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## The Retroactive Principle in Law No. 26 of 2000 concerning the court of human rights

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Article's Information	Abstract
<p><b>Keywords:</b> <i>Retroactive Principles; Human Right.</i></p> <p><b>DOI:</b> <a href="https://doi.org/10.25041/constitutionale.v1i2.2118">https://doi.org/10.25041/constitutionale.v1i2.2118</a></p>	<p><i>Protection of human rights is a responsibility that must be carried out by the state, in this case the state must also resolve cases of human rights violations that have occurred. There are many cases of human rights violations that occurred in the past but cannot be resolved because there are no legal rules that govern at that time. The presence of Law Number 26 of 2000 concerning the court of human rights is certainly a way for the government to resolve the problem of gross human rights violations in the past. The principle of retroactivity was included in Law Number 26 of 2000 concerning the court of human rights so that gross violations of human rights that occurred in the past could be</i></p>



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*resolved. The retroactive principle in Law Number 26 of 2000 concerning the court of human rights is considered to violate existing regulations in Indonesia, especially it is considered contrary to the 1945 Constitution. -Law Number 26 of 2000 concerning the court of human rights. This research uses normative research methods. The data used are secondary data in the form of primary legal materials, secondary legal materials, and tertiary legal materials. The results of this study indicate that the application of the retroactive principle in Law Number 26 of 2000 concerning the court of human rights does not contain elements that are absolutely contradictory to the Law. 1945 foundation.*

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## **A. Introduction**

### **1. Background**

Law is basically an instrument that is used to protect individual and group human rights. Humans are in an equal position and have the same opportunity in various aspects to develop all their potential is the basis of human rights.<sup>1</sup> The constitution of our country, namely the 1945 Constitution, regulates the law on human rights as a concrete form of protection of human rights as stated in Chapter XA articles 28A-28J. In substance, human rights as regulated in the written constitution in Indonesia are constantly changing along with the context. Changes in the map of the political regime in power, starts from the 1949 RIS Constitution, the 1950 UUDS, the 1945 Constitution, to the 1945 Constitution after the amendments.<sup>2</sup> The advantages of the human rights regulation in the constitution provide a very close guarantee because the amendment and / or elimination of one article in the constitution such as in the Indonesian constitution undergoes a very heavy and long process, among others, through amendments and referendums, while the weakness is because what is regulated in the constitution only contains rules that are still global, such as the provisions on human rights contained in the provisions of the 1945 Indonesian Constitution which are still global in nature.<sup>3</sup>

Starting from the existence of legal developments in Indonesia, both in terms of national and international interests, to resolve the problem of gross human rights violations and to restore security and peace in Indonesia, it is necessary to establish a human rights court which is a special court for serious violators of human rights (HAM), that is why Law Number 26 of

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<sup>1</sup>Budiyono dan Rudy, *Konstitusi dan HAM*, ( Bandar Lampung: PKKPUU, 2015), pg 53.

<sup>2</sup>Laras Astuti, "Penegakan Hukum Pidana Indonesia dalam Penyelesaian Pelanggaran Hak Asasi Manusia, *Jurnal Kosmik Hukum*, Vol.16, No,2, Juni (2016), pg 111.

<sup>3</sup>Susani Triwahyuningsih, "Perlindungan dan Penegakan Hak Asasi Manusia (HAM) di Indonesia", *Jurnal Hukum Legal Standing*, Vol 2. No.2, September (2018), pg 116.

2000 concerning the court of human rights was formed, this is a further form of Article 104 of Law Number 39 of 1999 which mandates that to adjudicate serious human rights violations by establishing human rights courts in Indonesia in the environment of general courts. In the rules or regulations of law there are actions that must be carried out, such as law enforcement, because law cannot be called law if it has never been implemented.<sup>4</sup> The source of law is law, outside the law is not considered as law.<sup>5</sup>

Law Number 26 of 2000 concerning the court of human rights contains one of the provisions which states that there is an opportunity to reopen cases of gross human rights violations that occurred before the promulgation of Law Number 26 of 2000 concerning the court of human rights, which are regulated in Article 43 regarding the Ad Hoc Human Rights Court and Article 46 regarding the invalidity of the expiration provisions for gross human rights violations.

