Routledge Research in Human Rights Law

INTERNATIONAL HUMAN RIGHTS AND LOCAL COURTS

HUMAN RIGHTS INTERPRETATION IN INDONESIA

Edited by
Aksel Tømte and Eko Riyadi

International Human Rights and Local Courts

This book addresses the technicalities of how international human rights law can be applied at the domestic level through a case study of the human rights methodology of the Indonesian judiciary. Numerous international human rights treaties have been ratified by States parties all around the world. However, local implementation has proven a difficult task for national authorities with every state struggling to realize rights to varying degrees. This reveals a gap between the standards of human rights as envisaged by the law and those experienced by rights holders at the local level. This work analyses how Indonesian courts interpret and apply human rights. It discusses the position of human rights within specific areas of Indonesian law: constitutional law, criminal law and private law. It analyses how courts have dealt with specific cases within these fields of law. Its key contribution lies in its detailed attention to the role of the Indonesian judiciary in implementing human rights, as well as to the influence of international law, and the role that actors other than the judiciary play in this process. It also incorporates international comparative perspectives. The book will be of particular interest to human rights scholars concerned with national judiciaries' role in human rights implementation, and to scholars, judges, civil society actors and legal practitioners working with law and human rights in Indonesia.

Aksel Tømte is senior adviser at the Norwegian Centre for Human Rights, University of Oslo. He has more than 15 years' experience in managing Official Development Assistance for the advancement of human rights and has organized research, courses and training targeting mainly Indonesian audiences.

Eko Riyadi is law lecturer and the Head of the Centre for Human Rights Studies at the Islamic University of Indonesia. Riyadi is one of the founders, and a board member of the Indonesian Lecturer Association for Human Rights and the Southeast Asian Human Rights Studies Network.

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Contents

Illustrations

Figures

Tables

Contributors

Adriaan Bedner is KITLV professor of Law and Society in Indonesia and Head of Department of the Van Vollenhoven Institute for Law, Governance and Society at Leiden University, The Netherlands. His research focuses on access to justice, legal reasoning, family law and land law, particularly in Indonesia. Bedner has supervized numerous PhD students and taught many courses at Leiden Law School and Leiden University College, including 'Law and Governance in Asia,' 'Political and Economic Foundations of Law' and 'Making Human Rights Work.' Bedner has been involved in many research and legal education projects in Indonesia, sponsored among others by the Royal Dutch Academy of Sciences, the Dutch Research Council, and the Dutch Department of Foreign Affairs. He is Chair of the Board of the International Institute of Asian Studies, editor of Routledge's book series "Law, Development and Globalization," and a member of the Working Group on Legal Co-operation Indonesia-Netherlands.

Sri Wiyanti Eddyono is associate professor at the Criminal Law Department of Gadjah Mada University (UGM), and the Head of UGM's master programme in law. She is the chair of UGM's Law, Gender and Society Research Centre, and a board member of the Women-Headed Household Empowerment Foundation and the Women's Ulama Networks. She has previously worked in LBH APIK, a nongovernmental legal aid organization for women, and as a Commissioner for the National Commission on Violence Against Women. She is the author of *Women's Empowerment in Indonesia* (Routledge 2019). Her current research activities are in the areas of women's human rights law, victimology, women's access to justice, violence against women, and gender equality law and policy reform in the contexts of Indonesia and Asia.

Julie Fraser is assistant professor with the Netherlands Institute of Human Rights (SIM) and the Montaigne Centre for the Rule of Law and Administration of Justice for the Rule of Law and Administration of Justice at Utrecht University. She specializes in human rights law, international criminal law, and transitional justice, and has presented at conferences worldwide and published widely on these topics. Fraser has been a visiting scholar at Monash University, Universitas Indonesia, Universitas Gadjah Mada, the University of Washington, and Oxford University. Her PhD was awarded the Max van der Stoel Prize in

Human Rights and was published by Cambridge University Press in 2020, *Social Institutions and the Implementation of International Human Rights Law: "Every Organ of Society."* Prior to academia, Julie practiced law as a qualified solicitor, including working at the International Criminal Court and Australian Government Solicitor.

Widodo Dwi Putro is lecturer at the Faculty of Law, University of Mataram, with a doctoral degree from the University of Indonesia. He is currently the chair of the legal research group Metajuridika and has previously been the chair of the Indonesian Legal Philosophy Association. He has previously been a Researcher at the Indonesian Judicial Commission. His research interests include the philosophy of law, freedom of expression, and interdisciplinary legal studies.

Eko Riyadi is law lecturer and the Head of the Centre for Human Rights Studies at the Islamic University of Indonesia. Riyadi is one of the founders, and a board member of the Indonesian Lecturer Association for Human Rights and the Southeast Asian Human Rights Studies Network. Riyadi is regularly involved in human rights trainings targeting judges, police officers, and prosecutors.

Matthew Saul is associate professor of Law at the Norwegian Centre for Human Rights, Faculty of Law, University of Oslo. Previously, Saul was associate and then full professor of Law at Inland Norway University of Applied Sciences. Saul's publishes on aspects of general international law, international human rights law, and international adjudication, often dealing with themes at the intersection between law and politics.

Shidarta is professor at the Department of Business Law, Faculty of Humanities, Bina Nusantara University, Jakarta. He also regularly teaches at the Doctoral Program of Law at the Diponegoro University and the Islamic University of Indonesia. Shidarta has been the founder and chairman of several professional associations, including the Indonesian Legal Philosophy Association (AFHI) and the Business Competition Lecturer Forum (FDPU). His research interests include philosophy of law, legal reasoning, legal research methods, business competition law, and consumer protection law.

Rhona Smith is professor of international human rights at the University of Newcastle and a former head of Newcastle Law School. She has previously worked in various universities in the United Kingdom but also in several institutions abroad. Her research encompasses range of areas such as rights of vulnerable groups, UN human rights systems or human rights education. From 2015 to 2021, she served as UN Special Rapporteur on the situation of human rights in Cambodia.

Herlambang Perdana Wiratraman is a lecturer at the Department of Constitutional Law, Faculty of Law, Universitas Gadjah Mada. He has a master's degree in Human Rights and Social Development from Mahidol University, and PhD from Leiden University. His specialization relates to constitutional law, human rights, freedom of expression, and interdisciplinary studies of law and society. He was the Coordinator for the Indonesian Caucus for Academic Freedom from 2019 to

2021, and the chair of the Indonesia Lecturer Association for Human Rights from 2014 to 2017. Wiratraman is also a founder and member of the Steering Committee of the Southeast Asian Human Rights Studies Network.

Aksel Tømte is senior adviser at the Norwegian Centre for Human Rights, University of Oslo. He has more than 15 years' experience in managing Official Development Assistance for the advancement of human rights and has organized research, courses and training targeting mainly Indonesian audiences, including judges, public interest lawyers, and law lecturers. Tømte has also been responsible for various human rights training targeting international audiences, such as NCHR's annual intensive course in human rights.

Foreword

Rhona Smith

I am deeply honoured to have been asked to write a foreword for this unique and timely book. I have had the privilege of meeting the editors, and indeed briefly worked with them, many, many years ago in Yogyakarta. I also have met with several of the contributors and am familiar with the work of many of those involved in this excellent volume.

This book aims to analyse human rights methodology across the work of the Indonesian judiciary. As such it will be of interest to Indonesian scholars, judges, civil society actors and those working in and with Indonesia. However, its reach is global as the central issue of rendering the paper commitments of duty bearers, primarily governments, to respect, protect and promote human rights a lived reality for us the rights holders is a perpetual challenge. Such implementation gaps can be identified in almost every country. Even when accepted as internationally binding legal obligations, the transformation of those rights and freedoms into accessible, nationally enforceable norms is partial at best. Courts and judges play a seminal role in upholding human rights through their core work of applying and interpreting national laws. Insights into the methodology and reasoning deployed by judges can contribute to our understanding of how best human rights can be realized in national law.

All states are required to give effect to international human rights norms. These are accepted by states in terms of their membership of international organisations, such as the United Nations, and their ratification, accession or succession to international and regional human rights treaties. All UN member states have accepted some core international human rights treaties.[1] Yet no state has a perfect record in terms of respecting, protecting and promoting human rights within their jurisdiction in fulfilment of these international obligations. The primary obligees in terms of those charged with fulfilling accepted treaty obligations is the legal state, so the government (executive) with the legal responsibility to give effect to the treaty obligations accepted by the country. The executive also is responsible for the reports to the treaty monitoring bodies for UN human rights treaties and, of course, represent the state in legal action. At the national, rather than international level, the legislature also has responsibility for enacting legislation to give effect to those treaties the state has accepted. However, as Julie Fraser notes in chapter 2, 'the role of the national judge in applying and interpreting human rights law is

equally important' (see p. 36). That is the focus of this book and something that is far less researched and understood. This book offers a very insightful contribution to understanding the potential for judges to better protect and promote human rights.

Inclusion of human rights in written constitutions is common, yet such provisions are not always justiciable. The justiciability of human rights in Indonesia is a central prerequisite to studies of judicial reasoning in human rights cases. Here, this book provides evidence of the practicalities of rendering human rights provision into real protection for individuals. Debates continue in many jurisdictions as to the justiciability of human rights provisions. Even when they are justiciable, there can be challenges: judges are not necessarily trained in human rights or in the methods and judicial reasoning skills required to apply human rights across the legal system. Whether or not constitutional provisions are enshrined, separate laws seeking to give effect to some, or all, treaty obligations may be enacted with varying degrees of success. Those laws, inevitably, should also be applied in a manner compatible with contemporaneous interpretations of international human rights standards and so, they also demand judicial cognisance of the methods and reasoning inherent in the application of human rights law to ensure that those rights and freedoms accepted by the state are given effect to in law.

A major challenge with international human rights remains ensuring implementation in the territories of all contracting states. Only if rights are promoted, respected and protected by governments can states fulfil their international treaty obligations. Whilst the geographical focus of this book is Indonesia, its value extends far beyond that archipelagic state. This book offers an insight into how the judiciary in a large, complex country implements human rights in practice. Those experiences will resonate in many jurisdictions around the world. Whilst this book offers a very valuable insight into the Indonesian legal system, much of the experience of Indonesia is reflected in that of other countries in ASEAN (Association of Southeast Asian Nations). Many have comparable experiences including colonial rule, periods of occupation, conflict, military rule, pursuit of liberal democracy and periods of authoritarian regimes. More broadly, the book is of equal value to those working in Indonesia and those working on human rights implementation anywhere. Realising human rights is a challenge being grappled with by theorists, jurists, scholars, human rights defenders and victims everywhere.

Indonesia is the world's largest archipelagic country and the fourth most populous country in the world. Yet little is known about its legal system outside the confines of Indonesian scholars and specialists. Much of the academic literature in English on the national implementation of international human rights standards approaches the subject from, essentially and inevitably, a common law perspective. That is the legal system which prevails in much of the English-speaking world and was exported to many of the former colonial territories of the UK (though not all the UK's national jurisdictions adhere to common law). There is comparatively less literature available in English on the approaches of civil law systems. Much of the literature on civil law systems is more introductory in nature, offering the reader an understanding of the system and how it operates in various

jurisdictions. More recently there are specific books and edited collections on national laws in civil, mixed and plural jurisdictions. This book also contributes to that growing body of English language literature and offers a rare analysis of a Southeast Asian state.

Common law systems' approaches to the role of the judiciary, and experiences of implementing the rule of law do not necessarily resonate with those in civil law, sharia-law-based and, indeed, plural legal jurisdictions. In particular, the role of judges and process of legal cases vary considerably between different legal systems. Understanding approaches, strengths and weaknesses, enables a deeper understanding of the challenges of implementing universal human rights standards. It is also relevant that experts from civil law systems have often been influential in bringing their approaches to the drafting of international human rights instruments.[2] Civil law systems are inquisitorial rather than the more adversarial common law approach. As such the role of judges in engaging with human rights is even more important in civil law jurisdictions. It is the judges who may identify human rights engagement in the facts they expose, whilst in common law jurisdictions, it is often the lawyers arguing the case before the court who will first raise human rights concerns.

Moreover, civil law systems do not adhere to the quite rigid common law system of binding judicial precedent. Rather than decision making being predicated on the interpretation (in point or distinguishable on facts) and application of previous senior/higher court cases, civil law primarily focusses on the application of codified law. Today, there is much more codification of law in common law jurisdiction, not least through legislation and, other than the UK, through written constitutions. Previous caselaw can be instructive in civil law and should be considered, not least as any application of law should comply with criteria of legal certainty.

Finally civil law systems often result in shorter judicial decisions, as distinguishable from the (often extensive) legal arguments evident in judgments emanating from common law jurisdictions. That can render it more challenging when trying to analyse the judicial reasoning process in civil law jurisdictions. Of course, there is judicial reasoning underpinning decisions made in civil law jurisdictions. Published judgements vary in length, as they do in common law jurisdictions. In most jurisdictions, standard cases in lower courts may be dealt with more summarily, whilst cases raising complex issues, or of constitutional significance, are likely to have more lengthy judgments. Decisions on which judgments are published vary from jurisdiction to jurisdiction; often the court record needs to be obtained directly from the court. Certainly, the prevalence of online technology and databases has contributed to greater awareness and accessibility of judgments around the world. The requirements of judicial reasoning are themselves evident in international human rights, not least supporting judicial independence and impartiality, as well as freedom from corruption. Judicial reasoning can evidence impartiality and independence of the judiciary, indicating that the law was the main driver in the decision. Furthermore, law should be applied prospectively, and in accordance with the law. This means that law is enacted/promulgated prior to any event to which it is applied.

This book maximizes the opportunity offered by the increase in Indonesian court judgments which are publicly available, enabling a deeper analysis of the judicial reasoning adopted by judges. Of course, not all judgments are so available, many are still not published, and the depth of legal analysis offered in the judgements can vary. However, as the chapters in this book evidence, there are a number of cases in which the courts are considering human rights and there is undoubtedly merit in a more detailed examination.

In Indonesia, as elsewhere, the status of international human rights in national law depends on the constitutional provisions of the country and the approach of the state to international law (i.e., whether the country adopts a dualist or monist approach). This is not necessarily clearly defined, and much can depend on the approach of the judiciary, often on a case-by-case basis. The role of the judiciary is also dependent on the legal system in the country, whether civil-law derived, common-law derived, hybrid, plural or other. Constitutional provisions can also dictate the powers and responsibilities of judges as well as establish their legal, temporal and geographical jurisdiction. In civil-law-based jurisdictions, the scope of the law to be applied and procedural elements are often found formulated in Codes which can be further elaborated on in separate laws.

This is reflected in the structure of this book, with separate chapters elaborating on the criminal law code and the application of human rights within criminal law, and on the civil code and how human rights can be given effect between private parties. It is possibly worth highlighting that in Indonesia, as Sri Wiyanti Eddyono notes, the designated Human Rights Court considers what otherwise would be termed *crimes* under international criminal law – genocide, violations of international humanitarian law, and so on. That certainly caused some confusion the first time I was working with academics in Indonesia.

Given human rights can often be politically sensitive. Whilst holding states to account at the international or regional level can be diplomatically and politically challenging, doing so within the national boundaries brings additional challenges. To actively consider violations by the government of human rights, not only must those rights and freedoms be justiciable in national law (whether because of a monist approach to international law, through specific incorporation or further effect through national laws), but judges must be able to act independently of the government. Whilst such a separation of powers to facilitate an independent judiciary is a requirement of international human rights, it is far from a reality in many countries.[3] The introduction to this book reviews the range of barriers to independence of the judiciary. Issues such as corruption and neopatrimonial practices (common in traditional and authoritarian systems) are not unique to Indonesia. Indonesia, like many other countries, experienced a lengthy period of authoritarian rule, a factor which is often found contrary to judicial independence.[4] That is particularly notable as fostering a less human rights compliant approach to interpreting and applying law – more rule by law than rule of law.[5] A growing body of scientific analysis in academic literature highlights the difficulties, difficulties which are often most acute when considering the position of human rights. Those working with barriers to judicial independence and identifying ways of better

giving effect to human rights in transitional, postcolonial and authoritarian regimes should find the insights in this book useful.

In civil law systems, judges themselves can determine which laws to apply in specific situations. In situations where judges have a choice between applying different laws, human rights aspects may not be considered, and the more human-rights-orientated laws may not be selected. This issue is reflected in the chapters addressing specific fields of law (i.e., chapter 6 on constitutional law, chapter 7 on criminal law and chapter 8 on private law).

With a very broad thematic approach to judicial methodology, this book explores beyond the vertical application of human rights. Whilst chapters do focus on the application of human rights standards when individuals are subject to the power of states (e.g., see the chapters on constitutional law and criminal law as the classic vertical application of rights), there is also detailed consideration of the application of human rights by courts within the sphere of private law. Such a horizontal application (between private legal persons) is particularly interesting, ensuring the full breadth of laws in a state further rights and freedoms. Different courts and indeed distinct judicial reasoning can be engaged considering private law cases.

In all cases, the role of the judiciary is central to closing the gap between international human rights law in theory and the operational and varied challenges faced by the judiciary in applying law in practice. The nature of the rhetoric/reality deficit in international human rights offers the judiciary a real chance to shape national laws so far as they are able to do so (which depends on the type of legal system and how human rights are effected therein).[6] Even with legal provisions seeking to offer protection to the rights and freedoms of individuals, the lived reality often can be somewhat different. It takes more than simply laws to give full effect to human rights. Courts and the judiciary play a central role. Interpreting and applying national laws to give effect to human rights strengthens protection by ensuring rights holders can realize their rights. The impact of tools and techniques that could be employed by judicial bodies in giving effect to human rights are explored in this book in the Indonesian context, but are highly relevant to other jurisdictions. Moreover, an independent judiciary can perform a valuable role in holding the executive and legislature to account for infringements of human rights. This can be through a constitutional court and/or supreme court, or even through judicial review of legislation when this is permitted, as in Indonesia. There is extensive evidence supporting the relationship between independence of the judiciary and improved respect for human rights.[7]

In the twenty-first century, much has been made of the apparent regression in human rights and freedoms around the world. The SARS-CoV-2 virus (COVID-19) global pandemic brought the fragility of human rights protections into stark focus as many of the world's most developed states limited a wide range of rights and freedoms—sometimes, though not always, under emergency powers.[8] Even before that, commentators were heralding the end times of human rights,[9] the twilight of human rights law,[10] others suggesting that the age of human rights may be over[11] and we were in the post-human-rights era.[12] A populist challenge[13] to human rights, over legalizing,[14] and politicising[15] rights and freedoms were

identified as factors in the democratic backsliding.[16] Indonesia, like so many countries, has made retrogressive moves in recent years, seemingly legislating to restrict some rights and freedoms.

Understanding how courts can use and apply human rights and freedoms through judicial reasoning and adopting human rights methodology is vital for those seeking to halt the apparent backlash, and strengthen protection of those rights and freedoms that, after all, are meant to be our birthright. This book offers a powerful insight into the Indonesian judicial and legal systems and provides hope for the future of human rights.

Notes

1 GA res 60/251 (2006).
2 An early example, the Universal Declaration of Human Rights was drafted initially by Eleanor Roosevelt (USA), Pen-Chun Chang (China) and Charles Malik (Lebanon) with the initial draft pulled together by John Humphrey (UK), Director of the UN Secretariat's Division for Human Rights. The drafters extended to the commission with common law (Australia, UK, USA) and civil law (Chile, China, France, Lebanon and USSR) experts. Of course, thereafter, a wide range of countries offered input. (NB: Indonesia was not a UN Member until after the UDHR's adoption.)
3 See, for examples, UN Human Rights Committee (which oversees the International Covenant on Civil and Political Rights) General Comment 32 – Article 14 Right to equality before courts and tribunal and to a fair trial CCPR/C/GC/32 (2007); UN Basic Principles on the Independence of the Judiciary (endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985); and International Bara Association, Minimum Standard of Judicial Independence 1982, available https://www.icj.org/wp-content/uploads/2014/10/IBA_Resolutions_Minimum_Standards_of_Judicial_Independence_1982.pdf.
4 See, for examples, Lisa Hilbink, *Judges beyond Politics in Democracy and Dictatorship: Lessons from Chile* (Cambridge University Press, 2007); Tamir Moustafa, *The Struggle for Constitutional Power: Law, Politics, and Economic Development in Egypt* (Cambridge University Press, 2007); Anthony Pereira, *Political (In)Justice: Authoritarianism and the Rule of Law in Brazil, Chile, and Argentina* (University of Pittsburg Press, 2005).
5 Tom Ginsburg and Tamir Moustafa, *Rule by Law: The Politics of Courts in Authoritarian Regimes* (Cambridge University Press, 2012).
6 Mary Robinson, 'Epilogue: Addressing the Gap Between Rhetoric and Reality,' in *The Universal Declaration of Human Rights: Fifty Years and Beyond*, ed. Yael Danieli, Elsa Stamatopoulou and Clarence Dias (Routledge, 1999).
7 See, for examples, M. Rodwan Abouharb, Laura Moyer and Megan Schmidt, 'De Facto Judicial Independence and Physical Integrity Rights,' *Journal of Human Rights* 12, no. 4 (2013): 367–396; Frank Ross, 'The Relevance of Law in Human Rights Protection,' *International Review of Law and Economics* 19, no. 1 (1999): 87–98; Lars Feld and Stefan Voigt, 'Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators,' *European Journal of Political Economy* 19, no. 3 (2003): 497–527; Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge University Press, 2003); Linda Camp, 'Judicial Independence and Human Rights Protection around the World,' Judicature 85, no. 4 (2002): 195–200.
8 For an overview of national responses, see 'Covid-19 – A Global Academic Project Mapping Legal Responses to Covid-19,' https://lexatlas-c19.org/.
9 Stephen Hopgood, *The Endtimes of Human Rights* (Cornell University Press, 2013).
10 Eric Posner, *The Twilight Of Human Rights Law* (Oxford University Press, 2014).

11 Makau W. Mutua, 'Is the Age of Human Rights Over? *Routledge Companion to Literature and Human Rights*, ed.Sophia A. McClennen and Alexandra Schultheis Moore (Routledge, 2016), 450–458.
12 Ingrid Wuerth, 'International Law in the Post-Human Rights Era' *Texas Law Review* 96 (2017): 279.
13 Philip Alston, 'The Populist Challenge to Human Rights,' *Journal of Human Rights Practice* 9 (2017): 1.
14 Laurence R. Helfer, 'Overlegalizing Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash Against Human Rights Regimes,' *Columbia Law Review* 102 (2002): 1832.
15 Rosa Freedman, *Failing To Protect: The UN And The Politicisation Of Human Rights* (Oxford University Press, 2015).
16 Natasha Wunsch and Philippe Blanchard, 'Patterns of Democratic Backsliding in Third-Wave Democracies: A Sequence Analysis Perspective,' *Democratization* 30, no. 2 (2023): 278–301; Ben Stanley, 'Backsliding Away? The Quality of Democracy in Central and Eastern Europe,' *Journal of Contemporary European Research* 15, no. 4 (2019): 343–353; Stephan Haggard and Robert Kaufman, *Backsliding: Democratic Regress in the Contemporary World* (Cambridge University Press , 2021).

Introduction

Aksel Tømte[1]

Two fundamental concerns have motivated this book. The first is a concern about the uneven and unpredictable application of Indonesian law, and its implications for the rule of law. The second is a concern that even though human rights are guaranteed in the constitution, national laws, and through the ratification of international treaties, Indonesian courts rarely consider human rights in their judgements.[2] This is not unique to Indonesia, as many states struggle to fully enforce human rights law.

There are many reasons causing the aforementioned concerns. A significant share of explanations are factors outside of the law itself. This is well proven by studies in *legal institutionalism,* which focuses on power relations between various actors involved in legal processes.[3] This can cover issues such as corruption, political pressure, security concerns, and other nonlegal factors. These undoubtedly affect the outcome of many cases in Indonesia. However, the present book is written based on the understanding that an important part of the explanation is also found in the law itself and in legal methodology and discourse, or lack thereof. The need for knowledge about, and development of, legal methodology is in no way limited to human rights cases; but this anthology focuses on human rights methodology specifically. Although one could contend that all court cases have an element of human rights (i.e., are related to fair trial or a right to a remedy), the majority of the cases discussed raise human rights beyond those elements.

Brief introduction to Indonesian law and court system

Indonesian law is based on the civil law system inherited from the Dutch colonial authorities. It has been shaped by colonization, by the struggle for independence, by fifty years of authoritarian rule under the Sukarno and Suharto governments (including the communist massacres of 1965), by the democratic reform period of the early 2000s, and by the current period, which many observers describe as a period of democratic regression.[4]

Customary laws are also recognized and applied. While many of these predate the colonial period, their position within the Indonesian legal system has nevertheless been influenced by colonial rule, under which civil law applied to Europeans, whereas the local population observed Indigenous laws or *adat*. Although principally

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recognized, and mentioned in the Constitution, the legal position of *adat* is weak when conflicting with statutory law.

Indonesian law is also strongly influenced by Islamic law. Currently, there are religious courts with jurisdiction over family law matters, as well as a Sharia court in Aceh. There are also many regional bylaws with religious profile. More broadly, however, Islam has influenced the legal system as a whole. The position of Islam in the state has been contentious ever since the proclamation of independence, and at times it has even seemed to threaten the existence of the state itself. The compromise between the secular nationalists, the Christian provinces and the proponents of an Islamic state, was found in *Pancasila*. *Pancasila* literally means 'five principles,' of which the first principle is the faith in Almighty God. The other principles are: just and civilized humanity; the unity of Indonesia; democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives; and social justice for all people of Indonesia. *Pancasila* is mentioned in the Preamble of the Constitution, it is engraved into Indonesia's national emblem, and it is commonly understood as a norm higher than laws, often referred to as the ideology of the Indonesian state. While the understanding of Pancasila has developed over time, and remains open to interpretation, courts have referred to *Pancasila* in some cases, confirming its relevance for Indonesian law.[5]

Indonesia is also characterized by pluralism. This is reflected in Indonesia's national motto: 'Unity in Diversity' (*Bhinneka Tunggal Ika*). While this motto is commonly seen in relation to the many different ethnicities, languages, religions, customs and practices within the country, the legal field is also pluralistic in many respects. For example, there are various forums or authorities that could deal with a given case, ranging from traditional/*adat*-forums, to (inter- or intra-) religious forums, state-based mediation forums, or courts. These different forums apply different standards. There is considerable variety between provinces in terms of culture, norms, and applicable law, as there are many regional bylaws. There is also considerable variety in the positive law applied by courts in dealing with certain kind of cases, and in the way they interpret and enforce the law (see, for example, the discussion on compensation for victims in chapter 6).

Indonesia's two highest courts are the Supreme Court and the Constitutional Court. They are equal in status. While the Supreme Court has been in existence since early independence, the Constitutional Court was established in 2003, as part of the democratic reform period following the fall of the New Order regime. The Court has a mandate to review whether statutory laws (*undang-undang*) are in line with the Constitution. It also has the mandate to decide on cases concerning electoral disputes, jurisdictional disputes between state institutions, dissolution of political parties, and misconduct by the president or vice-president as a basis for impeachment by the House of Representatives.[6] The cases discussed in this book all concern the constitutionality of laws.

All other courts are hierarchically organized under the Supreme Court. There are over 300 (general) district courts which hear most of the cases concerning civil litigation, or criminal prosecution.[7] The religious courts have jurisdiction over disputes between Muslims concerning family law. The

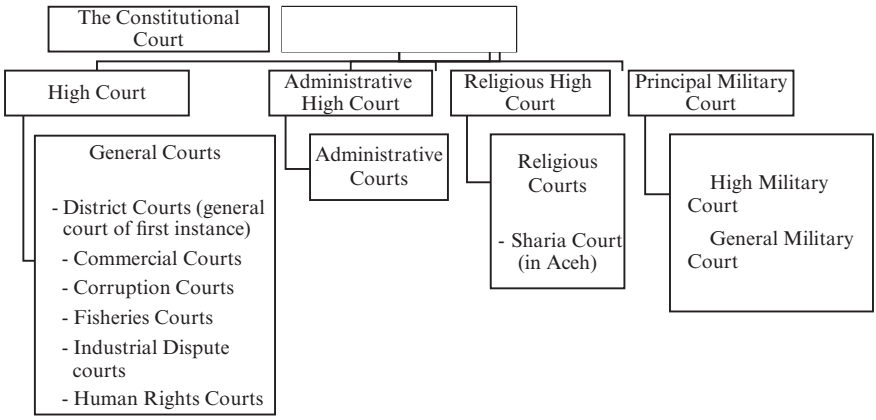

Figure 0.1 The Indonesian Court System

administrative courts have jurisdiction on disputes between citizens and the government concerning 'administrative decisions.'[8] There are many other specialized courts; the various branches of military courts, the commercial courts, the fisheries courts, the corruption courts, the industrial disputes court and the human rights courts.[9] The latter only has jurisdiction over criminal cases of genocide and crimes against humanity, thus the vast majority of Indonesian's human rights cases fall outside its jurisdiction. Until recently there were also separate taxation courts, but the Constitutional Court has recently ruled that tax matters should be handled by general courts.[10]

The importance of legal methodology for the Indonesian judicial system

It goes without saying that legal methodology is integral to the maintenance of a strong judiciary. Legal methodology is particularly important in cases where the outcome is unpredictable. Thomas M. J. Möllers contends that legal methodology is a way to find or make sense of the law. He describes legal methodology as a systematic process for gaining knowledge, linked to the ability to work methodically.[11] Möllers discusses methodology as a theory of argumentation, that can be used to distinguish important from unimportant, convincing from unconvincing, and justifiable from unjustifiable arguments.[12] Another key aspect of legal methodology Möllers discusses is linked to legitimacy and justification. By applying identifiable instruments for interpretation and substantiation of the law, it is more likely that the outcome of a court case will be understandable and acceptable to the public, at least in legal circles.

The Indonesian justice system, as well as the legal education system, has been impacted by a half century of authoritarian rule and, before that, a phase of violent decolonization.[13] According to Adriaan Bedner and Jacqueline Vel, the ideals of autonomy of law were widely shared among jurists in the 1950s but disappeared under the authoritarian governments of Guided Democracy (1959–1966) and

New Order (1966–1988).[14] Scholars generally find that the preconditions for effective autonomy of law in Indonesia are not present.[15] The literature addresses a range of challenges for the Indonesian judiciary and legal practitioners. This includes the very complex legal system and poor legislation, widespread corruption, low competence, high case load, conflicting court judgements, and difficulties in accessing judgments.[16] These factors have undermined the study and use of jurisprudence, and led to less scrutiny of court decisions, including on methodological issues. Methodological issues disappeared from legal education at the end of last century under the New Order regime.[17] This had much to do with the interests of the regime, which did not want an independent judiciary that could challenge its policies. There exists little recent Indonesian literature on legal methodology to this day. The reasoning of Indonesian courts, including the Supreme Court, is criticized for its brevity and scant reasoning.[18]

Methodology is obviously of great importance for giving meaning to human rights law. Human rights are legal norms of an overarching nature, and the provisions of international human rights treaties are formulated to varying degrees of precision. Such treaties put certain obligations on states, but the manner in which these obligations are met is generally up to the states concerned.

Regional human rights courts, as well as UN-treaty monitoring bodies, interpret and help give meaning to various rights, through jurisprudence and general comments. However, there is no regional human rights court/body with jurisdiction in Asia, and there is no established understanding about how much weight the (nonbinding) interpretations of the treaty monitoring bodies should be given within the Indonesian legal system. Like international treaties, Indonesia's constitutional human rights guarantees are generally of an open and overarching nature. Indonesian laws may in some areas provide very specific regulations pertaining to the content of a given right, or its enforcement, but in other areas they do not. In some cases, there are conflicts between the norms found in separate laws and regulations, and there are also cases where human rights considerations must be balanced against other rights and concerns. As discussed below, there are also some rights in which there are significant differences between the formulations found in national and international law. How such differences should be dealt with remains an open question. These challenges should not, however, keep judges from properly considering human rights whenever human rights claims are made, as a failure to do so may lead to a denial of justice.

A different explanation for the reluctance of courts to deal with human rights lies in the controversial or sensitive character of human rights in Indonesia. The controversial nature of human rights is seen, for example by the 'Asian values' debate of the 1990s, or a number of more recent complaints of 'westernization,' or 'excessive freedoms.' This controversy should not be exaggerated – a public perception survey found that as many as 98% of Indonesian citizens believe that human rights, as mandated by the Constitution, should be fought for. The survey nevertheless revealed a significant level of perceived inconsistency between human rights, Indonesian culture, and religion.[19] According to lawyers of the Indonesian Legal Aid Foundation, some judges are open to hear human rights arguments, yet

reluctant to refer to these arguments in judgements, even in those cases when the judgments go in favour of those allegedly having their rights violated. When human rights arguments, the judges will know humans rights are at stake, and in some cases 'this may influence their decision, even though they do not feel comfortable to explicitly mention human rights and prefer to give a more formalistic reason [for their decision].'[20]

There are, however, also judgments that do consider human rights. Ever since Indonesia's independence was achieved, there have always been some human rights acknowledged in the Constitution (as discussed in chapter 5). However, there was little room for serious debate on the interpretation and application of the Constitution under the Sukarno and Suharto governments. The situation changed significantly under the democratic reform period that followed Suharto's resignation in May 1998.[21] Under Indonesia's fourth constitutional amendment in 2002, a separate chapter of human rights was inserted into the Constitution. The Constitutional Court has made a significant number of decisions based on these constitutional human rights (some of which is discussed in chapter 5). This Court has been described as 'activist,'[22] and has been willing to stand up against the government and powerful interests in high-profile cases.[23] The Court also has provided more elaborate reasoning behind its decisions than any other national court, and it has made its decisions publicly available online.

At other courts, it is rarer to see judgements explicitly based on human rights. Yet it has happened in some recent cases, including cases handled by the Supreme Court itself, as well as lower courts. Perhaps inspired by the Constitutional Court, the Supreme Court has begun to make more and more of its reasoning publicly available, as well as that of the courts under its jurisdiction. Since 2019, the Supreme Court has included human rights within the obligatory trainings for all candidate judges, and it has also conducted human rights trainings towards more senior judges. The Norwegian Centre for Human Rights has cooperated with the Supreme Court on conducting human rights trainings, targeting judges with the potential to lecture at the Supreme Court's internal trainings. It is too early to assess the impact of these trainings.

There are a number of cases in which the Supreme Court, and lower courts, have ruled against powerful interests. In the Kalimantan Smoke case, discussed in chapter 4, this was done with explicit reference to human rights, and all levels of the courts – the district court, the high court, and the Supreme Court – ruled against the president, although this was alter overturned by the Supreme Court through a re-examination of the case (*Peninjauan Kembali*). The largest number of rulings against politicians and vested interests have been made by the anti-corruption courts. While political interests may still be deeply entrenched, and political pressure still may affect many cases (as discussed in chapter 5), the courts are nevertheless much more independent of the executive today, compared to the situation under the authoritarian New Order regime (1966–1998). Important developments have also taken place at the universities. The philosophy of law has recently been introduced as a mandatory topic at Indonesian law faculties. As discussed by Bedner and Vel, increasingly more Indonesian jurists have grown up

under democracy, and some universities have developed courses that strengthen critical legal thinking skills.[24] In a context of democratic regression, however, these gains are all very fragile, therefore the skills and independence of the judiciary become even more important. This anthology aspires to contribute towards that, by documenting practice and providing critical analysis of how human rights can be integrated into specific areas of law.

Book structure and issues related to operationalisation of human rights

According to the Chief Justice of the Indonesian Supreme Court, Muhammad Syarifuddin, 'many judges do not yet have the skills to apply human rights in the judgements they make on a day-to-day basis.'[25] It is thus necessary to ask what constitutes such skills. Certainly, this includes knowledge about national legislation pertaining to human rights, as well as international human rights law and relevant international instruments. However, as argued above, this alone is not sufficient: methodological tools are also needed. In chapter 1, Matthew Saul provides a general methodological framework for operationalizing international human rights law at the domestic level. The chapter identifies and examines some of the fundamental issues that judges encounter when required to apply and give meaning to the provisions of international human rights treaties. It begins with an overview of human rights treaties and considers key concepts that help to explain the nature of human rights obligations. The main part of the chapter addresses three central topics from the general human rights methodological toolbox: first, interpretation of human rights treaties; second, tests and thresholds for applying human rights provisions; and third, deference to nonjudicial institutions in the adjudication of rights. These are all topics that any institution adjudicating rights will encounter. The analysis in this chapter brings into focus the nature and significance of the choices that are available to judges when developing their human rights methodology.

In chapter 2, Julie Fraser provides a comparative analysis on how human rights law has been applied in the Netherlands and Australia, two countries with historical and geographical relevance to Indonesia, where the former follows a civil law tradition whereas the latter follows common law. The Netherlands follows monism and can apply international human rights directly within its national legal system. The state is also a party to the European Convention of Human Rights and subject to the European Court of Human Rights. Dutch courts routinely refer to and apply human rights law. However, Dutch courts defer to parliament if they find an international provision not to have direct effect. In Australia, international human rights treaties cannot be directly invoked before courts, and there is insufficient implementing legislation within national law. In addition, there is no regional human rights court with jurisdiction in Australia. Consequently, Australian Courts do not sufficiently uphold human rights, and they remain overtly deferential to the Parliament. Fraser argues that Indonesian courts are better situated to implement human rights than both their Dutch and Australian peers in the sense that there are fewer occasions requiring them to defer to parliament. Together, the two first chapters provide a basis for reflection on what might be optimal approaches to these issues in the Indonesian context.

The lack of substantial justice in court cases is often blamed on a legalistic or formalistic understanding of judges. In legal debates there is conflict between 'black letter law' and liberal or progressive law. Such conflict is not unique to Indonesia. However, the discussions in Indonesia can be very polarized; some go so far as to call for 'pure law,' inspired by the positivism of Kelsen, while others argue that judges should be guided by their own sense of justice and do away with statutory law altogether.[26] In chapter 3, Widodo Dwi Putro discusses the philosophical foundations for human rights protection through Indonesian courts. He outlines various schools of legal philosophy and relates these to the tension mentioned above. Putro presents the argument that human rights can be seen as a synthesis between, on the one hand, the concept of justice (which is too abstract), and on the other hand, legal certainty (which is too minimalistic). He also takes a clear stance in favour of the school of natural law, arguing that human rights are suprapositive, and should be considered by judges even when not regulated by positive law. Putro's chapter also contains an analysis of hard cases handled by Indonesian courts.

When discussing legal certainty, it is necessary to mention the link to corruption, which unfortunately has long constituted a key feature of the Indonesian legal system.[27] The many so-called grey areas of Indonesian law often lead to scenarios where two similar cases yield different results. Such environments enable corruption to flourish. As pointed out by Bedner, this is self-reinforcing: corruption enables the law to remain grey and corrupt judges will have an incentive to keep the law (and their methodology for finding or developing the law) as unclear as possible. Further, in a corrupt setting, methodological skills become less prioritized 'as other kind of skills are more important.'[28] The other, perhaps utopian, side of the coin is that if effective autonomy of law develops and manages to create more predictable applications of the law, then the space for corruption diminishes.

On paper, human rights enjoy a strong normative position in Indonesia, being guaranteed through a separate chapter in the constitution, as well as through various national laws and the ratification of international treaties. In chapter 4, Eko Riyadi provides an overview of the legal framework for human rights protection in Indonesia, including national laws and international commitments. The chapter also discusses the (unclear) status of international law within Indonesia. It can be claimed that Indonesia formally follows monism, as Indonesia inherited a monist legal system from the Dutch colonial authorities. National statutory laws are largely silent on the position of international law, however, and most scholars seem to agree that Indonesian court practice is closer to dualism.

The chapter also introduces various state institutions with a mandate related to human rights, such as the National Commission on Human Rights, the National Commission on Violence Against Women, and the National Commission on Child Protection. It examines how these institutions contribute towards human rights interpretation, through (written and oral) amicus briefs, and in the case of the National Commission of Human Rights, through the issuance of 'Standard Norms and Regulations' documents that address how particular rights should be applied within the Indonesian legal context. Amicus briefs appear to have

significant influence on at least some judgements, whereas the Standard Norms and Regulations are fairly new and have not yet been referred to in judgements. The courts are also open for expert witnesses to provide testimony on how human rights law should be understood and applied. Many of the book's Indonesian authors have previously provided such testimony. Finally, chapter 5 discusses limitation clauses and how these have been interpreted by courts.

A critical perspective on the role of courts in upholding human rights is provided by Harlambang Perdana Wiratraman in chapter 5. This chapter outlines the history of the Indonesian constitution and introduces the topic of constitutional law in Indonesia. From there, the chapter focuses in particular on the right to the freedom of expression, the freedom of opinion, and the freedom of assembly, as these rights are particularly important for the functioning of a democracy.

On the one hand, this chapter discusses some progressive judgements where human rights have been upheld – including in particular cases from the Constitutional Court, but also cases from the Supreme Court, and courts of first instance. On the other hand, this chapter provides some very critical perspectives on how political aspects affects legal decisions. The author argues that the progressive decisions of the Constitutional Court tend to be subverted by technical rules, in the interest of the ruling oligarch elite, with the effect that decisions of lower courts often undermine the freedom of expression.

