

The Construction of Gross Human Rights Settlement in Indonesia: The Transformation of Legal Reasoning from Formalistic Positivism to Constructive Utilitarianism

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ABSTRACT

The resolution of gross human rights violations in Indonesia continues to face various obstacles due to the dominance of formalistic legal positivism, which emphasizes procedural compliance rather than substantive justice. This study aims to analyze the transformation of legal reasoning from formalistic positivism to constructive utilitarianism as a basis for reconstructing the mechanism for resolving gross human rights violations in Indonesia. This study uses a normative juridical method, a statutory approach, a conceptual approach, and a historical approach. The source of legal material is obtained from relevant law and regulations, legal literature, court decisions, and international human rights instruments. The results of the study show that the formalistic positivist approach in resolving gross human rights violations has led to stagnation in case resolution, the marginalization of victims, and the perpetuation of impunity. The limitations of Law No. 26 of 2000 concerning Human Rights Courts and the legal vacuum following the repeal of Law No. 27 of 2004 concerning the Truth and Reconciliation Commission have also weakened the effectiveness of the human rights settlement system in Indonesia. This research offers constructive utilitarianism as an alternative paradigm for assessing the success of the law based on real social benefits, such as victim recovery, truth disclosure, reconciliation, and the prevention of the recurrence of gross human rights violations. Therefore, it is necessary to integrate judicial and non-judicial mechanisms through a criminal justice framework oriented towards victim protection, harmonization with international human rights standards, and the re-establishment of the Truth and Reconciliation Commission Law as an *ius constituendum* to realize an accountable, just, and future-oriented human rights settlement system.

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1. INTRODUCTION

Gross human rights violations are extraordinary crimes that have multidimensional impacts, both structurally, socially, politically, and psychologically for victims and the wider community. In the Indonesian context, various cases of gross human rights violations such as the 1965–1966 incident, the mysterious shooting (Petrus), the enforced disappearance of people in 1997–1998, the Trisakti and Semanggi Tragedy, and the violence in Aceh and Papua show that the state has not been fully able to carry out its constitutional obligations in protecting, respecting, and fulfilling human rights as guaranteed in the 1945 Constitution of the Republic of Indonesia and various human rights instruments that has been ratified by Indonesia [1]. Until now, these cases have been mired in legal stagnation, which has prolonged impunity and left victims in an state of uncertainty about justice.

Normatively, Indonesia already has a legal instrument in the form of Law Number 26 of 2000 concerning the Human Rights Court, which is intended as a basis for law enforcement against gross human rights violations. However, the law's implementation has not been sufficiently effective in resolving substantive gross human rights cases. These problems are not only caused by normative and institutional weaknesses, but also influenced by the dominant legal reasoning paradigm in the Indonesian criminal justice system, namely formalistic legal positivism. This paradigm views law as a system of written rules that are closed, autonomous, and independent of moral values and social contexts [2]. As a result, law enforcement is more oriented towards procedural certainty than the achievement of substantive justice.

The dominance of formalistic positivism can be seen in the practice of handling cases of gross human rights violations, especially through the mechanism of alternating investigation files between Komnas HAM and the Attorney General's Office on the grounds of formal administrative incompleteness. This condition shows that law enforcement officials tend to emphasize the fulfillment of legal-formal elements rather than the protection of victims' rights and the disclosure of substantive truths [3]. As a result, victims of gross human rights violations are often treated only as objects of evidence, not as legal subjects with the right to truth, justice, reparation, and guarantees of non-recurrence, as affirmed in the principles of international human rights law [4].

In the context of transitional justice, the settlement of gross human rights violations does not rely solely on the punishment of perpetrators through judicial mechanisms, but also includes the disclosure of the truth, reparations for victims, social reconciliation, and institutional reforms to prevent the recurrence of similar violations [5]. This approach has been applied in various post-conflict countries and authoritarian regimes as an instrument of socio-political recovery. However, the implementation of transitional justice in Indonesia still faces major obstacles, especially due to the strong legalistic paradigm in the national legal system, which views non-judicial mechanisms, such as the Truth and Reconciliation Commission (KKR), as contrary to the principles of legality and legal certainty [6].