The principle of retroactivity or retroactive law is stated in article 43 of Law number 26 of 2000 concerning the court of human rights, which consist of:

- 1) Serious human rights violations that occurred prior to the promulgation of this law are examined and decided upon by the ad hoc Human Rights Court.
- 2) The ad hoc Human Rights Court as referred to in paragraph (1) shall be established at the recommendation of the House of Representatives of the Republic of Indonesia based on certain events by a Presidential Decree.
- 3) The ad hoc Human Rights Court as meant in paragraph (1) is within the General Court.<sup>6</sup>

As a system, the law must of course become a guide in all actions taken by each individual. Good law is a law that can create order and prosperity for the people. Lon Fuller (1902-1978) explained that there are at least 8 indicators that must be included in making laws and regulations so that the established regulations can run well in society. These eight indicators are:<sup>7</sup>

1. *Generality;*
2. *Promulgation;*
3. *Prospectively;*
4. *Clarity;*
5. *Consistency or avoiding contradiction;*
6. *Possibility of obedience;*
7. *Constancy through time or avoidance of frequent change;*
8. *Congruence between official action and declared rules.*

Based on these eight things, there is a value stated in it, which is prospectively, a legal product that is made cannot be retroactive. In Lon Fuller's view, a law should not be retroactive, except for example for the purpose of correcting mistakes in the application of the previous law, and may not be applied to laws that aim to impose a sanction on members of the public.<sup>8</sup>

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<sup>4</sup>Fauzi Iswari, "Unsur Keadilan dalam Penegakan Hukum terhadap Pelanggaran Hak Asasi Manusia (HAM) di Indonesia", *Pagaruyuang Law Journal*, Vol 1, No.1, Juli (2017), pg 126.

<sup>5</sup>Mukhamad Luthfan Setiaji, "Kajian Hak Asasi Manusia dalam Negara *the Rule of Law*: Antara Hukum-Hukum Progresif dan Hukum Positif", *Lex Scientia Law Review*, Vol1. No.1, November (2017) pg 75.

<sup>6</sup> Article 43 of Law No. 26 of 2000 Concerning the Court of Human Rights

<sup>7</sup> MR. Zafer, *Jurisprudence; An Outline* dalam Gunawan Widjaja, *Lon Fuller, Pembuatan Undang-Undang dan Penafsiran Hukum*, Law Review, Fakultas Hukum Universitas Pelita Harapan, Vol. VI, No.1, Juli 2006, pg 21.

<sup>8</sup> Thomas Ian Mc.Leod, *Legal Theory* dalam Gunawan Widjaja, *Lon Fuller, Pembuatan Undang-Undang dan Penafsiran Hukum*, *Op.Cit.*, pg 24.

The application of the retroactive principle is basically not allowed in Indonesia considering Article 28 I of the 1945 Constitution of the Republic of Indonesia and the theory of law formation by Lon Fuller. In accordance with the order of laws and regulations in Indonesia, any lower legal rule must not conflict with a higher legal rule.<sup>9</sup> However, the retroactive principle has clearly been applied to Law Number 26 of 2000 concerning the court of human rights which should not be allowed because it contradicts the 1945 Constitution. For this reason, this research examines more deeply what is the basis for the application of the retroactive principle in Law Number 26 of 2000 concerning the Court of Human Rights.

## 2. Problem Identification

Based on what has been explained in the background above, the formulation of the problem which becomes the material to be studied is what is the basis for the application of the retroactive principle in Law Number 26 of 2000 concerning the court of human rights?