Since 2012, the Indonesian Supreme Court applied a chamber system for dealing with cases across different fields of law, namely private law (*perdata*), criminal law, religious law (*agama*), military, and state administrative cases (*tata usah negara*). This chamber structure has increased the efficiency of case handling and reduced the backlog of cases. It has also contributed to ensuring that cases before the Supreme Court are handled by judges with expert knowledge in the relevant field of law. This, in turn, is intended to lead to more consistency in legal decisions.[29] The chamber structure points to the importance of examining how human rights can be integrated into legal considerations when dealing with particular fields of law.

In chapter 6, Sri Wiyanti Eddoyono addresses the relationship between human rights law and criminal law. It starts by outlining international scholarship and continues to examine the Indonesian legal framework with attention to how well human rights are integrated into criminal code and the criminal procedure law, as well as in other national laws pertaining to criminal law. The chapter examines how international human rights obligations have led to changes in the domestic legal framework over time, but also analyses shortcomings and typical challenges. The chapter gives particular attention to the human rights of victims and witnesses, as this topic is relatively underexamined in Indonesia.

In chapter 7, Shidarta addresses how human rights can be integrated into private law. The chapter starts by reviewing theoretical models for the relationship between human rights law and private law. It then explores model that applies in Indonesia, through examining legislation, judgements, and so-called circular letters from the Indonesian Supreme Court, which provide guidance on how the law should be interpreted in certain types of cases.

Shidarta claims that Indonesian courts tend to solve private law cases within the corridors of private law alone, without properly considering other kinds of law, including human rights law. There are many examples of private law cases in which the judgement fails to properly consider human rights. However, there are also examples of judgements based on human rights, or on higher notions of justice. The provisions of the Civil Code are also ambiguous; some seem to indicate that civil law is subordinate to human rights, other seem to indicate that civil law is an autonomous legal field. Therefore, the chapter finds that existing jurisprudence has not created or shown any clear pattern concerning the use of human rights arguments in private law cases. Nevertheless, some initiatives from the Supreme Court, like the circular letters examined, has contributed to better integrate human rights considerations into civil law. The author recommends for such initiatives to be continued and expanded.

Throughout its various chapters, this book discusses several challenges for the judiciary in upholding human rights in Indonesia, as well as the potential for better human rights enforcement. The many uncertainties about how human rights are to be applied in the Indonesian context, gives room for judges, lawyers, academics, and national human rights institutions to take an active role in interpretation and development of the law.–

Writing process and methodology

This book has been written in parallel to the Indonesian language publication *Metodologi Hak Asasi Manusia dalam Putusan Peradilan Indonesia: Nalar, Praktek dan Tantangannya* (*Human Rights Methodology in Court Decisions in Indonesia: Reasoning, Practice, and Challenges*). These two books share much of the same material, but there are also significant differences. The Indonesian language publication is written for an Indonesian audience. It focuses not only on how human rights are interpreted and applied within various areas of law in Indonesia, but also on conveying knowledge about international standards, and analysing how they could have been better applied within Indonesia. This English language version puts more emphasis on analysing actual court practice. It also contains more information about the Indonesian context, information that Indonesian readers are assumed to largely possess already.

The authors of the various chapters have been specially invited to contribute, due to their expertize with their respective topics. Throughout the book, several cases are analysed. The cases have been picked by the authors. Various factors affect which cases that have made it into the book. Some of the cases have received significant attention in media. This could be due to their controversial nature, dealing with difficult issues with possibly large impact on law and society, such as many of the constitutional court rulings. Media attention could also come from particularly progressive court decisions, such as the Papua Internet shutdown case, or the Kalimantan fires case. Media attention could also come from 'bad' rulings and blatant injustice, such as in the Prita case or in the Saiful Mahdi case, both of which received nationwide attention. Other cases have received less media attention, but were known in smaller legal circles, and chosen for their assumed relevance. Some cases have been highlighted by the Supreme Court as *jurisprudence*, a term that is only

applied by the Supreme Court to certain cases.[30] Yet other cases were not well known at all and were chosen to analyse how certain issues are dealt with (e.g., concerning court rulings on compensation to victims in criminal cases). While some cases have relatively good quality reasoning, others are chosen for their typical lack of reasoning and narrow application of black letter law, to analyse or illustrate a typical way for the courts to deal with certain issues.

In 2020, the courts under the Supreme Court dealt with almost 4 million cases.[31] Of these, slightly less than 800,000 were uploaded to the internet,[32] and thus made easily accessible to the public. Whether those uploaded are similar in quality and scope to those not uploaded, is not known. One of the challenges in writing this book is that the reasoning of Indonesian courts is often barely visible in the judgments. How is it possible to analyse courts' human rights considerations when they are absent from their official reasoning? This has been dealt with in various ways. Within the field of criminal law, explicit human rights reasoning has been largely absent from court decisions. The criminal law chapter therefore puts much emphasis on how well human rights considerations have been integrated into applicable laws and regulations, and on how well rights are protected in practice. The cases discussed in this chapter are mostly examples of black letter law application, reflecting actual practice.

The private law chapter finds a general tendency not to explicitly consider human rights in private law cases, which is reflected in some of the cases analysed. However, in other cases analysed, the courts draw upon human rights or higher ideas of justice. In making the case selection, one consideration was to cover the various subdomains of private law; another was to find cases that in which the reasoning of the court could be used to analyse principal questions concerning the relationship between human rights and private law. The discussion of cases is complemented by an examination of circulars issued by the Supreme Court, addressing issues pertaining to human rights in relation to private law.

The chapter on institutionalization of human rights standards in Indonesia mainly examines institutions that try to influence the decisions of the courts, rather than the courts themselves. These institutions usually have quite clear views about how they think human rights standards should be interpreted and applied.

Court decisions by the Constitutional Court often contains much more lengthy and transparent reasoning than that of other courts. They also engage much more frequently with principal issues, including issues related to the human rights contained in the Constitution. Consequently, the discussions on constitutional court decisions can often go in more depth. This is seen by the chapter on constitutional law. This chapter also includes cases from lower courts, both problematic and progressive ones.

Outstanding issues: on the relationship between national and international human rights law

The status of international law within the Indonesian legal system is discussed in chapter 3, but all chapters touch on the relationship between national and international law. Most judgements seem to either not consider international human rights law at all, or use it to interpret stipulations found in the Constitution and in national legislation.

Generally, most human rights provisions found in national law resemble stipulations found in international agreements. However, there are also some provisions in which there are significant differences between national and international law. Since these are not examined elsewhere in the book, they will be briefly discussed here.

National and international rights pertaining to religion

While international human rights law guarantees 'freedom of thought, conscience, and religion,'[33] the Indonesian Constitution guarantees '. . .all persons the freedom of worship, each according to his/her own religion or belief' (Article 29). This was stipulated already in 1945, three years before the Universal Declaration on Human Rights was ratified. The 1999 Human Rights Act uses terminology similar to the Constitution and guarantees 'the freedom to embrace a religion and worship in accordance with that religion and belief.'[34]

In UN forums, the constitutional guarantees pertaining to religion tend to be translated as 'the right to freedom of religion [or belief],' giving the impression that the constitutional guarantees are like ICCPR's article 18. For example, in the 2012 Universal Periodic Review, the Indonesian government stated that the Indonesian Constitution guarantees the right to freedom of religion or belief.[35] This translation is also commonly used by human rights advocates. On the national political scene, however, there is much less agreement on how this constitutional right should be interpreted. Hearings in the Constitutional Court under the two legal reviews of the Law on Misuse and Defamation on Religion (the so-called Blasphemy Law) provided illuminating cases on how different actors would like to see this right interpreted. These hearings showed that there is considerable support for interpretations that differ from ICCPR in, among others:

1 Whether the right to embrace a religion includes the right not to do so;
2 Whether the right to 'worship in accordance with a religion' includes the right to worship in a manner that, is not considered to be 'in accordance' with the religion concerned;
3 Whether the right itself contains some kind of protection from insults or 'misuse or religion'; and
4 Whether any belief group should be considered 'religions' and thus be worthy of the same level of protection.

At the court hearings, the government appointed several expert witnesses that supported such alternative understandings, including one that explicitly stated that the constitutional guarantees pertaining to religion was different from 'the right to freedom of religion'[36]

Indigenous people's rights versus the rights of customary [law] communities

Indigenous people is a concept recognized by international human rights law. In spite of a general high level of ratification of international human rights treaties, Indonesia has not ratified ILO convention 169 on Indigenous peoples and does not recognize the concept of *Indigenous peoples* as applicable within Indonesia. This long-term policy of nonrecognition was explicitly stated during the 2012 UPR review:

> The Government of Indonesia supports the promotion and protection of indigenous people worldwide. Given its demographic composition, however, Indonesia does not recognize the application of the indigenous people concept as defined in the UN Declaration on the Rights of Indigenous Peoples in the country.[37]

Indonesian law acknowledges the concept of customary communities (*masyarakat adat*) or customary law communities (*masyarakat hukum adat*). This concept has a very different historical origin than that of Indigenous peoples – as a legal concept, it was introduced by the Dutch colonial powers as a sphere of law applying to the native population. However, the associations given to this term has changed over time. The largest advocacy group for Indigenous people in the country, AMAN (the Indigenous People's Alliance of the Archipelago) consequently translates *Indigenous people* with *masyarakat adat*.[38] Other national NGOs advocating Indigenous people's rights also tend to use the terms *masyarakat adat* and *Indigenous people's rights* interchangeably. Dictionaries and translation engines also tend to translate *Indigenous people* as *masyarakat adat*.[39]

For both these rights (i.e., pertaining to religion and to Indigenous communities), interpretation remains contentious. Another issue on which there are significant differences between the stipulations on national and international law concerns the circumstances under which limitations on human rights could be imposed, as discussed in chapter 3. The Constitution allows for rights be limited based on 'religious values,' a basis for imposing limitations that are not recognized in International law. While human rights advocates typically would like to see national law interpreted in line with international standards, the idea that Indonesia maintains its own particular, national human rights standards also holds significant clout. A telling example is when Arief Hidayat – who later became the Constitutional Court's Chief Justice – stated that 'Indonesia should implement human rights appropriate to the local context, instead of unconditionally adopting the standards of the United Nations.'[40]

When dealing with the many uncertainties concerning how human rights should be interpreted and applied, the reasoning and methodology of courts becomes particularly important.

Arguably, such uncertainties also provide a possibility for influencing courts. Here, scholars and human rights advocates have an important role to play.

Notes

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2 This statement will be better nuanced throughout the book – there are also a significant number of cases in which the courts have upheld human rights.
3 One recent and excellent example is M. Crouch ed., *The Politics of Court Reform* (Cambridge University Press, 2021).
4 See chapter 5 for more elaboration on this claim.
5 One such example concerns the Constitutional review of the 'blasphemy law,' Constitutional Court decision number 140/PUU-VII/2009.
6 The mandate of the Constitutional Court is regulated in the Constitution, through the fourth amendment made in 2002, and in Law 24/2003 on the Constitutional Court.
7 Butt and Lindsey, *Indonesian Law* (Oxford: Oxford University Press, 2018), 85.
8 Ibid., 86.
9 Most cases are handled by military courts, or upon appeal, by the military high courts and finally by the Supreme Court. However, if the accused has the rank of Major or higher, the Military High Court will act as the court of first instance, and upon appeal, to the Supreme Military Courts (Pengadilan Militer Utama). There are also the military conflict courts, which may have jurisdiction under armed conflict.
10 https://news.detik.com/berita/d-6738443/tok-mk-geser-pengadilan-pajak-dari-kemenkeu-ke-ma.
11 See T. M. J.Möllers, *Legal Methods* (Verlag C.H. Beck and Hart Publishing, 2020).
12 Ibid.
13 See A. Bedner and J. Vel, 'Legal Education in Indonesia,' *The Indonesian Journal of Socio-Legal Studies* 1, no. 1 (2021): 3.
14 Ibid.
15 See A. Bender, 'Autonomy of Law in Indonesia,' *Recht der Werkelijkheid* 37, no. 3 (2016).

The clearest exception seems to be in the area of Islamic law, where there is an existing community of peers, providing critical reflection and analysis. Therefore, the application of Islamic law is more predictable and has been better at bridging the gap between formal legal reasoning and local perceptions of justice, at least in some areas. See John R. Bowen, '*Islam, Law, and Equality in Indonesia* (Cambridge University Press, 2003).
16 These issues are all discussed in S. Pompe, *The Indonesian Supreme Court – A Study of Institutional Collapse* (Cornell Southeast Asia Publications, 2005), and A. Bedner, 'The Need for Realism, Ideals and Practice in Indonesia's Constitutional History,' in *Constitutionalism and the Rule of Law*, ed. M. Adams et.al. (Cambridge University Press, 2017).
17 Bedner and Vel, 'Legal Education in Indonesia,' with reference to S. Wignjosoebroto, *Dari hukum kolonial ke hukum nasional: dinamika social-politik dalam perkembangan hukum di Indonesia* (HUMA, 2014)
18 Examples on this is provided in S. Butt, 'Judicial Reasoning and Review in the Indonesian Supreme Court,' *Asian Journal of Law and Society* 6 (2019): 67–97.
19 R. Robet and A. Primaldhi, 'Do Indonesians Still Care about Human Rights?' *Indonesia at Melbourne*, 8 February 2019, https://indonesiaatmelbourne.unimelb.edu.au/do-indonesians-still-care-about-human-rights/.

See also discussion in chapter 3.
20 Personal communication with the Indonesian Legal Aid Foundation, October 2022.
21 See S. Butt and T. Lindsey, *Indonesian Law* (Oxford University Press, 2018), 100.

22 Ibid., 104. See also Augustine, Harijanti, Perwira and Wulandari, 'Constitutional Review of Criminal Norms: Does Indonesia Need Judicial Activism?' *The International Journal of Human Rights* 27, no. 4 (2023): 772–788.
23 Ibid., 101.
24 Bedner and Vel, 'Legal Education in Indonesia.'
25 Speech by the Indonesian Chief Justice at the University of Oslo, 9 May 2022.
26 Bedner and Vel, 'Legal Education in Indonesia.'
27 S. Butt and T. Lindsey, 'Judicial Mafia: The Courts and State Illegality in Indonesia,' in *The State and Illegality in Indonesia*, ed. E. Aspinall and G. V. Klinken, (Brill, 2011).
28 Bedner and Vel, 'Legal Education in Indonesia.'
29 The 2018 Indonesian Judicial Reform Forum found that the chamber system reform 'had not yet fully achieved its objective . . . to eliminate court decisions inconsistency [at the] Supreme Court.' IJRF Proceedings, LeIP 2018.
30 In the Supreme Court's online directory of decisions (mahkamahagung.go.id) certain cases are classified as jurisprudence. As per April 2023, there are only 21 such cases accessible online, all dating from 2018. Previously, the Supreme Court issued a publication called *Yurisprudensi Indonesia* [Indonesian Jurisprudence], which contained court decisions considered to constitute jurisprudence, as discussed in S. Pompe, *The Indonesian Supreme Court – A Study of Institutional Collapse* (Cornell University Press, 2005).
31 The Supreme Court's annual report, 2020, https://www.mahkamahagung.go.id/cms/media/8832
32 The Supreme Court's directory of decisions, https://www.mahkamahagung.go.id/id.
33 ICCPR article 18.
34 Law no 39/1999 on Human Rights, Art 22(1).
35 UN Human Rights Council Working Group on the Universal Periodic Review, Thirteenth Session (Geneva, 21 May–4 June 2012) A/HRC/WG.6/13/IDN/1, para 58.
36 A. Tømte, 'Constitutional Review of the Indonesian Blasphemy Law,' *Nordic Journal of Human Rights* 30, no. 2 (2012): 189–92.
37 Human Rights Council, Twenty-first session Agenda item 6, *Universal Periodic Review Report of the Working Group on the Universal Periodic Review* A/HRC/21/7/Add.1, paragraph 6.3. Available at: A-HRC-21-7-Add1_en.pdf (ohchr.org).
38 It was decided on AMAN's first congress to do so, the official reason being that the term *masyarakat adat* avoids the negative connotations with backwardness that alternative translations would bring.
39 See for example Cambridge Dictionary (online) or Google Translate.
40 *Jakarta Post* 3 May 2013. His statement was made at the fit-and-proper test before the Indonesian House of Representatives. (Quoted also by Simon Butt in 'The Position of International Law within the Indonesian Legal System,' 16.)

1 Judicial Methodology for the Application of International Human Rights Law

Matthew Saul[1]

Introduction

This chapter identifies and examines some of the fundamental issues that judges encounter when applying the provisions of international human rights treaties. It brings into focus a methodological framework for operationalising international human rights law in judicial contexts.

The chapter begins with a short overview of the main global and regional human rights treaties. This highlights key similarities and differences in the contents and infrastructure of human rights treaties. The next section considers key concepts that help to explain the nature of human rights-based obligations.

The main part of the chapter addresses three central topics from the methodological toolbox. First, interpretation of human rights treaties. Second, tests and thresholds for applying human rights provisions. Third, deference to non-judicial institutions in the adjudication of rights. These are all topics that any institution adjudicating rights will encounter.

The analysis in this chapter provides a reference point for subsequent chapters in this volume, which identify and examine the significance of the choices that Indonesian judges make in the application of human rights.

International human rights treaties

UN human rights treaties

There are nine core UN human rights treaties, each with a treaty body. The International Covenant on Civil and Political Rights (ICCPR); and International Covenant on Economic, Social and Cultural Rights (ICESCR) from 1966 are the two most general treaties. The other UN human rights treaties are focused on particular groups or thematic areas where it was determined that there was a need for specific provisions.[2]

Each of the core treaties has a treaty body. The treaty bodies are composed of independent experts, ranging from 10–23 members. The functions of these bodies are to review state reports, deal with individual complaints, and provide general comments, which summarize the main jurisprudence.

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Indonesia has signed and ratified all but one of the nine core human rights treaties,[3] but has not ratified the optional protocols that allow individuals to send complaints to the treaty bodies.

The outputs from UN human rights treaty bodies are formally nonbinding in international law.[4] States are legally free to depart from the interpretations of the treaties that the UN treaty bodies provide. Yet states are under an obligation to operate in good faith in relation to their obligations under treaties.[5] The meaning of good faith in the context of the treaty body outputs is emerging.[6] The UN Human Rights Committee (HRC) – which monitors the ICCPR – has found that states have a 'duty to cooperate with the Committee.'[7]

Regional human rights treaties

At the regional level, the following are the main legal instruments and institutions for rights protection. In Europe, there is the 1950 European Convention of Human Rights and Fundamental Freedoms (ECHR): and the European Court of Human Rights (ECtHR). In the Americas, there is the 1969 American Convention on Human Rights (ACHR): the Inter-American Commission (Washington, DC) and the Inter-American Court of Human Rights (IACtHR). In Africa, there is the 1981 African Charter on Human and Peoples' Rights (ACHPR): the African Commission on Human and Peoples' Rights (Banjul, Gambia) and the African Court on Human and Peoples' Rights (Arusha, Tanzania).

The ECHR was the first regional human rights treaty. Today, the ECHR has 46 States parties, giving rights protection to some 700 million people. All parties to the ECHR are required to recognize the contentious jurisdiction of the ECtHR, which makes it possible for individuals to take a case to the court.[8] The American Convention has 25 States parties, with 20 states that recognize the jurisdiction of the court, which makes it possible for the Inter-American Commission to refer an individual's case to the court.[9] The African Charter has 53 states, with 33 states that recognize the court, which makes it possible for the African Commission on Human and Peoples' Rights to refer a case to the court. In addition, there are eight states that have made declarations permitting individuals to bring cases directly to the African Court on Human and Peoples' Rights.[10]

There is a large overlap in the contents of the main regional treaties, which largely deal with civil and political rights. Economic and social rights are included to limited and varying degrees. The African Charter, for example, includes the right to work (Article 15) and the right to health (Article 16), neither of which are included in the American or European Convention. In both Europe and the Americas, there are separate treaties dealing with economic and social rights.[11]

The judgments of the courts in the noted regional systems are legally binding on the respondent states. The outputs of the commissions have a status like those of UN treaty bodies; they are not per se legally binding but have persuasive authority.

The most prominent human rights instrument in the Association of Southeast Asian Nations (ASEAN), of which Indonesia is one of ten member states, is the

ASEAN Human Rights Declaration from 2012. This instrument affirms and elaborates on the commitment of the ASEAN member states to the civil and political, and economic and social rights included in the Universal Declaration on Human Rights. The ASEAN declaration is not legally binding but generates expectations as to the conduct of the ASEAN member states.[12]

The nature of international human-rights-based obligations

The thematic focuses of international human rights treaties overlap to varying degrees. This section examines the nature of human rights obligations. It shows that there is also considerable commonality in the defining features of the obligations that human rights treaties generate for states. Such commonality facilitates mutual learning across international monitoring organs.

Obligations for the state as a whole

International law is traditionally concerned with regulating relations between states. In contrast, international human rights law targets actions at the domestic level. This is evident in the way that leading international human rights treaties formulate the general obligation of States parties. For example, Article 2 ICCPR:

> (1) Each State Party to the present Covenant *undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction* the rights recognized in the present Covenant.[13]

It follows that all branches and levels of the state have rights-based obligations under international human rights law. The actions of local, regional, and national state authorities can all lead to violations of rights granted to individuals under international law. However, the central government represents the state in international law. The central government will be responsible for representing the state in any case at the international level and following up any subsequent outputs.

Better protection of rights in the state's legal system, including through the practice of national courts, reduces the likelihood that rights issues will rise to the international level.[14] How well a state's legal system meets the standards from international human rights law will vary from state to state. In some states, such as the Netherlands, the constitution will provide a basis for the direct applicability of international human rights treaties in the national courts. In other states, such as the UK, an act of incorporation will be required before a treaty can be relied upon directly before a court. The UK incorporated the ECHR into national law in 1998. This makes it more likely that an individual will obtain sufficient legal redress at the national level, reducing the need for cases to be taken to the ECtHR.

It also occurs that national judges in many states refer to international human rights law in the interpretation of national legal provisions.[15] This helps to ensure that national law is applied in a manner that is consistent with the state's international legal obligations. Such interpretative approaches may be explicitly required

by a constitution, such as in South Africa and Spain,[16] or may emerge through judicial practice, as in Norway and Australia.[17]

Different types of human-rights-based obligations

Two of the main categories of human rights-based obligations are negative and positive obligations. Negative obligations are about not exercising authority in ways that interfere with rights. Positive obligations are about exercising authority to ensure rights. Civil and political rights are traditionally associated with negative obligations. Economic and social rights are traditionally associated with positive obligations.[18] However, the practice of international monitoring organs reveals that most rights provisions in human rights treaties provide the basis for the identification through interpretation of both negative and positive obligations. Consider this quotation from the HRC's General Comment on Article 19 ICCPR on freedom of expression:

> [s]tates parties should ensure that public broadcasting services operate in an independent manner. In this regard, States parties should guarantee their independence and editorial freedom. They should provide funding in a manner that does not undermine their independence.[19]

This quotation deals with just one part of the right to freedom of expression concerned with the media, but it shows how the negative obligation, to not interfere with the public broadcasting media, is interwoven with a positive obligation to ensure that they operate in an independent manner.

Another prominent approach to classification of obligations is tripartite and refers to the obligations to respect, protect, and fulfil human rights.[20] The Committee on Economic, Social, and Cultural Rights (CESCR) uses this classification, but it also has general relevance. Obligations to respect are of a negative character, requiring the state to refrain from interference. For instance, the CESCR finds that Article 12 ICESCR, the right to health, obligates the state to refrain from 'non-consensual medical treatment and experimentation'; Article 13 ICESCR, the right to education, obliges the state not to interfere in the 'free choice of education, subject to conformity with minimum standards'; and Article 15 (a) ICESCR, the right of everyone to take part in cultural life, requires 'non-interference with the exercise of cultural practices and with access to cultural goods and services.'[21]

The obligations to protect and fulfil are of a positive character. Obligations to protect refer to the state providing protection from the acts of others. For example, the ECtHR has found that Article 2 ECHR, the right to life, gives rise to the:

> duty to prevent and suppress offences against the person [when it is established] . . . that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the identified individual . . . and that they failed to take measures within the scope of their powers, which, judged reasonably, might have been expected to avoid that risk.[22]

Obligations to fulfil refer to the state introducing measures necessary to enable the realisation of a right. For instance, the HRC has found that Article 6 ICCPR, the right to life, requires that states 'should take appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity.'[23] Such measures may include, 'the bolstering of effective emergency health services, emergency response operations (including firefighters, ambulance services and police forces) and social housing programmes.'[24]

Positive obligations may also be distinguished in terms of whether they are substantive or procedural in nature.[25] Substantive positive obligations are concerned with the provision of an end, such as an adequate legislative framework to secure respect for the right to private life.[26] Procedural obligations target the existence and quality of national procedures. For instance, it follows from the right to life, Article 2 ECHR, that where someone has died and the state is likely to be held responsible, there is a requirement for an 'effective' official investigation.[27] The practice of the ECtHR has brought to light what is required for an investigation to be considered effective, including, that the investigation must be independent.[28] The practice of the ECtHR is referred to and expanded on by other bodies, such as the IACtHR, which specifies, for example, that 'the obligation to investigate effectively has a wider scope when dealing with the case of a woman who is killed or, ill-treated or, whose personal liberty is affected within the framework of a general context of violence against women.'[29]

The distinctions highlighted in this section are relevant for understanding the approaches judges take to matters such as interpretation and deference in the application of human rights. For instance, substantive positive obligations tend to be highly dependent on circumstances. Consequently, the relevant tests and thresholds are often formulated in an open-ended manner. Obligations to fulfil may have quite broad ranging policy and financial implications.[30] This leads to greater discretion being afforded to the state in the assessment of whether the state is in compliance with its obligations.

Absolute and qualified rights

Certain human rights are referred to as absolute. This is because no interference with the right can be justified.[31] Examples include Article 7 ICCPR, the prohibition on torture; Article 8 ICCPR, the prohibition on slavery and forced labour; Article 14 ICCPR, the prohibition on double punishment for a criminal offence; and Article 15 ICCPR, the prohibition on holding someone criminally accountable for an act that was not a criminal offence at the time it was committed.

Most human rights are not absolute in nature but are open for justified interference. This is regulated through limitation clauses, which may be explicitly included within the relevant human rights provision or subsequently identified by monitoring organs as implied by the wording of the provision.

Prominent examples of explicit limitation clauses include those found in statements of the rights to freedom of expression, association, and assembly. The

wording of the limitation clauses in Articles 21 (freedom of assembly) and 22 (freedom of association) of the ICCPR is identical:

> No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

Similar wording is found in Article 19 ICCPR on freedom of expression, although Article 19 also provides for limitation in the interest of 'respect of the rights or reputations of others'; and while it does not mention 'necessary in a democratic society,' the HRC has frequently made reference to the importance of freedom of expression for ensuring a democratic society.[32]

The noted provisions do not spell out in a limited and specific manner the permitted limitations. For a more constrained approach, consider the right to life, Article 2 ECHR. Given the fundamental importance of the right to life, Article 2 ECHR specifies that interference with the right to life is only permissible:

> when it results from the use of force which is no more than absolutely necessary: (a) in defence of any person from unlawful violence; (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained; (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

The more general wording of the limitation clauses of the freedoms noted above indicates a relatively more flexible approach to determining circumstances that can justify interference. This is based on an evaluation of the different rights and interests at stake in the circumstances of a specific case. It can involve a rights claim, such as the right to private life, competing with a public interest, such as the economic well-being of the country.[33] It can also involve two competing rights claims, such as the right to freedom of expression in conflict with the right to freedom of religion.[34] How international monitoring organs undertake these assessments is returned to below in the discussion on tests and thresholds.[35]

Interpretation of international human rights treaties

The main rule for interpretation of treaties, including human rights treaties, is found in Article 31 of the Vienna Convention on the Law of Treaties:

> A treaty shall be interpreted in *good faith* in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of its *object and purpose*.

The four elements that should be examined in each interpretative act are all found in the same sentence. This indicates that they should be applied holistically. When

the elements go in different directions, the relative weight of the different elements for the circumstances should be assessed.

The special nature of human rights treaties, as creating rights for individuals against the state, rather than rights and obligations between states, fuels arguments for a particular approach to their interpretation.[36] In its early judgments, for instance, the ECtHR repeatedly emphasized that 'regard must be had to its [the Convention's] special character as a treaty for the collective enforcement of human rights and fundamental freedoms.'[37]

In the practice of the international monitoring organs, the ECtHR's approach to interpretation is especially prominent and applicants to other international bodies, such as the HRC, often invoke the ECtHR's reasoning.[38] This may reflect the far greater body of case law and the ECtHR's tendency towards fuller reasoning of its methodological approach than some other bodies.[39] Variations in whether and to what extent monitoring organs explain their interpretative approaches may be linked to differences in the contexts within which they operate. For instance, the universal setting of UN treaty bodies may make them wary of explicit pronouncements on certain interpretative doctrines.[40]

Object and purpose

The special nature of human rights treaties entails that particular weight is placed on the object and purpose of the treaties in the interpretative practices of international bodies. One consequence is that when a monitoring organ is faced with a choice of interpretations, it will choose the approach that best aligns with the treaty's purpose rather than that which serves to best protect the state's sovereignty.[41]

Monitoring organs draw on the general purpose of the treaty. For instance, in giving meaning to the concept of progressive realisation in Article 2 (1) ICESCR, the CESCR found that:

> It is on the one hand a necessary flexibility device, reflecting the realities of the real world and the difficulties involved for any country in ensuring full realization of economic, social and cultural rights. *On the other hand, the phrase must be read in the light of the overall objective, indeed the raison d'être, of the Covenant which is to establish clear obligations for States parties in respect of the full realization of the rights in question*. It thus imposes an obligation to move as expeditiously and effectively as possible towards that goal.[42]

The ECtHR has also repeatedly pointed out and given weight to the ECHR's central purpose, which is to protect individual human rights and human dignity, as well as to secure and promote the ideals and values that underlie a democratic society.[43] The interpretative practice of monitoring organs involves giving meaning to these notions. Consider human dignity.

Human dignity is a value on which human rights are built and so should be referred to in the process of identifying and giving meaning to these rights.[44] This proposition is supported by the centrality of dignity in the Universal Declaration

of Human Rights and in the preambles of international human rights treaties and national constitutions.[45] It is also reflected in the prominent place that human dignity has in the interpretative practice of many national and international judicial bodies.[46] For instance, the ECtHR finds that in circumstances of imprisonment of an individual, the state's obligations under Article 3 ECHR, include ensuring:

> conditions which are compatible with respect for his human dignity, that the manner and method of the execution of the measure do not subject him to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, his health and well-being are adequately secured by, among other things, providing him with the requisite medical assistance.'[47]

Reviewing judicial practice from a range of jurisdictions, McCrudden argues that there is a basic minimum content to the notion of human dignity. This is centred on acceptance of the view 'that each human being possesses an intrinsic worth that should be respected, that some forms of conduct are inconsistent with respect for this intrinsic worth, and that the state exists for the individual not vice versa.'[48] McCrudden also identifies that the meaning of human dignity beyond this basic minimum is not settled: 'The fault lines lie in disagreement on what that intrinsic worth consists in, what forms of treatment are inconsistent with that worth, and what the implications are for the role of the state.'[49] It occurs that certain judicial bodies understand human dignity to have more of a communitarian emphasis (more concern for equality), whilst others place more emphasis on individual autonomy (more concern for liberty).[50] Consequently, two separate judicial bodies may both refer to human dignity in the interpretation of similarly formulated rights, yet come to different results.[51]

The object and purpose of specific human rights provisions is also important for interpretative practices. Consider an example from the ECtHR, *Van der Leer v Netherlands*. This case concerned interpretation of Article 5 (2) ECHR, the right to liberty and security, which specifies that: 'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.' The conditions for the applicant's stay in a psychiatric hospital were changed from voluntarily to mandatory without the patient being informed. The state argued that use of the word *arrest* in Article 5 (2) indicated that its scope extended only to criminal matters. The ECtHR drew on the aim and purpose of Article 5 as a whole – 'which are to protect everyone from arbitrary deprivations of Liberty' – and the related provision in Article 5 (4), which does not distinguish between the terminology of arrest and detained, to give the provision a broader interpretation in favour of the applicant.[52]

The centrality of 'object and purpose' in the interpretation of human rights treaties entails that the meaning of the provisions can extend significantly beyond what was originally envisaged by States parties. Explicit, well-structured reasoning may help monitoring organs to persuade States parties of the necessity of the extension of the meaning of a provision.[53]

The principle of effectiveness

The particular importance of the object and purpose of human rights treaties provides the foundation for further, more specific interpretative principles. One of these is the principle of effectiveness. The interpretation of human rights should have the primary aim of promoting their effective application (*effet utile*).[54] The ECtHR, for example, has justified its interpretative practices based on the consideration that it must interpret rights in such a way that they become 'practical and effective,' not theoretical and illusory. On this basis, the ECtHR interprets elements into rights that are necessary for them to have practical effect. The Airey-case is a prominent example.[55] This case involved the interpretation of a requirement of legal aid into Article 6 ECHR, the right to a fair trial, in the light of the circumstances of the applicant.

The IACtHR's interpretative approach also has a strong focus on effectiveness, stressing, for example, that 'the purpose and goal of the [American] Convention is to protect human beings; therefore, it requires that the right to life be interpreted and enforced so that its guarantees are truly practical and effective (*effet utile*).'[56] Further, the IACtHR has drawn on the principle of effectiveness in finding that the domestic law of States parties must be interpreted in line with the ACHR and the interpretations of the IACtHR.[57] Securing the effectiveness of rights protection is also a reference point in the interpretative practice of UN treaty bodies.[58]

Dynamic interpretation

Also of central importance in the practice of the interpretation of human rights is the principle of dynamic interpretation. If the provisions in human rights treaties are to be effective, it may be necessary to interpret them in accordance with the perceptions and demands of the time. Consider that the ECHR was adopted in 1950 and the ICCPR and ICESCR in 1966. Society has subsequently changed considerably, including in terms of new technologies and regarding what is seen as acceptable behaviour.

A classic example from the ECtHR is the Tyrer case, concerning whether judicial corporal punishment of juveniles amounts to degrading punishment within the meaning of Article 3 of the ECHR. The court found that it did. In its reasoning it highlighted the following:

> The Court must also recall that the Convention is a living instrument which, as the Commission rightly stressed, must be interpreted in the light of present-day conditions. In the case now before it the Court cannot but be influenced by the developments and commonly accepted standards in the penal policy of the member States of the Council of Europe in this field.[59]

This quotation indicates that the scope and contents of rights can evolve over time. An important question is what should be the basis for this evolution? In the quotation from the Tyrer case, the judges at the ECtHR point to the idea of an

empirical survey of how practice is changing across States parties, but they did not provide evidence of this survey. At the same time, another key bit of reasoning is the court's own assessment of how the punishment related to the value of human dignity:

> the very nature of judicial corporal is that it involves one human being inflicting physical violence on another human . . . [his punishment] constituted an assault on precisely that which it is one of the main purposes of Article 3 (art. 3) to protect, namely a person's dignity and physical integrity.[60]

In later practice, the ECtHR has done more to provide empirical evidence of changing practices across the member states of the Council of Europe. How necessary is empirical evidence for the dynamic interpretation of human rights?

Assessing the extent to which developments in the understanding of rights are shared across member states (European consensus) is a means for the ECtHR to explain its interpretative practice to member states. However, in the absence of evidence of sufficient consensus, this approach may lead to an overly conservative approach to rights interpretation.[61]

Other monitoring organs also refer to how practice is developing within member states, but usually with less of an emphasis on this aspect than the ECtHR.[62] For instance, in 2017, the IACtHR found for the first time that Article 26 of the ACHR on progressive development of economic, social and cultural rights, includes an autonomous right to a healthy environment.[63] The right was found to be 'included among the economic, social and cultural rights protected by Article 26' on the basis that 'this norm protects the rights derived from the economic, social, educational, scientific and cultural provisions of the OAS Charter,' which include obligations of sustainable development.[64] Still, part of the IACtHR's reasoning also underscored 'that the right to a healthy environment is recognized explicitly in the domestic laws of several States of the region, as well as in some provisions of the international corpus iuris.'[65]

It also occurs that the reasoning of international monitoring organs can be the catalyst for changes in how states understand certain rights. For instance, in 1992, the Committee on the Elimination of Discrimination Against Women (CEDAW) found that discrimination against women – as defined in Article 1 of the Convention – includes gender-based violence. More recently, the Committee reported that '[f]or over 25 years, in their practice of States parties have endorsed the Committee's interpretation.'[66] Similarly, the CESCR have found that Article 11 ICESCR, incudes the right to water. To support this finding, in its general comment on the right to water, the Committee supplemented a purposive approach to interpretation with reference to how States parties had not objected to this interpretation in the context of the state reporting process.[67]

The interpretation of rights by national courts

National courts develop their own doctrines for the interpretation of fundamental rights.[68] If these doctrines diverge too far from the approaches taken by the international monitoring organs, it is more likely that the state will be found to be in breach of its international human rights obligations. Thus, there is an incentive

for national courts to develop doctrines considering the approaches taken by international monitoring organs. This incentive is likely to be strongest when the outputs of a monitoring organ are formally binding on a state.[69] In Norway, for example, the Supreme Court has determined that when interpreting the ECHR (which is incorporated into national law), Norwegian courts should use the same interpretative methods as the ECtHR.[70] This involves taking the ECtHR's understanding of a right as the starting point for the analysis of that right in the circumstances of a case at the national level.[71] The Norwegian Supreme Court has also found that Norwegian courts must take the equivalent rights in the ECHR as the starting point for their interpretation of fundamental rights in the Norwegian constitution.[72]

Tests and thresholds for applying human rights

The provisions of human rights treaties are formulated to varying degrees of precision. Certain rights-based obligations are readily apparent from the wording of a right and can be implemented as such. For instance, the right to a fair trial includes the obligation on the state to organize civil or criminal proceedings (Article 6 ECHR; Article 14 ICCPR). If the state does not make provision for such a trial, it will be found to be in breach of its obligation. However, once there is a trial, the focus will turn to the fairness of the trial and key terms such as *independent* will need to be given meaning by the court. For instance, in *Campbell and Fell v UK*, the ECtHR highlighted that:

> In determining whether a body can be considered to be "independent" – notably of the executive and of the parties to the case . . . the Court has had regard to the manner of appointment of its members and the duration of their term of office . . . the existence of guarantees against outside pressures . . . and the question whether the body presents an appearance of independence.[73]

In this example, the court looks back over its earlier practice of interpreting and applying the notion of independent to develop a criteria-based approach. This makes the notion of independence less of a mystery. Both individuals and states can have an idea of whether a body is likely to be accepted as independent or not.

Over time, it is possible for judicial practice to produce a host of tests and thresholds that encompass and bring predictability to the application of a right in relation to the variety of circumstances that it can encompass. The rest of this section highlights central examples from the contributions that international monitoring organs have made to the operationalisation of human rights treaties.

Economic, social and cultural rights

The focus of the rights in the ICESCR, such as to housing, food, water, and health care, are readily understandable in their most basic forms. The CESCR has had an important role in developing the meaning of these rights in the context of

the running of a state. For example, the CESCR has identified and explained that there are seven elements that must be taken into account when assessing whether an individual has access to adequate housing (Article 11) for the purposes of the ICESCR.[74] These elements include, for example: 1) legal security of tenure ('all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats'); 2) availability of services, materials, facilities and infrastructure ('an adequate house must contain certain facilities essential for health, security, comfort and nutrition'); and 3) affordability ('personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised').[75]By breaking down the right to adequate housing into constitutive elements, the CESCR indicates its multilayered nature and provides a framework for assessing steps taken by the state to realize the right. The specification of the rights in this programmatic way is consistent with the particular nature of the general obligation for compliance with the ICESCR.