The problem became more complex after the Constitutional Court canceled Law No. 27 of 2004 concerning the Truth and Reconciliation Commission through the Constitutional Court Decision No. 006/PUU-IV/2006. The cancellation caused a legal vacuum in the non-

judicial mechanism for resolving gross human rights violations in Indonesia. As a result, the state only relies on criminal justice mechanisms, which in practice have not been able to provide a comprehensive settlement for victims and the community. In fact, the resolution of gross human rights violations requires an integrative approach that combines judicial and non-judicial mechanisms simultaneously and complements each other [7].

Several previous studies have discussed the problem of resolving gross human rights violations in Indonesia. Research [1] highlights the limited implementation of the Human Rights Court in delivering substantive justice to victims. Research [2] emphasizes the importance of a victim-centered approach to justice in resolving gross human rights violations. Meanwhile, Fajriyah et al. [8] examines the political and institutional barriers in the implementation of transitional justice in Indonesia. Research by Garapon [9] also shows that procedural rigidity in the national legal system is the main cause of stagnation in the settlement of serious human rights cases. However, these studies still generally focus on institutional aspects, the implementation of positive law, and transitional justice approaches in general. There have been few studies that specifically examine the transformation of the legal reasoning paradigm from formalistic positivism to constructive utilitarianism as the basis for reconstructing the system for resolving gross human rights violations in Indonesia. Thus, this research has novelty in an effort to build an alternative legal paradigm that not only emphasizes formal legality but also social benefits, victim recovery, and the prevention of impunity.

In this context, constructive utilitarianism becomes relevant as an alternative paradigm in resolving gross human rights violations. Departing from Jeremy Bentham's view of law as an instrument to achieve "the greatest happiness of the greatest number," constructive utilitarianism views law not merely as a formal norm, but as a means of social engineering whose success is measured by real impacts and benefits to society [10]. This approach allows the law to be judged by its ability to heal victims, uncover truths, build social reconciliation, and prevent the recurrence of gross human rights violations [11]. Therefore, transforming legal reasoning from formalistic positivism to constructive utilitarianism is an urgent need to create a more responsive, humanist, and substantive justice system for human settlement.

Based on this description, this study aims to analyze the limitations of formalistic legal positivism in addressing gross human rights violations in Indonesia and to examine the transformation of legal reasoning toward constructive utilitarianism as a basis for reconstructing an integrative system to resolve such violations. This research is expected to make a theoretical contribution to the development of a progressive legal paradigm and transitional justice in Indonesia, as well as to provide practical benefits by offering recommendations for the formulation of legal policies that are more victim-oriented, substantive, and harmonized with international human rights standards.

2. METHODS

This research uses normative juridical research methods, namely legal research focused on the study of positive legal norms, legal principles, doctrines, and legal theories

relevant to the problem being studied. This approach¹ was chosen because the main focus of the research is to analyze the legal construction of the settlement of gross human rights violations in Indonesia and to reconstruct legal reasoning from the paradigm of formalistic positivism to that of constructive utilitarianism. Normative juridical research allows researchers to examine law as a norm (*law in books*) and to assess the consistency, adequacy, and rationality of legal norms in achieving substantive justice goals [12].

The approaches used in this study include the statutory, conceptual, and historical approaches. The legislative approach is used to analyze various legal instruments that regulate the settlement of gross human rights violations, such as Law Number 26 of 2000 concerning Human Rights Courts and the Constitutional Court's decision³² nulling Law Number 27 of 2004 concerning the Truth and Reconciliation Commission. The conceptual approach is used to examine key concepts such as legal positivism, utilitarianism, transitional justice, and *victim-centered approaches* as developed in legal literature and legal philosophy. Meanwhile, a historical approach is used to understand the dynamics of the formation and development of human rights settlement legal policies in Indonesia in the context³⁰ of the post-New Order political transition [13].