## 3. Research's Method

This research uses normative legal research methods. This research was conducted with the intention of being able to provide legal arguments as the basis for determining whether an event that occurred was right or wrong according to the law.<sup>10</sup> Based on the subject of the study to be investigated, namely Law Number 26 of 2000 concerning the court of human rights, this research will use the library research method or library research in order to find out the basis for the application of the retroactive principle in Law Number 26 of 2000 concerning the Court of Human Rights. Research using this kind of method is commonly called "legal research" or "legal research instruction".<sup>11</sup> This type of legal research does not recognize direct research into the field (field research) because what are being studied are both primary and secondary legal materials. This research is library based, focusing on reading and analysis of the primary and secondary materials.<sup>12</sup>

## B. Discussion

### 1. Grounds of Retroactive Principle Enforcement in Law No. 26 of 2000 Concerning the court of human rights

Indonesia is a country that stands on its own feet based on Pancasila and the 1945 Constitution of the Republic of Indonesia which aims to create justice and prosperity for its people. The 1945 Constitution as the legal basis of the Indonesian state is of course a form of recognition to uphold human rights in all aspects of national and state life, such as for example the right to equal position in law and government where an example of an acceptable right is receiving legal protection or treated fairly in the trial. This right is an important part of the process of the national journey that leads to democratic freedom from time to time which will continue to develop.<sup>13</sup>

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<sup>9</sup> Pasal 4 TAP MPR Nomor III/MPR/2000 Tentang Sumber Hukum dan Tata Urutan Peraturan Perundang-Undangan.

<sup>10</sup> Mukti fajar, Yulianto Achmad, *Dualisme Penelitian Hukum Normatif & Empiris*. Yogyakarta: Pustaka Belajar. (2013), pg 36.

<sup>11</sup> Soerjono Soekanto dan Sri Mamudji, *Penelitian Hukum Normatif Tinjauan Singkat*, Jakarta: Rajawali Pers, (2006), pg 23.

<sup>12</sup> Jhonny Ibrahim, *Teori dan Metodologi Penelitian Hukum Normatif*, (Malang: Bayumedia Publishing, 2006), pg 46.

<sup>13</sup> Della Luisky Selian, "Kebebasan Berekspresi Di Era Demokrasi: Catatan Penegakan Hak Asasi Manusia", *Lex Scientia Law Review*, Vol.2 No.2, November (2018), pg 190.

Hans Kelsen argued that in relation to a rule of law which is also a democratic state, at least it must have 4 (four) conditions:<sup>14</sup>

- 1) a state whose life is in line with the constitution and laws;
- 2) a state which regulates the mechanism of accountability for any policies and actions taken by the authorities;
- 3) a state which guarantees the independence of judicial power and the existence of a state administrative court; and
- 4) A state that protects the human rights.

As explained by Hans Kelsen regarding the guarantee of the human rights of citizens, it can be said that in the constitution of a constitutional state it must be found that guarantees the human rights of its citizens themselves in various aspects of life such as the right to life, rights in political, economic rights, cultural rights, legal rights and others. As contained in Article 8 of the Universal Declaration of Human Rights which we know as UDHR, reads: "Everyone has the right to an effective settlement by the national judiciary to get equal protection against actions that violate the basic rights accorded to him by constitution or by law."<sup>15</sup> Especially for human rights in the field of law, of course this is related to the right to equal position in the law which is guaranteed in Article 27 paragraph (1) of the 1945 Constitution which stated: "all citizens have an equal position in law and government and are obliged to uphold law and government without exception". Based on the contents of this article, the state as the guarantor of the rights of every citizen of course must protect and fulfill every right of its citizens even though this has happened decades ago. One of the main problems that has become a stumbling block in efforts to resolve cases of past human rights violations is the issue of whether these cases can be resolved by formal, procedural, and normative mechanisms.<sup>16</sup> Upholding human rights law from a normative perspective to investigate and resolve past human rights violations will face obstacles from within the law enforcement system itself which is logically mechanical, while the cases faced are human rights violations that occurred in the past and were committed by state agents as part of state policy.<sup>17</sup>

Efforts made by the Indonesian state in upholding human rights can be in the form of improving legal products and legislation regarding human rights.<sup>18</sup> The prospect of upholding human rights in the future will certainly be better and brighter, considering that on the one hand the institutional process of human rights, among others, through reform and the formation of laws continues to show significant progress, and on the other hand the development of a public space that is more open to human rights struggles Humans in the past few years.<sup>19</sup> To resolve various human rights problems in Indonesia, serious efforts are needed from all parties, especially the government, with that effort it is hoped that the community, especially victims, will get a sense of justice, and the resolution and disclosure of cases of human rights violations is expected to be part of the experience of the Indonesian

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<sup>14</sup>Bobi Aswandi, "Negara Hukum dan Demokrasi Pancasila dalam Kaitannya dengan Hak Asasi Manusia (HAM)", *Jurnal Pembangunan Hukum Indonesia*, Vol 1, No.1, (2019), pg 132-133.

