule of law. Judging from the practice, turning to judicial institutions for conflict resolution is actually not unprecedented. The goal is clear, to reduce conflict as well as to provide a democratic channel for questioning a

[14] Galtung, "Violence, Peace, and Peace, " 353-4.
Galtung stated: *To resolve a conflict means*: 1. To *decide*: a. who is the winner and who the loser, b. what the future distribution of value shall be; 2. To administer the *distribution* of value, and; 3. to define the conflict as *terminated*.

[15] Ibid., 356.

particular issue. As the experience in the US Supreme Court, where the court provides a constitutional interpretation by taking into account the aspirations that arise from social movements.[16] Studies conducted by Zines also show a similar trend. Sharp disputes between groups in debating industrial employment policies were finally decided by the Australian High Court.[17] Not to be missed is the Indonesian Constitutional Court as indicated by Mietzner in the case of the Electoral Result Dispute for the Presidential Election.[18]

This paper will specifically highlight the potential of the Constitutional Court as a conflict resolution in its authority to review laws against the 1945 Constitution. It has been mentioned that the relationship between conflict resolution and the Constitutional Court is part of how the Constitution adapts to resolve conflicts. Jimly Asshiddiqie, the first chairman of the Constitutional Court, stated that the most important task of the state in civil society is to provide services.[19] However, indeed that with all the pulls of political dynamics, the policies taken have the potential to create disputes. In the setting of democratic regime, every dispute requires moderation, especially if the disappointment is caused by state policies. From this point, it can be understood as a general tendency that the Constitutional Courts in many countries were born from transitions that wanted to distinguish themselves from the previous authoritarian rule.[20]

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16 Reva B. Siegel, "Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of de facto ERA," *California Law Review* 94 (2006): 1323-37, https://doi.org/10.15779/Z38B97N.

17 Leslie Zines, "Social Conflict and Constitutional Interpretation," *Monash University Law Review* 22, no. 2 (1996), https://doi.org/10.1177/0067205X100380031.

18 Mietzner, "Political Conflict Resolution," 407.

19 Jimly Asshiddiqie, *Gagasan Konstitusi Sosial: Institusionalisasi dan Konstitusionalisasi Kehidupan Masyarakat Madani* [The Idea of Social Constitution: Institutionalization and Constitutionalization of Civil Society Life] (Jakarta: Pustaka LP3ES, 2015), 134.

20 Ni'matul Huda, *Politik Ketatanegaraan Indonesia; Kajian Terhadap Dinamika Perubahan UUD 1945* [Indonesian Constitutional Politics; Study of the Dynamics of Changes to the 1945 Constitution] (Yogyakarta: FH UII Press, 2003), 223; Hamdan Zoelfa, "Mahkamah Konstitusi dan Masa Depan Negara Hukum Demokrasi Indonesia [The Constitutional Court and the Future of Indonesia's Democratic Law State]" in *Beberapa Aspek Hukum Tata Negara, Hukum Pidana, dan Hukum Islam*; *Menyambut 73 Tahun Prof. H. Muhammad Tahir Azhary, S.H* [Several Aspects of Constitutional Law, Criminal Law, and Islamic Law; Welcoming 73 Years of Prof. H. Muhammad Tahir Azhary, S.H], ed. Hamdan Zoelva (Jakarta: Kencana, 2012), 53; Martitah, *Mahkamah Konstitusi: Dari Negative Legislature ke Positive Legislature?* [Constitutional Court: From Negative Legislature to Positive Legislature?] (Jakarta: Konstitusi Press, 2013); Fritz Edward Siregar, "Indonesian Constitutional Politics 2003-2013" (Doctoral thesis, University of New South Wales, 2016), 155.

2.1.3. The Rise of the Constitutional Court in Indonesian Reform

While the main strength of judicial authority is its nature of independence, in reality it does not always work that way. Studies from Pompe,[21] Hilbink,[22] and Tom Ginsburg *et al*[23] indicated problems of the independent judiciary during the authoritarian regime. In this context, judicial power is merely an extension of the executive, instead of protecting human rights and democratic values. Moreover, political pressure from the regime may not provide free space for the independence of judges.

During the New Order Regime, the presence of military culture and ideology appear in almost every aspect of civil society.[24] They do have almost unlimited discretional power.[25] With the military power being so hegemonic at the time, the military approach dominated conflict resolution. Indeed, this view is undemocratic and later on during Reformasi was declared as an abuse. After the transition of power took place in 1998, Indonesia was undergoing a phase of democratization.[26] There was the installment of democratic institutions and the strengthening of human rights laws, one of which was realized through the establishment of the Constitutional Court. At that time, it was felt that there was a need to create an institution authorized to conduct judicial reviews. It's just that the majority of

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[21] Sebastian Pompe, *Runtuhnya Institusi Mahkamah Agung* [Collapse of the Supreme Court Institution] (Jakarta: LeIP, 2012); Juan J. Linz, *Totalitarian and Authoritarian Regimes* (London: Lynne Rienner Publishers, 2000), 109; and Nora Hedling, *A Practical Guide to Constitution Building: The Design of the Judicial Branch* (Sweden: Bulls Graphics, 2011).

[22] Lisa Hilbink, *Judges Beyond Politics in Democracy and Dictatorship, Lessons From Chile* (New York: Cambridge University Press, 2007), 102-129, 157-176.

[23] Tom Ginsburg, Tamir Moustafa (eds). *Rule by Law: The Politics of Courts in Authoritarian Regimes* (New York: Cambridge University Press, 2008), 4-7.