Whereas Article 2 (2) ICCPR specifies a general obligation with immediate effect, Article 2 (1) ICESCR specifies that a state party has a general obligation:

> to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.[76]

The difference between the ICCPR and the ICESCR on this point stems from the view that, considering resource requirements and the different circumstances of States parties, 'full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time.'[77]

In operationalising the general obligation for progressive full realisation of the rights in the ICESCR, the CESCR has proceeded on the basis that the 'raison d'être, of the Covenant . . . is to establish clear obligations for States parties.'[78] It treats progressive full realisation as a necessary flexibility device, which does not mean postpone indefinitely. Rather, the CESCR specifies that the state must move as expeditiously and effectively as possible to full realisation of the rights.[79] For assessing whether a state has used 'the maximum of its available resources', the CESCR will assess the reasonableness of the measures taken.[80] To this end, it has highlighted factors that are relevant, such as 'the extent to which the measures taken were deliberate, concrete and targeted towards the fulfilment of economic, social and cultural rights'; and 'whether the State party exercised its discretion in a non-discriminatory and nonarbitrary manner.'[81] Deliberately retrogressive measures may only be justified to the extent that the state can prove they were based 'on the most careful consideration [and can justify them] . . . by reference to the totality of the rights provided for in the Covenant and by the fact that full use was made of available resources.'[82]

The CESCR has also found that each state party has 'a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights.'[83] These are elements within the rights that need to be prioritized. For instance, the committee has specified in relation to the right to social security that there should be a minimum level of benefits that will allow individuals 'to acquire at least essential health care, basic shelter and housing, water and sanitation, foodstuffs, and the most basic forms of education.'[84] If a state seeks to justify its failure to satisfy its minimum core obligations on a lack of resources, 'it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'[85]

Civil and political rights

The limitation clauses that permit interference with rights under certain circumstances are often worded in general, open terminology. The international monitoring organs have interpreted this terminology to provide specific approaches for assessment of whether or not an interference is justified. It is often possible to find monitoring organs applying a sequential approach that corresponds to what is referred to in legal theory as the proportionality test.[86] This test is captured as having four stages:

> First, there must be a determination that the enjoyment of a protected right has been limited, i.e. an infringement or prima facie violation. Thereafter, proportionality requires (1) consideration of whether the measure resulting in that limitation is intended to pursue a legitimate public aim; (2) consideration of whether the limitation is capable of achieving that aim; (3) consideration of whether the limitation is necessary in the sense that there is no alternative course of action equally capable of achieving the aim, but at less cost to rights; (4) consideration of whether the advantage of pursuing the aim by the means in question outweighs the cost to rights. If the rights-limiting measure satisfies all four stages, the infringement is justified.[87]

In practice, there is variation in the language that different bodies use. Monitoring organs may also differ in terms of which stages of the test they place most emphasis and with the level of detail they undertake the analysis.[88] The ECtHR, for example, often concentrates in its reasoning on the final balancing stage, proportionality in the strict sense, which is often depicted as a cost-benefit analysis. It is about determining whether a reasonable balance has been 'achieved among the interests served by the measure and the interests that are harmed by introducing it.'[89] The details for the substance of the balancing exercise come from the facts of the case and the surrounding context and the normative environment of the European Convention.[90] The ECtHR has considerable discretion as to the considerations that it will deem useful in its evaluation. This element is at times criticized for 'downplaying the complexity of moral discourses on human rights,'[91]

whilst also giving too much discretion to the court.[92] However, it is important to recognize that over time judicial practice can lead to a criteria-based approach, drawing on factors that have been relevant in similar cases.

One example of such an approach is found in the criteria that the ECtHR has specified for balancing in defamation cases. Specifically, where the right to freedom of expression is being balanced against the right to respect for private life. In such instances, the court has specified that it will consider factors such as: Is there a contribution to a debate of general interest? How well known is the person concerned and what is the subject of the report? What is the prior conduct of the person concerned? What method was used to obtain the information and how accurate is it? What is the content, form and consequences of the publication? And how severe is the sanction imposed?[93]

Cases that involve balancing exercises often touch upon policy choices to do with public order, health safety, economics or morals. This can generate separation of powers issues, in which political bodies consider they have more expertise or legitimacy to decide. These separation of powers issues are often addressed by courts through the development of doctrines of deference.[94] This is the focus of the next section.

Deference

Doctrines of deference in human rights law help a monitoring organ to determine when it should be more or less intensive in its scrutiny of decisions taken by other legislative, executive, or judicial bodies.[95] The ECtHR is relatively advanced in relation to the development of a doctrine of deference or judicial self-restraint.[96] The ECtHR has developed the concept of a margin of appreciation as a 'tool to define relations between the domestic authorities and the Court.'[97] The margin of appreciation is about how much space the state has to decide on issues alone without ECtHR oversight.

In an actual case, it will come to expression in terms of how much weight the ECtHR will attach to the state's own assessment of the situation and what measures it requires (in other words, how intensively the ECtHR will assess the national authorities' decisions). The ECtHR has not provided a full account of the margin of appreciation, but it has been more detailed in some cases. For instance, in *S.A.S v France* – a case concerning the banning of face coverings in public spaces – the ECtHR explained that:

> It is also important to emphasise the fundamentally subsidiary role of the Convention mechanism. The national authorities *have direct democratic legitimation* and are, as the Court has held on many occasions, in *principle better placed than an international court to evaluate local needs* and conditions. In matters of general policy, *on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.*[98]

This statement indicates that a good deal of the ECtHR's approach to deference stems from its status as an international body, external to the state. However, it is

also important to note that the margin of appreciation is variable.[99] There are additional factors connected to the nature of a case that will also make the ECtHR review more intensively the state's practice. These include the strength of the interference with the right (a stronger interference, leads to a smaller margin), or the aim of the interference (wider margin with policy-orientated considerations; narrow margin with considerations related to the functioning of democracy, such as conditions for political debate through a free media).[100] Many national courts have developed similar doctrines to guide their relation to the political bodies within their state. For example, in Norway the courts will show greatest deference to the political bodies of the state in the evaluation of rights-based issues with economic aspects.[101]

In contrast to the ECtHR, the HRC has resisted the explicit development of a margin of appreciation doctrine.[102] This can help to explain why we see different outcomes in similar cases that are taken to the ECtHR and the HRC.[103] Consider two cases, one from the ECtHR and one from the HRC, both of which concerned France's law from 2010 that prohibited the use of clothing that hid the face in public places. Violation of the ban could result in a fine of up to 150 euros and the individual concerned could also be required to complete a citizenship course.

The complainant, in *S.A.S v France* at the ECtHR,[104] was a Muslim woman who wore the burka and niqab in accordance with her religious, cultural and personal beliefs. She wanted to use it whenever and wherever she wanted, and the law in France prevented her from so doing. The ECtHR unanimously found that there was no infringement of Article 14 (freedom from discrimination) in conjunction with Article 8 (right to private life) or 9 (freedom of religion), and did not consider it necessary to make a separate assessment of the complainant's allegation of infringement of Article 10 (freedom of expression) alone or in conjunction with Article 14. A major feature of the ECtHR's reasoning was based on France's argument that the ban was seen as necessary to protect society's interest in 'living together', and that this outweighed the other interests, including the complainant's right to freedom of religion.[105]

In contrast, in the Yaker case with similar facts, the UN Human Rights Committee was not convinced by France's argument about 'living together.'[106] The HRC required that France identify the specific rights that were affected by the fact that some people had covered their faces in public. France did not do this, and the Human Rights Committee found a violation of the right to 'manifest religion.'[107]

The different outcomes of these two cases supports the view that how and when adjudicatory bodies defer to political organs can have significant consequences for rights protection. Consequently, it is advisable for all courts adjudicating rights to reflect over whether, when, and how it should pursue a policy of judicial restraint.

Conclusion

This chapter has proceeded on the basis that the provisions of international human rights treaties often do not come ready made for judicial application. Judicial bodies have an important role in the operationalisation of human rights provisions. If a judicial body is to apply human rights provisions effectively and legitimately, it

should develop a strategy for interpretation of the right, develop tests and thresholds for application of the right consistently across cases, and determine whether and when it will defer to other authorities. Judges may take inspiration from a wide body of international and national practice. A comparative approach, surveying national and international practice, as well as identifying and examining similarities and differences in the approaches taken to common issues, is likely to provide a good foundation for a judicial body to develop its own approach.[108]

Notes

1 Special thanks to Julie Fraser, Eko Riyadi and Aksel Tømte for comments on earlier drafts.

2 The International Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965); The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1979); The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); The Convention on the Rights of the Child (1989); The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); The Convention on the Rights of Persons with Disabilities (2006); International Convention for the Protection of All Persons from Enforced Disappearances (ICED) (2006). Details on States parties: http://indicators.ohchr.org/org/.

3 Indonesia has signed but not ratified the ICED, see M. Davies, 'States of Compliance?: Global Human Rights Treaties and ASEAN Member States,' *Journal of Human Rights* 13, no.4 (2014): 414–433 [419].

4 See M. Kanetake 'UN Human Rights Treaty Monitoring Bodies Before Domestic Courts,' *International and Comparative Law Quarterly* 67, no. 1 (2018): 201–232 [201–202]. States may choose to give treaty body outputs legally binding status at the national level, see Kanetake, 'UN Human Rights Treaty,' 217; also R van Alebeek and A Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in *UN Human Rights Treaty Bodies: Law and Legitimacy*, ed. H. Keller and G. Ulfstein (Cambridge University Press, 2012), 356, 362–63.

5 Article 26, Vienna Convention on the Law of Treaties.

6 See Kanetake, 'UN Human Rights Treaty,' 220.

7 The UN Human Rights Committee (HRC), General Comment No. 33, UN Doc. CCPR/C/GC/33 (5 November 2008), paras15 and 19; Ulfstein argues that a good faith response to outputs from UN treaty bodies entails 'a presumption of the correctness of such findings and require states parties, including national courts, to present good reasons for any conflicting opinion.' G. Ulfstein, 'Law-making by Human Rights Treaty Bodies,' in *International Law-Making: Essays in Honour of Jan Klabbers*, ed. R. Liivoja and J. Petman (Routledge, 2014), 6; also G. Ulfstein. 'Who is the Final Interpreter in Human Rights: the ICJ v CERD?,' EJIL: Talk, February 22, 2021 (indicating that the quality of the reasoning of a UN treaty body is likely to have a bearing on its relevance in the practice of other bodies that apply the treaty it monitors).

8 Further information on the ECHR is available at: https://www.echr.coe.int/Pages/home.aspx?p=court&c=

9 Further information on the Inter-American Human Rights System is available at: https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en

10 Further information on the African Human Rights System is available at: https://www.african-court.org/wpafc/basic-information/

11 The European Social Charter, 1961 (revised 1996); Additional Protocol to The American Convention on Human Rights in the Area of Economic, Social and Cultural Rights 'Protocol of San Salvador,' 1988.

12 See H. Bui, 'The ASEAN Human Rights System: A Critical Analysis,' *Asian Journal of Comparative Law* 11, no. 1 (2016): 111–140 [120].
13 Emphasis added.
14 See J. Fraser, 'Bringing the Law to Life: Judicial Operationalisation of International Human Rights Law' (chapter 2).
15 See Kanetake, 'UN Human Rights Treaty,' 215–216, 228.
16 See P. Andrews, 'Incorporating International Human Rights Law in National Constitutions: The South African Experience,' in *Progress in International Law*, ed. R. Miller, (Brill, 2008) 835–854 [840]; G. Martinico, 'Is the European Convention Going to Be "Supreme"?: A Comparative-Constitutional Overview of ECHR and EU Law before National Courts' *European Journal of International Law* 23, no. 2 (2012): 401–424 [408].
17 See M. Langford and K. B. Berge, 'Norway's Constitution in a Comparative Perspective,' *Oslo Law Review* 6, no. 3 (2019): 198–228 [222]; M. Kirby, 'Domestic Implementation of International Human Rights Norms,' *Australian Journal of Human Rights* 5, no. 2 (1999): 109.
18 See J. Gerards, *General Principles of the European Convention on Human Rights* (Cambridge University Press, 2019), 123.
19 General Comment 34, para 16.
20 See UN Doc E/CN.4/Sub.2/1987/23.
21 General Comment No. 14: The Right to the Highest Attainable Standard of Health (Art. 12), para 8; General Comment No. 13: The Right to Education (Art. 13), para 57; General Comment No. 21: The right of everyone to take part in cultural life (Art. 15), para 6.
22 Osman v UK (1998), ECtHR, para 116–117; see also Committee on the Elimination of Discrimination against Women, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, 14 July 2017, CEDAW/C/GC/35 (para 24 b) on 'due diligence obligations for acts and omissions of non-State actors.'
23 HRC, General Comment 36, 3 September 2019, CCPR/C/GC/36, para 26.
24 HRC, General Comment 36, 3 September 2019, CCPR/C/GC/36, para 26; see also for example CESCR, General Comment No. 13: The Right to Education (Art. 13) para 50 a state must 'fulfil (facilitate) the acceptability of education by taking positive measures to ensure that education is culturally appropriate for minorities and indigenous peoples, and of good quality for all . . . [and] and fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials, training teachers and paying them domestically competitive salaries.';
25 See Gerards, *General Principles*, 122 and 126.
26 See, for example, Case of Bărbulescu v. Romania, ECtHR (2017) para 115.
27 See McCann v UK, ECtHR (1995) para 161.
28 Gerards, *General Principles*, 126
29 Case of González et al. ('Cotton Field') v. Mexico, IACtHR(2009) para 293.
30 See Harris et al, *Law of the European Convention on Human Rights* (Oxford University Press, 2014), 22.
31 See M. Scheinin, 'Core Rights and Obligations,' in *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton (Oxford University Press, 2013), 527–540 [531–32]; B. Cali, 'Balancing Human Rights? Methodological Problems with Weights, Scales and Proportions,' *Human Rights Quarterly* 29, no. 1 (2007): 251–270 [258].
32 M. O'Flaherty, 'Freedom of Expression: Article 19 of the International Covenant on Civil and Political Rights and the Human Rights Committees' General Comment No. 34,' *Human Rights Law Review* 12, no. 4 (2012): 627, 640.
33 See, e.g., Hatton v UK, ECtHR (2002).

34 See, e.g., Wingrove v UK, ECtHR (1996); see further S. Greer, '"Balancing" and the European Court of Human Rights: A Contribution to the Habermas-Alexy Debate,' *The Cambridge Law Journal* 63, no. 2 (2004): 412–434; C. Evans, 'Principles and Compromises: Religious Freedom in Times of Transition,' in *Reasoning Rights: Comparative Judicial Engagement*, ed. L. Lazarus, C. McCrudden and N. Bowles (Hart, 2014), 223–239 [234–236].

35 For the guidance that UN treaty bodies have provided on limitation of rights in the context of the Covid-19 pandemic, see Human Rights Treaty Branch, *Internal HRTB Toolkit of Treaty Law Perspectives and Jurisprudence in the Context of COVID-19,* July 15th 2020. https://www.ohchr.org/sites/default/files/HRTB_toolkit_COVID_19.pdf

36 B. Schlutter, 'Human Rights Treaty Interpretation by the UN Treaty Bodies,' in *UN Human Rights Bodies*, ed. H. Keller and G. Ulfstein (Cambridge University Press, 2012), 261–319 [263].

37 See Soering v. United Kingdom, ECtHR, 1989, para 87; Ireland v. United Kingdom, 1978, para 239; other monitoring organs take similar positions see, e.g., Advisory Opinion OC-15/97, IACtHR, para 29.

38 Schlutter, 'Human Rights Treaty,' 267 and 273.

39 See also N. Mavronicola, 'What Is an Absolute Right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights,' *Human Rights Law Review* 12, no. 4 (2012): 723–758 [726–727].

40 See P. M. Taylor, *A Commentary on the International Covenant on Civil and Political Rights: The UN Human Rights Committee's Monitoring of ICCPR Rights* (Cambridge University Press, 2020), 20; see also on variation in the normative value of the different types of output from the UN treaty bodies, Kanetake, 'UN Human Rights Treaty,' 225.

41 See Wemhoff v. Germany, ECtHR (1968), para 8 'seek the interpretation that is most appropriate in order to realise the aim and achieve the object of the treaty, not that which would restrict to greatest possible degree the obligations undertaken by the parties.'

42 General comment No. 3: The nature of States parties' obligations (art. 2, para 1, of the Covenant) E/1991/23, para 9 (emphasis added).

43 See, e.g., Wemhoff v. Germany, ECtHR (1968) para 8; Advisory Opinion OC-15/97, IACtHR, para 29.

44 C. McCrudden, 'Human Dignity and Judicial Interpretation of Human Rights,' *EJIL* (2008): 655–724 [681]; Scheinin, 'Core Rights and Obligations,' 529

45 McCrudden, 'Human Dignity,' 671.

46 McCrudden, 'Human Dignity,' 683; V. Fikfak and L. Izvorova, 'Language and Persuasion: Human Dignity at the European Court of Human Rights,' *Human Rights Law Review* 22, no. 3 (2022): 1–24; J. M. Pasqualucci, *The Practice and Procedure of the Inter-American Court of Human Rights* (Cambridge University Press, 2013), 12.

47 Kudla v Poland, ECtHR, 2000, para 94.

48 McCrudden, 'Human Dignity,' 723, also 679.

49 McCrudden, 'Human Dignity,' 723.

50 McCrudden, 'Human Dignity,' 699, 702; on the different aspects of human dignity, see A. Clapham, *Human Rights Obligations of Non-State Actors* (Oxford University Press, 2006) 545–546.

51 Yet McCrudden, 'Human Dignity,' 695, also notes that '[o]ne of the attractions of dignity in the human rights context is the idea that different jurisdictions share a sense of what dignity requires, and this enables a dialogue to take place between judges on the interpretation of human rights norms, based on a supposedly shared assumption.'

52 *Van der Leer v Netherlands,* ECtHR, 1990 para 27; see also *Witold Litwa v. Poland*, ECtHR, 2000 para 61; for practice from the HRC, see for example, CCPR General Comment No. 6: Article 6 (Right to Life) Adopted at the Sixteenth Session of the Human Rights Committee, on 30 April 1982: 'the Committee has noted that the

right to life has been too often narrowly interpreted. The expression "inherent right to life" cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures. In this connection, the Committee considers that it would be desirable for States parties to take all possible measures to reduce infant mortality and to increase life expectancy, especially in adopting measures to eliminate malnutrition and epidemics.'; see also Yoon and Choi v. Korea, CCPR/C/88/D/1321–1322/2004, concerning whether or not conscientious objection falls within article 18 the right to freedom of thought, conscience and religion.

53 On differences in the interpretative styles of monitoring organs, see B. Cali, 'Specialized Rules of Treaty Interpretation: Human Rights' in D. B. B. Hollis, *The Oxford Guide to Treaties* (Oxford University Press, 2012), 540.

54 L. Lixinski, 'Treaty Interpretation by the Inter-American Court of Human Rights: Expansionism at the Service of the Unity of International Law,' *European Journal of International Law* 21, no. 3(2010): 585, 589; J. Fraser, *Social Institutions and International Human Rights Law Implementation: Every Organ of Society* (Cambridge University Press, 2020), 70.

55 Airey v Ireland, ECtHR, 1979; see also Magyar Helsinki Bizottság v. Hungary, ECtHR, 2016, para 155, finding that the right to access information falls within article 10, the right to freedom of expression.

56 Vargas Areco v. Paraguay, IACtHR, 26 September 2006, para 85; Pasqualucci, *The Practice and Procedure*, 12.

57 See Lori Berenson Mejıa´ v. Peru, IACtHR, 25 November 2004, para 220; Pasqualucci, *The Practice and Procedure*, 12.

58 See Fraser, *Social Institutions*, 70–71; Schlutter, 'Human Rights Treaty,' 286–7.

59 Tyrer v UK, ECtHR (1978)para 31.

60 Tyrer v UK, ECtHR (1978) para 33; for an example of dynamic interpretation from the HRC, see Judge v. Canada, Communication No. 829/1998, 5 August 2002, UN Doc. CCPR/C/78/D/829/1998, para 10.3.

61 See J. H. Gerards, 'Judicial Deliberations in the European Court of Human Rights,' in *The Legitimacy of the Highest Courts' Rulings*, ed. N. Huls, M. Adams, and J. Bomhoff (Springer, 2009), 17 (available at SSRN: https://ssrn.com/abstract=1114906); K. Dzehtsiarou, 'European Consensus and the Evolutive Interpretation of the European Convention on Human Rights,' *German Law Journal* 12, no. 10 (2011): 1730, 1735

62 The weight given to the comparative assessment by the ECtHR can vary depending on the circumstances of case, see, Dzehtsiarou, 'European Consensus,' 1733.

63 The Environment and Human Rights (State Obligations in Relation to the Environment in the Context of the Protection and Guarantee of the Rights to Life and to Personal Integrity – Interpretation and Scope of Articles 4(1) and 5(1) of the American Convention on Human Rights), Advisory Opinion OC23/18, IACtHR (Nov. 15, 2017), para 57.

64 Advisory Opinion OC23/17, para 57.

65 Advisory Opinion OC23/17, para 58.

66 CEDAW (2017). 'General Recommendation No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19,' para 2.

67 See General Comment No. 15: The Right to Water (Arts. 11 and 12 of the Covenant), 20 January 2003, paras. 3–5; also T. S. Bulto, 'The Emergence of the Human Right to Water in International Human Rights Law: Invention Or Discovery?,' *Melbourne Journal of International Law* 12, no. 2 (2011) 2–25.

68 See Fraser (chapter 2).

69 On variation in the weight national courts give to the formally nonbinding outputs from UN treaty bodies across a range of states, see Kanetake, 'UN Human Rights Treaty,' 215–216 ('in most cases judges invoke these findings not out of the obligation but due to their persuasiveness.')

70 Rt-2000–996 s. 1007–08 (Bøhler); the Norwegian Supreme Court has also found that the practice from the UN HRC and the Committee on the Rights of the Child, should be given significant weight, see, T. A. Hellerslia, 'Uttalelser Fra Fn-Komiteene – En Strukturell Analyse,' *Jussens Venner* 53, no. 2 (2018): 71–111 [74–75].
71 A. Bårdsen, A. 'Høyesterett og dynamisk tolking av EMK,' *Ryssdal-seminaret*, Oslo 30 (October 2017): 7 (available at https://www.domstol.no/contentassets/fd10f8a9715f4036ac6a523c747aafac/hoyesterett-og-dynamisk-tolking-av-emk.pdf); national courts in other States parties to the ECHR take similar approaches to the outputs from the ECtHR, but have sometimes specified reasons for why they may depart from the ECtHR's interpretation, see, from the UK, for example, R v. Horncastle and Others [2009] UKSC 14, at para 11 (where national law has been misunderstood by the ECtHR); R (Quila) v Secretary of State for the Home Department [2011] UKSC 45 (2011) para 43 (if the ECtHR's reasoning appears out of date); see further Martinico (2012), 421–422.
72 HR-2016–2554-P para 81 (Holship).
73 Campbell and Fell v UK, ECtHR (1984) para 78.
74 CESCR General Comment No. 4: The Right to Adequate Housing (Art. 11 [1] of the Covenant) Adopted at the Sixth Session of the Committee on Economic, Social and Cultural Rights, on 13 December 1991 (Contained in Document E/1992/23) para 8.
75 General Comment No. 4, para 8.
76 ICESCR, Article 2 (1).
77 General comment No. 3: The nature of States parties' obligations (art. 2, para 1, of the Covenant), E/1991/23, para 9.
78 General Comment No. 3, para 9
79 General Comment 3, para 9
80 See, e.g., Lorne Joseph Walters v Belgium, Views adopted by the Committee under the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, concerning communication No. 61/2018 (November 2021) para 10.1.
81 CESCR (Statement) An Evaluation of the Obligations to Take Steps to the 'Maximum of Available Resources' under an Optional Protocol to the Covenant, 21 September 2007, E/C.12/2007/1, para 8
82 CESCR (Statement) para 9
83 General Comment 3, para 10.
84 General Comment No. 19 The right to social security (art. 9), E/C.12/GC/19, 4 February 2008, para 59 (a).
85 General Comment 3, para 10.
86 See Y. Arai-Takahashi, 'Proportionality,' in *The Oxford Handbook of International Human Rights Law*, ed. D. Shelton (Oxford University Press, 2013), 446–468.
87 J. Rivers, 'The Presumption of Proportionality,' *Modern Law Review* 77, no. 3 (2014): 409–33 [412];
88 See M. Klatt and M. Meister, *The Constitutional Structure of Proportionality* (OUP, 2012), 9.
89 J. Gerards, 'How to Improve the Necessity Test of the European Court of Human Rights,' *Journal of International Constitutional Law* 11, no. (2013): 466–90 [468].
90 See A. Mowbray, 'A Study of the Principle of Fair Balance,' 10 *HRLR* (2010) 289, at 312.
91 Arai-Takahashi, 'Proportionality' (2013) 465.
92 N. Petersen, *Proportionality and Judicial Activism* (Cambridge University Press, 2017), 39; on the benefits of a balancing approach compared to alternatives, see A Stone Sweet and J. Matthews, 'Proportionality, Balancing and Global Constitutionalism,' *Columbia Journal of Transnational Law* 47 (2008): 74–165 [87–88].
93 Axel Springer AG v Germany, ECtHR, 2012, paras. 89–95.
94 Schlutter, 'Human Rights Treaty,' 303.

95 See A. Legg, The Margin of Appreciation in International Human Rights Law: Deference and Proportionality (OUP, 2012), 3.
96 D. McGoldrick, 'A Defence of The Margin of Appreciation and an Argument for its Application by The Human Rights Committee,' *International and Comparative Law Quarterly* 65, no. 1 (2016): 21–60 [33]; other international bodies have not been as explicit as the ECtHR, but it is possible to identify strands of similar reasoning in certain cases. For instance, the CESCR: recognizes that states have 'a certain amount of discretion' (Rodriguez v Spain, E/C.12/57/D/1/2013, para 13.3); see also B. Duhaime, 'What Room Is There for Deference in the Inter-American System?,' in *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation*, ed. L. Gruszczynski and W. Werner (OUP, 2014), 289.
97 A and Others v UK, ECtHR, 2009, para 184; also McGoldrick (2016) 33.
98 S.A.S v. France, 2014, ECtHR, para 129.
99 For critiques of the margin of appreciation as an adjudicative technique, including that it 'betrays the universality of human rights,' see Legg, 1.
100 See M. Saul, 'The European court of human rights' margin of appreciation and the processes of national parliaments,' *Human Rights Law Review* 15, no. 4 (2015): 745–774 [750].
101 See Langford and Beate, 'Norway's Constitution,' 219, 221.
102 See Taylor, *A* Commentary, 15–16; General Comment No. 34: Article 19 (Freedoms of Opinion and Expression), 12 September 2011, CCPR/C/GC/34 para 36.
103 See, for examples, Taylor, *A* Commentary, 16 at footnote 16.
104 S.A.S v. France, 2014, ECtHR
105 S.A.S v. France, 2014, ECtHR, para 121, para 157.
106 Yaker v France, communication No. 2747/2016, 17 July 2018, para 8.10.
107 Yaker, para 8.10.
108 See S. Fredman, *Comparative Human Rights Law* (OUP, 2018), 5.

2 Bringing the Law to Life

Judicial Operationalization of International Human Rights Law in the Domestic Sphere

Julie Fraser[1]

Introduction

Even seventy years after it was adopted in 1948, the Universal Declaration of Human Rights is still considered a landmark document of enduring relevance. The subsequent human rights treaties adopted by the United Nations (UN) enshrined its norms into binding law, guaranteeing rights to all humans based on their inherent dignity. These instruments were influential in shaping the post-World War II international order and represented significant political accomplishments – especially in the context of the Cold War. While it is difficult to overstate the importance of these treaties – both symbolically and as binding law – they are not *the* solution to human rights violations, but rather the first step in a long process. This is because international human rights standards do not take effect 'quietly and effortlessly' in States parties – but rather require determined and coordinated action.[2] Given the demands of this task, it is unsurprising that all states around the world struggle to varying degrees to implement their human rights treaty obligations.

While human rights norms are set at the international (or in some cases regional) level, 'domestic primacy' applies to the task of implementation.[3] This requires the involvement of all branches of government as well as the cooperation of private actors like businesses and the civil society. Often, implementation requires far-reaching reforms to socioeconomic systems, political structures, as well as cultural norms and practices.[4] While such reforms – particularly sociocultural changes – are longer term projects, the first implementation measure recommended by the UN treaties and treaty bodies is domestic incorporation of human rights into the national legal system. The primary role here is for the legislative branch of government to draft, debate, revise, and enact human rights legislation along with amending legislation/regulations for all impacted areas of law. This is generally the focus of scholarship addressing domestic human rights implementation. However, the role of the national judge in applying and interpreting human rights law is equally important and warrants further study.

This chapter therefore explores how judges and courts engage with human rights law in deciding cases before them. It first sets out in section 2 the requirements under international law for States parties to implement human rights treaties and the relevance here of whether a state's national legal system is monist or

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dualist in nature. Section 3 focuses on the role of the courts and explores if/how they address or apply human rights law in given cases. The chapter comparatively analyses jurisprudence from the Netherlands and Australia as examples of a monist and civil law system and a dualist and common law system, respectively. Given the historic and geographic ties, both states are relevant for Indonesia and vice versa. The Netherlands can be regarded as generally open to international human rights law domestically[5] – especially when compared to Australia.[6] In a way, they form a spectrum with Indonesia in the middle – a state with limited international or regional supervision but with significant domestic human rights legislation.

Illustrative human rights cases from Australia and the Netherlands were selected by identifying those that had been brought before international monitoring bodies like the UN Human Rights Committee (HRCee). Cases were selected if they were found to have exhausted domestic remedies, to be admissible, and decided in the last decade, regardless of whether a violation was found or not. For the purposes of this study, it was not important whether the state violated rights, but rather whether human rights were legitimately relevant to the merits of the case at hand. This method served to ensure that the domestic cases examined in this chapter were significant human rights cases for the states, raised substantive human rights questions, had been considered by the highest national courts, and were relatively contemporary. It also provided a comparison between the decision of the UN monitoring body and the national courts. This case selection method provided a highly relevant but also limited and therefore practicable sample – however, the selection does not attempt to account for the (potentially) large volume of other rights related cases that do not go beyond the national level.

Domestic implementation of International Human Rights Law

International human rights treaties oblige States parties to implement domestically the standards therein. However, the treaties do not instruct States parties as to *how* the treaties are to be implemented – just that the rights must be protected.[7] As such, states retain a generous (but not unlimited) discretion in their chosen manner of domestic implementation. Despite this, the manner most commonly (and sometimes solely) contemplated for implementation is legislative incorporation into the domestic legal system.[8] This involves different measures depending on the national system (i.e., monist or dualist), and generally entails the codification or transformation of international norms into domestic law.[9] This may relate to a constitutional incorporation clause, specific transformation of international law into a national bill, municipal proclamation, or legislation referring to international law or annexing it. In states like Japan, Mexico, and the Netherlands, international law can apply directly (monist), while others – predominantly common law states – require international law to be incorporated via domestic legislation (dualist).

While there is no general international law obligation on states to domestically incorporate legally all treaty provisions, sometimes treaties stipulate that certain provisions must be 'protected in law.'[10] Despite these exceptions, it is apparent from the practice of the UN treaty bodies that they prefer and encourage domestic

legal incorporation.[11] For example, the HRCee that supervises the implementation of the International Covenant on Civil and Political Rights (ICCPR) frequently invites States parties to incorporate the Covenant domestically, claiming that it has enhanced protection when part of the national legal system.[12] Similarly, the UN Committee on Economic, Social, and Cultural Rights (CESCR) argues that domestic legal incorporation 'can significantly enhance the scope and effectiveness of remedial measures and should be encouraged in all cases.'[13] As such, it 'strongly encourages formal adoption or incorporation of the covenant in national law.'[14] In fact, all of the UN human rights treaty bodies can be seen to favour domestic incorporation of the treaties.[15]

As illustrated by these examples, domestic legal incorporation is advocated on the basis that it aids the treaty's effectiveness in practice. This position is shared by many scholars, with Joshua Castellino claiming that the 'crucial element' in rights realisation is the extent to which they have been incorporated in domestic law.[16] Domestic incorporation is certainly useful as an opportunity for the legislature to 'clarify ambiguous language, insert new definitions and interpretations, and adapt the treaty to idiosyncratic domestic law concepts.'[17] National legislatures can facilitate more efficient implementation by tailoring domestic human rights legislation to their states' particular sociolegal context.[18] In this way, domestic incorporation is not simply a technical transferral of norms from one domain to another, but a process of (cultural) translation.[19] The UN Committee on the Elimination of Discrimination against Women (CEDAW Committee) regularly reiterates this 'crucial role' of legislatures in implementing women's rights in its concluding observations to States parties.[20]

While beneficial, this process of domestic incorporation is not a silver bullet for implementing human rights. First, domestic incorporation can take time – sometimes years. There can often be huge gaps between a state's ratification of an international instrument and any domestic legal implementation.[21] For example, despite the United Kingdom ratifying the European Convention on Human Rights (ECHR) in 1951, it only enacted the Human Rights Act in 1998. Similarly, despite ratifying the ICCPR in 1998, South Africa has not yet incorporated it into domestic law.[22] Similarly, incompatible legislation might remain part of a legal system despite contravening the international human rights standards.[23] Second, domestic incorporation in itself is often insufficient for rights realisation in practice. There are many examples of states that have human rights protection *de jure* but not *de facto*. So, while legal incorporation of human rights into the domestic system is typically a first step in implementation, it is very much a beginning and not an end. What is additionally needed is for these laws to be operationalized in practice by actors including the media, civil society, claimants, lawyers, and judges.

Human rights issues and arguments can make their way into courtrooms via multiple avenues. To promote human rights claims being made, states often require that universities provide training to law students on human rights, as well as training to lawyers and judges via legal associations. Awareness raising and education are key measures of implementation that are regularly advised to States

parties by the UN treaty bodies.[24] However, cases relating to human rights issues can also be litigated without an explicit reference to human rights. This is often the case in Australia due to the lack of national human rights legislation.[25] For example, a case may relate to a housing dispute, the procedure of a criminal trial, or a custody dispute over children, but not explicitly refer to human rights. It is not *per se* necessary that the language of human rights is employed by a court if the standards are upheld. If the parties themselves do not bring or raise human rights complaints in an ongoing case, another way for these issues to arise is via third-party submissions like *amicus curiae* briefs by academics, expert witnesses, or interventions by human rights bodies like national human rights institutes or ombudspersons. Once such issues are pertinent in a case before the court, it is up to the judge to apply human rights law.

Monism, dualism and in-between

Whether courts can rely directly on international human rights law or upon national human rights law depends on the nature of the domestic legal system, which is traditionally divided into categories of monism and dualism. The Netherlands is a monist state that applies international law with supremacy over national law – making it one of the states 'most friendly' to international law in the world.[26] The Netherlands is a party to all the main UN human rights treaties and European ones.[27] Importantly, Articles 93 and 94 of the Dutch Constitution (*Grondwet*) provide that treaty provisions that 'may be generally binding based on their content are to be implemented by the judicial and administrative bodies, if necessary by excluding application of any statutory regulations which are contrary to a treaty provision.'[28] This means that once the treaty is approved by Dutch Parliament, provisions with direct effect enjoy priority over both legislation and the Constitution.[29] It is a peculiarity of the Dutch system that courts can judge the compatibility of national with international law, but *not* the constitutionality of national laws (*toetsingsverbod*).[30] As such, petitioners can directly bring claims based on self-executing provisions[31] in international human rights treaties before the courts 'without the intervention of the national legislator.'[32]

However, it is the prerogative of Dutch judges to determine if a generally binding treaty provision has direct effect, and if not, to exclude provisions that are 'insufficiently accurate or concrete to prescribe a solution in an individual case because they do not make explicit which measures the State has to take and how.'[33] The courts have tended to consider whether the treaty provisions oblige the legislature to enact certain rules or whether the provisions are of such a nature that they 'can be applied as objective law right away.'[34] If provisions are considered to have direct effect (like most of those in the ICCPR and ECHR), they can be invoked before Dutch courts, but if not, implementing legislation is first required by parliament and it is not for the courts to proceed. For example, many of the provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Rights of Persons with Disabilities (CRPD) have been held not to have direct effect,[35] as have some from the

Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[36] These non-self-executing provisions are still considered relevant in the national system, but as authoritative rather than binding.[37] As this indicates, it is mainly civil and political rights that are considered by Dutch courts to be self-executing, while many socioeconomic rights are held to require implementing legislation.[38]

Contrary to the Dutch Constitution, Australia's is exceptional in its failure to include a bill of rights or deal with the role of international law domestically. Like the Netherlands, Australia has participated in the international human rights system since the creation of the UN. It has ratified the major international human rights treaties and many of the optional protocols.[39] However, as a dualist state adopting the British tradition, international law does not apply directly in Australia and must be incorporated by the parliament into national law. Australia is particularly strict in this approach, as petitioners can only rely on national instruments before the courts, and not causes of action based on international law. While this approach is theoretically permissible based on the discretion states have under international law, in practice it diminishes human rights protection in Australia given the lack of implementing legislation. Australia has failed to implement many of the treaties it has ratified, and this legislative gap is exacerbated by the small number of rights in Australia's 1901 Constitution.[40] To date, 'Australia remains the only modern democracy without a national-level human rights instrument.'[41] As such, Australia's High Court has to resolve rights related issues without having reference to human rights legal standards.[42]

The UN treaty bodies have repeatedly highlighted these deficiencies in the Australian legal system. For example, despite ratifying the UN Convention on the Rights of the Child (CRC) in 1990, 30 years later Australia has still not enacted 'comprehensive national child rights legislation fully incorporating the Convention.'[43] The CEDAW Committee noted that 'in the absence of a charter of human rights, the Constitution of the State party does not contain a guarantee of equality between women and men or a general prohibition of discrimination against women.'[44] Similarly, the Committee on the Elimination of Racial Discrimination (CERD) noted its concern that the 'protection against racial discrimination is still not guaranteed by the Constitution, . . . the Convention is not fully incorporated into the State party's domestic legal order and about the inconsistency of anti-discrimination legislation across States.'[45] While national implementing legislation is certainly lacking, federal legislation does cover antidiscrimination law[46] and three Australian domestic jurisdictions now have human rights instruments.[47] According to Gillian Triggs, this disconnection between Australia's international obligations and its national laws 'reflects the ambivalent approach' it has taken to human rights.[48]

Judicial operationalization of human rights

Judges, as public actors, bear international law obligations to implement human rights norms domestically. This includes judges sitting on national courts like a Constitutional Court, as well as judges at the provincial or administrative level.[49]

Courts can and do play key roles in domestic human rights implementation. This may be done by examining whether legislation is compliant with human rights standards (judicial review), by adjudicating complaints against the state, and by holding nonstate actors to account for violating domestic law implementing human rights protections (such as criminal law). The UN treaty bodies monitor this role of courts by requesting information from States parties regarding human rights law jurisprudence.[50] States are instructed to report on legal measures of implementation,[51] with the caveat that listing legal instruments is insufficient without additional information on implementation in both law and fact.[52] It is therefore important that judges are first made aware of and then apply these international obligations and mechanisms. This section looks at how courts use human rights law, using the examples of jurisprudence from The Netherlands and Australia.

Determination of human rights cases in the Netherlands

Human rights arguments are quite common before the Dutch courts and in their jurisprudence. This is due to the more monist approach of the Dutch Constitution, the enumeration of human rights (*grondrechten*) in that Constitution,[53] as well as the fact that the Netherlands is a party to the ECHR supervised by the European Court of Human Rights (ECtHR). Every year, hundreds of applications are made by petitioners to the European Court alleging rights violations by the Netherlands.[54] Dutch courts regularly refer to international human rights law, including specific provisions and principles, and engage in an analysis of case law. When engaging in treaty interpretation, the courts have the authority to interpret the relevant instruments and are not required to defer to the views of the legislature or the government.[55] Evert Albert Alkema claims that 'the interpretation and application of international human rights have become a matter of daily routine in the courtrooms and also in legislators' quarters.'[56] This can be seen from a short survey of cases against the Netherlands brought before the UN treaty bodies.

The first case relates to discrimination in social security. In the Netherlands, there are several human rights cases regarding social security under various treaties.[57] This first case was brought by Jamshed and Maryam Hashemi before the UN HRCee. They alleged that the Netherlands discriminated against them by denying them a right to social security under Articles 23, 24(1), and 26 ICCPR. The Hashemis are Afghan nationals who fled the Taliban and arrived in the Netherlands in 2001, where they subsequently had two children. Despite their unsuccessful asylum claims in the Netherlands, they were naturalized as citizens in 2014. The Hashemis applied for child benefits available under national legislation but were rejected by the Government due to their residency status (at the time) as being unlawful in the Netherlands.[58] The petitioners challenged this ruling before the Dutch courts. They claimed that they lived in 'absolute poverty' and that the benefit was necessary to keep them and their children living above the poverty line.[59] These petitions were denied by the Dutch courts, ultimately leading the Hashemis to take their case to the HRCee.

Before the Dutch Central Administrative Court (*Centrale Raad van Beroep*) in 2011, the petitioners argued that the denial of the child benefits based on their residency status was contrary to Article 8 (privacy and family life) and Article 14 ECHR (nondiscrimination).[60] They relied upon case law by the ECtHR and the positive obligations on the state to protect family rights in Article 8. The Hashemis referred to several international human rights instruments and argued for the best interests of the child under the CRC,[61] as well as for a joint reading of the ECHR and CRC.[62] In deciding the case, the Dutch Court referred extensively to human rights law, its key norms, principles, and specific provisions. The Court referred to the ECHR and jurisprudence of the ECtHR, noting the foundation of human dignity, contours of Article 8, and rights of the child. The Court held that a differentiation between lawful and unlawful residents for the purposes of paying the child benefit was justified if it pursued a legitimate aim and if the means employed to do so were reasonably proportionate.[63]

Using the language of the ECtHR, the Dutch Central Administrative Court found that the state has a large 'margin of appreciation' regarding public expenditure and that a 'fair balance' must be struck between the private interests of the petitioners and the public interests of the state.[64] The Court differentiated between the states' positive and negative obligations under Article 8 ECHR (regarding family life), noting that only in a 'very rare situation' would the state be obliged to make public payments.[65] In this case, the Court identified the legitimate aim to be having a consistent policy on foreigners and to disincentivize continued illegal residence, and found the denial of the child benefits to be a proportionate means.[66] However, in this case, the Hashemis had been in the Netherlands for a long time – now with resident permits – and had bonded with the Dutch community, rendering their exclusion from child benefits disproportionate.[67] The Social Security Bank appealed to the Dutch Supreme Court (*Hoge Raad*), which overturned this ruling. In so doing, the Supreme Court also specifically addressed human rights law including the ECHR, CRC, and ICCPR.