<sup>15</sup> Mansyhur Efendi, *Perkembangan Dimensi Hak Azasi dan Proses Dinamika Penyusunan Hukum Hak Azasi Manusia*, (Bogor; Ghalia Indonesia, 2005), pg 61.

<sup>16</sup>Aulia Rosa Nasution, "Penyelesaian Kasus Pelanggaran HAM Berat melalui Pengadilan Nasional dan Internasional serta Komisi Kebenaran dan Rekonsiliasi", *Mercatoria*, Vol.11, No.1, (2018), pg 106.

<sup>17</sup>M. Ahsanul Walidain, "Eksistensi Pengadilan Hak Asasi Manusia Terhadap Penyelesaian Kasus-Kasus Pelanggaran Hak Asasi Manusia Berat di Indonesia", *JOM Fakultas Hukum*, Vol.II, No.1, Februari (2015), pg 5.

<sup>18</sup>Lilis Eka Lestari, "Penegakan Dan Perlindungan Hak Asasi Manusia Di Indonesia Dalam Konteks Implementasi Sila Kemanusiaan Yang Adil Dan Beradab", *Jurnal Komunikasi Hukum (JKH) Universitas Pendidikan Ganesha*, Vol. 5 No.2, Agustus (2019), pg 21.

<sup>19</sup>Bambang Heri Supriyanto, "Penegakan Hukum Mengenai Hak Asasi Manusia (HAM) Menurut Hukum Positif di Indonesia", *Jurnal AL-Azhar Seri Pranata Sosial*, Vol.2, No.3, Maret (2014), pg 157.

nation so that it does not happen. later on, by looking at that experience.<sup>20</sup> Law Number 26 of 2000 concerning the court of human rights in this case is one of the ways the government in this case guarantees the human rights of its citizens, especially in the field of law enforcement to create justice. The existence of various legal instruments as a choice of state politics has actually not progressed significantly since 2000 after the administration of President BJ Habibie established Law Number 39 of 1999 concerning Human Rights and Law Number 26 of 2000 concerning the court of human rights, because after the two political products, there was none. The next president of Indonesia uses political policies to resolve past human rights violations.<sup>21</sup>

The issue of upholding human rights is not just a matter of legal rules alone, but in its implementation related to social, cultural, economic and public education issues, in this case, the Human Rights Law emphasizes that in the framework of protecting, advancing, upholding human rights is the responsibility government.<sup>22</sup> Law Number 26 of 2000 concerning the court of human rights is not the only legal product that was created to fulfill the protection of the human rights of Indonesian citizens, but there are also legal products that are the government's means of protecting the human rights of its citizens, namely Law Number 39 1999 concerning Human Rights itself. As it is known that as a rule of law that guarantees its citizens in the field of human rights, Indonesia certainly cannot be silent and ignorant of all crimes that have occurred in Indonesia regarding human rights violations itself. Based on the principle of state responsibility, the state must make remedies for human rights violations that have occurred, such as for perpetrators, the state is obliged to carry out legal proceedings against those responsible for human rights violations, while for victims, the state is obliged to provide compensation, restitution, rehabilitation and guarantees. No recurrence of similar events.<sup>23</sup>

Many cases of gross human rights violations occurred in Indonesia after Indonesian independence itself. The gross violation of human rights itself is an “extra ordinary crime” and has a wide impact both at the national and international levels so that it needs to be restored in realizing the rule of law to achieve peace, order, peace, justice and the welfare of the Indonesian people.<sup>24</sup>

Crimes against humanity itself have only been recognized in the legal system in Indonesia since the promulgation of Law Number 26 of 2000 concerning the court of human rights. The existence of the retroactive principle in Law Number 26 of 2000 concerning the court of human rights was born after an opinion poll that took place in East Timor that causes many victims. The perpetrators of human rights violations are tried and decided based on the trial that runs at the Human Rights Court. The Human Rights Court according to the provisions of Law Number 26 Year 2000, apart from having the authority to examine and decide cases of serious human rights violations that have occurred in the territory of the Republic of Indonesia (territorial principle), are also authorized to examine and decide cases of gross human rights violations that have been committed by Indonesian citizens outside the

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<sup>20</sup>Laurensius Arliman, “Pengadilan Hak Asasi Manusia dari Sudut Pandang Penyelesaian Kasus dan Kelemahannya”, *Jurnal Ilmu Hukum Tambun Bungai*, Vol.2, No.1, Maret (2017), pg 17.