[24] Arie Sudjito, "Gerakan Dimiliterisasi di Era Transisi Demokrasi Peta Masalah dan Pemanfaatan Peluang [The Militarized Movement in the Era of Democratic Transition Map of the Problems and Utilization of Opportunities]," *Jurnal Ilmu Sosial dan Ilmu Politik* 6, no. 1 (July 2022): 123-8, https://doi.org/10.22146/jsp.11097.

[25] Ibid.

[26] Alexandru Jădăneanț, "The Collapse of Constitutional Legalism: Racial Laws and the Ethno- Cultural Construction of National Identity in Romania during World War II," *Procedia - Social and Behavioral Sciences* 183, (2015), https://doi.org/10.1016/j.sbspro.2015.04.945; Monica Claes, "The Validity and Primacy of Eu Law and the 'Cooperative Relationship' between National Constitutional Courts and the Court of Justice of the European Union," *Maastricht Journal of European and Comparative Law* 23, no. 1 (2016): 151-169, https://doi.org/10.1177/1023263X1602300110; John Harrington and Ambreena Manji, "Restoring Leviathan? The Kenyan Supreme Court, Constitutional Transformation, and the Presidential Election of 2013," *Journal of Eastern African Studies* 9, no. 2 (2015): 175–192, https://doi.org/10.1080/17531055.2015.1012439; Theunis Roux, "Constitutional Courts as Democratic Consolidators: Insights from South Africa after 20 Years," *Journal of Southern African Studies* 42, no. 1 (2016): 5–18, https://doi.org/10.1080/03057070.2015.1139683; K.E. Klare, "Legal Culture and Transformative Constitutionalism," *South African Journal on Human Rights* 14 (1998): 146, https://doi.org/10.1080/02587203.1998.11834974.

the MPR [People's Consultative Assembly] still rejected the idea. It was only after the impeachment of Abdurrahman Wahid and the lengthy political saga that a consensus was finally reached in the MPR to form a separate institution which was later referred to as the Constitutional Court through the 3rd amendment of the 1945 Constitution. The powers of the Constitutional Court include: (i) judicial review of statutes against the Constitution; (ii) to decide power disputes among state institutions; (iii) to decide the dissolution of political party; (iv) to decide the general election dispute; and (v) to review the presidential impeachment from the MPR. On August 16 2003, nine Constitutional Court judges took the oath and Jimly Asshiddiqie, a well known constitutional law scholar, chosen as the first chief justice.

The presence of the Constitutional Court inevitably provides a new color for promoting democracy and human rights. This is reflected in the vision and mission of the 2003-2008 Constitutional Court, which declared itself to be the "guardian of the Constitution and the protector of Indonesian human rights".[27] And the Constitutional Court did not take long to gain public trust. A number of innovations which in the decisions of the Constitutional Court have the support of civil society. Maruarar Siahaan (Judge 2003-2008) even mentioned that the support of civil organizations greatly helped the Constitutional Court.[28] Over time the Constitutional Court has developed through an approach that the second Chairman, Mahfud MD, called "substantive justice". That to answer the problems that arise, the Constitutional Court does not only annul statutory norms (negative legislature) but also helps formulate new norms (positive legislature). The legal rules in the decisions of the Constitutional Court are filled with an atmosphere of judicial activism and by most parties are considered to answer the problems of legislation in Indonesia.

Broadly speaking, the authority of the Constitutional Court which is shown through its decisions is considered positive by many parties and is generally considered to have succeeded in contributing to Indonesian constitutionalism. This element is important to maintain public trust to ensure legal compliance,

[27] Siregar, "Indonesian Constitutional Politics," 2.
[28] Mietzner, "Political Conflict Resolution," 414.

or by borrowing the Kelsenian scheme, to guarantee legal efficacy.[29] The same reason also makes the Court become bound to a certain standard. The Court must be able to maintain, on the one hand, horizontal public trust, and the political interests of the elected officials related to vertical friction. The rise of the Constitutional Court should be placed as a new approach after authoritarianism which also marks the portrait of a shift in conflict resolution models from the military to the rule of law, or in other words: from the barrel of a gun to the hammer of judges.

This study was launched with the premise that an institution that has the authority to provide an authoritative interpretation of the 1945 Constitution has a vital role to not only resolve a social conflict, but also to provide guidance in the form of legal rules to anticipate it in the future.[30] That the Constitution as "living law" offers a constitutional solution. The following will explain the formulation of legal rules in the decisions of the Constitutional Court in post-authoritarianism in Indonesia.

2.2. Constitutional Conflict-Resolution before the Court: Modality

This section describes the influence of the Constitutional Court to be regarded as a conflict-resolution institution on the aspect of modalities. This section focuses on the decisions and the legal rules in them by using the legacy of conflict during authoritarianism as a touchstone. The modalities mentioned here refers to Gidden's with a few modifications. Modality in Giddens is a rule that directs the behavior of the community that contains a certain flexibility while providing space for behavioral changes. [31] This paper adopts this definition by placing the decision of the Constitutional Court as the basis of the rules, which simultaneously provides an opportunity for re-interpretation of the Constitution for its amendments and determine which the decided law should be translated into actions.

[29] Hans Kelsen, "Pure Theory of Law and Analytical Jurisprudence," *Harvard Law Review* 55, no. 1 (November 1941): 50-1, https://doi.org/10.2307/1334739.

[30] R. Dixon, "Constitutional Drafting and Distrust," *International Journal of Constitutional Law* 13, no. 14 (2015): 819-846, https://doi.org/10.1093/icon/mov068.

[31] Richard Whittington, "Giddens, Structuration Theory and Strategy as Practice," in *Strategy as Practice*, ed. Damon Golsorkhi et al. (New York: Cambridge University Press, 2015), 23-43.