The Supreme Court agreed that child benefits were covered by Article 8 ECHR and that Article 14 prohibited discrimination including based on nationality.[68] It reiterated the lower courts finding that unequal treatment is impermissible unless it pursues a legitimate aim in a manner that is reasonable and proportionate. The distinction in the present case was between aliens with a legal residence permit and those without, which required 'sufficient reasons' to be justified.[69] The Court then identified ECtHR jurisprudence permitting states to make distinctions in immigration based on nationality, and to take measures with the aim of protecting the states' economic wellbeing.[70] It reiterated that legislatures generally enjoy wide discretion regarding social security cases. The Supreme Court held that Dutch law makes it clear that the legislator did not intend for those aliens unlawfully resident in the Netherlands to have access to the same public benefits as those legally resident.[71] While not eligible for this child benefit, the petitioners were recipients of several other benefits including in relation to education, housing, and healthcare. The HRCee also found no violation by the state in the circumstances.[72]

Another illustrative case from the Netherlands before the UN human rights treaty bodies related to pregnancy discrimination.[73] In this case before the CEDAW Committee, several women, including Ms. Blok, challenged legislation and insurance policies in the Netherlands for self-employed workers regarding maternity leave, which in practice left the petitioners without benefits. The Dutch Government had withdrawn legislation that previously provided maternity cover and permitted insurance policies going forward to be determined by the private sector as part of the privatisation of insurance in the Netherlands (which it held was not contrary to international treaties).[74] The petitioners in the case were all self-employed women who had given birth and had been denied insurance benefits for incapacity to work. They claimed to be victims of gender-based discrimination before the Dutch courts and alleged a violation by the Netherlands of Article 11(2)(b) CEDAW for its failure 'to provide a statutory arrangement entitling self-employed women to maternity allowance.'[75]

Before the Dutch courts, the petitioners directly raised CEDAW and EU law regarding nondiscrimination. However, the courts dismissed the case (referring to Article 93 of the Dutch Constitution, see p. 39) finding that Article 11(2)(b) CEDAW was too vague to be directly applicable.[76] The treaty called for 'appropriate measures' without stipulating the duration of the leave nor the form or sum of the benefit to be granted.[77] In taking this position, the Supreme Court analysed the text of the CEDAW, its drafting history, as well as the Dutch jurisprudence. As such, the Court declined to apply the provision. In finding a violation by the Netherlands, the CEDAW Committee rejected the arguments of the State and the Supreme Court. The Committee 'reiterated its deep concern about the status of the Convention in the legal system of the State party and in particular about the fact that the authorities continued to consider that not all the substantive provisions of the Convention were directly applicable.'[78] It found the Netherlands had failed to provide maternity benefits for the affected pregnant women, which constituted discrimination and a violation of Article 11 CEDAW.[79]

While the Dutch courts engaged thoroughly with human rights law in these two cases, they did not do so in the following case regarding immigration. Here, Ms. Zabayo, a Nigerian woman challenged her deportation from the Netherlands on the grounds that her daughter would be subjected to female circumcision/cutting. Zabayo had allegedly fled Nigeria – with the help of human traffickers – while pregnant in order to avoid being circumcised herself by her mother-in-law.[80] Her asylum request was denied in the Netherlands, as the authorities held her identity and marriage could not be confirmed, that her fear of circumcision was not credible, and that she could seek refugee elsewhere within Nigeria. This decision of 28 September 2015, which briefly referred to Article 8 ECHR (regarding family life) with no further analysis, was upheld on appeal before the Dutch courts. The regional court in The Hague found that while the State had not reasonably justified its findings regarding credibility of the marriage and fear of circumcision,[81] the appellants failed to show that they could not safely live elsewhere in Nigerian.[82] The Court briefly referred to Article 3 ECHR (regarding torture and inhumane treatment) but did not engage in any analysis or interpretation.[83] In

finding a violation by the Netherlands, the HRCee was critical of the State's risk assessment process and required a revision to comply with Article 7 (cruel and inhumane treatment) and Article 24 (children's rights) ICCPR.[84]

This short survey clearly shows an engaged approach to human rights by the Dutch courts, with judges referring to human rights instruments and jurisprudence as well as applying similar tests used by supervisory bodies to distinguish interferences with rights from their violation.[85] Due to the lack of judicial review in the Netherlands, scholars have noted that international human rights treaties have come to operate like a sort of bill of rights.[86] The Dutch courts demonstrate sophisticated understanding of human rights, including the categories and contents of rights, positive versus negative obligations, and the varying discretion awarded to states in implementation. Despite not always undertaking thorough human rights-based analysis, the courts demonstrate an awareness of the relevant rights and instruments in cases before them. While this is laudable, it is not to present an overly rosy picture of human rights in the Netherlands, as scholars have identified domestic resistance and even vehement opposition to rights.[87] However, the Dutch Constitutional approach and jurisprudence sampled here demonstrate a relative openness of judges to engage substantively with human rights in relevant cases – as opposed to Australian courts as seen below.

Determination of human rights cases in Australia

In addition to the lack of implementing legislation in Australia – or perhaps precisely because of it – there is also a lack of explicit human rights jurisprudence from the courts. Although many cases brought before them raise human rights issues, Australian national courts can be generally reluctant to engage with those issues and even more unlikely to specifically refer to human rights norms.[88] Judges have acknowledged the role of international human rights law when interpreting Australian law but have limited these occasions and expressly rejected human rights when faced with clear domestic law to the contrary. In this way, judges have shown a remarkable deference to Australian legislators, even at the expense of providing legal protections for minority or vulnerable groups.[89] This can be illustrated by examining domestic judgments in cases that were subsequently brought against Australia before the UN HRCee.

The first case is about juvenile justice and the sentences of life imprisonment given to Blessington and Elliot, aged 14 and 16 when they abducted, sexually assaulted, and murdered a woman in 1988. Following their conviction by a jury in 1990, Blessington and Elliot were sentenced, where the maximum possible punishment under legislation was 'penal servitude for life' at the judges' discretion. At sentencing, Newman J. commented that 'the facts surrounding the commission of these crimes are so barbaric that . . . I recommend that none of the prisoners in this matter should ever be released.'[90] Both Blessington and Elliot appealed this sentence, arguing that it was excessive, but the Appeals Court found it to be 'well within' the permissible range.[91] The Court further found that the possibility of a royal prerogative of mercy meant that 'it cannot be said that there is no avenue for the release of each Applicant.'[92]

In his dissent in the case, Kirby J. referred to the particular nature of the applicants as juveniles and to the long history of special accommodation for children in criminal law.[93] He cited the CRC – ratified by Australia in 1990 – and its Article 37(a) regarding the impermissibility of life imprisonment without parole for children. Kirby J. was alone in his reference to human rights. In fact, Howie J. repudiated any recourse to international human rights law in favour of upholding the parliament's perceived will. Howie J. stated that:

> It is not for this [c]ourt to review the appropriateness of that decision. Insofar as that [sentencing] scheme might infringe international conventions or be inconsistent with normal sentencing principles or appear as incongruous with other statutory provisions dealing with the sentencing of young persons, that is, in my opinion, a matter for Parliament.[94]

On final appeal to the High Court in 2007,[95] the judges unanimously found no ground to reopen the case regarding sentencing. The judgment does not refer to human rights at all – neither general civil and political rights nor those of the child. This directly contrasts the views taken by the HRCee, which found Australia in violation of the ICCPR in 2014.[96] Blessington and Elliot claimed to be victims of violations including the prohibition on torture (Article 7), social rehabilitation (Article 10(3)), and special protection for children (Article 24(1)). The Committee restated the requirement for the punishment of life imprisonment to include both the review of sentence as well as the prospect of release, which 'should not be a mere theoretical possibility.'[97] The HRCee further recalled Article 37(a) of the CRC, which it held to be a valuable source that informed its interpretation of the ICCPR. While noting that Blessington and Elliot were given some consideration and adjustments as juveniles, and that they had both benefited from prison reform programmes, the committee found that they served their life sentences 'without real possibility of release.'[98]

Another illustrative case that went before the HRCee relates to the Australian mandatory sentencing rules.[99] In that case, the applicant, Nasir, was an Indonesian citizen who worked as a cook on a boat in 2010 that transported Afghan asylum seekers into Australia. The boat was intercepted by Australian authorities and Nasir was detained and ultimately charged with the 'aggravated offence of people smuggling' under the Migration Act (Cth 1958).[100] Before being charged and convicted, Nasir was detained in Australia's (infamous) immigration detention centres for the purpose of investigation and prosecution of those criminal offences. In 2011, the Queensland Supreme Court found Nasir guilty in a jury trial and sentenced him to five years in prison – the mandatory minimum sentence – with a three-year nonparole period.[101] At this point in time Nasir had already been imprisoned for some 600 days. Noting Nasir's diminished culpability and vulnerability, the sentencing judge expressed displeasure at the mandatory sentence, stating that he had already been 'adequately punished' and that in his absence his family had been 'left destitute.'[102]

On appeal, the case turned upon Nasir's *mens rea* and whether it met beyond reasonable doubt the requisite knowledge regarding the 'lawful right [of the Afghan passengers] to come to Australia.'[103] This appeal was dismissed. There was no discussion of human rights at either instance, nor at sentencing – despite the judges' protestations at having to impose the mandatory minimum of five years, which hinted at human rights concerns. This Australian judicial approach is again at odds with that taken by the HRCee. Before the committee, Nasir claimed that his rights under Articles 9, 10, and 14 ICCPR were violated due to the excessive length of his detention before being charged and tried, the disproportionate and arbitrary sentence imposed, and the suffering and loss of his family life. The committee found that Australia violated Article 9 by arbitrarily holding Mr. Nasir in immigration detention for almost five months without any formal charges.[104]

Given Australia's system of strict migration and sentencing laws, numerous cases raising human rights issues have been litigated before domestic courts. Two particular High Court cases addressed what role, if any, international human rights should play in their interpretation of Australian law. The first case was brought by Mr. Teoh,[105] a Malaysian man with a wife and children in Australia, who was to be deported following his criminal conviction. He appealed this order before the courts, arguing that it was not in the best interests of his (Australian) children under the CRC. The High Court held that treaty ratification by Australia gives rise to a 'legitimate expectation' that decisionmakers will act in conformity with its terms.[106] Any such expectation was limited by statutory or executive indications to the contrary, and would not compel decisionmakers to follow Convention norms.[107] However, if the legislation's ordinary meaning is clear, there is no need to draw upon extrinsic material such as international human rights law.[108]

This situation arose in a subsequent case before the High Court, *Al-Kateb v Godwin,*[109] which concerned a stateless man (a Palestinian born in Kuwait) who was denied refugee status in Australia. The Migration Act (Cth 1958) provided for the 'administrative' detention of unlawful noncitizens in Australia, who would be released from detention upon either being granted permission to remain in Australia (i.e., a visa) or by being deported. However, given his statelessness, no country had agreed to receive Mr. Al-Kateb. Release from detention, in this case, 'cannot be fulfilled for reasons unrelated to any fault on the part of the detainer, or the detainee.'[110] The Migration Act did not envisage such an in-between situation, where a person like Mr. Al-Kateb is both denied permission to enter Australia and unable to be deported.[111] In this case a majority of judges of the High Court did consider human rights, but rejected their application to interpreting the legislation.

Writing with the Court's majority, McHugh J. found that in the circumstances, the Migration Act required the continued detention of Mr. Al-Kateb until he could be deported. He held that the 'unambiguous language' of the law 'indicates that Parliament intends detention to continue until one of the conditions expressly identified therein – removal, deportation or granting of a visa – is satisfied.'[112] McHugh J. rejected that the provisions could be read to reflect 'an intention not to affect fundamental rights.'[113] Supported by Callinan and Hayne J. J., McHugh

J. held that the unambiguous text of the Act revealed Parliament's intent to interfere with the rights and freedoms of persons in the situation of Mr. Al-Kateb.[114] McHugh J. stated:

> It is not for courts, exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to basic human rights. The function of the courts in this context is simply to determine whether the law of the Parliament is within the powers conferred on it by the Constitution.[115]

McHugh J. rejected the suggestion that Australia's Constitution be interpreted by reference to or in conformity with international law, which he held, '[a]s a matter of constitutional doctrine . . . must be regarded as heretical.'[116] This is because interpreting the Constitution by reference to international law would be tantamount to amending the Constitution in violation of section 128, which sets out the procedure for amendments.[117] Where Australian laws violate international human rights law but remain constitutionally valid, 'the Parliament and those who introduce them must answer to the electors, to the international bodies who supervise human rights treaties to which Australia is a party and to history.'[118] Here again, Kirby J. dissented from the majority judgment, rebutting McHugh J.'s findings regarding human rights. He held that the Court can and should interpret the Migration Act consistent with the principles of international human rights law.[119] While acknowledging that international law does not bind Australian courts, 'the principles they express can influence legal understanding.'[120] While the Court's decision in *Al-Kateb* has been roundly criticized for some 20 years, it was only overturned at the time of writing this chapter in 2023 – potentially marking a new judicial approach.[121]

These judgments illustrate what a hostile environment Australian national courts can be for human rights law. The issue in most of these cases is not substantively about human rights norms, but what – if any – consideration judges should give them when interpreting and applying national law. There are limited instances where recourse to human rights can take place (i.e., when national legislation is unclear and able to be construed consistently with human rights norms).[122] Problematically, Williams notes that it can even be a 'strategic error' for advocates to mention human rights in their argumentation as some Justices of the High Court are 'antagonistic to such concepts.'[123] This reflects the role of subjectivities on the bench and the influence it can have on human rights argumentation as judges adopt different methodological approaches. Australian courts have doggedly refused to incorporate international human rights law into the common law without the need for prior legislation, which has had 'a chilling effect on the pursuit of international legal rights through the Australian courts.'[124] Geddes and McLachlan conclude that Australia's human rights protection is 'piecemeal, arbitrary and incoherent.'[125]

Conclusion

Realising human rights in practice is an ongoing process and not a destination. This chapter has demonstrated that despite the recognition in binding law of a

wide variety of minimum norms that protect the rights of all humans, much more action is needed to enjoy these rights in practice. This is the work that States parties are tasked with in the international treaties, and they enjoy wide discretion in the manner and measures of domestic implementation. There is not, nor should there necessarily be, any uniformity in the way states implement their human rights obligations; they may adopt different approaches and models influenced by multiple factors pertaining to their historical, political, socioeconomic, and legal cultures. There is no one-size-fits-all approach. Notwithstanding this, there is a strong emphasis on the need for States parties to incorporate international human rights norms into their domestic legal system on the basis that this facilitates effective implementation. This is typically the responsibility of the legislature and must take the form and content as required by (e.g., the state's constitution).

As noted above, this process can be time consuming and depends upon the necessary political will.

Many States around the world, like Australia, still fall short at this initial stage of human rights implementation, to the detriment of their people and lament of the UN treaty bodies. Other States, like the Netherlands, that have the advantage of monism, can directly apply international law in the national legal system. As seen in section 3.1, this can have a radical impact on the adoption of or recourse to human rights by the judiciaries. Whereas national Australian courts can address human rights topics without reference to human rights norms or even the language of human rights, Dutch courts routinely refer to and apply human rights law. Caveats do apply, however, and Dutch judges defer to parliament if they find an international provision not to have direct effect. Another facilitating factor in the Netherlands is its participation in the Council of Europe including the jurisdiction of the European Court of Human Rights. This Court's supervision incentivizes Dutch judges to heed the relevant human rights in cases before them that may be elevated to the regional level. The absence of any regional human rights system that Australia might participate in is therefore noteworthy.[126]

Given Australia's strict dualism and lack of bill of rights or implementing legislation, rather than being 'the ultimate guarantor of fundamental rights,' courts remain overtly deferential to the Parliament.[127] This includes situations where legislation directly violates human rights, like the Migration Act in the *Al-Kateb* case. The language of human rights was totally absent in the first two Australian cases discussed, and the last two cases debated what role – if any – human rights might play in the margins of legislative interpretation. As such, Australian judges employ no discernible human rights methodology. Experience from the three domestic jurisdictions (ACT, Victoria, and Queensland) that do have human rights legislation may in the future influence the national level and develop human rights within Australia's common law. Given that the common law recognizes judge-made law and that some judges are willing to consider human rights law, a more consistent judicial methodology incorporating human rights considerations could be foreseeable. A clearer solution might be found in the 2022 proposal for a Human Rights Act by the Australian Human Rights Commission.[128]

This chapter has highlighted the particularities of the role of human rights in the Dutch and Australian legal systems. Both are remarkable in different ways – for example, Australia's lack of a national bill of rights and the Dutch court's inability to perform judicial review. Notably, the Indonesian system suffers neither of these deficiencies, with significant human rights provisions in national legislation and the Constitutional Court's ability to perform constitutional review of legislation. In this way, Indonesian judiciaries are arguably better situated to implement human rights than both their Dutch and Australian peers with fewer occasions requiring them to defer to parliament. As this chapter has demonstrated, national legislators and judges play a key role in realising human rights domestically and, as state actors, are bound under international law to do so. Lawyers, judicial associations, universities, and national human rights institutes are also required to operationalize human rights law in practice. In fact, there is a need to go beyond implementation to look at the domestic human rights *institutionalisation*, which refers to 'a process in which a set of norms become an integral and sustainable part of a system.'[129] The judiciary has a crucial role to play in that system.

Notes

1 I am grateful for the erudite insights of Prof Janneke Gerards and Dr Adam Fletcher, as well as the volume's co-authors and editors. Errors remain my own.

2 See D. Galligan and D. Sandler, 'Implementing Human Rights,' in *Human Rights Brought Home: Socio-Legal Perspectives on Human Rights in the National Context*, ed. S. Halliday and P. Schmidt (Hart Publishing, 2004), 24.

3 See D. Donoho, 'Human Rights Enforcement in Twenty-First Century,' *Georgia Journal of International and Comparative Law* 35, no. 1 (2006–2007): 12.

4 See J. Fraser, *Social Institutions and International Human Rights Law Implementation: 'Every Organ of Society'* (Cambridge University Press, 2020), 111.

5 While Krommendijk and Oomen take this as their starting point, they also highlight domestic resistance to international human rights law and monitoring. See J. Krommendijk, 'Between Pretence and Practice: The Dutch Response to Recommendations of International Human Rights Bodies,' in *Netherlands Yearbook of International Law* vol 46, ed. M. den Heijer and H. van der Wilt (Springer 2015); B. Oomen, 'The Rights for Others: The Contested Homecoming of Human Rights in the Netherlands,' *Netherlands Quarterly of Human Rights* 31, no. 1 (2013) 41–73.

6 Triggs has commented upon Australia's 'exceptionalist' approach to protecting human rights: G. Triggs, 'Creating a Human Rights Culture,' *Southern Cross University Law Review* 17 (2014–2015): 59–78.

Fletcher provides an overview and explanation for Australia's reluctance regarding human rights in: A. Fletcher, 'Rights Protection in Australia: Overview and History,' in *Australia's Human Rights Scrutiny Regime: Democratic Masterstroke or Mere Window Dressing?*, ed. A. Fletcher (Melbourne University Publishing, 2018).

7 While not legally binding, the UN treaty bodies do offer guidance to States on implementation via, e.g., general comments and concluding observations.

8 Fraser, *Social Institutions*, 71.

9 The dichotomy of monism/dualism have been problematized as unhelpful in practice: see P. H. Verdier and M. Versteeg, 'International Law in National Legal Systems: An Empirical Investigation,' *American Journal of International Law* 109 (2015): 514, 515–516. This issue is addressed in the next section.

10 See for example Articles 6(1), 20(1) and 20(2), and 26 of the International Covenant on Civil and Political Rights (1966); Articles 4(a) and 4(b) of the Convention on the Elimination of Racial Discrimination (1965); Article 2(a) of the Convention on the Elimination of all forms of Discrimination Against Women (1979).
11 Fraser, *Social Institutions*, 87.
12 UN Human Rights Committee, General Comment No. 31, 26 May 2004, CCPR/C/21/Rev.1/Add13, paras 13, 15.
13 UN ESCR Committee, General Comment No. 12, 12 May 1999, E/C.12/1999/5, para 33; UN ESCR Committee, General Comment No. 14, 11 August 2000, E/C.12/2000/4, para 60; UN ESCR Committee, General Comment No. 15, 20 January 2003, E/C.12/2002/11, para 57; UN ESCR Committee, General Comment No. 18, 6 February 2006, E/C.12/GC/18, para 49.
14 UN ESCR Committee, General Comment No. 9, 3 December 2008, E/C.12/1998/24, para 8.
15 Fraser, *Social Institutions*, 73.
16 J. Castellino, 'Application of International Standards of Human Rights Law at Domestic Level,' in *An Introduction to International Human Rights Law*, ed. A. R. Chowdhury and J. H. Bhuiyan (Nijhoff, 2012), 253. See discussion of scholars including Oona Hathaway, Christian Tomuschat, and Rhona Smith in Fraser, *Social Institutions*, 75.
17 Verdier and Versteeg, 'International Law,' 521.
18 Verdier and Versteeg, 'International Law,' 522.
19 K. Knop, 'Here and There: International Law in Domestic Courts,' *NYU Journal of International Law and Politics* 32, no. 2 (2000): 506.

See the scholarship of Sally Engel Merry on the idea of translation and 'vernacularisation' of international human rights norms into domestic settings.

20 Fraser, *Social Institutions*, 103.
21 See for example the study by J. Grugel and E. Peruzzotti, 'The Domestic Politics of International Human Rights Law: Implementing the Convention on the Rights of the Child in Ecuador, Chile and Argentina,' Human Rights Quarterly 34, no. 1(2012) 178–198.
22 South Africa does, however, have many human rights protections in their post-apartheid Constitution. UN Human Rights Committee, Concluding observations on the initial report of South Africa, 27 April 2016, CCPR/C/ZAA/CO/1, paras. 6 and 7. See further E. de Wet, 'South Africa,' in *International Law and Domestic Legal Systems: Incorporation, Transformation, and Persuasion*, ed. Dinah Shelton (Oxford University Press, 2011), 578.
23 The UN Human Rights Committee has held that States parties have an obligation under Article 2 of the ICCPR to 'make such changes to domestic laws and practices as are necessary to ensure their conformity with the Covenant' (see General Comment No. 31. 26 May 2004, CCPR/C/21/Rev.1/Add. 13, para 13).

For example, in their concluding observations to South Africa, the UN Committee on the Rights of Persons with Disabilities recommended the State to revise several domestic laws: see Concluding observations on the initial report of South Africa, 23 October 2018, CRPD/C/ZAF/CO/1, paras 27(c) and 33(a).

24 Fraser, *Social Institutions*, 95.
25 L. Geddes and H. McLachlan, *50 Human Rights Cases that Changed Australia* (Federation Press, 2023), 1 and 4.
26 Oomen, 'The Rights for Others,' 57–58.
27 The Netherlands – along with many other developed States – has not ratified the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families. To date, The Netherlands has not (yet) ratified the Optional Protocols to ICESCR, the Convention on the Rights of Persons with Disabilities, or the Convention on the Rights of the Child creating communications procedures.

28 The Dutch Constitution is silent on customary international law. See E. A. Alkema, 'Netherlands,' in *International Law and Domestic Legal Systems*, 419–420.

However, this has been addressed in case law. See J. Gerards and J. Fleuren, 'The Netherlands,' in *The Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case-Law: A Comparative Analysis*, ed. J. and J. Fleuren (Intersentia, 2014), 219.

29 E. A. Alkema in *International Law and Domestic Legal Systems*, 409 and 413.

Regarding hierarchy and *jus cogens* norms see 421–423.

30 See Article 120 of the Dutch Constitution and discussion in *International Law and Domestic Legal Systems*, 423; J. Fleuren, 'Recent Developments Regarding the Direct and Indirect Application of Treaties by Dutch Courts: Fresh Approaches to Self-Executing, Non-Self-Executing and Non-Binding International Law,' in *Netherlands Yearbook of International Law*, ed. M. Kuijer and W. Werner (TMC Asser Press, 2016), 381–382; Oomen, 'The Rights for Others,' 61; Voermans notes that the Dutch prohibition on constitutional review makes it 'the odd one out' in Western constitutional systems, see W. Voermans, 'Conspicuous Absentees in the Dutch Legal Order: Constitutional Review & A Constitutional Court,' in *Judicial Cosmopolitanism: The Use of Foreign Law in Contemporary Constitutional Systems*, ed. G. F. Ferrari (Brill, 2020), 337.

Regarding proposals for introducing constitutional review, see J. C.A. de Poorter, 'Constitutional Review in the Netherlands: A Joint Responsibility,' *Utrecht Law Review* 9, no .2 (2013) 89–105; J. Uzman, 'Changing Tides: The Rise (and Fall?) of Judicial Constitutional Review in the Netherlands,' in *The Dutch Constitution beyond 200 years: Tradition and Innovation in a Multilevel Legal Order*, ed. G. F. Ferrari, R. P. and W. Voermans (Eleven, 2018), 257–271.

31 The concept of self-executing treaties was introduced to the Dutch Constitution in 1956 and was initially considered noncontentious. See its development as discussed by Fleuren, 'Recent Developments,' 381–382; Gerards and Fleuren, 'The Netherlands,' 223–224.

32 Committee on the Rights of Persons with Disabilities, Initial report submitted by the Netherlands under Article 35 of the Convention, 6 March 2019, CRPD/C/NLD/1, para 26.

33 Ibid.

See also C. Ryngaert, 'The Role of Human Rights in the Dutch Legal Order,' in *The Universalism of Human Rights*, ed. R. A. (Springer, 2013), 241.

34 The key cases of the Dutch Supreme Court are Staat der Nederlanden v Nederlandse Nietrokersvereniging CAN, No. 13/02931, ECLI:NL:HR:2014:2928, 10 October 2014, which revised the earlier decision in NV Nederlandse Spoorwegen v Vervoersbond FNV et al., Judgment, No. 12698, NJ 1986, No. 688.

See generally Gerards and Fleuren, 'The Netherlands,' 224, who argue that the Court's interpretative approach was influenced by European Union law.

35 Committee on the Rights of Persons with Disabilities, Initial Report submitted by the Netherlands under article 35 of the Convention, 6 March 2019, CRPD/C/NLD/1, para 26.

36 Concluding observations of the Committee on the Elimination of Discrimination against Women on the Netherlands, 5 February 2010, CEDAW/C/NLD/CO/5, para 12; Concluding observations on the sixth periodic report of the Netherlands, 24 November 2016, CEDAW/C/NLD/CO/6, para 9.

37 Fleuren, 'Recent Developments,' 383, 389, 391; Alkema in *International Law and Domestic Legal Systems*, 410. This is like in South Africa, where non-self-executing treaties that the legislature has not incorporated into domestic law 'will have no direct force of law but can be used to interpret legislation and the common law,' in E. de Wet, 'South Africa,' in *International Law and Domestic Legal Systems*, 587.

38 Oomen, 'The Rights for Others,' 60–61; Ryngaert (2013), 241; I. L. and M. L. Vermeulen, 'Codification and Implementation of Human Rights in the Netherlands,'

in *Codification in International Perspective Ius Comparatum – Global Studies in Comparative Law*, ed. W. Y. Wang (Springer, 2014), 320.

39 Australia has not ratified the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families, nor the International Convention for the Protection of all Persons from Enforced Disappearance. Australia has not ratified the Optional Protocols to ICESCR nor the CRC, which create individual complaint communications procedures.

40 Such as the equal treatment between residents of different States, trial by jury, freedom of religion, and just acquisition of property. Given the lack of explicit human rights protections, advocacy before the High Court often strategically relies upon constitutional values such as federalism or the separation of powers to 'coincidentally' pursue rights compliant outcomes.

See G. Williams, 'The High Court, the Constitution and Human Rights,' *Australian Journal of Human Rights* 21, no. 1 (2015): 7–9; L. Geddes and H. McLachlan, *50 Human Rights Cases that Changed Australia* (The Federation Press, 2023), 3.

The High Court has also read several human rights into the Constitution, such as freedom of political communication, see T. Blackshield, 'The High Court's Implied Rights Experiment,' in *The Legal Protection of Rights in Australia*, ed. M. Groves, J. Boughey and D. Meagher (Hart, 2019), 53–77.

41 A. de Jonge, 'Australia,' in *International Law and Domestic Legal Systems*, 25; Williams, 'The High Court,' 2.

42 Williams, 'The High Court,' 1.

43 UN Committee on the Rights of the Child, Concluding Observations on the combined fifth and sixth periodic reports of Australia, 1 November 2019, CRC/C/AUS/CO/5–6, para 7(a).

44 Committee on the Elimination of Discrimination Against women, Concluding observations on the eight periodic report of Australia, 25 July 2018, CEDAW/C/AUS/CO/8, para 11(a).

45 Committee on the Elimination of Racial Discrimination, Concluding Observations on the eighteenth to twentieth periodic reports of Australia, 26 December 2017, CERD/C/AUS/CO, para 7.

46 See for example the Commonwealth's Racial Discrimination Act 1975, Sex Discrimination Act 1984, Disability Discrimination Act 1992, and the Age Discrimination Act 2004 as discussed by Fletcher, 'Rights Protection in Australia,' 21–23.

Fletcher notes that despite the relative strength of the anti-discrimination protections, they remain subject to legislative override by the Government when it deems necessary – such as when it suspended operation of the Racial Discrimination Act in 2007. Williams comments on this point and the Constitution's 'racially discriminatory origins' in Williams, 'The High Court,' 2–4.

47 Australian Capital Territory, Human Rights Act 2004; Victoria, Charter of Human Rights and Responsibilities Act 2006; Queensland, Human Rights Act 2019. See discussion in J. Boughey, 'The Victorian Charter: A Slow Start or Fundamentally Flawed?' and S. Rice, 'Culture, What Culture? Why We Don't Know if the ACT Human Rights Act is Working,' in *The Legal Protection of Rights in Australia*. For an overview of successful human rights cases in Australia see Geddes and McLachlan, *50 Human Rights Cases* (2023).

48 Triggs, 'Creating a Human Rights Culture,' 64.

49 UN Human Rights Committee, General Comment No. 31. 26 May 2004, CCPR/C/21/Rev.1/Add.13, para 4.

50 See for example, UN Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties (Harmonised Reporting Guidelines), 3 June 2009, HRI/GEN/2/Rev.6.Annex Guidelines on Treaty-Specific Documents to be submitted by States Parties under Article 16 and 17 of the International Covenant on Economic, Social and Cultural Rights para 3(d).

51 UN Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties (Harmonised Reporting Guidelines), 3 June 2009, HRI/GEN/2/Rev.6, para 42.
52 Ibid., para 25.
53 Fundamental rights are set out in the first chapter of the Dutch Constitution, which contains 23 articles that compose the Dutch bill of rights. See I. Lintel and M. L. Vermeulen, 'Codification and Implementation of Human Rights in the Netherlands,' in *Codification in International Perspective Ius Comparatum – Global Studies in Comparative Law*, ed. W. Y. Wang (Springer, 2014), 315.
54 The Court first found a violation by the Netherlands in 1976. See Ryngaert (2013), 244.
From 1959 to 2022 there have been 177 judgments by the Court against the Netherlands. See European Court of Human Rights, Violations by Article and by State 1959–2022, at: https://echr.coe.int/Documents/Stats_violation_1959_2022_ENG.pdf, accessed 7 April 2023.
55 Alkema notes that in fact, 'the political branches often explicitly leave the interpretation of international law to the judiciary on the assumption that the courts may meet the dynamic development of international law more flexibly and effectively than the legislature itself.' Alkema in *International Law and Domestic Legal Systems*, 414.
56 *International Law and Domestic Legal Systems*, 424.
57 See for example A. Jacobs, 'Monism in Action: The Application of the International Covenant on the Rights of the Child in the Law of the Netherlands,' in *Arbeitsvölkerrecht: Festschrift für Klaus Lörcher* (Nomos, 2013), 130–133.
58 UN Human Rights Committee, Views adopted by the Committee under Art 5(4) of the Optional Protocol concerning communication no 2489/2014, 7 June 2019, CCPR/C/125/D/2489/2014, para 2.8.
59 Ibid., para 3.5.
60 Central Board of Appeal Decision ECLI:NL:CRVB:2011:BR1905,15 July 2011, para 3.
61 See Jacobs, 'Monism in Action,' 132.
62 They also argued the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of Racial Discrimination, the Convention on the Elimination of all forms of Discrimination against Women, and the European Social Charter.
63 Central Board of Appeal Decision ECLI:NL:CRVB:2011:BR1905,15 July 2011, para 4.9.
This test for permissible limitations is directly taken from the jurisprudence of the ECtHR. See analysis by G. Letsas, 'The Scope and Balancing of Rights: Diagnostic or Constitutive?' in *Shaping Rights in the ECHR: The Role of the European Court of Human Rights in Determining the Scope of Human Rights*, ed. E. Brems and J. Gerards (Cambridge University Press, 2013), 54.
64 Central Board of Appeal Decision ECLI:NL:CRVB:2011:BR1905, 15 July 2011, para 4.6.
65 Ibid.
66 Ibid., paras 4.10 and 4.11.
67 Ibid., para 4.13. See also High Council Decision (Hoge Raad) ECLI:NL:HR:2012:BW7740, 3 November 2012, para 3.2.2.
68 Ibid.
69 Ibid., para 3.5.5. This was found in contrast to differences based on nationality which required 'very weighty reasons' (para 3.4.5).
70 Ibid., para 3.5.7.
71 Ibid., para 3.5.9.
72 UN Human Rights Committee, Views adopted by the Committee under Art 5(4) of the Optional Protocol concerning communication no 2489/2014, 7 June 2019, CCPR/C/125/D/2489/2014.
73 UN CEDAW Committee, Views adopted by the Committee at its fifty-seventh session, Communication No 36/2012, 24 March 2014, CEDAW/C/57/D/36/2012.

74 Ibid., para 2.6.
75 Ibid., para 2.16.
76 High Council Decision (Hoge Raad) ECLI:NL:HR:2011:BP3044, Stichting Proefprocessenfonds Clara Wichmann et al. v Staat der Nederlanden, Judgment, No. 09/04671, 1 April 2011. See Fleuren's discussion of the case Fleuren, 'Recent Developments,' 389–390.
77 High Council Decision (Hoge Raad) ECLI:NL:HR:2011:BP3044, 1 April 2011, para 3.3.1.

See also UN CEDAW Committee, Views adopted by the Committee at its fifty-seventh session, Communication No 36/2012, 24 March 2014, CEDAW/C/57/D/36/2012, para 4.10.
78 UN CEDAW Committee, Views adopted by the Committee at its fifty-seventh session, Communication No 36/2012, 24 March 2014, CEDAW/C/57/D/36/2012, para 8.5.
79 Ibid., para 8.9.
80 UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2796/2016 CCPR/C/133/D/2796/2016, 18 February 2022, para 2.1.
81 Court of the Hague Decision (Uitspraak Rechtbank Den Haag), No. 15/17785, 22 October 2015, para 6.
82 Ibid., para 8.
83 Ibid., para 9.
84 UN Human Rights Committee, Views adopted by the Committee under article 5 (4) of the Optional Protocol, concerning communication No. 2796/2016 CCPR/C/133/D/2796/2016, 18 February 2022, para 10. There was also a dissent by three Committee members on the finding of a violation, see its Annex.
85 Gerards and Fleuren, 'The Netherlands,' 240. For example, on page 249, Gerards and Fleuren note that Dutch courts also apply the margin of appreciation domestically as developed by the European Court of Human Rights.
86 Fleuren, 'The Netherlands,' 257. They further note (258): 'In many fields of law, the Court's standards and criteria have deeply influenced national standards and, more generally, colour the legal and judicial discourse on fundamental rights. Moreover, it is indeed true that the national courts sometimes set aside legislation because it unjustifiably interfers with a Convention right.'
87 Krommendijk, 'Between Pretence and Practice; Oomen, 'The Rights for Others.'
88 Geddes and McLachlan, *50 Human Rights Cases*, 1 and 4.
89 Fletcher, 'Rights Protection in Australia,' 16. Justice Kirby has condemned this situation, noting that 'the sun-induced drug of lethargy produces blindness to injustice to minorities regarded as of 'no priority to elected governments.'

See M. Kirby, 'Foreword: Australian Exceptionalism?,' in *The Legal Protection of Rights in Australia*, 7.
90 Court of Criminal Appeal Decision R v Elliott and Blessington [2006] NSWCCA 305, 22 September 2006. Kirby J dissenting, para 111.
91 Ibid., Spigelman CJ, para 6.
92 Ibid., para 62.
93 Ibid., Kirby J dissenting paras 126–130.
94 Ibid., Howie J para 212.
95 Elliot v The Queen*; Blessington v The Queen* 2007 HCA 51, 8 November 2007.
96 UN Human Rights Committee, Blessington and Elliot v Australia, Communication No. 1968/2010, 22 October 2014.
97 Ibid., para 7.7.
98 Ibid., paras 7.9–7.10.

99 UN Human Rights Committee, Nasir v Australia, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2229/2012, 17 November 2016, CCPR/C/116/D/2229/2012.
100 See Australian Migration Act No 62, 1958 (Commonwealth) Division 12 offences.
101 *The Queen v Nasir and Jufri,* Queensland Supreme Court Criminal Jurisdiction, Atkinson J, Indictment No 300 and 419 of 2011, 2 December 2011.
102 Ibid., 4–6. Scholars have found that many judges have made similar statements upon having to give mandatory sentences. See A. Trotter and M. Garozzo, 'Mandatory Sentencing for People Smuggling: Issues of Law and Policy,' *Melbourne University Law Review* 36, no. 2 (2012): 567–568 [553].
103 Queensland Court of Appeal Decision *R v Jufri; R v Nasir* [2012], 248, para 14.
104 UN Human Rights Committee, Nasir v Australia, Views adopted by the Committee under article 5(4) of the Optional Protocol, concerning communication No. 2229/2012, 17 November 2016, CCPR/C/116/D/2229/2012.
See also analysis by Trotter and Garozzo, 'Mandatory Sentencing,' 582–583.
105 Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh [1995] HCA 20 (Teoh).
106 Ibid., Mason CJ and Deane J, para 34. Of note, Justice McHugh dissented, rejecting the role of the legitimate expectation doctrine in this case. The Australian Government's response to the case was quick and hostile: see S. Roberts, 'Teoh v Minister For Immigration: The High Court Decision and the Government's Reaction to It,' *Australian Journal of Human Rights*, 2, no. 1 (1995): 135.
See M. Groves, 'International Law, Administrative Powers and Human Rights: The Legacy of Teoh,' in *The Legal Protection of Rights in Australia*, 108–113.
107 *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20 Mason CJ and Deane J, paras 34 and 36. A subsequent 2003 case undermined much of the 'legitimate expectation' doctrine: *Re Minister for Immigration and Multicultural Affairs; Ex Parte Lam* (2003) 214 CLR 1. See general discussion by Groves in *The Legal Protection of Rights in Australia*, 103–121.
108 See A. de Jonge, 'Australia,' in *International Law and Domestic Legal Systems*, 48; *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20, para 26; Fletcher, 'Rights Protection in Australia,' 29.
109 Hight Court of Australia *Al-Kateb v Godwin* [2004] HCA 37. See discussion by A. Fletcher, 'The Reception of International Law in Constitutional Litigation – The *Al-Kateb* Battle and its Aftermath,' in *The Legal Protection of Rights in Australia*, 79–102.
110 Ibid., Gleeson CJ para 12.
111 Ibid., para 1.
112 Ibid., McHugh J para 35.
113 Ibid., para 33.
114 Ibid., Hayne J para 241, Callinan J para 298. See also Gleeson CJ para 19. Fletcher notes there continues to be nothing in Australian law to prevention such arbitrary administrative detention: Fletcher, 'Rights Protection in Australia,' 21. See also Triggs, 'Creating a Human Rights Culture,' 67.
115 Hight Court of Australia *Al-Kateb v Godwin* [2004] HCA 37, McHugh J para 74.
116 Ibid., para 63. He went on in para 66 to say: 'this Court has never accepted that the Constitution contains an implication to the effect that it should be construed to conform with the rules of international law.'
117 Ibid., para 68.
118 Ibid., para 48.
119 Ibid., Kirby J dissenting para 193. This is required in some other States, such as South Africa, where section 233 of its Constitution requires legislation to be interpreted in a way friendly to international law: 'When interpreting any legislation, every court must prefer any reasonable interpretations of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with

international law.' De Wet, 'South Africa,' in *International Law and Domestic Legal Systems*, 569.

In fact, many constitutions worldwide have these so called 'interpretation clauses,' which 'foster an interpretation of human rights that is both in conformity with the constitution itself and with the international treaties in force.' See European Commission for Democracy through Law (Venice Commission) Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts (2014) CDL-AD(2014)036, 35.

120 Hight Court of Australia *Al-Kateb v Godwin* [2004] HCA 37, Kirby J dissenting para 173. Justice Kirby has advocated the Bangalore Principles, which hold that common law judges may look to international law when interpreting uncertain domestic provisions. See M. Kirby, 'Domestic Implementation of International Human Rights Norms,' *Australian Journal of Human Rights* 5, no. 2 (1999): 109.

See also M. Kirby, 'Domestic courts and international human rights law: The ongoing judicial conversation' (2009) *Netherlands Quarterly of Human Rights*, 27:2, 291–308.

121 On 8 November 2023, the Australian High Court delivered its unanimous judgment in a case brought by a stateless Rohingya man known as *NZYQ v. Minister for Immigration, Citizenship and Multicultural Affairs & Anor* HCA 37.