<sup>21</sup>Nunik Nurhayati, “Quo Vadis Perlindungan Hak Asasi Manusia dalam Penyelesaian Pelanggaran HAM Berat Masa Lalu Melalui Jalur *Non Yudisial*”, *Jurnal Jurisprudence*, Vol.6 No.2, September (2016), pg 150.

<sup>22</sup>Nyoman Mas Aryani, “Gagasan Pengaturan yang Ideal Penyelesaian Yudisial Maupun Ekstrayudisial Pelanggaran Hak Asasi Manusia di Indonesia”, *Jurnal Legislasi Indonesia*, Vol.15, No.4, Desember (2018), pg 375.

<sup>23</sup>Andrey Sujatmoko, “Hak Atas Pemulihan Korban Pelanggaran Berat HAM di Indonesia dan Kaitannya dengan Prinsip Tanggung Jawab Negara dalam Hukum Internasional”, *Padjajaran Jurnal Ilmu Hukum*, Vol.3 No.2 Tahun (2016), pg 334.

<sup>24</sup> R. Wiyono, *Pengadilan Hak Azasi Manusia*, (Jakarta; Kencana, 2006), pg 170.

territory of the Republic of Indonesia (the principle of nationality). The purpose of this provision is to protect Indonesian citizens who commit serious human rights violations abroad, because with this provision they can be tried and punished based on the law applies in Indonesia.

In terms of the authority to try gross human rights violations that occurred before the enactment of UURI Number 26 of 2000 concerning the court of human rights, it is also known as the Ad Hoc Human Rights Court, therefore expiration is not recognized in gross human rights violations, in other terms the application of the retroactive principle, namely the principle of retroactive to gross human rights violations is a manifestation of the existence of the Ad Hoc Human Rights Court.<sup>25</sup>

Law Number 26 Year 2000 itself contains one of the articles which aims to fully uphold human rights in order to create as much justice as possible. Article 43 paragraph (1) of Law Number 26 Year 2000 stated, "Serious human rights violations that occurred before the promulgation of this law, were examined and decided upon by an ad hoc human rights court", indicating that even though gross human rights violations occurred prior to the promulgation of the law. However, cases of gross human rights violations will still be brought to the court table, this is known as retroactive or retroactive.

The provisions of Article 43 paragraph (1) of Law Number 26 Year 2000 concerning the court of human rights, which reads: "Serious human rights violations that occurred before the promulgation of this law shall be examined and decided upon by the Ad-hoc Human Rights Court". Based on this article, of course, many argue that it is very contradictory when referring to Article 28 I of the 1945 Constitution, but this view states that the provisions of Article 43 paragraph (1) of Law Number 26 of 2000 concerning the court of human rights are contrary to Article 28 I The 1945 Constitution is a very baseless thing.

Making a statutory regulation must be done by considering the three elements in it where these are related to one another. The elements that must be applied and included in a statutory regulation are that there must be elements of justice, legal certainty, and legal usefulness. With regard to these three things, Gustav Radbruch stated that these three things can attract each other and have a real effect on society itself.<sup>26</sup> If in making a statutory regulation prioritizes legal certainty in it which is reflected in the sound of the articles which are "rigid", then the value of justice which is the aspiration of the community in law will be shifted even it will be very difficult to find traces of its existence by the community itself.<sup>27</sup> Reflecting on this, a balance between the value of legal certainty and justice must be found in order to understand Article 28 I paragraph (1) of the 1945 Constitution systematically, because understanding the context contained in Article 28I paragraph (1) of the Constitution is not only limited to the text but also must understand in depth the meaning of the principles contained therein.