In the Indonesian context, the authoritarian regime has left a lingering presence in the society so deeply it has become the subconscious core of the Indonesian social structure. Such legacy of the New Order regime has been studied. Cornelis Lay[32] mentioned the New Order era as a sad period in which the "killing" of Pancasila was carried out systematically through the de-ideology of Pancasila. Soetandyo Wignjosoebroto[33] called it a period marked by the hegemony of state power. Pratikno[34] further argued that the violence occurred during the New Order was already an innate character of that regime in which the state was wholly implicated. Arie Sujito[35] blatantly called the New Order regime as "tyrannical". Ariel Heryanto[36] called the regime's violent past was a form of state terrorism. A more thorough of the above description can be found in the Indonesian National Commission on Human Rights (hereinafter, KOMNAS HAM)'s official report on preliminary gross human rights investigation which recorded conflicts and violence during the New Order.[37]

One notorious events which lay foundation for the New Order regime was the bloody transition during 1965-6. It was estimated that five hundred thousands of alleged communists were killed. The other ten of thousands were arbitrarily detained, mostly without proper trial. Another was 1982-5 of "Petrus" [*Pembunuhan Misterius*: Myterrious Killings], aimed at petty criminals and gang members. The killed victims were intentionally exposed in public space, gunned and tied up. The survivors mostly experiencing discrimination and closely monitored by the state's intelligence. These two theatre of horror were only samples of what was contained within the Komnas HAM's report. Those victims were and still experiencing discriminations from their traumatic past. As rightly stated by

[32] Cornelis Lay, "Pancasila, Soekarno, dan Orde Baru," *Prisma* 32, no. 2-3 (2013).

[33] Soetandyo Wignyosoebroto, "Hak-Hak Asasi Manusia: Perkembangan Pengertiannya yang Merefleksikan Dinamika Sosial-Politik [Human Rights: The Development of Their Understanding Reflecting Socio-Political Dynamics]," *Masyarakat, Kebudayaan dan Politik* 12, no. 4 (October 1999).

[34] Pratikno, "Keretakan Otoritarianisme Orde Baru dan Prospek Demokratisasi [The Cracks in New Order Authoritarianism and Prospects for Democratization]," *Jurnal Ilmu Sosial dan Ilmu Politik* 2, no. 2 (November 1998), https://doi.org/10.22146/jsp.11152.

[35] Sujito, "Gerakan Demiliterisasi di Era," 128.

[36] Ariel Heryant, *State Terrorism and Political Identity in Indonesia, Fatally Belonging* (New York: Routledge, 2006).

[37] Komnas HAM, *Merawat Ingatan Menjemput Keadilan, Ringkasan Eksekutif Peristiwa Pelanggaran HAM yang Berat* [Caring for Memory Picks Up Justice, Executive Summary of Serious Human Rights Violations] (Jakarta: Tim Publikasi Komnas HAM [Komnas HAM Publication Team], 2020).

Colombijn,[38] that those kinds of violence based approach has deep historical roots in Indonesian society.

Above depiction signify the role of judiciary in the context of transitional justice. Whether as the guardian and final interpreter of the Constitution, ideology, people's human rights and democracy, the Court is certainly expected to answer the challenges mentioned above. It does not mean that the efforts toward conflict resolution is non-existent. The early transition period has shown efforts to provide a settlement mechanism through judicial and extra-judicial. In that regard, both laws were filed to the Constitutional Courts, followed by the decisions.

2.2.1. Cornerstone Decisions Cemented by the Court

In the post-authoritarian regime, one of the main tasks in the transition period is the government's attitude to resolve the violence that occurred in the previous regime. Based on UN guidelines[39], transitional justice includes the following components: (i) initiatives to hold criminals accountable; (ii) disclosure of the truth; (iii) reparations for victims, (iv) institutional reforms; and (v) "national consultation" in the form of ensuring participation in the transitional justice process. As stated by pundits,[40] Indonesia has only partially adopting transitional justice principles. While the transition period initiate to many pillars of democracy (including the Constitutional Court), impunity and recognition of victims still have not been touched.

From a regulatory perspective, the criminal mechanism for gross violation of human rights is divided into two mechanisms: judicial and non-judicial. The former regulated in UU 26/2000.[41] The article 43 paragraph (1) of the UU *a quo* exclude the non-retroactive principle of past gross human rights violations

[38] F. Colombjin, "Explaining the Violent Solution in Indonesia," *The Brown Journal of World Affairs* 9, no.1 (2002): 49–50.

[39] UN Guidance Note of the Secretary General, *United Nations Approach to Transitional Justice* (New York: United Nations, 2010), 7-11.

[40] Sri Lestari Wahyuningroem, "From State to Society: Democratisation and the Failure of Transitional Justice in Indonesia" (Ph.D Thesis, Australian National University, 2018); Edward Aspinall, "The Irony of Success," *Journal of Democracy* 21, no. 2 (April 2010), https://doi.org/10.1353/jod.0.0157; Suparman Marzuki, *Tragedi Politik Hukum HAM* [Human Rights Legal Political Tragedy] (Yogyakarta: Pustaka Pelajar, 2011).

[41] Law of the Republic of Indonesia Number 26 of 2000 concerning the Human Rights Court (State Gazette of the Republic of Indonesia of 2000 Number 208).

through the *ad hoc* Human Rights Court. For the latter, non-judicial mechanisms, is regulated via Tap V/MPR/2000.[42] Tap *a quo* ordered the establishment of a Truth and Reconciliation Commission (TRC) which was then followed by the enactment of UU 27/2004.[43] These two instruments were intended to be the "Indonesian way" to commencing transitional justice. However, both were failed to be performed by the state.