122 Williams, 'The High Court,' 5–6.

123 Williams, 'The High Court,' 11.

124 De Jonge, 'Australia,' in *International Law and Domestic Legal Systems*, 54.

125 Geddes and McLachlan, *50 Human Rights Cases*, 3.

126 An example of a regional human rights system in Australia-Asia is the Association of South East Asian Nations (ASEAN), which published its Human Rights Declaration in 2012. Indonesia is a key participant in this system and the ASEAN Intergovernmental Commission on Human Rights.

127 European Commission for Democracy through Law (Venice Commission) Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts (2014) CDL-AD(2014)036, 45.

128 Australian Human Rights Commission, *Position Paper: A Human Rights Act for Australia* (December 2022).

129 S. L. B. Jensen, S. Lagoutte, and S. Lorion, 'The Domestic Institutionalisation of Human Rights: An Introduction,' *Nordic Journal of Human Rights* 37, no. 3 (2019): 170.

3 Philosophical Foundations for Considering Human Rights in Judgements in Indonesia

Widodo Dwi Putro

Introduction

Whether we realize it or not, legal philosophy certainly affects judges' perspectives in examining, weighing and deciding cases. While this is true everywhere, it is perhaps particularly relevant for Indonesia, where judges hold a high level of discretion. This chapter will put forward the author's stance that human rights are supra-positive, and could be considered by courts even if not regulated in national law. It will examine the tension between 'law in the books' and vaguer, more overarching concepts of justice, and discuss how various schools of legal thought have dealt with this tension. I will argue that human rights constitute a synthesis between the demands for legal certainty and identifiable positive law, on the one hand, and more abstract ideas of justice, on the other.

The chapter will discuss courts' role in finding the law, and relate this to legal philosophy. It will go through the various stages of a court case, and address how human rights could be considered through each phase. It will analyse three cases, that are considered 'hard cases,' relevant for human rights.

Human rights as supra-positive

I hold the position that human rights are fundamental; humans have human rights due to their intrinsic dignity as human beings. Being fundamental, human rights are supra-positive,[1] and their existence does not depend on the presence or absence of positive law, nor on the will of any state.[2] Judges are morally bound to consider human rights whenever relevant, even when these rights are not guaranteed by positive law. When humans are stripped, one by one, of their accessories (race, nation, religion, gender, social class and so on), what is left is the essence of humanity. People are human beings not because of their inherent accessories, but because of their human dignity. If human rights are removed, then humans cannot live with dignity as human beings, which means the essence of their humanity is lost.

Human rights are universal, transcending the boundaries of state jurisdiction. They have a supra-positive character and must be considered as an extrasystemic source of the legal system. *Positive* in this context is not in contrast to *negative*. *Positive* comes from the Latin *ponere* (to put), which means 'established by

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agreement.' The term *supra-positive* refers to law that is not made by the legal system (legislators, governments, and so on.); it exists because of the dignity of human beings. It is *super* insofar as it has a higher status compared to positive law. Its higher status sets a standard for the legal system.[3] Laws and regulations can be evaluated against constitutional standards. But to evaluate the constitution and the legal system as a whole, there must be some reference to supra-positive standards—for example, moral standards. Human rights are the relevant moral standards for evaluating the legal system as a whole.[4]

Indonesian scholars generally agree that the constitution ranks highest in the hierarchical system of statutory laws in Indonesia. This perspective has been influenced by Hans Kelsen's thinking about the theory of levels in which higher norms become the source for the formulation of subordinate norms. Kelsen was relatively successful in explaining the existence of a hierarchical system of positive legal norms. The problem only arose when he reached the top of the hierarchical system, which Kelsen named *Grundnorm*. According to Kelsen, *Grundnorm* is 'the presupposition of basic norm that one ought to behave as the constitution prescribes.'[5] Being logical-transcendental, the *Grundnorm* is Kelsen's strategy to ensure that the norm is not based on something that is metajuridical, but on the constitution.[6]

Behind this paradigmatic disagreement lies a basic idea that is very important for judges. Even though a country does not have statutory laws that regulate human rights and has not ratified human rights instruments, judges are still morally bound to consider human rights values and principles in their decisions.[7] In Indonesia, human rights are regulated in the constitution and laws,[8] thus human rights have become positive law. Most international human rights treaties have been ratified.[9] Thus, there is no reason – including for judges who subscribe to the legalist school of thought, which treats the law as identical to statutory laws – not to make human rights a central source of law in weighing and deciding cases.[10]

Human rights among different schools of legal thought

Judges are demanded to seek and find justice. All court decisions in Indonesia begin with 'For Justice in the name of God Almighty,' as if to authorize the judge to find and provide justice. This may seem rhetorical because justice can never be formulated with certainty. No philosopher has ever succeeded in interpreting justice perfectly; no single formulation of the concept of perfect justice exists.[11] Justice is like the horizon: when we approach it, it always turns out to be wider than what we are able to envision. This impermanence and fluidity of the notion of justice is precisely what has attracted philosophers to devote all their thoughts to discovering what justice means, until arriving at a dialectical meaning of justice.[12]

If justice cannot be fully achieved or objectively ascertained, how can courts be expected to draw normative conclusions based on the value of justice? If courts only rely on positive law, and apply positive legal norms to concrete legal facts, they do not need to be creative in finding the ideal law. There is a risk that the judgments may become formalist-minimalist – minimalist, because judges limit the major premise to only positive legal norms, more specifically the statutory system.

This reduction carries a danger because it limits the law to its formal form, hence minimalist, conceptually, temporally, and spatially. Conceptually, a legal formulation reduces the value of justice to mere articles. Temporarily, a legal formulation tends to fall behind the times. Spatially, a legal formulation may be valid, but if it contradicts the society's contemporary sense of justice, it would be perceived as unjust if applied, thus the law may be set aside and remain dormant.[13]

These issues can be seen in light of the philosophical dispute between natural law and legal positivism. The school of natural law is a very old one, and impossible to summarize in one definition. Generally, it holds that *lex naturalis* is universally applicable, and that abstract moral values such as justice and humanity are supreme vis-à-vis positive law. My claim of human rights being supra-positive is in line with this school. The natural law school holds that universal values of justice and humanity are superior to positive law, therefore they should become the main source for judgements. All laws and regulations must be accounted for ethically: if a positive law contradicts moral principles, then the law shall no longer be considered valid as it has undergone legal decay (*lex iniusta non est lex*).[14]

On the other hand, law is based on abstract moral justice, hence its weakness. The school of natural law failed to develop a method that can better provide certainty. Certainty should not be sacrificed for the sake of justice, for if certainty cannot be guaranteed, then justice itself cannot be guaranteed either.

Legal positivism gives more emphasis to the law in its formal form, not its content. Law is a system of norms set by a rightful ruler.[15] The law is obeyed not because its contents are good or bad, but because the law is legitimate. The advantage of legal positivism, which identifies the law with statutory regulations (i. e., law as it is written in the books), is that it can provide legal certainty. At least people will know with some level of certainty what they can and cannot do, and what the legal consequences are if they violate the law. This formalistic position of thought leads to a sharp separation between law and morals. Justice in legal positivism has been reduced to what is in accordance with positive law. The weakness of legal positivism is that rigid application of positive law risks hurting justice. For the most moderate advocates of legal positivism, the first consideration is positive law; the moral principles of justice only occupy a complementary position.

How can the demands for justice and certainty be met? Dialectically, human rights are a synthesis that bridges justice that is too abstract and legal certainty that is too minimalist. Human rights can be thought of as being somewhere between justice and certainty, or as 'certain justice.' Human rights are values and principles that are assumed to be universally applicable, and at the same time constitute positive law. They are broad in scope, but sometimes with very specific implications.

Concerning human rights as part of international legal theory, the writings of the natural law thinker Hugo Grotius, particularly his rational approach,[16] are considered as a forerunner to the idea of universal human rights.[17] John Locke affirmed the idea of natural rights that became the basis for the rights revolution that erupted in England, the United States, and France in the seventeenth and eighteenth centuries.[18] Since then, the idea of human rights developed into an international common standard of aspiration.

When human rights were first introduced into the realm of international law, they initiated a revolutionary change. Whereas previous international laws only recognized the rights of the state, human rights are concerned with the rights of legal subjects living within the border of states, something that was previously considered an internal matter.

Ever since human rights have been ratified into positive law, it is through human rights that the pre-positive moral demands can be realized in positive law. On the one hand, human rights express the basic demands of human dignity as championed by the school of natural law. On the other hand, because these demands for human rights are formulated into positive law as basic norms, other legal norms must not contradict them. At this point, the demands of both the natural law school, which emphasizes the law in its content, and of the legal positivism school, which emphasizes the law in its formal form, are answered.

Of course, human rights have also received attention from, and interacted with many other schools of thought, including utilitarianism, critical legal studies, feminist legal theory, environmentalism, and more.

Schools and methods of discovery of law

Many philosophers have developed theories of rights without reference to international human rights formulations and documents.[19] It could be because they wanted to build a moral vision unencumbered by normative decisions formulated by politicians and diplomats.

The legalism school that favours certainty requires that interpretation does not leave the bounds of legal texts. This can create problems, especially if legislators are incapable of rejuvenating positive law to address new problems in society. The rigidity of legalism led to the emergence of the *Begriffsjurisprudenz* school. According to the *Begriffsjurisprudenz* school, judges need not be 'mouthpieces of the law,' but can draw implied arguments from the law, and make legal discoveries.[20] While softening the rigidity of legalism, the *Begriffsjurisprudenz* school still emphasizes legal certainty. This school relies on logic through syllogism.

The weakness of *Begriffsjurisprudenz* is that it does not see the social realities, thus giving rise to a reaction from the *Interessenjurisprudenz* school which looks at the resultant law from various interests. Judges no longer see the law as a mere *formal legis* but must assess its purpose.[21] This school introduced the method of teleological interpretation.

The antithesis to radical legalism is *Freirechtsbewegung*. The task of courts, according to *Freirechtbewegung*, is not to maintain legal certainty but to find justice. When faced with unjust legal texts, courts should not be 'captives of the law,' but try to construct law to achieve justice or provide benefits to society. Judgements are more dynamic and follow the developments of society. This school is also not without weaknesses, as it is deemed to have failed to develop a method that can provide sufficient legal certainty.

The synthesis of the dissension between the legalism and *Freirechtbewegung* schools gave rise to the *Rechtsvinding* (i.e., literally, 'finding the law') school.

According to this school, the law is not always available and even if it is, it is not always able to provide an appropriate solution. For this reason, there is a need for legal discovery. Paul Scholten distinguishes between two conditions that can initiate the discovery of law. The first situation occurs when positive legal norms exist but are not appropriate. In such conditions, Scholten suggests applying the method of interpretation. The second situation occurs when positive legal norms are not or not yet available.[22] According to Scholten, the method of finding the law should be distinguished from the methodology for considering the 'applicability of law' and 'creation of law.'[23]

Indonesia subscribes to the *Rechtsvinding* school. This is reflected in the Laws on Judicial Power of 1970, 2004 and 2009. The current law states that 'Judges and Constitutional Justices shall be obliged to explore, follow, and understand the legal values and sense of justice that prevail in society.[24]' However, it is hard to generalize around this matter because Indonesia is a very plural society and the paradigms of judges also vary greatly.

A more technical matter concerns how to apply human rights considerations through the various stages of a judgment, as shown by the following table:

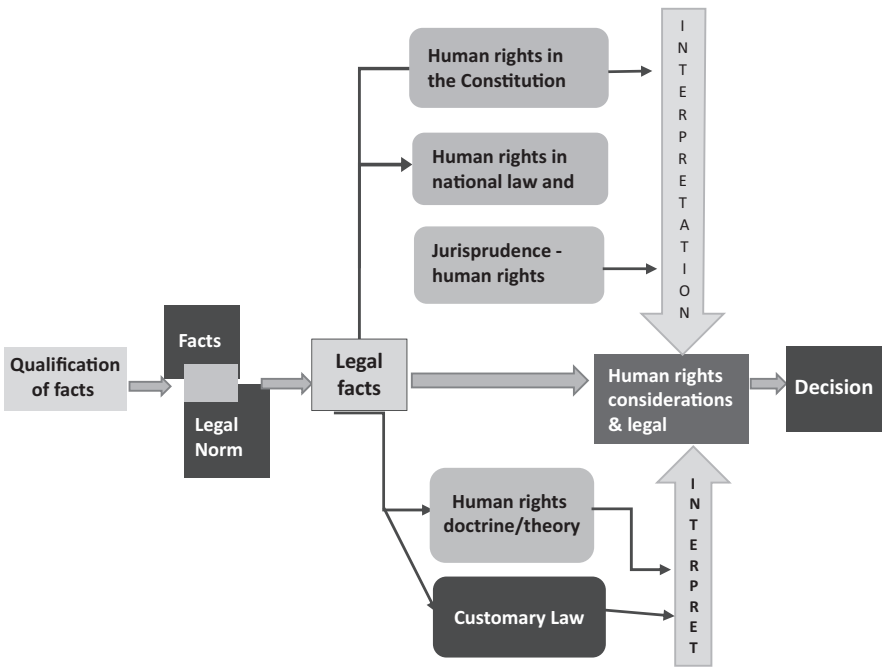

Figure 3.1 Application of human rights values in legal decisions

Fact examination and qualification stage

In legal cases, courts begin by examining the facts. A fact is what has happened – it is *a posteriori*.[25] The parties convey facts supported by evidence. Courts qualify

facts as either legal facts or nonlegal facts. Thus, legal facts are not raw material, but facts that have been interpreted and evaluated by courts, based on law.[26] When courts qualify and select facts, they conduct preliminary research on the facts based on their legal knowledge so they can sort between legal facts and nonlegal facts. Legal facts as a minor premise are not given but have been perceived and qualified by the judge in the context of the relevant legal rules, to be then selected and classified based on legal categories.

Identification phase, analysis of legal sources and human rights standards

The courts then identify the source of the applicable law, which is positioned as the major premise. The judge analyses the source of the law to determine the applicable legal rules and the policies that underlie these rules. Generally, the sources for judges to make legal discoveries are statutory laws, customary law, judgements, and doctrine.[27]

Human rights can be found in the constitution, in national law and in various international instruments, mainly in the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). While the Constitution constitutes the highest written norm, courts should not stop at the constitution because its norms are still general in nature. Courts should synthesize the standards and legal provisions that apply into a coherent structure in which more specific provisions are grouped under the more general ones. In a hierarchical system, the values, principles, norms of human rights law as universal law then become general law.

If human rights conflict with other positive laws, for example in the case of crimes punishable by death penalty, judges must lay out the various relevant norms on the table with human rights law as 'high-priority norms.'[28] The general prescription that applies is that 'the International law of human rights is higher positive law, binding on states that adhere to it regardless of their own constitutions or other laws, and requiring them to conform their laws and their official behaviour to international norm.'[29] Human rights are placed as the priority norm, so that if they conflict with other positive legal norms, human rights should be prioritized.[30]

Legal interpretation and human rights internalization stage

Courts apply a structure of rules that is positioned as a major premise on facts to determine the rights or obligations arising from the facts, using the policy underlying the rules to resolve legal cases.[31] In syllogism, this major premise is presupposed to be self-evident, which means it is *a priori* in nature. Although the truth of the major premise is authoritative in syllogism, courts always have a wide margin for their interpretation of legal norms.

Syllogism is important and necessary in legal reasoning,[32] but its practice is not as simple as matching the major premise with the minor premise and ending by making a conclusion, whether an act fulfils the legal elements or not. It is not that simple. The rule of law which is placed as the major premise always requires

interpretation. That is why, the rule of law always undergoes formation and reformation (by interpretation and reinterpretation).

A norm is not self-explanatory. It requires humans to interpret it. Normative truth waits to be discovered by jurists and other subjects through interpretation. Paul Scholten emphasized that 'The law already exists, but remains to be discovered; in the discovered law there is something new.'[33] This means that every law, even the best formulated law, still requires interpretation. Legal texts are always open to interpretation, even though the text may say that it is self-explanatory.

The challenge for judges is that when human rights values and principles (*lex naturalis*) are formulated in positive law (*lex humana*) with a certain language, they will nonetheless experience reductionism. Language as a means has its own limitations, so it is acknowledged that it can never articulate the values of human rights in their entirety. The human rights that are formulated in the UDHR are general formulations responding to situations preceding them. Human rights as a generalization requires a method of interpretation.[34]

Different interpretation methods complement each other. Each method has its own character, so there are no instructive principles that compel a judge in a concrete case. The judge can quote a formulation contained in the elucidation to the law through authentic interpretation. Judges can understand legal texts according to the use of everyday language by using explanations from linguists, or from technical-juridical meanings that are customary through grammatical interpretation. Courts may use a systematic interpretation method by referring to human rights formulation in various norms within the same legal system or employ comparative interpretation by considering normative provisions from other countries. Courts can also apply historical interpretation by tracing the historical background of the law and the history of its formulation. It is also possible for courts to use teleological interpretations by exploring and seeking the intentions behinds laws. Courts have the possibility of creating a new norm through the construction method.[35]

Both interpretation and legal construction can also be traced back to their origins in legal sources that are in the realm of a judge's knowledge. Authentic, grammatical, historical and systematic interpretations, for example, draw their source from statutory laws.

In particular hard cases, the norms are sometimes not fully available and/or always ready to use but must be reformulated by judges. When there is a void in legislation, legal sources of broad character need to be applied. Human rights can be internalized in judgments, while constitutional principles and supremacy of law remain intact.[36] Ronald Dworkin sees hard cases as a special laboratory.[37] For Dworkin, hard cases are very significant as they test fundamental principles. Breakthroughs in judgements are important because not all complex and difficult legal cases can be answered directly in the available positive law.[38] The subjectivity of the legal breakthroughs and interpretations, according to Arief Sidharta, would be reduced to the minimum because the interpretation must always refer to legal ideals (justice, legal certainty, predictability, utility), fundamental human values, and the applicable legal system.[39]

Decision stage: legal arguments' 'heart of decision'

In court practice, everyone is free to express and defend their views. Legal argumentation constitutes the heart of a judgement, as the judgment follows logically from the legal argument. A judge is required to make clear legal arguments because justice seekers have the right to be informed of why they are convicted or acquitted – entitled or otherwise.

Special Laboratory: Human Rights Considerations in Judges' Decisions

The following section presents an illustrative selection of hard cases to show how courts take human rights principles and norms into consideration in their decisions. The judgements are diverse, and cover criminal, civil and administrative cases, both at the lower level and on cassation.

The Usmani defamation case: on the right to exercise social control

The right to freedom of expression is guaranteed in various laws and regulations, including the constitution and ICCPR (see chapter 5 on constitutional law for more details). However, there are also laws in force that conflict with this right, particularly those concerning defamation offenses. These provisions are problematic, both in how they are stipulated, and in how they are applied.

In the Usmani defamation case,[40] a farmer named Usmani complained to the police about a person selling fake pesticides to farmers. Although the police launched an investigation, the case was later terminated without any official reason. The farmer had seen the defendant meet with the head of the Criminal Investigation Unit of Aceh Tamiang Resort Police (Irwan MY) in his office. It was known that the defendant had given money as a fee for the revocation cost of the pretrial case. However, the revocation of the pretrial case was supposedly free of charge. The farmer therefore believed that bribery had caused the police to drop the case. Therefore, he sent a letter of complaint to the chief of police of Aceh and a copy of the complaint to the chief of Indonesian National Police. This resulted in the head of the Criminal Investigation Unit of Aceh Tamiang Police Station being rotated to a different position. He then reported the farmer for defamation under Article 311 paragraph (1) of the Indonesian Criminal Code.

The defendant, Mr. Usmani, was not assisted by a lawyer. However, through a split decision, the court acquitted the defendant, stating that the elements of the charged offense were not legally and convincingly proven.

The judgement acknowledged that the defendant's reason for his actions was to seek justice in a legal process. The court claimed that the public has a right to exercise social control, and the exercise of this right cannot be criminalized:

> the efforts of the defendant [was] to seek justice for the law and justice for the small community, so that social control of the community is manifested, in order to create a police force [that functions] as public servants, and to create social justice.[41]

Consequently, the element of 'defamation' was not fulfilled. The court ordered for rehabilitation and remedies to be provided to the defendant.[42]

In this case, the court made a legal discovery, finding a right that is not mentioned in any statutory law or jurisprudence (i.e., the right to social control). The court did not explain its reasoning in enough depth for us to attribute this legal discovery to any particular theory, school of thought, or overarching norm. Possibly, the judgement could have been based on society's sense of justice, in line with the Law on Judicial Powers. The right to social control could also possibly be seen as a right contained within the freedom of expression, or even be considered to constitute a supra-positive human right in itself. A combination of these is also possible.

The case on Agus Widoyo's sex transition, and the relationship between law and morality

This case is an example of discord between the guarantee of a human right as formulated in the law and the prevailing attitudes in society, which considers the protected right to be immoral. In such situations, the judges do not to identify social morals by, for example, counting votes or running a poll. Instead, they should engage in philosophical reasoning.

In this regard, judges can be inspired by the debate between Patrick Devlin and H. L. A. Hart about the relationship between law and morals. While Devlin considers the law to be a suitable tool to enforce morality, Hart disagrees. According to Devlin, the immorality of an act can be determined by a reasonable person. To attain that, the concept of public morality can be made into law, as the state has the authority to guard against moral decay.[43]

Hart responds to Devlin by demonstrating how his opinion can be classified as supporting positive morality. Hart prefers critical morality over positive morality.[44] According to Hart, there is a danger of defending the prejudices of society or the interests of the ruling majority in the name of morality if we are not critical.[45]

The debate between the two philosophers helps in questioning the established general truth claims. For example, can actions that are contrary to public morality threaten the existence of society itself? Would granting rights lead to endangering public morality?

Conservatives argue that if a judgement grants, for example, sex change, more and more people will openly do the same. If one refers to Hart's argument above, then the conservative argument can be rejected, because even if gender-affirming surgery takes place, it would not be by coercion, and thus no one is endangered or harmed by the decision.[46]

In Indonesia, cases that have a dimension of legal and moral relationship—in this context, cases of sex change—are still controversial.[47] Sex reassignment became a legal issue when developments in medical sciences made gender transition possible. In Indonesia, there is no positive law that regulates this matter.

Agus Widoyo, the fourth child of Witem and Sugyanto, was assigned a male gender at birth, but did not exhibit a masculine character. Upon entering puberty, this tendency became more apparent. Agus changed their name to Nadia Ilmira

Arkadea, or Dea for short, and decided to undergo genital surgery. For Dea, surgery became a way to 'perfect' herself as a woman. After the operation, Dea applied to the Batang District Court, and this application for sex reassignment invited a reaction. Some opined in mass media that the Court should reject Dea's request because there is no law that regulates it, and that it is against the morals of society.[48]

Judgements not only address the status quo but also anticipate possible events that may occur in the future. For cases or events that clearly fall under the application of a positive legal rule, only knowledge of the applicable laws is required. However, the situation will be fundamentally different if a court is faced with a concrete case for which there is no clear legal rule that can be applied. In the Dea case, the court was of the opinion that there is a need in society that is not regulated by law, thus creating a legal vacuum (i.e., a void in laws and regulations). According to the court, a legal vacuum is natural because the law (i.e., statutory laws) always lags behind the needs of society.[49] Furthermore, the court stated that in cases where there is such a legal vacuum, the court may not refuse to examine, hear, and decide on a case submitted on the pretext that the law does not exist or is unclear. Rather, it is obliged to examine and adjudicate.[50]

If the judge does not find the formal law, the solution according to Law No. 48 of 2009 concerning judicial power is that the judge must explore, follow, and understand the legal values and sense of justice that prevail in society. A challenge in handling the case on Agus Widoyo's sex transition is that gender transition is still not fully accepted or even contradicts the values of the majority.[51] Thus, it is a hard case, even if the applicant does not face an opposing party in court, because it confronts the dominant view in society.

After hearing the testimonies of witnesses (including medical expert witnesses), the court held that it is not easy to perform genital surgery like the one undergone by the applicant. Not all men who display traits traditionally associated with femininity can undergo gender-affirming surgery as the applicant did. Thus, the concern that many men who display these traits would now easily undergo a gender-affirming surgery is unfounded because there are strict medical procedures and examinations by a medical team who work under oath, adhere to professional ethics, and follow medical standards.

As legal basis for the decision, the court referred to the constitutional stipulation that recognition as a person before the law is a human right that cannot be reduced.[52] This provision is, according to the court, further regulated in the 1999 Human Rights Law which states that everyone has the right to his or her integrity, both physical and spiritual, and everyone has the right to legal recognition to actualize themselves according to their personal circumstances.[53]

After establishing a legal basis, the court again sought to consider public opinion. In its consideration, the court tried to record the different and conflicting views held in society regarding sex change, as follows:

> considering that the progress of culture and the open views of some people today have accepted the existence of transsexual groups such as the applicant,

> as is proven that there are many transsexual groups who can excel in many fields and are recognized for their success by society.[54]

While on the other hand, 'considering, that it is undeniable that others in society consider sex change as done by the applicant is something that goes against nature. . . .'[55]

At this dilemmatic point, a court is required to be able to sensibly link law and human rights with morality, and to be astute in envisioning future legal needs (visionary). The court argued in its decision:

> differences of opinion in society are natural and understandable considering the heterogeneity of society which also causes the values held in society to be heterogeneous. However, these opinions shall not be the reason for the State not to recognize the rights of its citizens which are guaranteed by the highest law of the State, namely the 1945 Constitution. . . .
>
> [the court] . . . orders the Head of Bandar Village and Head of Sub-District of Bandar Batang Regency to record the change in gender and name of the applicant. . . .'[56]

This judgement is unusually progressive, in a case in which there was no available law regulating the matter in detail. While the community's sense of justice could admittedly not be used to justify the outcome, the court based its decision on constitutionally guaranteed human rights.

The Jakarta air pollution case

In this citizens' lawsuit, the petitioners claimed that air pollution in Jakarta undermined 'the right to a good and healthy environment' (*hak atas lingkungan hidup yang baik dan sehat*), which is recognized as a human right in the Constitution and in the 1999 Human Rights Law.[57] The defendants were the president and the ministers of Environment and Forestry, Home Affairs, and Health, as well as the governors of Jakarta, Banten, and West Java. Each of these were, in different ways, accused of failing to protect and fulfil the right to a healthy environment.[58] Much of the emphasis was on the lack of monitoring mechanisms, lack of effective actions or strategies to improve air quality, lack of action taken towards polluters, and the failure to develop the legal framework to deal with air pollution.

The petitioners cited data that showed that the levels of fine particulate matter and ozone had consistently exceeded air quality standards over the previous three to seven years. The petitioners also presented data showing there were 5,387,694 cases of illnesses related to air pollution in 2010, which increased to 6,153,634 cases in 2016. As a result, residents of Jakarta had to bear the cost of IDR 38.5 trillion in 2010 and IDR 51.2 trillion in 2016 for the treatment of diseases caused by air pollution.[59] The petitioners presented three victims bearing testimony on how they suffered from the bad air quality, as well as several expert witnesses, including an expert witness from the National Human Rights Commission. She

argued that the formulation 'the right to a good and healthy environment' found in Indonesian law, with separate emphasis on *good* and *healthy*, was intended to cover both health and environmental aspects. Further, she claimed that providing information was part of the procedural obligations related to the right to a healthy environment. She further stated that air pollution in Jakarta Province constituted a violation of the right to life, the right to a healthy environment, the right to health, and the rights of children as guaranteed in the constitution and various laws related to human rights, child protection, and the environment.

The defendants claimed the petition was procedurally flawed. Concerning substance, they pointed to various policies and initiatives under development intended to deal with the issue of air pollution.

An Amicus Curiae brief was submitted by David Richard Boyd, the UN Special Rapporteur on Human Rights and the Environment. According to Boyd, the poor air quality has implications for various rights, including the right to life, health, food, housing, children's rights, and the right to a healthy environment.

The court granted the petitioners' claim in part. It found that the bad air quality in Jakarta had caused harm to the residents of Jakarta's right to a healthy environment. It ruled that the president, all the ministers, and the Jakarta governor had violated the law by taking insufficient action. Each received a different verdict from the Court. It ordered policy change, improved monitoring and supervision. The court explicitly stated that they considered the Amicus Brief submitted by Boyd.

Conclusion

Human rights are supra-positive (i.e., their existence does not depend on the presence or absence of positive law, or the will of the state). Judges are morally bound to consider human rights values and principles in their decisions, even in the absence of positive law. Human rights are supra-positive because they are of a higher degree than positive law.

Indonesian judges need to master legal sources, including various human rights norms that have been ratified as well as those that have not been ratified. The more legal sources a judge masters, the wider their horizon of consideration in legal arguments. Judges who understand legal theories are also likely to provide viable legal arguments, augmenting so the quality of their legal considerations. In cases that intersect with human rights, but are not clearly regulated by positive law, a judge's challenge lies in dealing with questions which legal texts have not critically answered. It is at that point that courts should start to philosophize by exploring and discovering the values and principles of human rights in the meta-juridical realm of the given society.

The fact that several court decisions reflect human rights considerations is an interesting development, even though it is not yet mainstream practice. Despite some shortcomings, in terms of quality, several decisions deserve appreciation and are worthy of being imitated by Indonesian courts, such as those discussed in this chapter. This is intimately linked with the courts' efforts to internalize various human rights principles and norms as a basis for consideration in their decisions.

These judgements illustrate how the judges in their legal arguments simultaneously consider universally applicable human rights principles along with the rule of law that applies in Indonesia, principles that do not need to negate each other. It also shows that the internalization of human rights can extend to criminal, civil, and state administrative cases.

Notes

1 See T. C. van Boven, 'Distinguishing Criteria of Human Rights,' in *The International Dimensions of Human Rights*, ed. K. Vasak and P.Alston (Unesco, 1982), 43.
2 See S. R. S. Bed, *The Development of Human Rights Law by Judges of The International Court of Justice* (Hart Publishing, 2007), 364.
3 See P. Tiedemann, *Philosophical Foundation of Human Rights* (Springer, 2020), 12.
4 Tiedemann, *Philosophical Foundation*, 13.
5 '*Man soll sich so verhalten, wie die Verfassung vorschreibt*'
6 See H. Kelsen, *The Pure Theory of Law* (University of California Press, 1976), 202. See B. A. Sidharta, 'Stufentheorie from Hans Kelsen,' (unpublished, n.d.), 1.
7 One of the arguments that justifies how human rights are binding to states is the consequence of its normative nature of universality and solidarity. Ragazzi states: 'The first one is universality, in the sense that obligations erga omnes are binding on all States without exception. The second one is solidarity, in the sense that every State is deemed to have a legal interest in their protection.' See M. Ragazzi, *The Concept of International Obligation Erga Omnes* (Clarendon Press, 1997) 17.
8 Human rights are the development of awareness of human rationality in which the Universal Declaration of Human Rights (1948), with all its derivative covenants, is one of the important pillars of human civilization and also of nations regarding the meaning of justice. In 2005, the Government of Indonesia ratified the ICCPR (1966) which was adopted in Law No. 12 of 2005, and ICESCR (1966) which was ratified in Law No. 11 of 2005. In each of the covenant ratifications, the Government of Indonesia did not make any reservation except regarding the right to self-determination (Article 1). With the ratification of the two Covenants, Indonesia is bound as a State Party to the Human Rights Treaty and must comply to implement the contents of the two Covenants and submit periodic reports to the United Nations Human Rights Treaty Body.
9 The only core treaty that has not been ratified is the International Convention for the Protection of All Persons from Enforced Disappearance, which has been signed by Indonesia but not yet ratified (as per April 2023).
10 The Legalist School treats the law as identical to statutory laws. The perspective of legalism is similar to that of legal positivism, with some differences. For example, if legalism identifies the law only with statutory laws, legal positivism still accepts customary law as a 'second' source of law after statutory laws. If mapped, legalism is the most conservative strand of the classic legal positivism variant.
    See, N. E. Algra and K. Van Duyvendijk, *Rechtanvaang* (Binacipta, 1983), 139.
11 See K. Lebacqz, *Teori-Teori Keadilan* (Nusa Media, 2011). Also see H. P. Olsen and S. Toddington, *Architectures Of Justice Legal Theory And The Idea Of Institutional Design* (Ashgate Publishing Limited, 2007).
12 Dialectics is a method of reasoning that consists of a series of negations. The negation consists of thesis – antithesis – synthesis. The thesis is the initial statement. This statement is then negated by the opposing view, called the antithesis. The antithesis (as the result of the first negation) is then negated again to produce a synthesis. This synthesis then becomes a new thesis, which in turn is refuted by another antithesis, and so on. Therefore, synthesis or truth, according to Hegel, is a negation of the negation.

On dialectics, see G. W. F. Hegel, *The Science of Logic* (*Wissenschaft der Logik*) (Cambridge University Press, 2010), 76–100.

See also, F. K. Sitorus, 'Absolute Idealism G. W. F. Hegel: The Whole Universe Is a Self-Manifestation of the Spirit,' *Course Paper of the Indonesian Legal Philosophy Association at the Faculty of Law* (University of Mataram, 2019), 15–16.

13 William Chambliss calls the law that applies but is set aside or put to sleep with the term 'statutory dormancy.' See W. Chambliss, 'Law and Society' in *Sociological Readings in the Conflict Perspective* (Addison-Wesley Publishing Company, 1973), 434–435.

14 See N. Kertzmann, 'Lex Iniusta Non Est Lex: Laws on Trial in Aquinas' Court of Conscience,' *American Journal of Jurisprudence* 33, no. 1 (1988): 99–122.

15 See J. Austin, *The Province of Jurisprudence Determined* (Cambridge University Press, 1995), 1–22.

16 Hugo De Groot continued and developed natural law thinking by breaking its theistic origins and making it secular.

17 See T. Buerenthal, 'International Human Rights in a Historical Perspective,' in *Human Rights: Standard and Concepts*, ed. J. Symonides (Aldershot and Unesco Publishing, 2001), 6.

18 See J. Locke, *Second Treatise of Government* (The Project Gutenberg Ebook, 2010).

19 See J. J. Thomson, *The Realm of Rights* (Harvard University Press, 1990).

20 See S. Mertokusumo, *Penemuan Hukum Sebuah Pengantar* (Maha Karya Pustaka, 2020), 116–117.

21 Mertokusumo, *Penemuan Hukum Sebuah Pengantar,* 118–119.

22 See Shidarta, 'In Search of Scholten's Legacy, The Meaning of the Method of Rechtsvinding for the Current Indonesian Legal Discourse,' *DPSP Annual Volume 1* (2020): 199.

23 Shidarta, 'In Search of Scholten's Legacy.

24 Article 5 of Law No. 48 of 2009.

25 Fact comes from the Latin *facere* which means 'to make' or 'to do something' – in modern discourse, taking into account the origin of the word, it can be interpreted as 'all the results of actions or man-made.' In contrast to the term phenomena, derived from the Greek word *phainomenas* (rooted in the word *phanein*: to appear), which is often used for objects that are still outside the realm of human consciousness. Phenomena are still of 'objective' value while facts have 'subjective' value as they have been interpreted by the human. Phenomena can only become human consciousness when they have been reduced to a parameter that is defined as fact.

See S. Wigjoesoebroto, 'Fenomena Cq Realitas Sosial sebagai Objek Kajian' *(Sains) Sosial* (2001): 1–2.

26 See B. A. Sidharta, *Struktur Ilmu Hukum Indonesia* (Parahyangan Catholic University Faculty of Law, 2008), 21.

27 Mertokusumo, *Penemuan Hukum Sebuah Pengantar,* 101.

28 See J. W. Nickel, *Making Sense of Human Rights* (Georgetown University Press, 2004), 11.

29 See L. Henkin, *The Rights of Man Today* (Center for the Study of Human Rights, Columbia University, New York 1988) 22.

30 To broaden the horizon, it is necessary to provide reading materials such as jurisprudence, reference books (theories), as well as treaties and ratification of human rights covenants, which are important considerations in legal reasoning. The more legal sources a judge is proficient in, the wider the horizon of consideration in his legal argument.

31 K. J. Vandevelde, *Thinking Like A Lawyer: An Introduction to Legal Reasoning* (Colorado: Westview Press, 1996), 1–2.

32 Syllogism (the so-called Aristotelian logic) is not the only system of logic. There are many other logic systems that have developed particularly since the 19th century to the present, such as classical logic, paradoxical logic, intuitionistic logic, modal logic, free logic, and plural value logic.

See M. Suryajaya, *Principia Logica*(Penerbit Gang Kabel, 2022). A diverse and inclusive understanding of logic systems is needed especially when judges face 'hard cases.'

33 '*Het recht is er, doch het moet gevonden worden; in de Vondst zit het nieuwe*' in P. Scholten, *Mr.C. Asser's Handleiding tot de Beoefening van het Nederlands Burgerlijk Recht: Algemeen Deel* (Zwolle, W.E.J. Tjeenk Willink, 1974), 12. Cited by Shidarta, 'Penalaran Hukum dan Penemuan Kebenaran' in *Menemukan Kebenaran Hukum dalam Era Post-Truth* (Sanabil & Metayuridika Fakultas Hukum Universitas Mataram, 2020).

34 Although a judge's interpretation is inevitably influenced by their educational background, gender, ideology, age, sexual orientation, background, family and social class, it is not purely subjective because a judge's horizon is also bound by the legal text. Uniquely, text is not purely objective either, because text also tends to be ambiguous and contains a plurality of meanings. When faced with a text, a judge must understand, interpret, converse or dialogue with the legal text. Likewise, in trial, it is not only the judge and the text, but also the parties who have a dialogue and have an interest in the case. Truth according to law is an intersubjective truth (a middle ground in between objective and subjective truth). The truth of the law is not total objectivism (apart from the relationship with the subject) or total subjectivism (apart from the relationship with the object), but the truth that is built from the relationship between the subject and the subject (between subjects with one another). Juridical truth is constructed from the legal arguments of the subjects (intersubjective).

35 Concerning the interpretation and construction of lawsee S. Mertokusumo, *Penemuan Hukum Sebuah Pengantar*. See also Shidarta, *Hukum Penalaran dan Penalaran Hukum* (Genta Publishing, 2013).

36 See I. McLeod, *Legal Method* (Palgrave Macmillan Law Masters,2013), 99, 100, 304.

37 Each case (both 'hard cases' and 'clear cases') is essentially unique and therefore requires a new legal interpretation, or in other words, there are never two completely similar cases. Facing this complicated case, it is not enough for judges to simply copy the articles in the laws and regulations, but they must carry out interpretation and reinterpretation (reinterpretation of the law).

38 See R. Dworkin, *Taking Rights Seriously* (Universal Law Publishing, 1977), 81–130.

39 B. A. Sidharta, *Ilmu Hukum Indonesia* (Universitas Parahyangan Faculty of Law, 2010), 30.

40 Decision No. 288/Pid.B/2010/PN.Ksp by Kualasimpang District Court.

41 Ibid, 25.

42 Based on Article 97 (1) of Law No/1981 on Criminal Procedure and Article 14 (1) of Government Regulation No. 27 of 1983 concerning the Implementation of the Criminal Procedure Code (p. 36) of the court's decision.

43 For more, read Devlin's view in his book entitled *The Enforcement of Morals* (Oxford University Press, 1993).

44 H. L. A. Hart, *Law, Liberty, and Morality* (Vintage Books, 1966), 20.

45 Petrus C. K. L. Bello, *Hukum & Moralitas Tinjauan Filsafat Hukum* (Penerbit Erlangga, 2021), 96.

46 Hart, *Law, Liberty, and Morality*, 21.

47 Previously, there was a similar case, namely the application of Iwan Rubianto who asked the court to authorize or stipulate a sex change as well as set his name to Vivian Rubianti in 1973. See Erman Rajagukguk, *Philosophy of Law* (University of Indonesia, 2017), 60.

48 *MUI desak KY Periksa Hakim Perkara Ganti Kelamin*, See: https://news.okezone.com/read/2009/12/24/340/287866/mui-desak-ky-periksa-hakim-perkara-ganti-kelamin. Accessed 11 December 2021.

49 Decision No. 19/Pdt.P/2009/PN.Btg., 17.

50 In his consideration, the judge quoted Article 16 of Law no. 4 of 2004 which mandates that courts through judges, as the last pillar to find justice for the public, must answer the society's needs by finding the law if there is no legal arrangement for the case at

hand, so long as it does not conflict with existing laws, propriety and decency (Decision No. 19/Pdt.P/2009/PN.Btg., 17).

51 Judge Widyatinsri Kuncoro Yaakti claimed: 'The sex change case has indeed attracted public attention. This case is not the first, but indeed rare. The MUI issued a haram fatwa and condemned sex change. But some people allow it, so there are differences of opinion. As a judge, I only see that sex change cases are related to population administration, not allowing someone to change sex but legitimizing sex change so that their human rights as citizens are recognized and protected by the constitution.' Quoted in W. D. Putro, *Kritik Terhadap Positivise Hukum* (Genta Publishing, 2011), 219.

52 Article 28 I number (1) of the Constitution.

53 Article 21 and Article 29 of Law No. 39 of 1999 concerning Human Rights (referred to on p. 21 of Decision No. 19/Pdt.P/2009/PN.Btg).