The legal materials used in this study include primary, secondary, and tertiary sources. Primary legal material includes laws and regulations²⁷, court rulings, and official state documents related to gross human rights violations. Secondary legal materials include legal textbooks, national and international scientific journals, research findings, and reports from independent institutions relevant to transitional justice and human rights. Tertiary legal materials in the form of legal dictionaries and encyclopedias are used to clarify terminology. All legal materials are analyzed qualitatively using deductive reasoning and prescriptive¹ argumentation, in order to formulate an ideal legal construction (*ius constituendum*) for the settlement of gross human rights violations in Indonesia, oriented towards substantive justice and social benefits [14].

3. RESULTS AND DISCUSSION³

a. The Limitations of Formalistic Positivism in the Settlement of Gross Human Rights³

The formalistic legal positivism approach⁶ has long dominated the Indonesian legal system, including in the settlement of gross human rights violations. Legal positivism views law as a set of written norms that apply hierarchically and are binding, without regard for the moral, social, or historical dimensions of a legal event [15]. In the context of gross human rights violations, this approach places the principles of legality, legal certainty, and formal procedures as the main parameters of law enforcement. As a result, the assessment of a case is more focused on the fulfillment of formal juridical elements than on the crime's substance and the victim's suffering. This is in line with criticism of legal positivism that this approach⁴ tends to ignore substantive justice when dealing with *extraordinary crimes* such as gross human rights violations [16].

The limitations³ of formalistic positivism are clearly reflected in the institutional practice of solving gross human rights violations in Indonesia, particularly in the relationship between the National Human Rights Commission (Komnas HAM) and the

Attorney General's Office. The results of Komnas HAM's pro justitia investigations are often returned by the Attorney General's Office because formal administrative requirements are not met, without an in-depth assessment of the crime's context and the existing substantive evidence. This pattern shows the dominance of purely procedural legal reasoning, thus causing stagnation in case settlement and strengthening the practice of impunity. This phenomenon has been identified as one of the main obstacles to the strict enforcement of human rights laws in Indonesia [17]. The formalistic approach also undermines the role of the judiciary in reconciling competing legal interests; when procedural rigidity overrides the capacity of courts and legal institutions to pursue substantive settlements, the legitimacy and effectiveness of the justice system as a whole is severely compromised [18], [19]. Moreover, the failure to enforce the law against cybercrime and other forms of evolving criminal behavior demonstrates a broader structural weakness in the capacity of the Indonesian legal system to adapt positivist norms to contemporary challenges.

In addition to hindering the accountability of the perpetrator, formalistic positivism also has an impact on marginalizing the victim's position in the legal process. Victims are often reduced to a means of proof to satisfy the elements of subtlety, rather than as legal subjects entitled to truth, justice, and restoration. In fact, international human rights law standards and transitional justice principles place victims at the center of all mechanisms for resolving gross human rights violations. When the legal system fails to accommodate victims' needs substantively, the law loses its social function as a means of protecting human dignity.

Formalistic positivism also creates tensions between national law and international human rights standards. Principles of international law regarding gross human rights violations, such as the state's obligation to investigate, prosecute, and punish perpetrators, are often hampered by narrow interpretations of the principles of non-retroactivity and legality in national law. This approach ignores the special character of gross human rights violations, which are internationally recognized as crimes and cannot be treated in the same way as ordinary criminal acts. As a result, national law fails to function as an effective transitional justice instrument.