2.2.2. Defending the "Retroactive" Principle: on Impunity

This section will successively discuss the decisions of the Constitutional Court relating to impunity for perpetrators of past conflicts. The most important fulcrum in this topic is the examination of the retroactive clause contained in Law 26/2000.

The first precedent is the review of Article 43 Paragraph (1) of Law 26/2000 through Decision Number: 065/PUU-II/2004 (Human Rights Tribunal Case) which was requested by Abilio Jose Osorio Soares. The Constitutional Court stated that retroactive application could be limited to extraordinary crimes.[44] That the crime of gross human rights violations is an act that is contrary to the Constitution. For this reason, the exception to the non-retroactive principle is justified because what is protected is the interest of humanity as a whole.[45] The Constitutional Court basically stated that the deviation was justified because the basic rights (non-derogable rights) contained in Article 28I paragraph (1)

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[42] Ketetapan Majelis Permusyawaratan Rakyat Nomor V/MPR/2000 tentang Pemantapan Persatuan Nasional [General People's Assembly Decree on Promotion of National Unity].

[43] Law of the Republic of Indonesia Number 27 of 2004 concerning the Truth and Reconciliation Commission (State Gazette of the Republic of Indonesia of 2004 Number 114).

[44] Constitutional Court of Indonesia, Decision No. 065/PUU-II/2004 (Indonesian Constitutional Court 2004), 52:
> Considering whereas the standard for determining the balance between legal certainty and justice, in particularly in upholding the principle of non-retroactivity must be carried out by considering three tasks/objectives of law which affect one another (*spannungsverhaltnis*) namely legal certainty (*rechtssicherkeit*), legal justice (gerechtigkeit) and legal usefulness (zweckmassigkeit). With Equal consideration of the three legal objectives, the limited retroactive application of a law, particluarly for extraordinary crimes, is legally justifiable;

[45] Ibid., 54.
> [...] Therefore, the overriding of the principle of non-retroactivity on such crime is not contradictory to the 1945 Constitution; as the constitution of a civilized nation, the spirit of the 1845 Constitution in fact mandated the enforcement of humanity and justice; hence the above described crimes against humanity must be eradicated. When the demand to uphold humanity and justice is hindered by the principle of non-retroactivity-which historically and initially had the background of the intent to protect individual human beings' interest from arbitrary actions of absolute rulers - hence the overriding of the principle of non-retroactivity becomes an unavoidable action because the interest which are to be saved through such overriding is the interest of human beings as a whole whose value exeeds the interest of an individual human being;

were limited by the "limitation" clause in Article 28J paragraph (2) of the 1945 Constitution. The non-retroactive exception for gross human rights violations was again mentioned in Decision Number: 29/PUU-V/2007 (Film Censorship Case), which states that non-derogable rights in paragraph (1) can be limited by Article 28J paragraph (2) of the 1945 Constitution.[46]

The review of the retroactive principle in Law 26/2000 marked a shift of interpretation from the previous precedent, Decision Number 013/PUU-I/2003 (Bali Bombing Case). The Bali Bombing Case mainly questioned the retroactive provisions in Law 16/2003 where the Court differentiated the category of serious crime (in this case, terrorism) and extraordinary crime (gross violation of human rights).[47] The Constitutional Court stated that the non-retroactive principle can only be accepted in the latter case.[48] In the Bali Bombing Case, the Constitutional Court argued that the provision of "non-derogable" clause in Article 28I paragraph (1) cannot be reduced to the "limitation" clause in Article 28J paragraph 2 of the 1945 Constitution due of the phrase "under any circumstances". In this section, the Constitutional Court refers to the opinion of the expert Maria Farida Indrati (Constitutional Court Judge 2008) regarding the rule of law that the constitution should not "slice its own flesh" [*de constitutie snijdt zijn eigen vlees*].[49]

[46] Constitutional Court of Indonesia, Decision No. 29/PUU-V/2007, 223:
[...] Moreover, for Human Rights classified as non-derogable rights, fo example the right not to be prosecuted under retroactive laws (non-retroactive) might be waived in cases of gross violence of human rights, such as crime against humanity and genocide: Similarly, the Human Rights namely the Right to life as stipulated in Article 28I paragraph (1) may be restricted by the Article 28J paragraph (2) of the 1945 Constitution;

[47] Law of the Republic of Indonesia Number 16 of 2003 concerning Stipulation of Government Regulation in lieu of Law of the Republic of Indonesia Number 2 of 2002 concerning the Enforcement of Government Regulation in Lieu of Law of the Republic of Indonesia Number 1 of 2002 concerning Eradication of Criminal Acts of Terrorism, in the Bali Bombing Explosion Date October 12, 2002 Becomes Law (State Gazette of the Republic of Indonesia of 2003 Number 46).

[48] Constitutional Court of Indonesia, Decision No. 013/PUU-I/2003, 43-4:
[...] Hence, a reffererence to the Rome Statute of 1998 as well as Law, Bali bombing does not belong to an extraordinary crime that may be subjected to a retroactive principle of law, but an ordinary crime that is very cruel, but can still be prosecuted under the existing criminal code. [...]
[...] it is important to first look at the aim of applying the nonretroactive principle, that is, in order that the people in power will not arbitrarily make a law to punish their citizens. From the philosophical view, this principle must not of course be used for protecting the people who have committed a violation against the human rights, if such an effects a situation where the people who have committed gross violation of human rights will enjoy impunity. The nonretroactive principle should not be rigidly applied. [...]