54 Decision No. 19/Pdt.P/2009/PN.Btg., Op.Cit, 17.

55 Ibid.

56 Ibid.

57 Decision of the Jakarta District Court No. 374/Pdt.G/Lh/2019/Pn Jkt.Pst, page. 35–36.

58 Ibid., 3–5.

59 Decision 374/Pdt.G/Lh/2019/Pn Jkt.Pst, 35–36.

4 Institutionalization of Human Rights Standards in Indonesia

Eko Riyadi

Introduction

This chapter will discuss the framework for human rights implementation in Indonesia. It will address law, institutional architecture and practice pertaining to human rights. It will give particular attention to how state institutions outside the courts contribute to the interpretation of human rights. The chapter also discusses court practice; however, court practice is covered in more depth in the chapter 6 on constitutional law, chapter 7 on criminal law and chapter 8 on private law.

At the domestic level, human rights principles and norms have been adopted in various ways, including incorporation into the constitution, enactment into domestic law, in the formulation and harmonization of laws and regulations, by court decisions, and by the actions of various organizations that play a role in assuring the respect for human rights, such as ombudsmen, national law commissions, and government departments.[1]

More than a decade after a human rights chapter was incorporated into the constitution, public resistance to human rights is still relatively strong. There are at least two possible explanations for this resistance. Firstly, human rights are understood as part of the religious domain. Human rights violations are often interpreted as acts that violate human dignity, which is bestowed by God. Human rights are positioned and understood as moral rights rather than legal norms. Secondly, human rights are associated with intercommunity relations such as that of between two citizens.[2] These two approaches have serious implications because they omit one key element of the human rights discourse – namely, the responsibility of the state towards its citizens (and other rightholders). Human rights law does not focus on intercommunity relations, but rather on the duties and conduct of the state.

In the second decade of the democratic reform era, stakeholders' perspectives on human rights have begun to change. Judicial institutions, including courts, prosecutors, police, and correctional facilities, have started to incorporate human rights principles into the way they are functioning. Courts are among the state institutions that have tried to incorporate human rights principles and norms into their institutional work, both through their public services and through court decisions. A study conducted by the Center for Human Rights Studies at the Islamic University of Indonesia (Pusham UII) found that human rights have

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progressed slowly with regard to how judges apply human rights in deciding cases before the courts.[3] The study analysed 119 cases from the Constitutional Court, the Administrative Court, the District Courts, and the Religious Courts. The analysis was based on eight categories of rights – namely, the right to life, political rights, the freedom of religion and belief, the freedom of expression, the right to a healthy environment, the right to work and the right to property ownership. Fifty-eight court decisions referred to human rights, out of which twenty-eight came from the Constitutional Court. The cases examined were chosen due to their assumed relevance, some of them having received considerable media attention. This means the cases were not necessarily representative of general court practices. The findings from the study may have masked many courts' failure to consider human rights in relevant cases. Nevertheless, the study shows, beyond any doubt, that various courts have considered human rights in a significant number of cases. This alone is important, even though the study also found that the considerations made were often mediocre.

Domestic authorities are responsible for implementing human rights standards as established by various international treaties. This is called the responsibility of compliance. This responsibility is borne by domestic actors – namely, the government (executive), the members of parliament (legislators), and the judiciaries.[4] Only by understanding a country's domestic compliance, both through legislation and judicial enforcement, can an understanding on how and when international law protects human rights effectively be developed.[5] Compliance with international human rights law is generally incentivized in two ways. Firstly, compliance is a fundamental and inherent domestic political process. It depends on the relationship between domestic political actors and their motivations, capacities, and institutional strengths. Secondly, court decisions and recommendations can be a driving force for executive policy changes. Such changes may increase human rights protection.[6]

Judges may use their personal authority to incorporate international human rights law into their judgements. Courts have the authority to order the state to apologize to victims, provide remedies, hold perpetrators accountable, and impose sanctions. Moreover, courts are invested with the power to ask the government to amend prevailing laws that are against the spirit of human rights law. By integrating references to human rights treaties into court decisions, courts can lean on international law when deciding cases.[7]

Many states including Indonesia have adopted human rights as constitutional rights. Vicky C. Jackson has encouraged this practice, known as the generic constitutional theory, developed by David S. Law.[8] After World War II, international human rights law was adopted into the constitutions of many countries around the world. David S Law described this as generic constitutional rights, the basis of his generic constitutional theory, the incorporation of which has become widely accepted over the years.[9] Where in 1946 no generic rights were found in 90% of the constitutions worldwide, by 2006 nine categories of rights were found in all constitutions around the world. David S. Law states that when authorities overlap, generic doctrines work in court because they present both simplicity and reduce

the risk of conflict between the courts and the legal system.[10] Vicki C. Jackson and Mark Tushnet use the phrase 'upward-and-downward flow' between national and international law, which are interrelated recursively[11] on certain rights.[12]

Human rights law in Indonesia: between monism and dualism

The development of human rights law in Indonesia has clearly been influenced by international law. Indonesia has ratified all the United Nations (UN) core human rights treaties, except the Convention for the Protection of All Persons from Enforced Disappearance, which is signed but not ratified. In this regard, one key question is whether international human rights treaties can be applied directly by Indonesian courts.

Sefriani explains that monism is a school which states that national law stems from international law.[13] International law has a higher status than national law. According to Agusman, under monism the rules of international law apply within a national law's jurisdiction without going through a transformation process. In other words, international law will apply in national jurisdictions without losing its character as international law.[14]

The dualism school perceives international law and national law as two very different systems. This difference can be seen by three aspects, namely: (1) the subject of international law is the state, whereas the subject of national law is the individual; (2) the source of international law is the common will of states, while the source of national law is the will of one state; and (3) national law has more impeccable integrity than international law.[15] Agusman adds that this model requires a transformation that converts international law principles into national law. Thus, the international law principles will become a product of national law and prevail as national law, subject to their inclusion into the order of national legislation.[16] The concepts of monism and dualism has been discussed in further detail in chapter 2.

Comparing country reports from 25 different states submitted before the XVIIIth Congress of the International Academy of Comparative Law, Shelton finds that all the examined constitutions, except one (Japan), have defined the domestic legal status of a treaty.[17] This could lead to us to conclude that not defining the position of treaties is rather uncommon. However, given the selection of states in the study referred to by Shelton it would be too hasty to draw such a conclusion.[18] Agusman, on the contrary, argues that for former colonies that have adopted a civil law system, the status of international treatises under domestic law commonly remains undetermined.[19]

In Indonesia, there is debate on whether Indonesia adheres to monism or dualism. There is no unequivocal answer to this question because the characteristics of both schools can be found in practice in Indonesia. Normatively, from the perspective of international law, Indonesia is bound by the provisions of Article 26 of the Vienna Convention (1969), which conveys that states that have ratified international treaties are obligated to implement them in good faith (because of the *pacta sunt servanda* principle). States shall not avoid implementing international treaties with the excuse that the provisions are against their national law.

Article 11 of the constitution states that the president has the authority to ratify international treaties with the approval of the House of Representatives. This is further regulated by Law Number 24 of 2000 on International Treaties. In these two laws and regulations, there are no normative provisions regarding which schools are applied in Indonesia, or whether international treaties can be directly enforced or not.

According to Agusman, Indonesia tended to be hostile towards international law at the beginning of its independence.[20] During the New Order era, Indonesia did not completely reject international law, but used it selectively. Strategic considerations and national security were the benchmarks. If complying with international law would disrupt security and political stability, then Indonesia would choose not to comply. In the democratic reform era, serious efforts were made to bind Indonesia at the international level by ensuring that international treaties are ratified and made effective in the national legal system. Unfortunately, the Indonesian legal system has not been adequately prepared to apply it.

Further analysis has been developed by Simon Butt. Engulfed in uncertainty, the dominant view is that Indonesia may be formally monist. Several treaties appear to be applied automatically and are often used in interpreting cases in the Constitutional Court. However, in practice the Supreme Court tends to apply the dualist concept. The Supreme Court uses international law only to fill gaps in Indonesian law, and not to set aside national law. The dualist paradigm is also evident in how government officials do not implement international law before it is transformed into Indonesian law. In practice, Indonesia does not implement a treaty until it is promulgated into a national law.[21]

Agusman and Butt's conclusions are based, among other things, on how international treaties are implemented by the judiciary in Indonesia.

With regards to human rights specifically, there is a clear legal basis for claiming that international human rights law applies in Indonesia. Article 7 of the 1999 Human Rights Law stipulates that '…human rights provisions accepted (*diterima*) by Indonesia becomes Indonesian law (*hukum Indonesia*).'[22] Under Indonesia's reporting to the Human Rights Committee on the implementation of the International Covenant on Civil and Political Rights (ICCPR) in 2013, Indonesia was requested to clarify whether the covenant was directly applicable before Indonesian courts. To this, the Indonesian government responded in the affirmative, stating that:

> In this regard, provisions contained within the Covenant, in principle, can be directly invoked or referred to by judges. However, the direct use of the provisions from the Covenant is not yet a common practice. In most cases, provisions in the Covenant on criminalizing certain acts need to be elaborated in domestic law. It is mainly to do with the principle of legality applied in the country's criminal law.[23]

At the time, this stance (i.e., the covenant could be directly applied) was seen as quite controversial.[24]

Courts and the Constitutional Court often refer to and even textually cite the articles in human rights treaties without providing comments and considerations about whether they are directly applicable. Various decisions illustrate this. For example, in the *Papua Internet* case[25] (which is discussed in chapter 5), the court ruled that the government's policy to throttle or block internet access in the provinces of Papua and West Papua constituted an illegitimate limitation on the right to information. The Court then referred to Article 28J (2) of the 1945 Constitution, as well as to Article 19 (3) of the ICCPR.

The Constitutional Court has referred to international human rights on several occasions. It developed a practice of referring directly to international treaties early on after its establishment. For example, in a case reviewing the constitutionality of the death penalty, the court referred directly to Article 6 (2) of the ICCPR to justify declaring the death penalty constitutional.[26] In this case, the court did not give due regard to the fact that the covenant had been supplemented with the Second Optional Protocol, which called on States parties to abolish the death penalty. Although Indonesia has not ratified this Optional Protocol, the spirit of international human rights law is for the abolition of the death penalty. Referring to the covenant without paying attention to the Second Optional Protocol does not make for a good argument.

Another example concerns the retroactivity of laws. The former governor of East Timor had been sentenced on charges of crimes against humanity, with command responsibility for murder and persecution conducted by his subordinates and militias. East Timor was treated by the Indonesian state as an Indonesian province during the time of his tenure as governor. He challenged the constitutionality of the law applied, which clearly allowed for retroactive application.[27] The court ruled that the law was in line with the constitution and used international human rights instruments to justify this stance. It cited Article 29 (2) of the Universal Declaration of Human Rights (concerning limitations), linking it with the limitation article in the constitution to justify that the right not to be prosecuted by retroactive legal provisions can be limited. The court also cited Article 4 (1) of the ICCPR, saying that the state is allowed to take measures in an emergency that threatens the life of the nation to soften (*melunakkan*) its international obligations in the field of human rights. In my opinion, the court made at least two erroneous arguments related to at least two aspects. Firstly, the limitation clause in the universal declaration may only be applicable if determined by the law. The state, when making limitations on human rights, is burdened with proving that these limitations are necessary in order to protect the public interest in a democratic society. The limitation clause should not be used to limit nonderogable rights, which include freedom from the application of retroactive laws. Secondly, the court erred when referring to Article 4 (1) of ICCPR as a justification for retroactive application of a law. This article stipulates that during emergency situations that threaten the life of the nation, the state may set aside or delay the fulfilment of international human rights obligations. These emergency situations, according to the Human Rights Committee, include war, widespread social conflict, and catastrophic natural disasters. The Siracusa Principles explain that an

emergency situation must be announced to the public when a state will issue a derogation policy, and even require the state to send a notification to the Secretary General of the UN. However, nonderogable rights cannot be limited even under emergency. Using ICCPR to justify retroactive application of laws is not only a badly constructed argument, but a serious error.[28]

The decisions above show two trends. First, the courts in Indonesia have shown signs of following the monist tradition. This is indicated by the direct citing of international human rights treaties as part of the decisions' considerations (although they tend not to elaborate on what status this law holds within Indonesia). Second, when referring to international human rights treaties, the courts seem not to be comprehensive and tend to do so only to justify certain arguments they prefer. This second situation is dangerous because the courts may use the elements within an international treaty to decide something that is in fact against the spirit of the law.

Human rights legislation in Indonesia

Human rights law in Indonesia is constructed on two pillars of regulation – namely international treaties and domestic laws. These two pillars interact with each other in tidal dimensions, which are influenced by political, economic, and cultural factors. This section will be limited to a normative discussion of the laws and regulations on human rights in Indonesia.

As explained earlier, international law has played a significant role in the progress of human rights law in Indonesia, especially since the reform era. Indonesia has ratified the following international human rights treaties:

1 International Covenant on Civil and Political Rights (ratified by the Indonesian government by Law Number 12 of 2005)
2 International Covenant on Economic, Social and Cultural Rights (ratified by Law Number 11 of 2005).
3 International Convention on the Elimination of All Forms of Racial Discrimination (ratified by Law Number 22 of 1999)
4 Convention on the Elimination of All Forms of Discrimination against Women (ratified by Law Number 7 of 1984),
5 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (ratified by Law Number 5 of 1998),
6 Convention on the Rights of the Child (ratified by Presidential Decree No. 36/1990),
7 International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (ratified by Law Number 6 of 2012),
8 Convention on the Rights of Persons with Disabilities (ratified by Law Number 19 of 2011),

There is only one out of the nine core UN human rights treaties that Indonesia has not ratified: the International Convention for the Protection of All Persons

from Enforced Disappearance. Apart from the eight core treaties, Indonesia must also observe ASEAN Declaration of Human Rights (ADHR). Although this declaration is not legally binding, the provisions in the declaration need to be considered, bearing in mind that Indonesia is an ASEAN member state.

Indonesian laws and regulations on human rights continue to develop. The constitution has a separate chapter of human rights, Article 28, which consists of many subarticles and provides a strong basis for recognition of human rights in Indonesia. This chapter must be read together with Article 24 (2) of the Constitution and Law no. 24 of 2003, which both concern the Constitutional Court. The Constitutional Court has the authority to enforce human rights recognized in the constitution through a judicial review mechanism. The Constitutional Court has been called 'a protector of human rights,'[29] and 'the sole interpreter of the Constitution.'[30] The latter term could be questioned, considering that other courts also have a mandate that allows them to make decisions based on the constitution. Yet, the Constitutional Court has taken a key role in clarifying the reach and scope of human rights provisions in the constitution.

There are also a number of statutory laws which regulate human rights and provide specific institutions with the authority to oversee human rights implementation. They include:

1 The 1999 Human Rights Law, which guarantees various human rights and regulates the mandate of the National Human Rights Commission *(Komisi Nasional Hak Asasi Manusia/*Komnas HAM).[31]
2 The 2008 Law on Elimination of Racial and Ethnic Discrimination, which criminalizes racial and ethnic discrimination, and provides Komnas HAM with the authority to enforce and supervise state policies in order to reduce and eventually eliminate racial and ethnic discrimination.[32]
3 The 2014 Law on Child Protection, which regulates children's rights and provides the basis for the establishment of the Indonesian Child Protection Commission (*Komisi Perlindungan Anak Indonesia/*KPAI).[33]
4 The 2008 Law on the Ombudsman, which regulates the rights of citizens to public services and to report maladministration, and constitutes the basis for the establishment of the Ombudsman institution.[34]
5 The 2014 Law on the Witness and Victim Protection (*Lembaga Perlindungan Saksi dan Korban/*LPSK), which recognizes and regulates the rights of victims or witnesses of certain crimes, and is the basis for the establishment of the Witness and Victim Protection Agency (LPSK).[35]
6 The 2005 Presidential Regulation on the National Commission on Violence Against Women (*Komisi Nasional Anti Kekerasan Terhadap Perempuan/* Komnas Perempuan), which constituted the basis for the establishment of Komnas Perempuan and regulates its mandate.[36]
7 The 2016 Law on Persons with Disabilities, which regulates the rights of persons with disabilities and constitute the basis for the establishment of the National Commission for Disabilities (*Komisi Nasional Disabilitas/*Komnas Disabilitas).[37]

Different law enforcement agencies have issued internal regulations concerning human rights implementation. Some examples include the Supreme Court Regulation No 3/2017 on handling cases on women in conflict with the law, Supreme Court Regulation no 4/2014 on Guidance on Children in conflict with the law, and regulation of the attorney general no 1/2021 on access to justice for women and children in handling criminal cases. The preamble to these regulations refers directly to international human rights treaties, like ICCPR, CEDAW and the Convention on the Rights of the Child. At the time of writing, there are draft regulations by the Supreme Court, the Attorney General's Office and the Police Unit for Criminal Investigations concerning appropriate accommodation for persons with disabilities in conflict with the law. These regulations have been based on the ratification of the Convention on the Rights of Persons with Disabilities in 2011[38]

This illustrates that human rights already have been institutionalized in various law enforcement institutions.

The role of national institutions in upholding human rights

The above-mentioned laws have led to the establishment of various institutions with a mandate aimed at promoting, respecting, protecting, and fulfilling human rights. This includes Komnas HAM, Komnas Perempuan, KPAI, and Komnas Disabilitas.[39] This chapter will examine two aspects of their practice that directly concern legal interpretation – namely, their function as *amicus curiae* and Komnas HAM's issuance of Standard Norms and Regulations.

Komnas HAM has the authority to supervise the implementation of international human rights principles and norms that have been ratified by Indonesia. It is in principle an independent state institution, which has the mandate to oversee state behaviour in the context of fulfilling, protecting, and respecting human rights as regulated in laws and regulations – including the constitution and statutory law, which covers laws on ratification of international human rights treaties.[40] The establishment of Komnas HAM was inspired by the Paris Principles on the Status of National Institutions.[41]

*Friends of the court (*amicus curiae*)*

Komnas HAM has the authority to provide opinions on certain cases in the judicial process, known as *amicus curiae*. There are three formal conditions: the approval of the Chief of Court, the existence of allegations of human rights violations, and the notification of the judge/court to the parties involved.[42] This function is influenced by the practice of the European Court of Human Rights, which allow third parties outside the dispute to submit written information, such as comparative legal analysis or human rights principles assessment that are relevant to resolving the dispute.[43] It can also be compared to the Indonesian practice of appointing expert witnesses who provide testimony before courts. Such testimony does not only concern issues outside the competence of the court itself; it

could also address how the law should be interpreted and applied. An important role of the human rights institutions is to give advice and provide experts who can present scientific evidence on the interpretation and application of human rights clauses in certain cases.[44]

Amicus curiae constitute a means for Komnas HAM to advocate for people's rights that are potentially violated before or during the trial. In civil and criminal trials, court officials often only consider the field of civil and criminal law, without noting whether there are human rights aspects in the case. Disputes over child custody, for example, are then handled only by considering the civil rights of the disputing parents, while the rights of the child concerned are neglected. Several cases concerning alleged defamation have the potential to impact the rights to freedom of expression. Komnas HAM can act as *amicus curiae* to assist the courts in handling cases with human rights dimension in a fair and proportional manner. Komnas HAM works as *amicus curiae* in two ways, by submitting written legal opinions and presenting direct (oral) statements in court.

One example is the citizen lawsuit on forest and land fires in Central Kalimantan.[45] This case was filed by a group of residents affected by the 2015 forest fires. They argued that their right to a clean and healthy environment[46] was violated by the government's failure to tackle forest fires. This caused the death of one toddler, one child, and two adults due to smoke inhalation, and caused acute respiratory infections to almost 50,000 people in August – September 2015. The fires had also caused financial losses amounting to hundreds of billions of rupiah and led to the cancellation of 2,512 flight. In its written *amicus curiae* submission, Komnas HAM emphasized that the right to a clean and healthy environment is a human right guaranteed by the Constitution and International Human Rights Law. It stressed that the government had three obligations: firstly, the obligation to respect which implied not making policies that disturb and damage the environment; secondly, the obligation to protect which implied taking strategic steps to prevent environmental violations and sanction parties, especially corporations, that damage the environment (e.g., by burning forests); and thirdly, the obligation to fulfil by taking effective action to improve regulations, policies, budgets, promotions and providing health services to victims of forest fires. Komnas HAM encouraged the court to grant the plaintiffs' petition. This included to order the government to apologize, seriously review the management of forest fires and establish a respiratory hospital in areas affected by forest fires.

Another example is a case concerning a land dispute between a company that has been granted cultivation rights, and indigenous farmers.[47] The land concerned was formally classified as state land but had been cultivated for generations by the local farmers. In this case, Komnas HAM conveyed a written opinion that everyone has the right to welfare.[48] Komnas HAM recommended the court to realize the state's obligation to fulfil the right to welfare for the community, especially Indigenous peoples.

In other cases, Komnas HAM has testified directly before the court, for example, in a case on the legitimacy of the Presidential Letter on the Draft Law on Job Creation.[49] The plaintiff argued that the legal drafting process was carried out in a closed

manner and the public had access only after the president's letter was sent. Komnas HAM stated that public participation in drafting laws and regulations was not only part of a formal procedure, but also constituted part of freedom of expression, guaranteed by domestic and international law.[50] Komnas HAM also emphasized that everyone had the right to obtain information[51] and the right to seek justice by filing a lawsuit.[52] Everyone had the right to participate in government affairs[53] and participate in cultural life and benefit from knowledge.[54] Komnas HAM had the opinion that the drafting process of the Job Creation Law violated the principle of transparency and the public's right to obtain information and adequately participate. Therefore, Komnas HAM recommended the court to order the suspension of the Law's deliberation, and that it should resume only after information, transparency, and public engagement was adequately provided.

Komnas Perempuan also acts as *amicus curiae*.[55] Procedurally, Komnas Perempuan sends a letter of proposal for *amicus curiae* to the presiding judge in certain cases. The presiding judge determines whether the *amicus curiae* is accepted or not.

Komnas Perempuan submitted an *amicus curiae* brief to a case challenging a regional regulation on water usage.[56] The plaintiffs argued that the provision concerned, which regulated the water supply network and use of drinking water, had the potential to cause discrimination in obtaining access to water and the potential to prevent communities from fairly obtaining water. The *amicus* brief claimed that unfair water policies could potentially interfere with women's rights. It emphasized that gender roles connected women to tasks related to water use. There were three aspects that were underlined. Firstly, there was housework, such as cooking, washing and raising children. Thus, the responsibility for water availability rested more on women. Secondly, in various cultures, women also had a duty to collect water as a reflection of their role as wives or mothers. Lastly, women had a greater need and vulnerability to water for their reproductive health (e.g., during menstruation, pregnancy, childbirth or after childbirth). Limitations on access to water would cause women to experience multiple layers of discrimination. Komnas Perempuan urged the Jakarta government to formulate regulations that would guarantee the fulfilment of the right to water. Komnas Perempuan firmly supported the call for the regulation under review to be declared null and void.

In another example, Komnas Perempuan filed an *amicus curiae* at a pretrial hearing to terminate the investigation of a domestic violence case.[57] This case was submitted by a woman who had experienced domestic violence. However, the investigation of the case was suspended by the police on the grounds of insufficient evidence. Komnas Perempuan sent a legal opinion to the panel of judges, which essentially stated that the protection of women is the state's obligation. Indonesia has ratified various human rights instruments, particularly the Convention on the Elimination of All Forms of Discrimination against Women, which obligates States parties to provide maximum protection to women. The opinion stated that in the formal process of investigating a crime, the police tend to turn a blind eye to the fact that violence against women is often carried out in closed or private spaces and requiring to present witnesses in some cases is difficult to fulfil.

It is possible for law enforcement officers to take affirmative action for women by seeking alternative evidence that are equally valid and adequate. Through this legal opinion, Komnas Perempuan asked the panel of judges to grant the pretrial request submitted by the victim.

The use of *amicus curiae* is not limited to state institutions. NGOs often present *amicus* in court as well. The formal process is similar to that of state institutions, an NGO sends a letter to the Chief of the Court informing that the organization intends to send an *amicus curiae*.

One example of this is when the Institute for Policy Research and Advocacy (ELSAM), a human rights NGO, submitted an *amicus* brief for the case against Saiful Mahdi.[58] Saiful Mahdi was brought to trial on charges of defamation through electronic media for criticizing the recruitment policy at one of the faculties in Syah Kuala University, Aceh. ELSAM sent an *amicus* with the title 'The Future of Freedom of Expression and Opinion at the Tip of the Judge's Gavel.' In essence, the human rights legal opinion presented by ELSAM in this case referred to a Constitutional Court Decision on Article 27 (3) of the Law on Electronic Information and Transactions (Law No. 11 of 2008) on distribution or transmission of defamatory information[59] and general comments of the Committee on Civil and Political Rights on Freedom of Expression,[60] to explain that freedom of expression, speech, conveying opinion and thought through all kinds of channels is at the heart of democracy and a part of academic freedom. Freedom of expression and opinion are also protected by Article 19 of the Universal Declaration of Human Rights (UDHR) and Article 19 of the ICCPR. Limiting the freedom to express criticism through criminal defamation charges could constitute a human rights violation if the limitation on the freedom of expression is fails to meet the criteria of a justifiable limitation.

ELSAM has also provided *amicus curiae* in cases involving Indigenous peoples.[61] Bongku, a farmer and member of Sakai tribal community living in the Bengkalis area, was arrested by the police and brought to court for planting cassava and sweet potatoes on their customary land, which was located inside an industrial forest concession. He was charged with criminal provisions in the law on Prevention and Eradication of Deforestation.[62] ELSAM emphasized that Indonesia was one of the countries that voted for the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. This declaration prescribes protection for Indigenous peoples to fight for their traditional rights, such as their collective rights to their customary land. This declaration protects the individual and collective rights of traditional communities such as culture, ancestral domain, language, education, identity, employment, and health. ELSAM also referred to a decision of the Constitutional Court stating that 'the criminal provisions [of Prevention and Eradication Law on Deforestation] are not applicable for people who have lived in forest areas for generations [as long as their actions] are not intended for commercial interests.'[63] ELSAM recommended that the charges against Bongku should be declared not proven and that the defendant should be acquitted.

More recently, individuals have started to submit *amicus curiae*. The formal procedure is like institutions, people who have high interests in certain human rights issues may send a letter of proposal to the presiding judge for their legal opinion to be heard. Examples concern the cases of Basuki Wasis[64] and Saiful Mahdi.[65]

Basuki Wasis was an expert on economic aspects of environmental damage. He acted as expert witness in a case against the former Governor of North Sulawesi.[66] As expert witness, he assessed the losses incurred by environmental damage allegedly related to corruption in the granting of a oil palm concession by the defendant. The case itself is discussed in more detail in chapter 5. In this case, Herlambang Perdana Wiratraman (who also happens to be the author of chapter 5), in his capacity as a lecturer as well as a member of the Advisory Council of the Indonesian Caucus for Academic Freedom, and representing several concerned organizations and individuals, presented an *amicus curiae* with the title 'Protection of Scientists as a Principle of Academic Freedom.'[67] There were two important aspects conveyed in this *amicus* brief. First, the most appropriate mechanism for testing the expertise of a scientist was through peer review. Suing an academic for his opinion was inappropriate because the results of research could not be tried in a court, but rather tested scientifically. Second, conveying an academic opinion was part of academic freedom and part of the right to education. He referred to the general comment of the Committee on Economic, Social and Cultural Rights on the right to education.

In the *Saiful Mahdi case*, Wiratraman submitted an *amicus* brief titled 'An Academic's Criticism of His Institution as Freedom of Expression and Academic Freedom.' The *amicus* brief began by citing several articles of human rights in the Constitution,[68] followed by an analysis of the human rights aspects of the case involving Saiful Mahdi. One very important aspect was the use of General Comment No. 34 on Article 19 of the ICCPR, which relates to freedom of opinion and expression (Human Rights Committee, 102nd session, Geneva, July 11–29, 2011). Paragraph 21 of this General Comment in explaining Article 19(3) states as follows:

> the exercise of the right to freedom of expression carries with it special duties and responsibilities. For this reason, two limitative areas of restrictions on the right are permitted, which may relate either to respect of the rights or reputations of others or to the protection of national security or of public order (ordre public) or of public health or morals. However, when a State party imposes restrictions on the exercise of freedom of expression, these may not put in jeopardy the right itself. The Committee recalls that the relation between right and restriction and between norm and exception must not be reversed.

Wiratraman emphasized that what Saiful Mahdi did was part of freedom of expression as well as academic freedom, which was protected by human rights law. Therefore, using the Electronic Information and Transaction Law to indict Saiful Mahdi was an unlawful limitation of freedom, and thus the charge must be declared unproven.

There is no known study of the effectiveness of these amicus curiae, but they appear to have had significant influence in some cases (e.g., the citizen lawsuit on forest and land fires in Central Kalimantan, and the *Papua Internet case* mentioned above). In these cases, the courts ruled in favour of the claimants, and adopted many of the arguments conveyed in the *amicus curiae*. Possibly, the *Jakarta Air Pollution Case* discussed in chapter 3 could also be added to this list. In other cases, there have been no apparent impact. In terms of procedure, the courts have always accepted the submission of *amicus curiae* briefs.

Norms and regulatory standards

In the UN human rights system, the treaty-monitoring bodies issue 'General Comments' pertaining to how the treaty concerned should be interpreted and implemented, as discussed in chapter 1 on judicial methodology. In somewhat similar fashion, Komnas HAM has developed the Standard Norms and Regulations (SNP). This is a progressive step to provide guidance on the interpretation of human rights norms within Indonesia. The SNP are projected to be used by all branches of the state apparatus, when interpreting certain human rights norms.

The SNP are developed to provide meaning, assessment, and guidance on human rights norms. According to their own stipulations, the SNPs seek to position international human rights principles and rules within Indonesia, without losing Indonesian principles and character.[69] Practically, the objectives of the SNP include:[70]

1 For the government, to ensure that there are no policies and actions - from planing, to regulation and implementation - that are against human rights norms, as well as to ensure legal processes and sanctions against perpetrators for actions that infringe upon human rights norms
2 For law enforcement officials, to ensure equitable legal protection in protecting human rights and law enforcement
3 For corporations or private sector actors, to respect human rights and society, avoid actions that violates human rights, and ensure compliance with a fair and appropriate solution when human rights violations have been identified
4 For individuals, communities, and community organizations, to understand and comprehend all matters related to actions that infringe on human rights norms so as to ensure that their human rights are protected; to not commit acts that violate human rights and may trigger wider social conflict; and to build mutual understanding and tolerance

The SNP can be utilized to assess the human rights aspects of cases that have been brought before the court. As of November 2022, Komnas HAM has issued 11 SNPs, addressing: the right to freedom of opinion and expression; the right to health; the freedom of religion and belief; the elimination of racial and ethnic discrimination; the defenders of human rights; the freedom of association and assembly; the right to land and natural resources; the right to justice; the recovery

of victims of gross human rights violations; the right to adequate housing; and the right to freedom from torture. The SNPs have the potential to guide courts and legal practitioners in interpreting human rights norms within the Indonesian legal setting. However, these SNPs are still relatively new, and at the time of writing, there are no known cases where they have been applied by the courts.

Limitations and derogations of human rights

International legal discourse distinguishes between human rights limitations and human rights derogations. The state has the authority to limit the fulfilment, protection, and respect of human rights under certain terms and conditions.[71] These are elaborated in the Siracusa Principles, which stipulate that limitations can only be carried out if they meet three conditions: they must be prescribed by the law, for the purpose of meeting a legitimate aim, which is necessary in a democratic society.[72]

Derogation concerns the state's opportunity to suspend or restrict certain treaty rights in emergency situations that threatens the life of the nation. The main provisions on limitations can be found in Article 28J (2) of the Constitution which reads as follows:[73]

> In exercising their rights and freedoms, everyone is obligated to be subject to the limitations stipulated by law for the sole purpose of ensuring the recognition and respect for the rights and freedoms of others and to fulfil just requirements in accordance to moral, religious values, security, and public order considerations in a democratic society.

This could be compared to Article 29 (2) of the UDHR:

> In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

The reasons for limiting human rights as regulated by the UDHR and the constitution are relatively similar. However, there is one important limitation clause in the constitution, which is not found in the UDHR (or in the ICCPR or other international human rights treaties) – namely, religious values. There is little guidance on how this term should be interpreted. More generally however, human rights limitations have become an important legal issue in Indonesia. This is indicated by the many tests of the legitimacy of the limitations through the judicial review mechanism in the Constitutional Court, as well as in cases tried by other courts. Some examples include the *Wiretapping Authority case*, the *Blasphemy Law case*, and the *Papua Internet Shutdown case*.

The Wiretapping Authority case

This case was related to the prohibition for anyone intercepting or wiretapping electronic information, as regulated through Article 31 of Law No. 11 of 2008 on Electronic Information and Transaction.[74] Exceptions from this prohibition were interceptions carried out in the context of law enforcement at the request of the police, prosecutors, and/or law enforcement institutions. The problem with the article under review was that the interception procedure could be executed with a government regulation. The petitioner argued that wiretapping had the potential to violate the right to privacy. Theoretically, and pursuant to Article 28J (2) of the constitution, limitations on the right to privacy can only be exercised by statutory law. The petitioner in this case asked the court to state that the regulation under review had the potential to limit the right to privacy arbitrarily and conflicted with the constitution. The court agreed and ruled that the provision under review was unconstitutional and void.

The Blasphemy Law case

In this case, the petitioners challenged the Law on Prevention of Defamation and Misuse of Religion, which has been popularly referred to as the Blasphemy Law.[75] The Constitutional Court did not grant the petition, although it seemed to acknowledge some shortcomings in the law under review, which could be addressed by the lawmakers. Concerning limitations, the court explicitly stated that the grounds for imposing limitations under the constitution included religious values and thus were different from the grounds for justifiable limitations allowed by the ICCPR. While this seemed to affirm the relevance of religious values as a justifiable ground for imposing limitations, the court's reasoning was rather ambiguous on this point since it did not state whether the Blasphemy Law imposed any limitations on human rights.[76] At the same time, the court held the opinion that the law under review was 'in line with the ICCPR,' something that could be suggesting 'religious values' were not detrimental to the outcome of the case.[77]

Papua Internet Shutdown case

In this case, the petitioners challenged the government's policy of cutting internet access across wide areas of Papua. Concerning limitations, the District Court found that this policy was not proportional and failed to meet the criteria for a legitimate limitation on human rights. The court ruled that the policy was unlawful. The District Court referred to the limitations clauses found in the Constitution, in ICCPR and in the Human Rights Act.

The case will be further discussed in the chapter 5.

Conclusion

Human Rights standards have progressively become institutionalized in different parts of the Indonesian state apparatus. This is indicated by various aspects,

including (a) the ratification of almost all international human rights instruments; (b) the adoption of domestic laws and regulations which mostly are in line with standards in international human rights instruments (although there are some significant exceptions); (c) the establishment of state institutions tasked with supervising the protection and fulfilment of human rights; (d) the stipulation of internal regulations in law enforcement agencies based on human rights standards.

The challenge lies in ensuring that human rights standards are well understood and consistently enforced. Various cases have illustrated that courts often fail to understand the inherent meaning of human rights, or to integrate human rights considerations into their decisions. Consistency is another important issue because many court decisions are found to be far from consistent with, and sometimes even clearly in contradiction of, human rights standards and norms.

Notes

1 Maria O'Sullivan, 'National Human Rights Institution, Effectively Protecting Human Rights?' *Alternative Law Journal* 25, no. 5 (October 2000): 236–240.
2 Knut D. Asplund examined the attitudes and views as well as the responses of judges and lecturers who participated in human rights law trainings organized by several institutions in Indonesia and supported by the Norwegian Center for Human Rights. Read more in Knut D. Asplund, 'Resistance to Human Rights in Indonesia: Asian Values and Beyond,' *Asia-Pacific Journal on Human Rights and the Law* 10, no. 1 (2009): 28.
3 Eko Riyadi, 'Human Rights Judicial Methodology: An Indonesian Practices,' *Laporan Penelitian* (Pusham UII, 2020).
4 Alfred W. Chanda, 'The Role of Lower Courts in the Domestic Implementation of Human Rights,' *Zambia Law Journal* 33 (2001): 1–17.
5 Ibid., 17.
6 Courtney Hillebrecht, 'The Domestic Mechanism of Compliance with International Human Rights Law: Case Studies from the Inter-American Human Rights System,' *Human Rights Quarterly* 34, no. 4 (November 2012): 984–985.
7 Ibid., 970.
8 David S. Law, 'Generic Constitutional Law,' *Minnesota Law Review* 89, no. 3 (February 2005): 726.
9 David S. Law and Mila Versteeg, 'The Evolution and Ideology of Global Constitutionalism,' *California Law Review* 99, no. 5 (October 2011): 1119.
10 Law, 'Generic Constitutional Law,' 726.
11 A term often used in mathematics or programming to mean a function that calls itself or is often associated with the principle of repetition.
12 This term refers to the context that some international human rights law developed flowing up from the domestic legal system to the international legal arena and then flowing down to the domestic legal system again (see Law, 'Generic Constitutional Law,' 727).
13 Sefriani, *Hukum Internasional: Suatu Pengantar/International Law: An Introduction* (Rajawali Press, 2011), 76–77. See also J. G. Starke, *Introduction to International Law* (Butterworths, 1989).
14 Damos Dumoli Agusman, 'Status Hukum Perjanjian Internasional dalam Hukum Nasional RI: Tinjauan Dari Perspektif Praktik Indonesia/ Legal Status of International Treaties in Indonesian National Law: Overview From the Perspective of Indonesian Practice,' *Indonesian Journal of International Law* 5, no. 3 (April 2008): 489.
15 Sefriani, *Hukum Internasional*, 76–77. See alsoStarke, *Introduction*.
16 Agusman, 'Status Hukum.'

17 Dinah Shelton, 'International Law in Domestic Systems,' in *General Reports of the XVIIIth Congress of the International Academy of Comparative Law*, ed. Karen B. Brown and David V. Snyder (Springer, 2012).
18 As also stated by Shelton, the reports are mainly from Europe, Northern America, and utterly Europeanized South American states such as Argentina. In addition to Japan, the Asia/Pacific examples are Australia and New Zeeland.
19 Ibid., 4.
20 Damos Dumoli Agusman, 'The Dynamic Development on Indonesia's Attitude Toward International Law,' *Indonesian Journal of International Law* 13, no. 1 (October 2015), 5.
21 Simon Butt, 'The Position of International Law Within the Indonesian Legal System,' *Emory International Law Review* 28, no. 1 (2014): 27.
22 UU no 39/1999 art 7(2). According to Agusman, this article is influenced by dualism, as it 'transforms' international law to national law (Agusman, 'Status Hukum,' 499) He further claims that the article fails to specify when Indonesia is considered to have 'accepted' international human rights law. 'Can, for example, unilateral statements or even 'the absence of persistent objections' be enough? (Agusman, 'Status Hukum,' 500).
23 Human Rights Committee, 108th session, 8–26 July 2013, Agenda item 6, Consideration of reports submitted by States parties under article 40 of the Covenant, Addendum, Replies of Indonesia to the list of issues (CCPR/C/IDN/Q/1/Add.1), para 2.
24 Interview with an employee from the Indonesian Ministry of Foreign Affairs. One example of a different viewpoint is that of Hikmahanto Juwana, Universitas Indonesia's leading expert on international law, who previously had claimed that although Indonesia has ratified the ICCPR, the covenant has not yet been transformed [to national law], and therefore, could not be enforced by domestic courts (Juwana, Hikmahanto, Catatan atas Masalah Aktual Perjanjian Internasional, *Indonesian Journal of International Law* 5, no. 3 [2008]: 443–451).
25 Decision of the State Administrative Court Number 230/G/TF/2019/PTUN-JKT.
26 Decision of Constitutional Court Number 2–3/PUU-V/2007, 426, 428. The court referred to Article 6 paragraph (2) of the International Covenant on Civil and Political Rights.
27 Article 43 Paragraph (1) of the Human Rights Court Law states, 'gross human rights violation which occured prior to the enactment of this law, shall be examined and decided by an ad hoc Human Rights Court.'
28 Nonderogable rights as regulated in Article 4 paragraph (2) of the International Covenant on Civil and Political Rights, and Article 28I paragraph (1) of the 1945 Constitution.
29 Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia/ The Procedures of the Constitutional Court of the Republic of Indonesia* (Konstitusi Press, 2005), 11–12.
30 I Dewa Gede Palguna, *Mahkamah Konstitusi, Judicial Review dan Welfare State/The Constitutional Court, Judicial Review and the Welfare State*, Secretariat General and Registrar of the Constitutional Court (Jakarta, 2008), 48.
31 Law number 39/1999.
32 Law number 40/2008.
33 Law Number 35 of 2014 on Amendments to Law Number 23 of 2003 in conjunction with Law Number 16 of 2017 on the Second Amendment to Law Number 23 of 2002 on Child Protection.
34 Law Number 37 of 2008 on the Ombudsman of the Republic of Indonesia.
35 The Law on the Law Number 31 of 2014 on Amendments to Law Number 13 of 2006 on Witness and Victim Protection.
36 Number 65 of 2005.