Seeing this, of course, in this case the value of justice must be put forward in the event of a tug of war between the value of justice and the value of legal certainty that occurs in Law Number 26 of 2000 concerning the court of human rights, where justice is the main goal of law itself. Justice is something the government must aim for and achieve because the government is the guarantor of the human rights of its citizens. If a value of justice is put aside only to achieve a legal certainty, then it becomes very unreasonable.

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<sup>25</sup>Sri Warjiyati, "Instrumen Hukum Penegakan Hak Asasi Manusia di Indonesia", *Justicia Islamica*, Vol. 15, No.1, Juni (2018), pg 134.

<sup>26</sup> Putera Astomo, *Pembentukan Undang-Undang dalam Rangka Pembaharuan Hukum Nasional di Era Demokrasi*, Jurnal Konstitusi, Volume 11, Nomor 3, September 2014, pg 584.

<sup>27</sup>*Ibid.*

Based on the provisions in Article 28 I paragraph (1) of the 1945 Constitution which reads: “the right to live, the right to be tortured, the right to freedom of thought and conscience, the right to religion, the right not to be enslaved, the right to be recognized as a person before the law, and the right to not prosecuted based on retroactive law is a human right that cannot be reduced in any form”. This becomes baseless because it is not absolute since the application is limited by the provisions of Article 28 J paragraph (2) of the Constitution of the Republic of Indonesia. Literally, it is possible that Article 28 I paragraph (1) of the 1945 Constitution can give the impression that a person has the right not to be prosecuted based on retroactive law which is absolute, but if you look at the formulation, Article 28 I paragraph (1) cannot be read separately themselves but must carefully read the next article, namely Article 28 J paragraph (2). Seeing this, it becomes unreasonable if the phrase: “it cannot be reduced in any form” in the provisions of Article 28 I paragraph (1) causes the provisions contained in Article 28 J paragraph (2) to be meaningless, because in Article 28 J paragraph (2) reads: “In exercising his rights and obligations, every person is obliged to comply with the restrictions established by law with the sole purpose of ensuring recognition and respect for the rights and freedoms of others and to fulfill fair demands in accordance with moral considerations, values, religion, and public order in a democratic society”.

The provisions of Article 28 J paragraph (2) constitute a guarantee of recognition and respect for the rights and freedoms of each individual and to fulfill fair demands and in accordance with considerations of moral, religious values, security and public order in a democratic society. Seeing this, basically the retroactive principle can still be applied even though the crimes concerning gross human rights violations occurred before the enactment of Law Number 26 of 2000 concerning the court of human rights.

It can be seen systematically that in fact human rights cannot be prosecuted based on retroactive law, it can be said firmly that this is not absolute, because in theory and practice a person in exercising their rights and freedoms is obliged to respect other human rights without spontaneous without enforcing their rights individually and are obliged to comply with the restrictions that have been regulated and determined in the law with the sole purpose of upholding and respecting the rights and freedoms of others and to fulfill decisions of a fair nature by taking into account moral considerations, values religion, security and public order in a democratic society as stipulated in Article 28 J paragraph (2) of the 1945 Constitution. Based on this, if we read carefully Article 28 I paragraph (1) continues with Article 28 J (2) , then it seems that the rights of every Indonesian citizen is not to be prosecuted based on retroactive law or in this case known as “retroactive” is not absolutely applicable, so that if a gross human rights violation occurs before the enactment of Law Number 26 Year 2000 can be tried fairly by setting aside the retroactive principle.

### **C. Conclusion**

The ground for retroactive principle enforcement in Law Number 26 of 2000 concerning the Court of Human Rights is due to the serious violations of human rights that occurred after the popular consultation in East Timor. The existence of the retroactive principle in Law Number 26 Year 2000 concerning Human Rights Courts is strengthened by the limitation of rights and obligations stated in Article 28 J paragraph (2) of the 1945 Constitution. Based on this, applying retroactive law is legally justified in order to resolve cases of serious violations. Human rights that occurred in the past cannot be reached if the retroactive principle is not applied in Law Number 26 of 2000 concerning Human Rights Courts.

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