[49] Constitutional Court of Indonesia, Decision No. 013/PUU-I/2003, 42:
Considering that Article 28I of the 1945 Constitution endorses the previous laws and regulations and places the a quo principle as supreme laws and regulations in the constitutional law arrangements. *Constitutie is de hoogste wet!* The State is unable to negate the Constitution as such a thing would mean the Constitution is slicing its own flesh. Referring also to the opinion of Dr. Maria Farida Indrati, S.H., M.H., the provision of

In terms of procedural law, the Court made its stance in the Decision 18/PUU-V/2007 (Human Rights Tribunal Mechanism Case I). This decision questions the procedure for establishing an *ad hoc* Human Rights Court in Law 26/2000. The Constitutional Court stated that the DPR [House of Parliament] cannot establish an ad hoc Human Rights Court without first obtaining the results of an early and further investigation by Komnas HAM and the Attorney General's Office.[50] As a result, the DPR cannot arbitrarily decide whether an action constitutes a gross human rights violation without preliminary phase conducted by those two institutions.

The next decision is a matter of technical order regarding the stagnation of the follow-up to the Komnas HAM's early investigation by the Attorney General's Office. This stagnation is motivated by the division of powers of "investigation" in the Law 26/2000. The Attorney General's Office returned the Komnas HAM's early investigation under the pretext that it was incomplete and needed to be corrected. Komnas HAM then fixed the documents but again the Attorney General returning it and refusing to proceed to conduct a further investigation.

The Petitioner believes that the two institutions' deadlock has resulted in legal uncertainty. The Constitutional Court through Decision 75/PUU-XIII/2015 (Human Rights Tribunal Mechanism Case II) rejected the applicant's application. There was a conflicting arguments within the decision. First, the Court argued that the main issue was not a matter of unconstitutionality but more of a problem of norms implementation. Second, the Constitutional Court acknowledges the incompleteness of investigation procedure within the law. In the end, the Court only makes suggestions on how in the future the policy should be taken by the legislative. The Constitutional Court merely "provides suggestions" for: (i) resolving differences of opinion between Komnas HAM and the Attorney General; (ii) regarding if Komnas HAM is unable to complete the dossier within the time limit as stipulated in Article 20 paragraph (3) of Law 26/2000; and (iii) a way out that can be taken by citizens who feel aggrieved.[51]

Article 28J paragraph (2) of the 1945 Constitution, which gives limitations to human rights, does not apply to Article 28I paragraph (1) because there is the phrase "under any conditions whatsoever".

50 Constitutional Court of Indonesia, Decision No. 18/PUU-V/2007, 94.

51 Constitutional Court of Indonesia, Decision No. 75/PUU-XIII/2015, 85.

2.2.3. On Dealing with the Past through Non-Judicial Mechanism

The most important decision related to resolving past conflicts through non-judicial means is Decision 006/PUU-IV/2006 (Reconciliation Case). This case was brought by civil society, which in essence questioned the imbalance relationship between victims and perpetrators in the reconciliation process. That the victim is charged with forgiving the perpetrator as a condition for obtaining reparations. The Constitutional Court approved the opinion of the Petitioners and annulled Law 27/2004 in its entirety. According to the Constitutional Court, the pardon provision in Article 27 is a "Key Article", so the cancellation of that Article will affect the construction of Law 27/2004 as a whole. In addition to canceling Law 27/2004 in its entirety, the Constitutional Court provides rules for settlement through the reconciliation mechanism, which are explained as follows.

First, about the position of the victim. The fact that gross human rights violations have occurred has created an obligation for both the state and the perpetrators to provide restitution, compensation, and rehabilitation to victims, without any other conditions.[52] Second, about the position of the perpetrator. That amnesty can actually be granted to perpetrators, but with limitations where the person concerned cannot benefit from the amnesty and amnesty cannot be granted for types of crimes that violate human rights that have been recognized by international law.[53] Third, regarding the form of settlement in the future through, among others: (i) reconciliation in the form of legal policies in

[52] Constitutional Court of Indonesia, Decision No. 006/PUU-IV/2006, 122:
The fact that there are gross human rights violations, which the state is actually obliged to avoid and prevent, and victims whose Human Rights should be protected by the state, are adequate to give rise to the legal responsibility of the state and individual perpetrators who can be identified to provide restitution, compensation and rehabilitation to the victims, without any other conditions. Stipulating amnesty as a requirement is a negation of legal protection and justice. [...]

[53] Ibid., 124
[...] It is stated that although the KKR is intended to create conducive conditions in achieving peace and national reconciliation, it is necessary to determine the limitations for the granting of amnesty, namely the perpetrators may not take advantage of amnesty. Amnesty should not have legal concequences relating to the rights of the victims to obtan reparation, and further amnesty shall not be granted in respect of violations of human rights and international humanitarian law, which constitute criminal offences, for which amnesty and other forms of immunity are not allowable.

accordance with the Constitution and universal human rights law, or (ii) through political policies in the context of rehabilitation and general amnesty.[54]

Previously, the Constitutional Court had decided on the cases filed by Sumaun Utomo et al, some of whom were former New Order political prisoners. The Petitioners in essence questioned the prohibition of prohibited organizations from participating in the General Election as stated in Article 60 letter G of Law 12/2003.[55] The Constitutional Court through its Decision 011-017/PUU-I/2003 (ex-Communists Party Election Case) stated that the limitation was discriminatory and therefore unconstitutional. In his considerations, it was also stated that these restrictions were irrelevant to reconciliation efforts in developing democracy and justice.[56] The two decisions above provide complementary precedents on the principles of reconciliation. Apart from the ultra petite controversy in the Reconciliation Case, in general the Constitutional Court has given its support for the reconciliation program which is currently being launched at that time.