37 Law Number 8 of 2016 on Persons with Disabilities.
38 Ratified through law number 19/2011, followed by the issuance of law number 8/2016 on people with disabilities, and government regulation number 39/2020 about proper accommodation for people with disabilities dealing with the law.
39 Komnas HAM was established pursuant to Law Number 39 of 1999, the National Commission on Violence Against Women was established pursuant to Presidential Decree Number 181 of 1998 which was later strengthened by Presidential Regulation Number 65 of 2005, the Indonesian Child Protection Commission was established pursuant to Law Number 32 of 2002 in conjunction with Law Number 35 of 2014, and the Commission on Disability was established pursuant to Law Number 8 of 2016.
40 Read Articles 75 and 76 of Law Number 39 of 1999 on Human Rights.
41 The Paris Principles were formulated before the 1993 Vienna World Conference. Supported by the General Assembly and the Commission on Human Rights, the UN Center for Human Rights held a conference attended by representatives of governments, agencies of the United Nations, Non-Governmental Organizations, and regional human rights watchdogs on 7–9 October 1991 in Paris. It was this conference that formulated the Paris Principles, which were later adopted through the Commission on Human Rights Resolution 1992/54 in 1992 and the General Assembly Resolution 48/134 on 20 December 1993.
42 Article 89 paragraph (3) letter h of Law Number 39 of 1999 on Human Rights.
43 Rachel A. Cohowski, 'The European Court of Human Rights, Amicus Curiae, and Violence Against Women,' *Law & Society Review* 50, no. 4 (2016): 243.
44 Margaret Mulgan, 'Norms in the Domestic Context: The Role of National Institution,' *Canterbury Law Review* 5 (1993): 238–247 (referring to practice in New Zealand).
45 Komnas HAM had sent Letter Number 441/K/PMT/III/2017 dated 6 March 2017 addressed to the Head of the Palangkaraya District Court cq. the Panel of Judges in Case No. 118/Pdt.G/LH/2016/PN/Plk.
46 Article 28H of the 1945 Constitution, Articles 2 and 9 paragraph (3) of Law no. 39 of 1999 on Human Rights, and Article 65 paragraph (1) of Law no. 39 of 2009 on Environmental Protection and Management.
47 Komnas HAM had sent Letter Number 0.594/AC-PMT/VII/2019 dated July 3, 2019 addressed to the Head of the Kotamobagu District Court cq. Panel of Judges Case No. 85/PDT.G/2018/PN.KTG.
48 Article 1 of Law no. 11 of 2009 on Social Welfare, Articles 36–42 of Law no. 39 of 1999 on Human Rights, and the International Covenant on Economic, Social and Cultural Rights.
49 In this case Komnas HAM had sent a Letter of Opinion No. 1073/AC-PMT/IV/2020 dated 15 September 2020. 01/SK/TAUD/VIII/2020 to the Chief of the Jakarta State Administrative Court cq. the Panel of Judges of Case Number 97/G/2020/PTUN.JKT. Sandrayati Moniaga, Commissioner of the National Human Rights Commission, was present at the trial when presenting the *amicus curiae*.
50 Freedom of expression is regulated in Article 28E paragraph (2) of the 1945 Constitution, Article 23 paragraph (2) of Law Number 39 of 1999 concerning Human Rights, and Article 19 paragraph (2) of the International Covenant on Civil and Political Rights.
51 Article 14 of Law no. 39 of 1999 on Human Rights.
52 Article 17 of Law no. 39 of 1999 on Human Rights.
53 Article 25 of the International Covenant on Civil and Political Rights.
54 Article 15 paragraph (1) of the International Covenant on Economic, Social and Cultural Rights.
55 Komnas Perempuan was established pursuant to Presidential Decree No. 181/1998 on the Commission Against Violence against Women, October 9, 1998, which was later amended by Presidential Decree No. 65/2005 on the National Commission on Violence Against Women, 18 October 2005.

56 Case No. 34 P/HUM/2021 on the Judicial Review of the Regulation of the Governor of The Special Region of the Capital City Jakarta No. 16 of 2020 on Procedures for Water Supply Network and Drinking Water Usage (Regional Gazette Number 63004 of 2020). For more information, please access https://komnasperempuan.go.id/laporan-pemantauan-ham-detail/ketangan-tertulis-komnas-perempuan-as-teman-pengadilan-amicus-curiae-pada-perkara-no-07-pid -praper-2021-pn-jkt-tim, last accessed on 22 November 2021.
57 *Komnas Perempuan's Amicus Curiae in pre-trial application case No.* 07/PID.PraPer/2021?PN.JKT.TIM.
58 Andi Muttaqien, Deputy Director of Advocacy for ELSAM, sent a letter to the Chief of the Banda Aceh District Court cq. Chief of the Panel of Judges Case No. 432/Pid. Sus/2019/PN.Bna on 18 February 2020.
59 Constitutional Court Decision Number 2/PUU-VI/2009.
60 General Comment No. 34 to Article 19 of the International Covenant on Civil and Political Rights.
61 Andi Muttaqien, Deputy Director of Advocacy for ELSAM, sent a letter to the Chief of the Bengkalis District Court cq. Chief of the Panel of Judges Case No. 89/Pid.B/LH/2020/PN/Bls.
62 Violation of Article 82 paragraph (1) letter c of Law Number 18 of 2013.
63 Constitutional Court Decision Number 95/PUU-XII/2014.
64 Court Decision Number 47/Pdt.G/PN.Cbi.
65 Court Decision Number 432/Pid.Sus/2019/PN Bna.
66 Court Decision Number 47/Pdt.G/PN.Cbi.
67 This *amicus curiae* was jointly written by the Human Rights Lecturers Union (SEPAHAM Indonesia); Center for Law and Human Rights Studies, Faculty of Law, Airlangga University; Center for Human Rights Studies, Islamic University of Indonesia (Pusham UII); Center for Human Rights and Migration (CHRM), University of Jember; and Center for Human Rights Studies, State University of Medan, and 37 names of individual lecturers from various universities in Indonesia.
68 Article 28, 28C paragraph (2), 28E paragraph (3), 28F, 28G paragraph (1) 1945 Constitution.
69 Point 20 SNP Number 4 on Right to health.
70 Point 22 SNP Number 4 on Right to health.
71 Riyadi, 'Human Rights Judicial Methodology,' 58.
72 All explanations regarding the reasons for the limitation of human rights in this section are written by referring to the provisions stated in the Siracusa Principles in Part B, numbers 15–38.
73 Provisions on limitations can be found in Articles 18 paragraphs (2), 19, 21, 22 paragraphs (2), the International Covenant on Civil and Political Rights, and Articles 70 and 73 of Law no. 39 of 1999 on Human Rights.
74 Decision of the Constitutional Court Number 5/PUU-VIII/2010, namely regarding the review of Article 31 paragraph (4) of Law Number 11 of 2008 on Electronic Information and Transaction.
75 . Law number 1 PNPS/1965.
76 Aksel Tømte, 'Constitutional Review of the Indonesian Blasphemy Law,' *Nordic Journal of Human Rights* 30, no. 2 (2012): 174–204.
77 Ibid.

5 The Judiciary and Human Rights Constitutionalism

Herlambang P. Wiratraman

Introduction

Legal politics in Indonesia remains strongly influenced by the heritage of Suharto's authoritarian regime. Consequently, judicial decisions in Indonesia are often intertwined with politics.

Many studies suggest the persistence of oligarchic powers, and their ability to dominate the very instruments of democratization. This has been called by many names: 'democratic setbacks,'[1] 'democratic regression,'[2] 'democratic decline,'[3] and 'defective democracy.'[4] The study series of The Institute for Economic and Social Research, Education and Information provides good documentation of a deteriorating democratic situation.[5] In today's Indonesia, oligarchic powers are adept at controlling liberal democratic instruments. They neatly and hierarchically utilize formal democratic structures based on political representation through elections. Political democratic structures are controlled by a cartelized party system[6] or the 'cartel coalition.'[7]

This obviously has major influence on the production and operation of the law in society. There are studies on how authoritarian political power relations influence the development of democratisation and the rule of law, such as the work of Tom Ginsburg and Tamir Moustofa.[8] In Indonesia, there is a tendency for the judiciary to become a tool to bolster the regime's power, which in turn legitimizes human rights violations.[9] The decline of democracy is linked with attempts to undermine the rule of law. Constitutional arguments are used to justify authoritarian agendas. Such justifications are a manifestation of 'authoritarian constitutionalism,' a phenomenon described by Tushnet.[10] This can be identified in the systematic legalisation of corruption and the weakening of its eradication. State-captured corruption is rampant, especially through involvement in excessive exploitation of natural resources, impunity, and constant reliance on violent approaches. In such a situation, how has the judiciary applied the principles of human rights and the rule of law?

The chapter will discuss the development of the Indonesian Constitution and its human rights guarantees. It then examines the court rulings related to the freedom of expression, the freedom of political expression, and the freedom of the press. Before turning to civil rights, however, it should be acknowledged that

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economic, social and cultural rights also constitute an important part of Indonesian constitutionalism. The constitution guarantees various economic, social and cultural rights, including the right to work,[11] education,[12] a home, a healthy environment, medical care,[13] and social security.[14] Also relevant, although not an explicit human rights as such, is the stipulation that 'The land, the waters and the natural resources within shall be under the powers of the State and shall be used to the greatest benefit of the people.'[15] There are quite a few decisions of the Constitutional Court based on economic, social and cultural rights. For example, in a judicial review of the manpower law, the court cancelled certain articles of the law under review that were considered to be contrary to the right to work and the right to a decent standard of living found in the constitution.[16] A judicial review of the Law on the State Treasury (*pembendaharaan*) found that certain articles were in conflict with the right to work (this concerned state debt and security of pensions),[17] thus they were declared unconstitutional and void. A constitutional review of the Law on the 2006 State budget against the constitutional right to education declared the law under review to be conditionally unconstitutional (a term to be discussed later): the law would be unconstitutional if it was interpreted so as to establish an upper limit on the spending on education.[18] The 2004 Law on Water Resources has been challenged in several cases and was finally declared unconstitutional, to the effect that the 1974 Water Law was reinstated.[19] In this case, the petitioners referred to various constitutional rights, including the human right to a healthy environment, the traditional rights of customary law communities (*masyarakat hukum adat*), and the state obligation to uphold human rights in general. Although the court partially accepted the petitioners' claims, it did not explicitly state which constitutional articles that were violated by the law under review. In another case, the Constitutional Court declared a number of articles in the Law on Small Islands and Costal Areas to be unconstitutional and hold no legal force.[20] The petitioners referred to various constitutional guarantees, including 'the right to live and defend one's existence,' the rights of customary law communities, and the above-mentioned guarantee that land, waters and natural resources shall be used to the greatest benefit of the people. Other courts have made judgements based on economic, social and cultural rights. For example, in 2015, the Central Jakarta District Court annulled water privatization in Jakarta after finding that the public-private partnerships were negligent in fulfilling the human right to water for Jakarta's residents.[21] The Supreme Court upheld the ruling against water privatization and ordered restoration of public management to ensure the human right to water.[22]

The constitution and the constitutionalism of human rights

As Ginsburg and Moustafa explain, judicial politics in authoritarian states is often much more complex than we assume. Courts help regimes maintain social control,

attract capital, uphold bureaucratic discipline, adopt unpopular policies, and increase their legitimacy.[23]

Human rights in the constitution have been regulated in line with the changes in the ruling political regimes. Indonesia has experienced four constitutional changes. The first was the 1945 Constitution, then the 1949 Constitution of the Federal Republic of Indonesia (the RIS Constitution), then the 1950 Provisional Constitution, the so-called return to the 1945 Constitution, and then amendments to the 1945 Constitution, which came into force in 2002. The 1945 Constitution was created following Japanese occupation of Indonesia, at the time when the former Dutch colonial powers sought to regain control. Consequently, the constitution was made under serious pressure and was intended to be temporary. The Netherlands recognized Indonesia's independence and formally transferred sovereignty by the very end of 1949. However, the Netherlands transferred powers to a federation, the United States of Indonesia, or *Republik Indonesia Serikat* (RIS). The RIS Constitution was federal, parliamentary and liberal democratic.[24] Seen by some as an attempt to divide and conquer, RIS collapsed within months. It was replaced by the Unitary Republic of Indonesia on 17 August 1950. The new Provisional Constitution was based on the previous RIS Constitution, but the federal component had been removed.[25] However, it was not based on any national consultation and therefore lacked political legitimacy.[26] The task of creating a more detailed and final constitution was therefore given to a Constituent Assembly. However, the Constituent Assembly failed to reach an agreement, which required a two-third majority. A particularly contentious issue concerned the position of Islamic Law.[27] In 1959, after a long period without progress, President Sukarno, backed by the military, reinstated the 1945 Constitution in 1959.[28] The constitution then remained unchanged for a long time, until a range of constitutional amendments was made in the early 2000s as part of the democratic reform period.

Since 1945, the concept of human rights has existed in all these various Indonesian Constitutions. Initially, human rights were linked to the desire for independence from colonialization. The preamble of the 1945 Constitution reads: 'That independence is truly the right of all nations and thus colonialism in the world must be abolished, because it is not in accordance with humanity and justice.'[29] Here, the affirmation of human rights was aimed not only at the newly independent Indonesian nation, but at all nations in the world. This was not without significance, as Indonesia was the first former colony to proclaim independence in the aftermath of the Second World War.

For a long time, the constitutions with the most comprehensive human rights framework were the 1949 RIS Constitution and the 1950 Provisional Constitution, both of which adopted the 1948 Universal Declaration of Human Rights (UDHR). After the return to the 1945 Constitution, a separate chapter on human rights was inserted through the Second Amendment in 2000.

Constitutional scholars generally agree that the 1945 Constitution recognized human rights. However, one of its drafters, Mohammad Yamin, held a different view. He held that, although the preamble guaranteed democracy:

> the articles despised individual freedoms, and opposed liberalism and revolutionary democracy. As a result, human rights were not fully recognized . . . in line with the political and social atmosphere in 1945 that was influenced by the war between fascist and democratic states.[30]

Yamin pointed out that only three articles (articles 27, 28, 29) guaranteed human rights, these concerned freedom of association and assembly; the freedom of thought; the right to work and life; and religious freedom. 'When drafting the 1945 Constitution, broader human rights were indeed intended, but the proposal failed on the grounds that at that time human rights were seen as a victory for liberalism, which was disfavoured.'[31]

Constitutional scholars generally agree that the 1945 Constitution recognized human rights. However, one of its drafters, Mohammad Yamin, held a different view:

> When the Indonesian law [meaning the Constitution] was drafted, the preamble guaranteed democracy, but the articles despised individual freedoms, and opposed liberalism and revolutionary democracy. As a result, human rights were not fully recognized and only one or two were adopted. These were more or less in line with the political and social atmosphere in 1945 that was influenced by the war between fascist and democratic states. The organic law that guarantees or limits human rights as found in the 1945 Constitution had not yet been formulated. For the Republic of Indonesia, which recognized democracy in its preamble as the basis of the state, it is very obvious in the constitution. Only three articles (articles 27, 28, 29) guaranteed human rights. These articles concerned the freedom of association and assembly; the freedom of thought; the right to work and life; and religious freedom. The first and second freedoms had not been expressed in statutory law, and the third and fourth human rights were only guaranteed without being regulated further. When drafting the 1945 Constitution, broader human rights were indeed intended, but the proposal failed on the grounds that at that time human rights were seen as a victory for liberalism, which was disfavoured.

A different viewpoint was held by Sukarno, Indonesia's first president, who optimistically stated that 'although the 1945 Constitution does not clearly [state that it provides] basic rights and freedoms, this does not mean that the 1945 Constitution does not recognize the existence of these basic human rights and freedoms.'[32] These rights and freedoms were indeed formulated in passing, but the 1945 Constitution has included rights in four fields, namely rights in the political field (Article 28); rights in the economic field (Article 27); rights in the social field (Article 34); rights in the cultural field (Article 31).

In comparison, the human rights provisions of the 1949 RIS Constitution and the 1950 Provisional Constitution were much more comprehensive. The latter contained a separate section of rights comprising 27 articles. Yamin himself claimed that the 1949 RIS Constitution and the 1950 Provisional Constitution had succeeded in incorporating human rights as mandated by the United Nations Charter.[33] When the 1950 Provisional Constitution was in effect, the political dynamics made it impossible to agree on a new constitution to replace the provisional. President Sukarno, disappointed with the Constituent Assembly's performance, re-enacted the 1945 Constitution and declared the start of Guided Democracy, a move that was in fact unconstitutional, as the 1945 Constitution does not vest the president with such powers.

The re-enactment of the 1945 Constitution was expected to allow for democratization and provide stronger guarantees of human rights. This expectation was, however, very difficult to fulfil, because there were many practices of abuse of power, including by the president himself. According to Bagir Manan, who served as the chief justice of the Supreme Court between 2001 and 2008, the return to the 1945 Constitution meant a return to a hastily adopted government mechanism that contained many shortcomings.[34] In addition to the discrepancies on human rights, the system of checks and balances in the 1945 Constitution was inadequate as it gave too much authority to the executive. Bagir Manan concluded that the constitution gave room for dictatorial rulers, as seen by the Old Order and New Order regimes.[35]

Derived from the above discussion, three issues should be noted regarding the development of human rights in the Indonesian Constitution. First, the human rights regulation in the 1945 Constitution was added hastily to seize the momentum to declare independence, thus only certain rights that the constitution's formulators or drafters considered important were included. This is a commonplace phenomenon: no newly established state can produce a perfect set of laws, therefore certain shortcomings should be expected. Second, it is reasonable that the 1949 RIS Constitution and the 1950 Provisional Constitution had more comprehensive human rights provisions, considering that they were introduced after the 1948 UDHR. In the international political atmosphere at the time, the demand for human rights guarantees was very prominent across the world as an effort to prevent the recurrence of world wars. Third, a constitution that is incomplete or imprecise in enshrining human rights has the potential to allow for interpretation that enables authorities to abuse their power to advance their own interests rather than the rights of the people.

Courts have the potential to challenge state policies, also known as 'judicial activism.'[36] However, several cases show a weakening of the special functions of the judicial power, which increases the legitimization of the authoritarian powers' interests.[37] Constitutionalism and constitutional rights as provisions in the law have only been used to a limited extent by the courts. There was no space for judicial review under the governments of Sukarno (1957–1966) and Suharto (1966–1998).[38] Since the beginning of the democratic reform period however, particularly with the establishment of the Constitutional Court in 2003,

constitutional rights have been upheld by courts, and the debates on constitutional rights have become more substantial. The decisions of the Constitutional Court have undeniably been influencing other courts as well.

From here, the term *the constitution* will refer to the currently applicable constitution, the postamendment version of the 1945 Constitution.

The constitutional rights to freedom of expression and the role of the judiciary

The freedom of expression, the right to communicate, obtain, and convey information (the right to information) and the freedom of the press are firmly guaranteed in the constitution and in several laws and regulations.[39] There are at least four articles in the constitution related to the aforementioned rights:

> Article 28: The freedom of association and assembly, expressing opinions verbally and in writing and so forth shall be regulated by law.
>
> Article 28C (2): Every person has the right to advance him/herself in fighting for his/her rights collectively to build his/her community, nation and state.
>
> Article 28E (3): Every person has the right to freedom of association, assembly and expression of opinions.
>
> Article 28F: Every person has the right to communicate and obtain information to develop his/her personal and social environment, and has the right to seek, obtain, possess, store, process, and convey information using all available channels.

The expansion of human rights in Indonesian law helps to strengthen the foundation of the state through encouraging the social contract between the ruler and the people in the spirit of Indonesian constitutionalism. Such expansion can be found in national legislation for instance in the 1999 Human Rights Law and in the 1999 Press Law. Both were promulgated during the democratic reform period following the fall of the Suharto regime. Similarly, in line with Article 28F of the constitution, the 2008 Law on Access to Public Information was enacted, which guarantees the right to obtain information. Moreover, the International Covenant on Civil and Political Rights has become part of Indonesian law after being ratified through the Law No. 12 of 2005. The Constitutional Court has a key role in interpreting the constitution. Since its establishment in 2003, it has ruled against the government in important cases, and has been hailed as 'one of the most successful institutions established during the post-Suharto Reformation (*Reformasi*) era.'[40]

The court is endowed with authority to examine whether national laws reflect the constitution and to strike down unconstitutional legislation. The court considers itself a 'negative legislator,' but has developed a tradition of issuing 'decisions of conditional constitutionality.'[41] 'Conditional constitutionality' is used in decisions where the Court has identified a problem with the law under review but still decided that the law should remain in force, provided that it is implemented in line with the court's conditions.[42] This could be seen as a kind of deference to the legislative.[43] However, as will be evident from some of the cases discussed below,

a problem with this approach is that the government or lower courts can ignore the Constitutional Court's decisions. Therefore, the court has in some cases declared problematic statutes conditionally unconstitutional (i.e., invalid unless specific conditions are met), which according to Simon Butt and Tim Lindsey, makes the court's decisions harder to ignore.[44] A recent example of this is a decision on the Omnibus law, where thecCourt held that the law under review – the controversial 'omnibus law' on job creation – contradicted the constitution, and would have no legal force if it was not rectified within a period of two years following the Constitutional Court's decision in November 2021.[45]

A key challenge discussed by Butt and Lindsey is that the court lacks formal enforcement powers, which may make it more dependent on public popularity and political support. While the court managed to build a reputation for independence, competence, and impartiality early after its establishment,[46] this reputation has been impaired by various corruption scandals and apparent attempts to undermine the Court's independence.

The third chief justice, Akil Mochtar was sentenced to prison for life in 2014, for money-laundering and corruption related to an election dispute.[47] In 2017, another Constitutional Court judge, Patrialis Akbar, was sentenced to eight years in prison for receiving money to influence a Constitutional Court review case. In 2022, the chief justice of the Constitutional Court married the president's sister.[48] The same year, the House of Representatives replaced Judge Aswanto from the Constitutional Court for allegedly failing to represent the interests of the House, which had nominated him.[49]According to the Head of the House Commission III, Bambang Wuryanto, a judge nominated by the House of Representatives must represent and protect their interests. He claimed that if the judge's performance is 'unsatisfactory,' the House of Representatives has the right to recall the judge.[50] Jimly Asshiddiqie, the first chief justice of the Constitutional Court, called the replacement of Aswanto a 'shocking and unconstitutional development that undermines judicial independence and even threatens the existence of the Constitutional Court as a guardian of democracy.'[51] Although such incidents raise serious concerns about the court's independence, and could undermine its reputation, the court has so far remained popular.[52]

The court has a practice of letting individual judges express their dissenting opinions. As argued by Butt, it is not clear what status or significance such dissenting opinion has, but it can at least be seen as a measure of transparency and individual accountability for the judges concerned.[53] The court does not provide a remedy to victims of human rights violations; it only reviews the constitutionality of laws.

Case analysis

This chapter will now examine judicial practice in four topics related to freedom of expression: limitation of human rights through disrupting internet access, expressions of criticism, criminal charges against expert witnesses, and charges of treason. The cases examined have been handled by the Constitutional Court, the Supreme Court, State Administrative Courts, and District Courts.

Limitation of human rights through disrupting internet access

There are various kinds of internet restrictions. This includes internet shutdown (blackout), which causes partial or complete failure of internet services, and internet throttling (i.e., slowing or restricting the bandwidth), which makes access to internet delayed or entirely inaccessible. There is also internet blocking, which is a measure intended to restrict access to certain information or resources, and which can be used to target particular social media platforms or users.

The Papua Internet shutdown case

The provinces of Papua and West Papua are located in the east of the country. These provinces can be considered remote, in the sense that it takes a long time to travel to, and within, the province(s). They are also much less developed economically than the national average.[54] There is considerable tension between Indigenous Papuans and people who have moved to the area from Java or other parts of Indonesia. There exists a Papuan independence movement, with a military wing. These guerrilla fighters have very limited military capacity, yet there is a considerable presence of Indonesian military personnel stationed in the area. Accusations of human rights violations are not uncommon, but often hard to verify. Papua has for a long time been difficult to access by the press.

The Papua Internet case[55] was raised at an administrative court against three policies of the Government of the Republic of Indonesia (represented by the president and the minister of Communication and Information), namely:

1 Throttling or slowing down internet access/restricting bandwidth for seven and a half hours in several areas in West Papua Province on 19 August 2019
2 Blocking data services and/or completely shutting down internet access in 42 cities/regencies in the provinces of Papua and West Papua from 21 August to 4 September in 2019
3 Extending the data services blockage and/or internet access cut off in six cities/regencies in the provinces of Papua and West Papua from September 4 to September 9 in 2019

The petitioners consisted of civil society representing journalists or concerned with journalism.[56] They argued that the government's policy caused losses because they were unable to carry out their work as journalists, and that the policy violated the right to freedom of expression, including the right to seek, access and disseminate information. The policy constituted, they argued, an illegal limitation of rights. The author of this chapter was an expert witness in this case, providing testimony that emphasized human rights law.

The court found that, first, internet access affects the freedom to express opinion and information, and constitutes a means to realize rights such as the right to education and teaching, enjoyment of the benefits of science and technology, work, political rights, association and assembly, and health care. Freedom of the

press is also a fundamental human right that forms the basis for other rights and freedoms in a democratic society because it allows everyone to actualize their potential and reveal the truth.

Second, the internet is a neutral facility. It can be advantageous or disadvantageous depending on its users. Therefore, internet access restrictions can only be proportional when aimed at perpetrators and illegal content, and legal proceedings are carried out against the perpetrators. Disconnecting the internet in its entirety is a policy that ignores other rights.

Third, the policies concerned did not only limit human rights, but also constituted a derogation of rights. Policies that derogate from existing rights should be based on an official declaration of a state of emergency. The court considered the Government Regulation in Lieu of the Law No. 23 of 1959 on emergencies and found that the government could have the authority to limit internet access under such circumstances as described in this regulation. However, no such declaration was in place and the government's actions were not proportionate. Consequently, the actions failed to meet the requirements for lawful limitation of rights and were declared contrary to the provisions on human rights limitations found in the constitution,[57] the Human Right Law,[58] and in the International Covenant on Civil and Political Rights (ICCPR),[59] ratified through the Law No. 12 of 2005.

Based on the above considerations, the court granted the petitioners' claim and declared the three contested policies as unlawful acts. In its reasoning, the court referred to human rights law, as found in the constitution, national law, as well as in international treaties. The court also referred to various international soft-law instruments, including the Siracusa Principles on the limitation and derogation of provisions in the ICCPR; the Johannesburg Principles on national security, freedom of expression and access to information; the Camden Principles on the freedom of expression and equality; General Comment No. 34 by the Human Rights Committee on the right to freedom of expression; and General Comment No. 13 by the Committee on Economic, Social and Cultural Rights on the right to education.

This case is a rare example of an administrative court making decisions directly based on human rights, as well as an example of an Indonesian court explicitly considering international soft law instruments on human rights. However, no remedies were granted to any victims, and no sanctions were imposed. The court merely stated that the internet blocking and throttling that had already taken place was unlawful. After the court's decision in June 2019, internet services were allegedly shut down, again, in July of the same year.[60] Shutting down or throttling internet access has also been practiced elsewhere in the country. For example, in Wadas village, Central Java, there was a land conflict, where residents opposed a mining project on land that they considered their own. Thousands of police officers and *preman* (militias or gangsters) were brought in, and many residents were arrested or subjected to violence.[61] The police began their operation by shutting down or throttling the villagers' internet access to the effect that the internet was completely inaccessible.[62] Incidents such as these indicate that the Court's decision in the Papua Internet shutdown case had absolutely no impact in real terms.

Constitutional review of Article 40 in the Information Technology and Electronic Transactions Law

This case addressed a crucial issue: who should decide on when a limitation of human rights is appropriate, the judiciary or an institution under the executive government?

Article 40 of the 2016 Information Technology and Electronic Transactions Law (ITE law), regulates internet blocking, throttling, and shutdown. This article was challenged before the Constitutional Court.[63] Article 40 reads as follows:

(1) The Government facilitates the use of Information Technology and Electronic Transactions in accordance with the provisions of laws and regulations.
(2) The Government protects the public interest from all kinds of disturbances resulting from misuse of Electronic Information and Electronic Transactions that disrupt public order, in accordance with the provisions of laws and regulations.
    (2a.) The Government is obligated to prevent the dissemination and use of Electronic Information and/or Electronic Documents containing prohibited contents in accordance with the provisions of laws and regulations.
    (2b.) In carrying out the prevention as referred to in paragraph (2a), the Government is authorized to terminate access and/or instruct the Electronic System Operator to terminate access to Electronic Information and/or Electronic Documents which have contents that violate the law.
(3) The Government determines agencies or institutions that have strategic electronic data that must be protected.

The petitioners, Arnoldus Belau and the Alliance of Independent Journalists argued that Article 40 (2b) violated their constitutional rights. They argued the provision gives broad authority to the government to take over the court's power in upholding law. They argued that the authority to examine, hear, and decide a case belongs to the judiciary as regulated in the Law on Judicial Powers.[64] This especially concerns the authority to terminate access, which is a limitation of the freedom of expression and the freedom of information. Such measures must be subjected to strict supervision, which should be exercised by the courts. The petitioners also claimed that the government's authority to unilaterally interpret whether a particular piece of information or content of an electronic document violates the law should be considered as contrary to due process of law. For this reason, the petitioners requested for Article 40 (2b) of the ITE Law to be declared unconstitutional, having no binding legal force. Instead, they argued, termination or slowing of internet services should be subject to a prior approval by the state administrative courts.

Maintenance of public order may constitute a justifiable ground for imposing limitations under human rights law. The petitioners were not arguing against the possibility of restricting internet access as such, or for the revocation of the norms

in the above-quoted Article 40 (2b), but appealed to the court to limit the interpretation of the *a quo* norm by adding the phrase 'after issuing a written administrative order or state administrative order.' This is what is known as digital notification through the three-part test process, elaborated in the Siracusa Principles, as a legally accountable mechanism:

> In its decision, the Court emphasized how information could spread quickly on the internet. It argued that, if electronic information that violates the law are allowed to spread, then the negative impact can be much larger. For this reason, measured speed and accuracy are needed by the Government to be able to immediately take precautions by terminating access to the electronic information and/or electronic documents with contents that are in violation of the law.[65]

The Constitutional Court found that the law under review did not violate the constitution. In its decision, the Court stated that:

> the internet is a digital communication platform that can involve anyone with the characteristics of distributing electronic information and/or electronic documents that are very fast, extensive, and massive, without knowing space and time. If the electronic information and/or documents with content that violates the law has been accessed before being blocked, then the negative impact will be much faster and massive which, within the limits of reasonable reasoning, can cause racket, anxiety, and/or disrupt public order. For this reason, measured speed and accuracy are needed by the Government to be able to immediately take precautions by terminating access to the electronic information and/or electronic documents with contents that are in violation of the law.

In other words, speed was considered necessary to curb illegal content, thus it was considered too time demanding for the government to issue a written state administrative court order before initiating a restriction. There were two dissenting opinions from Justices Suhartoyo and Saldi Isra. They argued that the petition in question should be partially granted and that the article under review did not specify any procedures that should be carried out by the government when terminating access. The article under review had the potential to impose limitations on human rights, and on constitutional rights, and this limiting potential should be clearly regulated to provide legal certainty. Their argument emphasized that the law should provide legal certainty on how rights limitation is carried out so that citizens or institutions affected would know the basis behind the decision to limit their right to information.[66]

The author is of the opinion that excluding the limitation on human rights from scrutiny by the courts, in this case from the state administrative courts, is tantamount to discretion without legal accountability. Any human rights limitations need to be scrutinized to ensure that state practice does not violate human rights standards. A key problem with Article 40 (2b) is that it is too broad and lacking in

detail, giving too much room for interpretation. Ideally, systematic interpretation should be applied (i.e., paragraphs 2a and 2b of Article 40 should be read together rather than separately). Then it becomes clear that 'termination of access' in paragraph 2b should not be interpreted as allowing internet shut down, as the phrase refers to the termination of access to a content prohibited by law and regulation (as prescribed in paragraph 2a) or in other words, content blocking. The wide scope of interpretation is making the law vulnerable to abuse by the executive government. This is shown by actual occurrences such as the Papua Internet shutdown case and the Wadas internet shutdown case, previously mentioned. The courts have hardly any role in providing oversight on this issue. In the exceptional case that a court ruling takes a clear stance, as in the Papua Internet shutdown case, it still does not affect government behaviour.

Expressions of criticism

There are various legal provisions that could be used to undermine freedom of expression. In this subsection, three cases will be discussed, in which problematic provisions were challenged before the Constitutional Court. This subsection also discusses cases pertaining to the application of the ITE law. The ITE Law has often been criticized for its potential to violate the freedom of expression. The case chosen for discussion is special in the sense that it has received considerable national attention, but in other aspects it is considered typical for how the ITE Law can be applied to silence critical expressions.

Constitutional review of the presidential insult articles

The petitioners, a lawyer and a private entrepreneur, claimed that the prohibition of insulting the president and the vice president, as regulated through the Criminal Code,[67] violated their right to legal certainty, in particular with regards to the constitutional rights to obtain and convey information.[68] In its reasoning, the court considered the colonial history of the prohibition of insulting the sovereign Head of State, which was originally the king or the queen. Whereas, under the newly amended constitution, sovereignty is held by the people as stated in paragraph 2 of Article 1:

'The dignity of the President and/or Vice President is entitled to be respected in terms of protocol, but. . . may not be granted privileges resulting in . . . their dignity being substantively different from that of other citizens.'[69] The court found the article on presidential insult violate the constitutional right to equality before the law and the rights to equal treatment, protection and certainty before the law.[70] The Court also referred to Article 7a of the constitution, which states that 'the President's and the Vice President's terms can be terminated by the People's Consultative Assembly based on proven violations regarding treason against the state, corruption, bribery, and other serious criminal offenses or disgraceful acts.' According to the court, maintaining the 'presidential insult article' could obstructs efforts to clarify whether the president or the vice President has

committed such violations. The court granted the petition and declared that the articles of the Criminal Code concerned held no legal force.

Constitutional review of the articles on expressions of enmity, hatred, and insult against the government of Indonesia

The petitioners claimed that certain articles in the Criminal Code violated their rights to legal certainty.[71] These articles, they held, were 'in spirit' similar to the articles on presidential insult that had been declared unconstitutional by the Constitutional Court in the 2006 case (previously discussed). Under the prevailing human rights commitment and supremacy of law, these articles were outdated.

The court decided in favour of the petitioners and ruled that the articles concerned should hold no binding legal force. The issues highlighted in its reasoning included the lack of clear legal indicators in the articles concerned, and the potential for abuse of power. This decision emphasized that the principle of proportional freedom of expression must take precedence over the sacralisation of public office.

Constitutional court review on defamation articles in the Criminal Code

H. Alias Wello, the Head of the Regional Legislative Body in Lingga, claimed in a petition that the articles on defamation in the Criminal Code,[72] violated his constitutional right to freedom of expression, as guaranteed by Art. 28 (F).[73]

The court ruled that the articles concerned should remain in force, since they protected the human rights of others (i.e., the right to reputation and dignity).[74] This constituted a legitimate limitation of human rights in line with the conditions for limitations spelled out in the constitution.

The Constitutional Court found that the case was in essence a constitutional complaint, not a constitutional review. In other words, the case did not so much concern whether the articles in question were in line with the constitution or not (as it would be in the case of a constitutional review), but it was rather about how the law was applied. However, the court observed that its mandate was to review the constitutionality of the norms, not their application.

One important aspect of the decision was its emphasis on the function of the articles under review – namely, to protect the human rights of others. Arguably, this should indicate that the articles concerned should only be used to protect individuals. In practice, however, they been frequently used also to protect institutions and enterprises, for example in the Saiful Mahdi case discussed in the next section.

The Saiful Mahdi case

Saifu Mahdi was a lecturer at Syiah Kuala University (Unsyiah) in Aceh, who had been teaching for 25 years at the Faculty of Mathematics and Natural Sciences. In March 2019, he wrote a WhatsApp message complaining about the faculty recruitment process at the Faculty of Engineering, implying irregularities and

corruption. The message was sent to a group that had around 100 Unsyiah lecturers as members.[75] Saiful Mahdi was then reported by the Dean of Engineering to the University Senate. He was summoned for clarification by the University Senate, and afterwards, reported to the police. His case was handled by the District Court in Aceh, which found him guilty of slander and sentenced him to three months imprisonment, and a fine of 10,000,000 IDR.[76] The case was appealed and upheld by the High Court. This case drew nationwide attention as an example of blatant injustice, which led President Joko Widodo to request the House of Representatives to grant amnesty to Saiful Mahdi. This request was approved.[77] This amnesty was welcomed by human rights activists, but some pointed out that the case of Saiful Mahdi had been like that of many other people sentenced for defamation or slander under the ITE law, who were not granted any presidential pardon.

The courts should have primarily considered whether the elements of the crimes were fulfilled. There are two facts that should have become the grounds for Saiful Mahdi's acquittal. First, there is no insulting or defamatory content. Saiful only claimed that the campus recruitment was not based on meritocracy. No names or particular persons were mentioned.

Both the District Court and the High Court failed to differentiate between insulting (*beleediging*) personal qualities (*smaad*) and insulting officials or public bodies (*gestelde macht of openbaar lichaam*). In line with the constitutional review of defamation in the Criminal Code previously discussed, the article under which Saiful Mahdi was charged should only apply to protect the dignity and reputation of natural persons, not legal entities.

Both the District and High Court's decisions failed to assess the legal facts revealed during the trial and failed to consider the justification for the norms of cyberdefamation. The Criminal Code's provisions on defamation allow for expressions in line with the public interest.[78] The courts should consider whether Mahdi's critical comments concerned a matter of public interest. The judicial decisions in this case are not only far removed from the formal and substantive standards of law and its development, they also do not engage with the issue of the constitutionalism of human rights at all. The court could also have considered the six-part threshold test as stipulated in the 2012 Rabat Action Plan.[79]

Ramsiah Ahmad case

Ramsiah Ahmad at the State Islamic University Alaudin Makassar, who criticized the closure of the university's communication laboratory, also had to endure what Saiful Mahdi did.[80] Ramsiah's case did not reach the court, but the case was terminated only after four years of being named a suspect.

Defamation charges against expert witnesses

Expert witnesses are widely used in Indonesian courts. They may be appointed by the court or suggested by parties to a case. The Criminal Procedural Code[81] and the Constitutional Court Decision No. 21/PUU-XII/2014 recognize expert

testimony as a form of legal evidence. Judges have the discretion to take advantage of the expert's testimony or set it aside. Nevertheless, there are several cases where academics have been sued for the testimonies they had given as expert witnesses in trials, which will be examined in the following paragraphs.

Professor Bambang Hero Saharjo from Bogor Agricultural University (IPB), was sued for 510 billion IDR by the palm oil company Jatim Jaya Perkasa after giving an expert testimony in a government lawsuit against the company, concerning negligence leading to fires on its oil palm concession in Sumatra. A key part of his testimony was to assess the financial value of the environmental damage resulting from the fires.[82] The court fined the company 119.8 billion IDR and ordered it to pay for the restoration of ten square kilometres of burned plantation, estimated at 371.1 billion IDR.[83]

His colleague at IPB, Professor Basuki Wasis, functioned as an expert witness for the Corruption Eradication Commission in a case against the now former governor of South Sumatra, Nur Alam, who was sentenced to 15 years in prison for corruption related to the issuance of a mining permit. As an expert witness, Professor Wasis calculated the state's losses. Nur Alam sued the witness and demanded compensation for material losses amounting to 1.47 billion IDR and immaterial losses amounting to 3 trillion IDR.[84]

Both cases ended in favour of the scientists.[85] However, the judicial process had greatly disrupted their academic activities, and one could question whether such cases should be accepted at all (i.e., cases where people are sued for the expert witness statements they provide to the court).

There are at least three reasons why criminal charges against expert witnesses should be stopped. Firstly, thoughts and opinions should not be punished. Secondly, according to the Higher Education Law, giving expert testimony in a court is part of the three duties of higher education – namely, community service.[86] Thirdly, the punishment contravenes with the 2017 Surabaya Principles on Academic Freedom, which emphasizes that academics must be free from restrictions and disciplinary action in order to develop an academic culture that is accountable and has scientific integrity for humanity. Many expert witnesses are academics.

*Political expressions versus the accusation of treason (***Makar***)*

The act of *makar* is forbidden by various articles in the Criminal Code. The term is often translated as *treason*, but since the meaning is contested, this paper will use the Indonesian term. As shown below, charges of *makar* have often been applied to criminalize expressions in areas associated with separatism, particularly in Papua. It is not obvious from the Criminal Code itself what elements constitute the act. Consequently, the term has been open for (mis) interpretation. A key question in this regard is whether an expression can qualify as *makar*, or whether there needs to be a corresponding act (i.e., an attack in a narrower sense of the word).

Constitutional court review of treason (*makar*) articles

The meaning of *makar* was challenged at the Constitutional Court in 2017.[87] The petitioner, the Institute for Criminal Justice Reform, argued that the Criminal Code provisions using the term[88] violated the constitutional human right to legal certainty and equality before the law,[89] and the right to personal protection and freedom from fear.[90]

The court considered that the existing Criminal Code originated from the Dutch colonial authorities, and that the Dutch language used in the code had not been replaced with any official regulation that specified how various terms should be understood. A new Criminal Code was enacted in 2022 and is expected to come into force in 2026.