The limitations of formalistic positivism in resolving gross human rights violations are not only technical and procedural but also paradigmatic. Overreliance on formal legal certainty has come at the expense of substantive justice, social benefits, and victim recovery. These conditions underscore the urgent need to shift legal reasoning towards a more contextual and results-oriented approach. This transformation is the basis for the development of constructive utilitarianism as an alternative paradigm in resolving human rights violations in Indonesia, which will be discussed in the next sub-chapter.

b. Constructive Utilitarianism as a Transformation of Legal Reasoning

Constructive utilitarianism is proposed as an alternative paradigm to transform legal reasoning in resolving gross human rights violations in Indonesia, which have been trapped in formalistic positivism. In contrast to positivism, which assesses the validity of law solely on formal and procedural grounds, utilitarianism views law as a public policy instrument

whose main purpose is to produce the greatest benefits for society. In the tradition of legal philosophy, utilitarianism emphasizes a *consequentialist approach*, judging law by its real impact when applied. This approach is relevant in the context of a human rights burden because the fulfillment of legal procedures does not measure justice, but rather the extent to which the law can recover victims, prevent impunity, and restore public confidence in the rule of law.

The concept of constructive utilitarianism in this study is not understood as classical utilitarianism, which is solely oriented towards quantitative calculation of happiness, but rather as a normative approach reconstructed to conform to the principles of human rights and transitional justice. Constructive utilitarianism places social benefits, the restoration of victims' dignity, and the sustainability of the legal system as the main parameters in the formulation and application of the law. In the context of legislation and legal policy, this approach is in line with the idea that laws should be designed rationally and functionally to respond to concrete social needs, rather than simply reproducing ineffective formal norms.

The application of constructive utilitarianism in gross human rights settlement shifts the legal orientation from *rule-oriented justice* to *outcome-oriented justice*. In this paradigm, judicial and non-judicial mechanisms are no longer positioned in a dichotomous manner, but rather as complementary instruments to achieve the best outcomes for victims and society. Assessments of the success of gross human rights settlements are based on substantive indicators, such as truth disclosure, victim rehabilitation, institutional reforms, and non-recurrence guarantees. This results-based approach is in line with the development of modern legal policy theory that emphasizes the evaluation of the effectiveness and social impact of law (*law as a tool of social engineering*)

Constructive utilitarianism serves as a conceptual bridge between the demand for legal certainty and the need for substantive justice in resolving gross human rights violations. This approach does not deny the importance of positive legal norms and the principle of legality. However, it places them within the framework of broader goals, namely social benefits and the protection of human dignity. The transformation of legal reasoning through constructive utilitarianism opens up space for the renewal of human rights law policies in Indonesia that are more responsive, adaptive, and victim-oriented, while providing a philosophical foundation for the regulatory and institutional reconstruction of human rights violations in the future. In this regard, the quality of public administration and governance reform serves as an important driver for legal transformation. The implementation of effective public policies based on responsive and locally informed governance is necessary for legal institutions to function in a way that responds to the needs of communities and protects the rights of citizens

c. Integration of Judicial and Non-Judicial Mechanisms in the Criminal Justice Framework

The integration of judicial and non-judicial mechanisms through the *Criminal Justice Framework* is a logical continuation of the layered accountability and results-oriented approach discussed earlier. This framework is built on the realization that resolving

gross human rights violations cannot rely solely on conventional criminal justice processes, which are often hampered by limited evidence, temporal constraints, and political resistance. In this context, non-judicial mechanisms such as truth commissions are not seen as alternatives that negate the judiciary, but rather as complementary instruments that strengthen the functions of criminal law enforcement. This integration is in line with the development of transitional justice that rejects the rigid dichotomy between *retributive justice* and *restorative justice*, and emphasizes the importance of mutually supportive institutional design [20], [21].

Within *the Criminal Justice Framework*, the findings of non-judicial mechanisms, such as disclosures of crime patterns, command structures, and institutional responsibilities, can serve as an initial basis for evidence in the judicial process. This is not intended to lower the standard of criminal proof, but rather to enrich factual and historical contexts that often cannot be disclosed through judicial mechanisms alone. Thus, the function of the truth commission does not end with moral narratives or symbolic reconciliation, but also contributes directly to the effectiveness of human rights prosecutions and trials. This kind of integrative model has been recognized in the transitional justice literature as a way to overcome the impasse between the demand for truth and the need for criminal accountability [22], [23].