2.2.4. Comprehending the Court's Intentions

Basically, the tests in the Bali Bombing Case and the Human Rights Tribunal Case test the same thing, namely the application of the non-retroactive principle. In these two cases, the Constitutional Court basically stated that the exception of non-retroactive principle can only be limitedly applies to the gross human rights violations. They defended their stance while at the same time making a shift of interpretation. In the Bali Bombing Case, The Court nullify the retroactive clause in the Bali Bombing Emergency Law by positioning "non-derogable clause" of Article 28I paragraph (1) of 1945 Constitution as irreducible. Falling within this non-derrogable clause was the right to not to be prosecuted with the retroactive law. Meanwhile, in the Human Rights Tribunal Case, the Court justified the

[54] Ibid., 131.
[...] Many options can be selected for achieving such goal, among others, by achieving reconciliation in the form of legal policies (laws), which are in line with the 1945 Constitution and universally applicable human rights instruments, or achieving reconciliation through policies on general rehabilitation and amnesty.

[55] Law of the Republic of Indonesia Number 12 of 2003 Concerning the General Election of Members of the People's Representative Council, Regional Representative Council, and Regional People's Representative Council (State Gazette of the Republic of Indonesia of 2003 Number 37).

[56] Constitutional Court of Indonesia, Decision No. 011-017/PUU-I/2003, 37.

retroactive clause in the UU 26/2000 by interpreting that Article 28I paragraph (1) is subordinate respective to the "limitation clause" in Article 28J paragraph (2) of 1945 Constitution.

The decisions on the retroactive clause imply the Constitutional Court's stance on impunity. The considerations in the jurisprudence show that the Constitutional Court justifies the exception of the non-retroactive principle specifically for cases of gross human rights violations, namely crimes against humanity and genocide. It is also implied that gross human rights violations are considered a higher degree of crime than terrorism. Thus, broadly speaking, the Constitution does not condone impunity for perpetrators of gross human rights violations. This attitude was reaffirmed by the limitation of the amnesty conditions contained in the consideration of the Reconciliation Case.

The procedural aspect of the ad hoc Tribunal of Human Rights is a bit difficult to conclude. The Constitutional Court stated that the DPR cannot arbitrarily declare a case as a gross human rights violation or not. This decision certainly has the effect of preventing the potential for the DPR to unilaterally decide a case to grant impunity. However, in the Human Rights Tribunal Mechanism Case II Decision, the Constitutional Court gave a less firm answer, namely acknowledging the lack of regulation but stating that the article was constitutional. The Constitutional Court only provides suggestions for guidance to the legislature to complete the lack of norms. Because the form is just a suggestion, there is no obligation for the legislature to make improvements as stated in the rules for considering that Decision.

For cases related to past conflicts through extra-judicial channels, the opinion of the Constitutional Court can be read from several perspectives. The Constitutional Court annulled Law 27/2004 in its entirety and as consequence the victim loses the momentum for a settlement through reparations.[57] This phenomenon is actually a dilemma, especially from two main considerations. First, in relation to what has been mentioned earlier, that the cancellation of Law

[57] Dissenting opinion from Justice I Gede Dewa Palguna, Constitutional Court of Indonesia, Decision No. 006/PUU-IV/2006, 143.

27/2004 means that the victim is unable to take extra-judicial routes. Second, the Constitutional Court still leave the door open for reconciliation as shown in its *ratio decidendi* [reason for falling]. Perhaps the Constitutional Court did not imagine that in fact the decision was not followed up by the legislature which resulted in the uncertainty of the fate of the victims due to the absence of a legal umbrella.

Broadly speaking, the above-mentioned decisions show the modality of norms testing in the Constitutional Court as a means of conflict resolution. In brief, the Court does not justify the existence of impunity and encourages the realization of peace through reconciliation, recognition of the victims' once-forcibly-taken rights. But of course, this modality does not necessarily solve the problem. As is well known, so far none of the perpetrators has been convicted and not a single victim has received legal recognition and received reparations. This absence of punishment and reparation shows a fracture between the meta-conflict and its real solution, the original-conflict.

2.3. Enhancing the Role of the Court: Trajectory

2.3.1. Court Decisions as Constitutional Engineering in Indonesian Rule of Law

The decision of the Constitutional Court has the nature of finality which justifies it as the basis for interpretation of the 1945 Constitution. Therefore, there are decisions whose legal rules provide a conclusion for resolving problems with a mediation or arbitration approach. Through the principles contained in its decisions, the work of the Constitutional Court can also be interpreted as part of constitutional engineering.

The decisions of the Constitutional Court have shown the modalities as well as the faults between meta-conflict in the realm of original-conflict. That there is a discontinuity of resolutions in the trial forum with real problem solving in the field. This topic is a classic problem regarding the executional aspect of the Constitutional Court decisions, where its *erga omnes* [towards all] nature does not necessarily make it directly implemented. This problem was acknowledged by

Maruarar Siahaan, who emphasized the acceptance of the Constitutional Court's decisions by other branches of power, especially the legislature.[58] Another study that extensively explores the relationship between the Constitutional Court and the legislature can be found in Fajar Laksono's dissertation research.[59] This paper confirms these opinions while adding to the relationship with conflict-resolution institutions.

If conflict resolution institutions are judged on their ability to resolve real conflicts on the ground, the experience of the Constitutional Court has given varying results. These variations relate to the extent to which the execution of the Judgment takes place, but it is not the only one. In certain cases, it appears that the Constitutional Court is careful to provide clear solutions. This modality then determines how to see constitutional engineering carried out by the Constitutional Court for conflict resolution. This challenge will also be seen in a broader context: the political momentum as an aspect of its own.

2.3.2. Injustice for Inherited Conflicts

As already noted, the Court has determined its position as shown in the discussion [2.2]. The stance of the establishment of the Constitutional Court, at least normatively, has an important role in the direction of resolving conflicts inherited from the New Order. In its ideal form, the legislature could actually follow up on the issue by adhering to the rules of the Reconciliation Case Decision. Not that there is no initiation at all. In 2015, a draft of the TRC Bill appeared. Then continued with the 2015-2021 period with a number of ideas ranging from the National Harmony Council to policies through Presidential Regulations by forming a special work unit. Long story short, none of these plans came true.

From another level, the prosecution has stalled without any significant progress. In this case, the Constitutional Court has given its view through the

[58] Maruarar Siahaan, "Mahkamah Konstitusi dalam Penegakan Hukum Konstitusi [Constitutional Court in Upholding Constitutional Law]," *Jurnal Hukum* 16, no. 3 (July 2009): 376, https://dx.doi.org/10.20885/iustum.vol16.iss3.art3.

[59] Fajar Laksono, "Relasi Antara Mahkamah Konstitusi dengan Dewan Perwakilan Rakyat dan Presiden Selaku Pembentuk Undang-Undang (Studi terhadap Dinamika Pelaksanaan Putusan Mahkamah Konstitusi melalui Legislasi Tahun 2004-2015) [The Relationship Between the Constitutional Court and the House of Representatives and the President as Legislator (Study of the Dynamics of Implementation of Constitutional Court Decisions through Legislation 2004-2015)]" (P.hD Thesis, PDIH FH University of Brawijaya Malang, 2017).

Human Rights Tribunal Mechanism Case II with unsatisfactory considerations. The stagnation of the process from the investigative institutions and investigators made the case unable to immediately proceed to the DPR to establish an ad hoc Human Rights Court.

The result of the impasse is legal certainty for victims. There are only two ways to get official recognition as a victim. First, through a reconciliation mechanism, unfortunately, until now there is no legal umbrella. Second, through the ad hoc Human Rights Court. This mechanism still needs a long way to go because it requires prerequisites for the perpetrator to be convicted through a decision that has permanent legal force. The simple logic is that the legal events of gross human rights violations and their victims require that the perpetrators be punished first. It means that even if Komnas HAM and the Attorney General's Office has reached an agreement and an *ad hoc* Human Rights Court is formed, it still does not guarantee that any perpetrators would be convicted so that victims can get reparations.

With no guarantee of legal certainty, and in the absence of legal recognition to victims, how to interpret the Constitutional Court's decisions? In the light of Carl Schmitt, the interpretation of norm and its implementation are viewed as a unity of monism.[60] Borrowing that perspective lead to the argument that this "more democratic regime" of Reformasi as a mere banner, not to say the worst, a new form of authoritarianism. In other words, it does not passed the test to formed a "We" that distinguished a new society with their darker past.

2.3.3. Bridging Meta to Original: Translating Decisions into Actions

If the Constitutional Court decision is indeed a legal engineering that can be utilized to resolve a conflict, then the next task is to connect the values contained in the decisions with conflicts that occur in the real world. Yet with all the authority it has, the Constitutional Court still cannot run alone, which in Javanese terms is often likened to an "*idu geni*" [spit of fire] proverbs where what is said can simply come true. In a broader perspective, this follow-up is also

[60] See Carl Schmitt, *Political Theology, Four Chapters on the Concept of Sovereignty* (Chicago: The University of Chicago Press, 2005).

needed as a fulfillment of transitional justice; justice for victims and perpetrators to assemble a collective memory for the mistakes of the past regime and not repeat the atrocious crimes of the past. For this reason, this paper will try to offer a settlement option based on the above Constitutional Court decisions. Thus, following the logic of the decisions of the Constitutional Court above, it is possible to reach a settlement through two mechanisms: judicial and extra-judicial.

First is about the judicial mechanism. It has been explained that the obstacles that arise to the problem of judicial settlement are mainly the problem of improving the procedural law mechanism as stated in "Human Rights Tribunal Case Mechanism II". These improvements are to bridge the deadlock in the preliminary investigation and investigation procedures that have been hampering the progress of the case. There are two ways to fix this issue, either amending the law to meet the requirement as stated by the Court or to make drastic approach synchronizing Komnas HAM and Prosecutor's perspectives.

Second is about the extra-judicial mechanism. Referring to the principles presented by the Court in the Reconciliation Case, a number of keywords can be formulated: (i) prioritizing the right to reparation for victims; (ii) caution if there is sub-poena authority to grant amnesty to perpetrators; (iii) the opening of options for implementing extra-judicial settlement policies, including through legal policies and political policies. By taking into account these references, the option is open to determine the design of the settlement through the reconciliation mechanism. There are at least four options: first, a legal policy accompanied by sub-points of authority such as in South Africa; secondly, legal policies without sub-poena authority, such as in Chile; third, political policies through rehabilitation and general amnesty; and fourth, an alternative route by setting up a temporary commission/team before being followed up with legal or political policies.