The relationship *between the Criminal Justice Framework and layered accountability can be seen in the design of mechanisms that supervise each other*. Prosecution recommendations issued by non-judicial mechanisms are conditionally binding, in that law enforcement agencies are obliged to provide transparent legal reasons if they do not follow up. Instead, the judicial process remains subject to ethical, public, and judicial oversight as formulated in a multi-layered accountability architecture. This design prevents *selective justice and ensures that the decision to prosecute or not prosecute is based not only on political considerations but also on publicly testable legal evaluations* [24].

Philosophically, *the Criminal Justice Framework* reflects the constructive utilitarianism discussed earlier, particularly in assessing the legal system's success based on tangible results. Judicial and non-judicial integration enables the system to address human rights burdens and achieve several goals at once: imposing criminal sanctions against the main perpetrators, restoring victims' rights, disclosing structural truths, and instituting institutional reforms to prevent the recurrence of violations. Thus, the legal system is not trapped in sterile procedural adherence to social impacts, but rather oriented towards collective benefits and long-term transformation. This approach is in line with the view that justice in the context of ¹⁵ transition should be judged by its contribution to sustainable peace and the reconstruction of the rule of law (Laplante, 2008). In addition, the effectiveness of legal protection depends not only on normative compliance but also on the capacity of legal instruments to balance the interests of victims and the wider community through substantive mechanisms that guarantee fair outcomes [25]. The evolution of public governance and institutional capacity is also a structural prerequisite for meaningful legal transformation, as a strong administrative framework grounded in democratic values creates the conditions for rights-based legal reform to take effect [26].

The integration of judicial and non-judicial mechanisms through the *Criminal Justice Framework* reaffirms the urgency of the establishment of a new Truth and Reconciliation Commission Law as an *ius constituendum*. Without a clear and binding legal basis, the relationship between judicial and non-judicial mechanisms will remain ad hoc and vulnerable to conflicts of authority. The new KKR Law is needed to codify the integration flow, give legal force to the 25th commission's findings, regulate institutional relations with the Prosecutor's Office and Human Rights Courts, and ensure the protection of the rights of victims and witnesses. Thus, the *Criminal Justice Framework* is not only a theoretical construction, but is institutionalized as an operational, accountable, and outcome-oriented legal system, as desired in the transformation of legal reasoning from formalist positivism to constructive utilitarianism (de Greiff, 2006).

d. Long-Term Preventive Orientation, Normative Harmonization, and the Urgency of the KKR Law as an *Ius Constituency*

1 A long-term preventive orientation is one of the most important strategic innovations in efforts to resolve gross human rights violations in Indonesia. So far, the legal approach to gross human rights violations has tended to be reactive, focusing on handling past cases rather than establishing systematic prevention mechanisms to prevent similar violations in the future. The preventive approach offered in this study makes prevention the main goal, equivalent to case resolution, so that every step to address gross human rights violations should be directed at strengthening institutional capacity, improving legal structures, and building a legal culture that respects human rights. In the transitional justice literature, this kind of orientation is seen as important to ensure that justice does not stop in the past, but contributes to long-term stability and democracy [27].

The preventive approach is operationalized through the integration of harsh human rights settlement policies with the agenda of structural reform and the development of a legal culture. Concrete programs such as human rights-based legal education, ongoing training for law enforcement officials, and institutional monitoring and evaluation mechanisms for compliance with human rights standards are important instruments in preventing the recurrence of violations. Thus, the settlement of gross human rights is no longer understood as a process separate from the legal system as a whole, but rather as a catalyst for national legal reform. This approach is in line with the view that non-recurrence guarantees are one of the main pillars of transitional justice that must be realized through sustainable legal policies [28].

The normative novelty in this study lies in the effort to harmonize national law with international human rights standards through contextual and constitutional approaches. Harmonization is not carried out by adopting international norms directly, but through an adjustment process that takes into account Indonesia's national legal system, constitutional values, and social context. International human rights instruments, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights, are intended as normative sources for strengthening national human rights protections, rather than as norms that replace national law. This approach reflects an

11 effort to balance the universalist demands of human rights with the principle of the state's constitutional sovereignty.

13 Normative harmonization is situated within the philosophical framework of Pancasila, particularly the Second Precept on Just and Civilized Humanity and the Fifth Precept on Social Justice for All Indonesian People. By making Pancasila an ethical and philosophical norm, the integration of international human rights norms into national law acquires dual legitimacy, both constitutionally and morally. This approach avoids the national legal system from falling into the trap of cultural relativism, which rejects universal human rights standards, while preventing normative universalism that ignores local contexts. From the perspective of legal theory, harmonization based on the basic values of the state is seen as an important prerequisite for the effectiveness and acceptance of human rights norms in practice.

1 All these preventive orientations and normative harmonization ultimately underscore the urgency of establishing a new Truth and Reconciliation Commission Law (KKR Law) as an ius constituendum. The legal vacuum following the repeal of Law No. 27 of 2004 left no constitutionally valid non-judicial instruments to address gross human rights violations and establish long-term prevention mechanisms (Abdurrahman and Susanto, 2016). The new KKR Law is needed as a legal foundation that codifies preventive orientation, measurable success indicators, harmonization of national and international norms, and the integration of human rights settlement mechanisms in a sustainable manner. Thus, the KKR Law does not only function as a complementary regulation, but as a strategic instrument to transform conceptual and methodological novelties into an operational, accountable, and future-oriented legal system.

4. CONCLUSION

5 The resolution of gross human rights violations in Indonesia still faces fundamental obstacles stemming from the dominance of the formalistic legal positivism paradigm in the criminal justice system. This approach prioritizes legal certainty and formal procedures over substantive justice, victim restoration, and social benefits, which should be the primary goals in resolving gross human rights violations. As a result, the settlement of gross human rights cases has stagnated, the practice of impunity continues, and victims have not obtained the right to truth, justice, reparation, and guarantees that are not sufficiently repeated.

This research shows that the limitations of formalistic positivism are not only technical and procedural, but also paradigmatic, because they fail to place the law as an instrument for protecting human dignity and promoting social transformation. Therefore, there is a need for a paradigm shift in legal reasoning towards constructive utilitarianism, which views law as a means to generate real social benefits through victim recovery, truth disclosure, institutional reform, and the prevention of future gross human rights violations. The constructive utilitarian approach provides space for more responsive, context-sensitive, and results-oriented law enforcement without neglecting the principles of legality and legal certainty.

The transformation of legal reasoning is realized through the integration of judicial and non-judicial mechanisms in the Criminal Justice Framework, which complement each other. Non-judicial mechanisms such as the Truth and Reconciliation Commission are not intended as a substitute for criminal justice, but rather as a supporting instrument to strengthen truth-telling, accountability, and victim recovery. This integration allows for the resolution of gross human rights violations to be carried out more comprehensively by combining the functions of punishment, social reconciliation, and institutional reform in one coherent legal system.

In addition, this study emphasizes the importance of a long-term preventive orientation and the harmonization of national law with international human rights standards, grounded in the values of Pancasila. The prevention of gross human rights violations must be achieved through institutional reform, strengthening a human rights-based legal culture and legal education, and increasing the capacity of law enforcement officials. The harmonization of international norm and national law also needs to be carried out constitutionally and contextually, so that the protection of human rights can be effectively implemented without compromising Indonesia's national law.

In the end, establishing a new Truth and Reconciliation Commission Law as an *ius constituendum* is an urgent need to operationalize this paradigm shift. The new Criminal Justice Law must serve as a legal basis for integrating judicial and non-judicial mechanisms, strengthen the protection of victims' rights, ensure state accountability, and build a system for resolving gross human rights violations that is accountable, substantive, justice-oriented, and future-oriented.

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