On August 16, 2022, President Joko Widodo stated that he has signed the Presidential Decree No. 17/2022 on the formation of task force for gross violations

of human rights through non-judicial mechanisms. Judging from its form, this policy can be classified as the fourth option, namely a temporary policy as a bridge until later resolved through legal policy or political policy. At a minimum, this team should be able to provide disclosures on the legacy of past conflicts and recommendations for reparations to victims. One small note perhaps is the emphasis on urgency. After more than two decades, many of the victims have died. Some with wounds wide open, some with unspeakable sufferings, and some of them are still in silence without having time to tell the sufferings they had to endure. How far this new task force could contribute in the Indonesian transitional justice agenda is still need to awaited and anticipated.

2.4. Constitutional Courts in a "Moving Backward" Democracy

There are studies on the rise and fall of human rights momentum in Indonesia's post-New Order regime. First, many scholars generally accepted that there is a changing trend of human rights developments in Indonesia.[61] In essence, the researchers said that there was a strong momentum of human rights commitment at the beginning of Reformasi. As time goes by, studies shown the decline of democracy.[62]

Judicial institutions, even though they have independent powers, will have no meaning if their decisions are not obeyed. This is apart from the problem of political attraction at the time of selection of judges which is more or less influenced by the existing political background.[63] Compliance of the decision is needed to maintain the corridor to ensure how it being translated into actions. For this reason, it can be said that the political aspect also influences the nature

[61] Wahyuningroem, "From State to Society"; Marzuki, *Tragedi Politik Hukum*; Hikmahanto Juwana, "Special Report Assessing Indonesia's Human Rights Practice in the Post-Soeharto Era: 1998-2003," *Singapore Journal of International & Comparative Law* (2003).

[62] Herlambang P. Wiratraman, "Constitutional Struggles and the Court in Indonesia's Turn to Authoritarian Politics," *Federal Law Review* 50, no. 3 (2022): 16, https://doi.org/10.1177/0067205X221107404; Thomas P. Power, "Jokowi's Authoritarian Turn and Indonesia's Democratic Decline," *Bulletin of Indonesian Economic Studies* 54 (2018); Thomas Power, Eve Warburton (eds), *Democracy in Indonesia From Stagnation to Regression?* (Heng Mung Keng Terrace: ISEAS Publishing, 2020); Iqra Anugrah, "The Illiberal Turn in Indonesian Democracy," *The Asia-Pacific Journal* 18, no. 1 (March 2020); Abdurrachman Satrio, "Constitutional Retrogression in Indonesia Under President Joko Widodo's Government: What Can the Constitutional Court Do?" *Constitutional Review* 4, no. 2 (December 2018), https://doi.org/10.31078/consrev425.

[63] See Hendriyanto, *Law and Politics of Constitutional Courts, Indonesia and the Search for Judicial Heroes* (New York: Routledge, 2018), 155-9.

of the decisions, at least in the sense of maintaining the continuity of the decision and the supremacy of the court. [64]

Despite the existing criticism, the Constitutional Court has subsequently provided guidelines for conflict resolution through human rights and transitional justice approach. However, still no justice for either perpetrators or victims. The recognition and redistribution contained in the meta-conflict are not materialized in the original-conflict. Justice delayed, justice denied. This shortcoming, once again, certainly cannot be charged to the Constitutional Court alone. If the Court has already made their decisions in what manner the dark past should be dealt with, then now is time for other branches of power to prove their stance. Translating decisions into policies to once and for all ending the conflict. Whether or not Indonesia's democracy is walking in stagnation or even regressing should be answered by real actions to answer the call for those who suffered the most.

This rised a further question: unable or unwilling? As comparison, Chile has the experience with the Amnesty Law 1978 which protected the crimes committed by the Pinochet's regime and South Africa's Indemnity Acts 1962, 1977, 1990, and 1992 that blocking legal prosecution for the crimes during apartheid. Yet both were relatively able to cope with the questions of their past through victims' reparation and punishment for the perpetrators. There were and are dynamics on both, but at least they did not stay silence. As reflected by the Court's decisions, Indonesia does not have such legal obstacle to restore the nation's dignity to deploy recognition and redistribution as required by the transitional justice. The Court has condemned the impunity and urged the truth revealing and victim's reparation to resolving the abused past. It means that legally speaking there is no available pretext that they are unable to fulfill its duty.

III. CONCLUSION

The question remains, can the Indonesian Constitutional Court be called as conflict-resolution body? The Court has successfully defended the retroactive

[64] Michael Hein, "Constitutional Conflicts between Politics and Law in Transition Societies: A Systems-Theoritical Approach," *Studies of Transition States and Societies* 3, no. 1 (2011).

clause within the Act 26/2000. It also provides a legal foundation for the future reconciliation agendas through legal policy and political policy. In this sense, the answer is yes, the Court has taken the role as the conflict-resolution body.

But on the other hand, lack of justice in the realm of original-conflict requires further examination. The decisions of the Constitutional Court cannot necessarily guarantee that the "winning" party will immediately receive justice. There are factors for that, from the problem of interpretation in the decisions itself, the authority to carry out executions, to the political dimension which are aspects that should be considered. The Constitutional Court will always be faced with choices on how to carry out the "distribution of values" in its decisions. The distribution pattern that determines the winners and losers, as described, will be greatly influenced by the level of compliance and public trust. Since this paper has proven that the Court has carved a constitutional pathway to urge the transitional justice, then it relies on the willingness of the policymakers.

In the end, the biggest challenge for the Constitutional Court to become a conflict resolution body depends on how far their decisions are translated into actions. This paper acknowledged that the Court had fulfilled its duty to determine how society should be transformed constitutionally. However, it was the nature of the Court's lack of political legitimation to provide final closure for the problem of transitional justice. This inability of the Court was arguably not a weak spot of an institutional setting. If so, who should blamed for this stagnation? in the case of transitional justice in Indonesia, for the most part, it is not the Court.

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