The court's reasoning addressed various terms used and how they had been translated. The court paid attention to how the colonial authorities had used the term *makar*. It also examined how the term was used in an Indonesian dictionary (*Kamus Besar Bahasa Indonesia*), which, the court argued, had 'moved away from the term's original meaning' (i.e., when the Criminal Code was originally passed).[91] In addition, the court considered the right to legal certainty in relation to Article 3 of the constitution, which states that Indonesia is *Negara Hukum* (literally, a' Law State'). The court found that the use of the term *makar* had created legal uncertainty, as it was not obvious whether the term should be interpreted as an actual attack. However, in most cases where the term was used in the Criminal Code, it originated from the Dutch word *aanslag*, which means 'attack.' Consequently, the court found that these terms should indeed be interpreted as an attack' otherwise the various articles in the Criminal Code would be in conflict with the constitution and hold no legal force. This is an example of how the court make rulings of 'conditional constitutionality.'

This decision implies that the proof of intent is not enough and that the element of an act (i.e., an actual attack) must be proven in court. In the context the term is used, that would mean an attack with the intention that all or part of Indonesia's territory falls into the hands of an enemy, or to separate parts of Indonesia's territory. In its decision, the court seemed to direct criticism at the way the public prosecutor and the Supreme Court had applied *makar* articles in the past, and referred to a number of Supreme Court decisions, where neither the court nor the public prosecutor had proven or considered the element of attack.[92] The Supreme Court seemed not to consider what elements the act consisted of and yet the defendants had been sentenced to long prison sentences.[93] The court emphasized that law enforcers must be careful in applying articles related to *makar* so that they do not become a tool to silence freedom of expression in a democratic country, which is contrary to the spirit of the 1945 Constitution.

In practice, the public prosecutor and the courts tend to incorrectly apply the elements of treason, finding treason even when there is no evidence of an attack, only intent. This has resulted in the deprivation of the constitutional rights of many citizens. In addition to the above-mentioned examples given by the Constitutional Court itself, there are also more recent examples. One such example is the Papua Students Case, discussed below.

Papua Students case

Seven Papuan students were charged of *makar* after they had staged a demonstration against the way the police acted towards the residents of the Papuan student dormitory in Surabaya. This came in the aftermath of several racist incidents against indigenous Papuans in Surabaya and Malang. Among the accused was the chairman of West Papua National Committee and a spokesman for the Indonesian People's Front for West Papua, two organisations advocating for independence. The Banjarmasin District Court found all seven students guilty of treason, as regulated in Article 106 of the Criminal Code, and sentenced them to ten months in prison.[94] Applying *makar* charges for such protest, is clearly contrary to the aforementioned Constitutional Court decision.

Trends on makar *charges*

The table below shows the number of cases concerning *makar* in the Supreme Court's directory of Court decisions. This also covers decisions of lower courts. The Supreme Court is gradually making more and more judgements publicly available, including decisions of the courts under its jurisdiction, but most court decisions are still not published. Thus, both the total number as well as the trends may not be fully represented by the Figure 6.1. Nevertheless, the table clearly shows that even after the Constitutional Court's decision pertaining to *makar*, the related articles are still frequently used to silence free political expression.

Many of these cases occur in Papua where there is several organizations that advocate for independence. They have frequently been targeted by law enforcement apparatus and charged with *makar*. Based on Figure 6.2 from Papua Behind

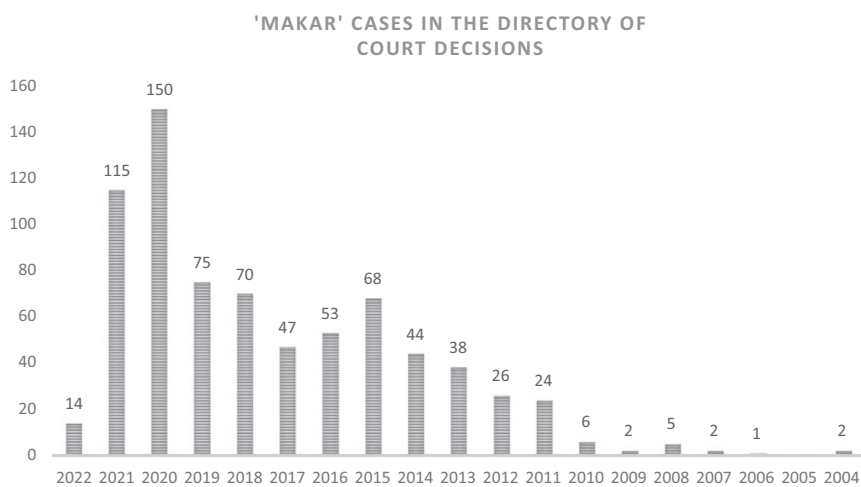

Figure 5.1 Makar cases in the Supreme Court's directory of court decisions

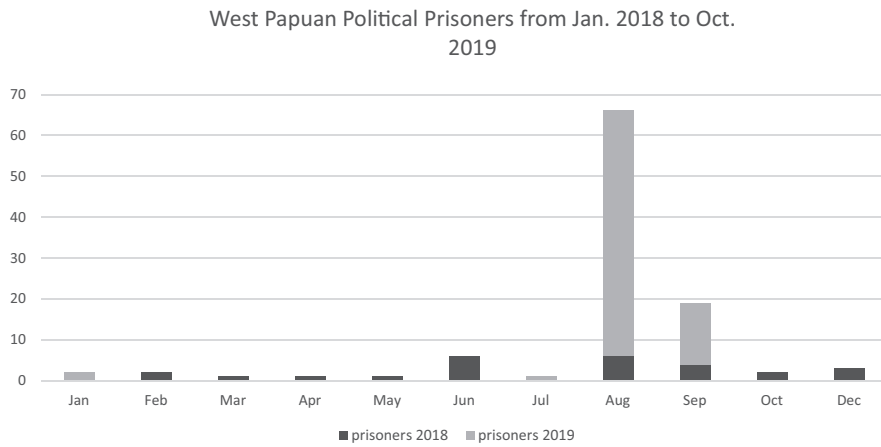

Figure 5.2 West Papuan Political Prisoners behind bars from January 2018 to October 2019

Bars, an online resource about political prisoners in West Papua, from January 2018 to October 2019 there were 99 political prisoners from Papua or West Papua.[95]

According to 2020 Papua Behind Bars data, out of the 27 *makar* cases in 2018 and 2019, 25 were arrested for taking part in peaceful gatherings and political demonstrations. Three suspects were arrested in 2018 while engaging in a traditional burning stone and worship event at the West Papua National Committee office in Timika. In 2021–2022, eight Papuans were arrested by the police after raising the Morning Star Flag, which represents Papuan independence, followed by a long march to the offices of the Papuan People's Representative Council.[96] They were charged with *makar* under the Criminal Code.[97]

Conclusion

The chapter shows that the judiciary has failed to robustly and fundamentally uphold the human rights guaranteed by the constitution. Legal considerations often rely on formal aspects, and even then they are often incomplete, incoherent and far from delivering standard decisions that adopt legal developments, including the human rights treaties ratified by Indonesia.

The Constitutional Court refers to human rights more often than other courts and has upheld human rights in important decisions. The court has defended constitutional guarantees for freedom of expression, for example in its decisions concerning the treason/*makar* case or the case involving articles on insulting the president. However, as evidenced by the aftermath of these cases, decisions of the Constitutional Court are not necessarily followed, neither by other courts nor by other branches of government.

To strengthen human rights protection through court decisions, documenting jurisprudence should be encouraged and made easily accessible for judges as well as other law enforcement officers. Furthermore, constitutionalism and human

rights standards need elucidation in training programs for judges, as these elements continue to be an important basis for judicial decisions. This last point is pertinent to be studied further to examine how to establish and maintain a legal tradition that utilizes arguments based on doctrinal and legal developments stemming from jurisprudence.

Decisions of the Constitutional Court have often been subverted in the interest of ruling powers: laws have been applied in ways that clearly go against the ruling of the Court (as shown throughout the chapter). The shrinking space for civil liberties and the deteriorating situation for freedom of expression, tested before the judiciary, cannot be separated from either law or politics.

Notes

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6 The Relationship between Human Rights and Criminal Law

A Human Rights-Based Criminal Justice System

Sri Wiyanti Eddyono

Introduction

This chapter will explore the relationship between the criminal justice system and human rights in Indonesia. It will outline the legal framework pertaining to criminal law, and discuss the human rights dimensions of this framework, with special focus on the right of victims of crime. Examinations of judicial practice will be integrated into this discussion.

This structure is chosen to provide a comprehensive picture of the integration of human rights into the field of criminal law. On the one hand, human rights have had significant influence on the development of the legal framework pertaining to criminal law, but on the other, serious human rights challenges remain. Most courts provide scant reasoning behind how they apply criminal law provisions, and human rights are rarely considered at all in criminal cases. These claims will be substantiated throughout this chapter.

The Constitutional Court has in some cases reviewed laws pertaining to criminal law (both procedural and substantive) against the human rights guarantees found in the constitution. While this chapter discusses some of these cases, the courts' reasoning in these cases is discussed in more detail in chapter 5 on constitutional law.

In practice, criminal law in Indonesia is often viewed as separate from human rights. This perspective is rooted in the division of law into specialized fields, where each field is seen as having its own unique qualification in addressing legal issues. In addition, there is the perception that human rights cases are under the jurisdiction of the Indonesian Human Rights Courts. This is erroneous because the Indonesian Human Rights Courts only have jurisdiction over cases concerning crimes against humanity and genocide. Perhaps for these reasons, law enforcement officials, including police, prosecutors, judges, and defence advocates, often fail to recognize the human rights aspects of criminal cases.

Indonesia has many human rights issues, the solutions to which are complex and broad, connecting various fields of law. For example, a land conflict pertaining to dam and mine development on community land in Central Java was handled with excessively repressive measures by the security forces. Many residents were injured in clashes with the police and 67 residents were detained for one night (from 8 February to 9 February 2022).[1] As this case illustrates, conflicts over land

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or natural resources can lead to violence that adds a criminal dimension to these cases. It is increasingly important to clarify the relationship between human rights and criminal law, bearing in mind that on different occasions, criminal law is used to silence parties who express themselves or fight for their rights (as discussed in chapter 5 and as illustrated by various cases discussed below).

The relationship between criminal law and human rights law is complex and can create paradoxes. Criminal law is both an effective tool for protecting human rights and a tool that can be repressive and used to perpetuate human rights abuses.[2] In the context of protecting basic rights, criminal law is intended to prevent interference by various parties that could curtail individual freedoms, protection, and interests. Mahmoud Cherif Bassiouni also views criminal law as a safeguard against the abuse of power that can impact individual life, freedom, and integrity.[3] According to Françoise Tulkens, there are three areas that represent the close relationship between criminal law and human rights: namely, the classification of criminal acts, procedures, and sentencing.[4] Thus, the substance and procedure of criminal law can constitute an important indicator of the extent to which a country is based on the rule of law, and whether it can be considered to protect human rights. When analysing the legal framework, this chapter addresses four aspects of criminal law: regulation of criminal acts, criminal procedures, sentencing, and protection and rights of victims.

Overview of criminal law in Indonesia

At the time of writing, Indonesia's current Criminal Code has been in effect since 1918, when the country was still under the Dutch colonial rule. A new Criminal Code is expected to come into effect in 2026. After gaining independence, Indonesia retained the Criminal Code it inherited from the Dutch and officially inducted it into their legal framework in 1946. Thus, in this chapter, it will be referred to as the 1946 Criminal Code. It is written in Dutch. Translations exist, but no particular translation is formally approved by the government. Consequently, one may often see Dutch terms emerge in Indonesian legal discourse, and in cases before the courts. Over the years, there were various failed attempts to revise the Criminal Code. However, the criminal law framework has been updated through the enactment of laws that impose criminal sanctions for actions that are not regulated in the Criminal Code, as illustrated in Figure 8.1. This chapter will refer to these laws as special criminal laws. They may regulate both substantive and procedural aspects. Some laws – like the law on banking – do contain some criminal law provision, although the laws themselves are mainly of an administrative nature. Penal arrangements in law of administrative nature are only complementary.

With the existence of various laws that partially overlap, where several possibly could be applied to a given case, the principle is that the more specific law should be applied. However, police investigators and state attorneys have, in practice, much discretion to pick which laws and articles to apply. As will be clear from the discussion below, some of the laws protect human rights, including the rights of victims, much better than others.

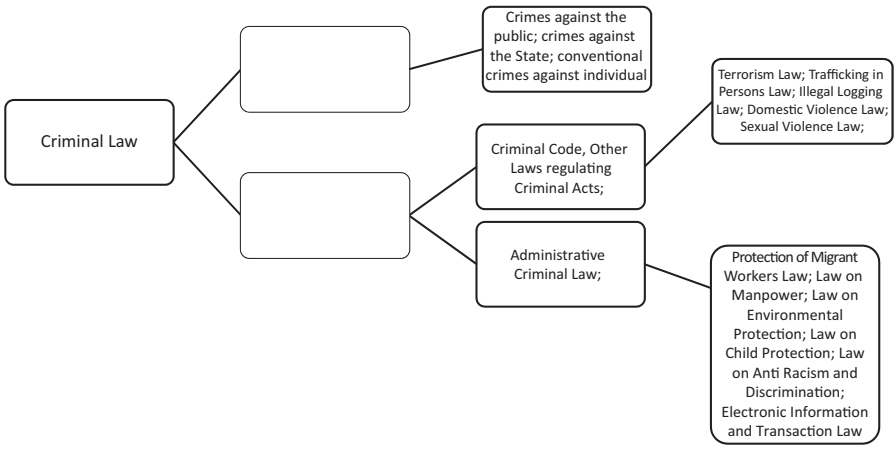

Figure 6.1 Criminal law framework in Indonesia

The new Criminal Code

Recently, a new Criminal Code has been approved, amid much controversy. The 2023 Criminal Code is expected to come into effect in 2026. Until then, the old Criminal Code still applies. The 2023 Criminal Code significantly reduces the scope of special criminal law by incorporating many of the criminal provisions from the special criminal laws into the new code. The intention is to make a more streamlined and integrated approach to criminal law and create a more coherent and comprehensive legal framework.[5] The new Criminal Code includes a range of criminal acts that were previously regulated in separate laws, such as Law No. 23 on Child Protection, Law No. 40 of 2008 on Elimination of Racial and Ethnic Discrimination, and the 2018 Law on Terrorism.[6] In addition, new criminal provisions have been added to address emerging issues such as smuggling in persons, counterfeiting of passports and travel documents, criminal acts involving misuse of human organs, human body tissue, human blood, as well as abortion.

Human rights dimensions of Indonesia's criminal law

According to Edward Omar Sharif Hiariej, there are two major schools of thought regarding the purpose of criminal law.[7] While Hiariej refers to European scholars, his writing is influential within the field of criminal law in Indonesia. The classical school of thought posits that criminal law exists to address situations where there is no legal certainty, and injustice occurs due to differential treatment before the law. The classical school seeks to establish legal certainty and protect the interests of the state. This includes protecting individual interests from arbitrary authority. This school is built upon three main principles: the principle of legality, the principle of error, and the principle of proper retaliation. The second school of thought – referred to as neoclassic – emphasizes that criminal law exists to protect

the interests of society and individuals.[8] While these two schools have different orientation, they both aim to protect the interests of individuals and society.

The purpose of criminal law and the purpose of punishment are not clearly defined in the 1946 Criminal Code.[9] This has had implications for law enforcement, as the lack of a clear purpose results in clashes between justice, certainty and expediency.[10] The 2023 Criminal Code emphasizes that the existence of a national criminal law is adjusted to the development of the life of the nation and state with the aim of respecting human rights. The 2023 Criminal Code is also based on the concept of balancing various interests:

> [balancing]public or state interests and individual interests, between the protection of perpetrators of criminal acts and victims of criminal acts, between elements of action and mental elements, between legal certainty and justice, between written law and living law in society, between national values and universal values, and between human rights and human obligations.[11]

This shows that the 2023 Criminal Code recognizes human rights and seeks to balance these with other aspects and interests.

An important element in the protection of individual rights in criminal law is the principle of legality. The principle of legality is the main pillar of criminal law in Indonesia, which emphasizes that there is no crime without law.[12] The principle of legality itself can be understood as a mechanism for protecting individual rights from the arbitrariness of the state (i.e., from accusations that do not rely on law).[13] The principle of legality is emphasized in Article 1 of the 1946 Criminal Code:

1 No act can be punished except based on the strength of criminal rules in existing laws, before the act is committed
2 If after the act has been committed there is a change in the law, the rule that is the lightest for the defendant is used

Can the principle of legality be excluded? According to Moeljatno, criminal law rules cannot be applied retroactively.[14] Historically, the principle of non-retroactivity has been ignored or excluded at the international level in the context of ad hoc military criminal justice (Nuremberg and Tokyo Tribunals) and other international ad hoc criminal tribunals (The International Criminal Tribunal for the former Yugoslavia and The International Criminal Tribunal for Rwanda). These exceptions to the principle of legality were done in cases concerning serious human rights violations and crimes of *erga omnes* nature.

In Indonesia, there are some Constitutional Court cases concerning laws that side-line the principle of nonretroactivity. One example is the case concerning the former governor of the then Indonesian province of East Timor, who had been sentenced on charges of crimes against humanity. He challenged the constitutionality of the law applied, which clearly allowed for retroactive application.[15] The court ruled that the law was in line with the constitution and argued that the right not to be prosecuted by retroactive legal provisions can be limited. For

criticism of this stance, see chapter 4. Another case concerned the law used to try the perpetrators of the 2002 Bali Bombings, which killed more 202 people of more than 20 nationalities. A new general antiterror law had been passed six days after the bombings took place. This law was first an interim law issued by the president, and later approved as a permanent statute by the House of Representatives. On the same day the interim antiterror law was passed, as well as another interim law that stated that the antiterror law could be applied for the Bali bombings. This latter interim law was then submitted for a judicial review before the Constitutional Court. The applicant, one of the perpetrators behind the bombings, claimed that the law allowed for retroactive application, and thus was contrary to Article 28I of the constitution, which reads 'the right not to be prosecuted under retrospective laws is a basic human right that must not be diminished under any circumstances.' He argued that the words 'under any circumstances' meant that the guarantee against retroactive laws was absolute.

The government argued in response to him that, first, existing laws at the time the Bali bombing occurred were not sufficient to handle terrorism effectively, so the new laws were necessary. Second, it argued its actions had to be considered in the context of its international responsibilities to criminalize terrorism. Third, it argued that the constitutional guarantee against retroactivity did not stand alone, but had to be considered against the human rights limitation clause in the constitution (Article 28J [2]), and that the right of the Bali bombers to not be subjected to retrospective laws was outweighed by the death, injuries and loss of property that occurred as a result of the bombings. Fourth, it argued that terrorism constituted an extraordinary crime, a 'crime against humanity,' and therefore, retrospective legislation was permissible to address it.[16]

The court ruled in favour of the applicant and declared the law null and void.[17] In its reasoning the court referred to the principle of legality to which the Criminal Code adhered – namely, '*nullum delictum nulla poena sine previa lege poenali*' (no crime, no punishment without previous penal laws). The reasoning also discussed international law, and the rationales behind the application of retrospective laws in the Nuremberg trials. The court held that international law prohibits retrospective criminal laws, unless used to pursue gross violations of human rights. It held that the bombings were not a gross violation of human rights as regulated through Indonesian law (which only includes genocide and crimes against humanity, as regulated through the 2000 Law on Human Rights Courts).

A minority of the judges held the view that the right not to be subjected to retrospective laws was not absolute, and that internationally, retrospective criminal laws had been found acceptable in very serious cases, where justice for victims was more important than the rights of perpetrators. This meant that the ban on retrospective laws could be set aside.[18]

The principle of legality in the 2023 Criminal Code is also regulated, although it is not the same as the 1946 Criminal Code. Based on the 2023 Criminal Code, a person can be convicted not only based on criminal law provisions, but also based on 'the law that lives in society,' which makes certain actions subject to criminal punishment even though they are based on unwritten rules. This can be

seen through the phrase '. . . does not reduce the validity of the law that lives in society which determines that someone deserves to be criminalized.'[19]

According to the 2023 Criminal Code, there are restrictions on the application of laws that live in society, namely: a) they only apply in communities where these laws apply; b) insofar as the act is not regulated in the Criminal Code; c) the living law must be is in accordance with the values contained in *Pancasila* (which has often been referred to as Indonesian state ideology, and is outlined in the preamble of the constitution), the constitution, human rights, and the general principles of law that are recognized by the people of nations.[20] Thus, there is ambiguity concerning the legality principle. On the one hand, the 2023 Criminal Code seems to provide some space for laws that live and are applicable in society but, on the other, there are quite rigid restrictions concerning how such living laws shall be enforced. Interestingly, human rights are mentioned as one of the important principles that can limit the enforcement of laws that live and are applicable in society.

Indonesian criminal law seeks to protect three interests when a criminal act is dealt with: the interests of the individual, the interests of society, and the interests of the state.[21] The Criminal Code contains articles that reflect these interests and guide the application of criminal sanctions. However, some criminal law articles have been subject to controversy due to concerns that they may be used to suppress individual freedoms and human rights, such as the articles on public crimes and state security. These articles are formulated in a way that give them a broad scope of interpretation. This has the potential to produce different and ambiguous interpretations, and with that, creating legal uncertainty. For example, the provisions related to treason[22] are open for interpretation, and arguably for misuse. This is inconsistent with the principles of *lex certa* and *lex scripta* as one of the derivatives of the principle of legality. In chapter 5 on contitutional law, Witraman claims that these articles have been frequently applied to silence critical expressions, especially in Papua. These articles have been challenged before the Constitutional Court. However, as discussed in that chapter, the court found that the problem resides in the application of the law, not in how it was formulated.

Another particularly controversial special law is Law No. 11 of 2023 on Electronic Information and Transactions, which has been used to criminalize online expressions. Well known examples of this include the Saiful Mahdi case (the case of a lecturer who was convicted for defamation after questioning the governance of his institution, discussed in chapter 5) and the Prita Mulyasari case (the case of a patient who was sentenced for defamation after complaining about the health services in a hospital, discussed in chapter 7).[23] Some aspects of this law are also discussed in chapter 5.

Law No. 1 of 1965 on Prevention of Misuse or Defamation of Religion[24] can also be considered to be particularly controversial, and have a wide scope for interpretation, as seen by the case of Meliana (who complained that the mosque's call to prayer was too loud and was sentenced for blasphemy).[25]

The principle of *nullum crimen, noela poena sine lege stricta* implies that criminal law provisions should be interpreted strictly or narrowly, but cases such as those mentioned above illustrates that this is not consistently adhered to in court practice.

Various special criminal laws also have an important function in human rights protection. Special criminal laws that are sensitive to human rights include, among others, Law No. 23 of 2004 on Elimination of Domestic Violence,[26] Law No. 21 of 2007 on Eradication of the Criminal Acts of Trafficking in Persons,[27] Law No. 23 of 2002 on Child Protection,[28] Law No. 11 of 2012 on Juvenile Criminal Justice System,[29] and Law No. 12 of 2022 on Criminal Acts of Sexual Violence.[30]

The development of criminal law has been influenced by the existence of an international legal framework in the form of covenants, conventions, declarations, and conferences. This framework has been used by activists to advocate for legal changes domestically. This has involved either ratifying international legal instruments or establishing policies that align with the mandates of international conventions. For instance, the Domestic Violence Law in Indonesia was a result of persistent advocacy by the women's movement, which demanded that the state provide protection to women by adjusting the legal framework pertaining to criminal law to fulfil its obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[31]

Civil society organizations have advocated for ratification of international conventions as a means of promoting human rights protections at the national level. For example, those advocating for the enactment of a Migrant Worker Protection Bill in Indonesia from 2010–2017 urged the ratification of the Migrant Worker Convention as a first step. This was based on the consideration that the Draft Bill could later incorporate the high standards required by the convention,[32] leading to adaptations in national law that better protect migrant workers and victims of criminal acts related to their exploitation.

As shown in Table 6.2, the legal framework pertaining to criminal law has started to acknowledge the rights of vulnerable groups and address discrimination. The Domestic Violence Law describes four types of domestic violence: physical, psychological, sexual violence and neglect or abandonment. Each of these crimes has an intensity of violence that ranges from mild to severe. This law is directly linked to CEDAW, which Indonesia has ratified.[33]

The Law on Trafficking in Persons is an example of the state's obligation to protect women and children from trafficking as mandated by CEDAW. This law criminalizes human trafficking for sexual exploitation, labour exploitation, and organ exploitation.[34] Similarly, the Sexual Violence Law was enacted to protect everyone, especially women, from sexual violence by designating it as a special crime. This law is in line with Indonesia's international human rights obligations.

Indonesia has taken significant steps in protecting the rights of children through the enactment of the Child Protection Law and the Law on Juvenile Criminal Justice System. The Child Protection Law provides clear provisions for protection of children's rights, including protection from acts of physical, psychological, sexual violence 'or abandonment, including threats to commit acts, coercion, or unlawful deprivation of liberty.'[35] Certain acts are also categorized as criminal acts, which include abuse of children in political activities, involving children in armed conflicts, involving children in social unrest, involving children in events that contain elements of violence, involving children in war, involving children in

Table 6.2 Ratification of Human Rights Conventions and its impact on criminal regulations

No.	*Ratification of International Human Rights Conventions*	*Criminal Code and Criminal Justice System*	*Crimes Regulated*
1.	Law No. 7/84 on Ratification of Convention of Elimination of all kinds of Discrimination Against Women (CEDAW)	Law No. 23 of 2004 on Elimination of Domestic Violence	Physical violence, psychological, sexual as well as light, medium and severe neglect/ abandonment.
		Law No. 21 of 2007 on Eradication of the Criminal Acts of Trafficking in Persons	Trafficking in persons with the purpose of: sexual exploitation, exploitation of physical force and physical organs.
		Law No. 12 of 2022 on Criminal Acts of Sexual Violence on Crimes of Sexual Violence	Sexual harassment, sexual exploitation, forced sterilization, forced marriage, sexual abuse and slavery.
2.	Presidential Decree No. 36/ 1990 on the Ratification of the Convention on the Rights of the Child (CRC)	Law No. 23 of 2002 on Child Protection Law No. 11 of 2012 on Juvenile Criminal Justice System	Discrimination against children, Abandonment of children, not helping children who need help and in emergencies, unlawful adoption of children, cruelty, violence or threats of violence, including sexual violence, abuse of children, sexual intercourse with children, trading, selling, or kidnapping children, transplanting organs and/or body tissues of children, persuading children to choose other religions, recruiting or using children for military purposes, economic or sexual exploitation of children, involving children in the distribution of narcotics.
3.	Law No. 29/1999 on the Ratification of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)	Law No. 40 of 2008 on Elimination of Racial and Ethnic Discrimination	Intentionally make distinctions, exclusions, restrictions, or selection based on race and ethnicity; Showing hatred or hatred towards others based on race or ethnicity; Intentionally commit deprivation of life, assault, rape, obscenity, theft by force, or deprivation of liberty based on race or ethnicity.

No.	*Ratification of International Human Rights Conventions*	*Criminal Code and Criminal Justice System*	*Crimes Regulated*
4	Law No. 6/2012 on the Ratification of the International Convention on the Protection of he Rights of All Migrant Workers (ICMW)	Law No. 18 of 2017 on Protection of Indonesian Migrant Workers (IMW)	Providing incorrect data and information in documents, transfer of IMW documents to other parties, Charging placement fees to IMW, or Placement of IMW -that do not meet the age requirements; -with inappropriate position, type and skills; -that does not meet the requirements and without documents -in a closed country that does not have regulations that protect IMW

Source: by author

trafficking of persons, involving children in distribution of alcohol and other addictive substances, and sexual crimes against children. The Law on Juvenile Criminal Justice System specifically regulates the handling of children in conflict with the law, victims, and witnesses. It recognizes the importance of distinguishing the handling of children from that of adults and emphasizes the principle of the best interest of the child as the main consideration. The law also highlights that detention and imprisonment should only be used as a last resort.

The Law on Elimination of Racial and Ethnic Discrimination constitute 'implementing legislation' for the Convention on the Elimination of Racial Discrimination. This law clearly includes two types of criminal acts based on racial discrimination, namely:

1 Article 16: 'Anyone who intentionally makes differences, exclusions, restrictions, or selections based on race and ethnicity which results in the deprivation or reduction of the recognition, realization or implementation of human rights and fundamental freedoms to be equal in the civil, political, economic, social, and cultural aspects.' This article contains a specific provision on discrimination based on race and ethnicity.
2 Article 17: 'Any person who intentionally commits deprivation of life, assault, rape, obscenity, theft by force, or deprivation of liberty based on racial and ethnic discrimination.' Although the Criminal Code has regulated these crimes, this Article makes these crimes more explicit in the context of racial and ethnic discrimination.

The Law on Elimination of Racial and Ethnic Discrimination has been used in district courts. In one case involving hate speech against ethnic Chinese delivered at a mosque in Surabaya, the court concluded the defendant was found guilty of the crime, with reference to Article 16 of the Elimination of Racial and Ethnic Discrimination Law. The court's reasoning stopped at referring to the above-mentioned law; it did not explicitly link the defendant's actions to human rights issues.[36]

The Law on Protection of Indonesian Migrant Workers falls into the category of special administrative criminal law. This law was enacted to meet the standards of protection of the Convention on the Rights of Migrant Workers.[37] Criminal acts regulated in this law include:

1 Provision of incorrect data and information in each document required for migration (Article 78)
2 Placement of Indonesian Migrant Workers (IMW) who do not meet the age requirements (Article 79)
3 Placement of IMW with inappropriate position, type, and skills (Article 80 and Article 85)
4 Placement of IMW that is not in accordance with the work agreement and is contrary to the law (Article 81)
5 IMW placement that does not meet the requirements, such as having no insurance and no paperwork (Article 82)
6 Transfer of IMW documents to other parties (Article 85)
7 Charging the placement fee to IMW (Article 86)
8 Placement to a closed country that has no rules in protecting IMW (Article 85)
9 Criminal acts committed by state actors, namely officials who deliberately send IMWs who do not meet the document requirements or deliberately delay the departure of IMWs who already have the complete documents or other requirements.[38]

The emergence of special criminal laws outside the Criminal Code has strengthened human rights protection and become a crucial aspect of criminal law in Indonesia. These laws provide more specific protection for individuals who are considered vulnerable through the criminalization of certain acts. However, conflicting interests protected by law can still arise in the context of special criminal laws. Some special criminal laws fail to strike a good balance between the protection of the interests, of state, society, and individuals. For example, the law on terrorism was heavily influenced by the paradigm of protecting state security and ideology,[39] disregarding individual rights and human rights protections for those suspected of terrorism.[40] From a human rights perspective, one of the problematic aspects of this law is the broad authority granted to law enforcement agencies in arresting and detaining individuals suspected of terrorism.[41] The issue of protection of individuals versus the interests of the state also relate to the issue of insulting the president. Articles criminalising insult of the president were previously included in the 1946 Criminal Code. As discussed in chapter 5, the Constitutional Court found these articles contrary to the constitution and ruled that they held no legal force. However, 2023 Criminal Code has again included these articles.[42]

Criminal sanctions

Criminal sanctions are regulated in the 1946 Criminal Code, special criminal laws, and the 2023 Criminal Code. In the 1946 Criminal Code, there are several types of principal and additional criminal sanctions. Principal sanctions include: death penalty; imprisonment; confinement; fines; and house arrest. Meanwhile, additional penalties include: deprivation of certain rights; confiscation of certain goods; announcement of the court's decision.[43] In the special criminal laws, sanctions mostly include imprisonment and fines, and constitute either alternative or cumulative sentences to those regulated by the Criminal Code. Additional criminal sanctions include dishonourable termination of the public officials involved in trafficking,[44] and chemical castration and installation of electronic detection devices for perpetrators of sexual crimes against children.[45]

The regulation of sanctions has undergone significant development, particularly regarding children in conflict with the law. The Law on Juvenile Criminal Justice System, in Article 78, outlines the main criminal sanctions that can be imposed on children in conflict with the law, including warnings, sanction with conditions, coaching outside the institution, community service, job supervision or training, coaching within the institution, and imprisonment. Additional criminal sanctions that can be imposed are the deprivation of proceeds derived from criminal acts and the fulfilment of customary obligations.

The Law on Juvenile Criminal Justice System is aligned with the Convention on the Rights of the Child (CRC) and emphasizes the principle of the best interest of the child, making criminal sanctions a last resort. Imprisonment is utilized when no other type of sanction is suitable, and when it is used, the sentence will be reduced by a third compared to the sentence given to adults. Concurrently, adults who commit crimes against children will have their sentences increased by a third. However, there is a lack of clarity regarding the procedures for enforcing non-criminal sanctions, which can lead to judges imposing prison sentences on children more often than other types of punishment.

Indonesia has yet to abolish the death penalty. It is regulated in the Criminal Code and reaffirmed by several special criminal laws.[46] This is considered a contradiction to the constitution, which guarantees the right to life.[47] The main reason given is emergencies faced by Indonesia, such as the alleged narcotics emergency.[48]

In addition to the overarching principled issues, a more practical matter of contention is the enforcement of death penalty.[49] The lack of regulations concerning enforcement has resulted in convicts waiting up to 20 years in prison until their execution.[50] Another issue of concern is the imposition of death penalty against children as young as 16 years old. In one murder case, a child was treated as an adult defendant and charged with premeditated murder alongside other defendants that were adults. The court sentenced the child perpetrator to the death penalty in direct contradiction to the CRC and the ICCPR.[51] The district court's decision was later overturned by the Supreme Court on the basis of incorrect assessment of facts.[52] The Supreme Court found that the defendant had

not participated in the murder and that one of the defendants was a minor (16 years old) at the time of the incident. The Supreme Court revised the decision and imposed a sentence of five years, minus detention and imprisonment for the minor defendant. The court did not explicitly consider how the previous decisions conflicted with the human rights of children. It is important for judges to consider the Law on Juvenile Criminal Justice System and international human rights instruments when making decisions regarding children in conflict with the law.

In a recent decision in Indonesia, capital punishment in narcotics cases was changed to imprisonment.[53] However, the decision did not rely on human rights-based arguments,[54] such as the right to life as a nonderogable right.

Castration as a penalty is a highly controversial. The Law on Child Protection allows for castration as an additional punishment; however, this is found to be in violation of human rights,[55] and can have long-lasting negative effects on the body and health of those who are subjected to it. Furthermore, the use of castration as a punishment has not been found to be an effective deterrent to crimes against children. In one case where chemical castration sanctions was applied, the court did not consider the extent to which chemical castration had an impact on the perpetrator's human rights.[56] It is still necessary to improve the legal framework pertaining to criminal sanctions, both in relation to the death penalty and to other sanctions.

The 2023 Criminal Code regulates the purpose of punishment ,which includes: a) prevention of crime; b) rehabilitation of perpetrators; c) resolution of conflicts arising from criminal acts, restoring balance and a sense of security in society; and d) growing a sense of remorse and guilt in the convict.[57] Reparation for victims is not at all mentioned. Reparation is mentioned only for the community. As the above-mentioned article shows, the overall focus of criminal law in Indonesia is still largely offender oriented, with the interests of the victims being equated and linked to the interests of society. Furthermore, Article 70 of the new Criminal Code stipulates that imprisonment should not be imposed under certain circumstances, including if the defendant has paid compensation to the victim or if the crime occurs within the family circle. While this may be aimed at avoiding unnecessary imprisonment, it may also be seen as prioritizing the interests of the defendant over those of the victim.

The 2023 Criminal Code introduces a more diverse range of basic punishments,[58] including prison sentences, house arrest, supervision, fines, and social work.[59] Notably, the death penalty is no longer the main punishment, but is reserved as a special punishment that may be imposed as a last resort.[60] In such cases, the convict will be shot to death and the execution will be conducted in a restricted location.[61] The execution of the death penalty may be postponed for pregnant women, breastfeeding women, and individuals with mental illness, until they have given birth, stopped breastfeeding, or have been declared cured of their mental illness.[62] A court may also consider a probationary period of ten years in imposing capital punishment, taking into account the defendant's feelings of remorse and potential for self-improvement, or the defendant's role in the criminal act. If the convict commits a commendable act during the probation period, the death penalty may be commuted to life imprisonment. Conversely, if the convict's behaviour does not change, the death penalty will be carried out.[63]

Criminal Procedural Code and human rights

The Criminal Procedural Code is intended to uphold human rights and guarantee equality before the law, ensure legal supremacy, justice, and protection of human dignity, public order, and legal certainty, by using the framework of due process of law (see Figure 8.2).

To uphold the rights of suspects, defendants and convicts, there are very rigid arrangements regarding the process of detention and confiscation, including mechanisms to prevent the arbitrariness of law enforcement officials through pretrial.

Even so there is considerable potential for abuses of power by law enforcement officials, which is a pressing concern. These abuses may take the form of arbitrary arrests, and questionable methods of evidence collection, including torture during interrogations. Moreover, victims and perpetrators may be exploited for the economic interests of law enforcement officials, both during the investigation process and in the court system.

Pretrial mechanism

Pretrial proceedings constitute the only control mechanism against abuse of authority by police investigators and public prosecutors related to arrest, seizure, and detention.[64] Thus, pretrial proceedings are essential for ensuring human rights of suspects and defendants, and prevent arbitrary actions from police and prosecutors.[65] The Constitutional Court has expanded the scope of pretrial proceedings to include the determination of suspects, searches, and confiscations.[66]

Most pretrial decisions are rejected. The Institute for Criminal Justice Reform analysed 80 pretrial decisions and found that only 3% of cases were granted.[67] According to the Supreme Court directory of cases (which include cases from lower courts), out of 6,148 pretrial cases identified, only around 189 were granted trial.[68] Most cases were rejected due to procedural reasons. Pretrials do indeed concern procedure, but sometimes a too narrow application of procedural aspects may contradict human rights. For example, in a pretrial petition concerning arbitrary detention, the defendant argued that his human rights had been violated. However, because of him being held in detention, he was unable to submit the pretrial petition within the time period required. The judge did not consider this aspect and dismissed the petition because the main proceeding of the criminal case had already begun before the pretrial session was held. As a result, the suspect's right not to be arbitrarily detained was lost due to procedural aspects.

In another case where the pretrial petition was granted, the judge did not adequately consider the human rights approach, emphasizing the necessity to meet the procedural aspects regulated by the Criminal Procedural Code.[69]

The rights and protection of victims

In 2002, Douglas E. Beloof claimed that while the rights of suspects, defendants, and convicts had been established and recognized in various criminal justice

systems, the notion of the rights of victims was a relatively new concept.[70] Today, the same can be said about the rights of victims in Indonesia.

The rights of victims

Several laws specifically regulate the rights of victims, including the Law on Child Protection, the Law on Domestic Violence, the Law on Trafficking in Persons, the Law on Terrorism, the Law on Narcotics,[71] the Law on Sexual Violence and the Law on Human Rights Courts. To varying degrees, these laws regulate:

1 victims' access to justice
2 victims' rights to protection, including when accessing justice and posttrial
3 victims' right to remedy, including the right to restitution or compensation

The Laws on Trafficking in Persons, Terrorism, and Sexual Violence cover these aspects relatively well. The Law on Child Protection and the Law on Domestic Violence have provided a foundation for victims' rights within the criminal justice system, and played a significant role in advancing the protection of victims' rights in Indonesia. The Law on Child Protection mandates special protection for children in conflict with the law as well as child victims who are not involved in criminal activities.[72] The obligation of providing such protection falls upon both the state and the society. It outlines the rights of children who are victims of crime, which includes:

1 rehabilitation efforts for victims that are carried out by government institutions and/or external institutions
2 protection of identity, especially from news in the mass media, including protection from labelling of child victims
3 guarantees of physical, mental, and social protection for children who are victims or witnesses
4 access to information, especially regarding the case progression[73]

The Law on Domestic Violence provides specific regulations for the rights of victims of domestic violence, which encompass protection, healthcare, confidentiality, legal assistance and aid, and spiritual services or counselling. This protection is provided by families, law enforcement officials (such as police, prosecutors, and courts), advocates, and social agencies. It includes temporary protection, such as the provision of a protection order from the court. The healthcare provided under this law is tailored to the needs of victims. Furthermore, victims are entitled to legal aid during every stage of examination. However, the court decisions made in domestic violence cases impose relatively low criminal sanctions, despite the crimes committed being severe acts of violence that carry a maximum criminal sanction of ten years.[74]

Law No. 23 of 2006 on Witness and Victim Protection[75] confirms of the rights of victims to protection throughout the criminal justice process. The Witness and Victim Protection Agency offers access to sixteen rights for victims, which includes

the right to security protection; confidentiality of personal identity, family, and property; the right to be free from threats and intimidation, particularly when giving testimony; the right to receive information on the case, including release of the convict; the right to obtain a new identity, temporary and new residence; and the right to receive assistance, including legal assistance and temporary living expenses during the criminal proceedings. The law also mentions the right to restitution and compensation for victims. Since this law was enacted, other special criminal laws have tended to follow its provisions regarding rights of victims, including the right to service, protection and restitution or compensation as stipulated in the laws on trafficking, terrorism and sexual violence.

Victims right to restitution and compensation

Restitution (*restitusi*) as a victim's right to receive payment from the perpetrator(s) is guaranteed through several relatively recent laws including the Law on Trafficking in Persons, the Law on Child Protection, and the Law on Sexual Violence. The concept of compensation (*ganti rugi*) for victims of crime has long been recognized in the Criminal Procedural Code, which states that if a criminal act results in harm to others, the judge has the authority, based on the victim's request, to combine the compensation claim with the criminal case.[76]

Decisions on compensation are subsidiary in nature as they depend on the decision of the primary case (i.e., concerning the criminal act being charged). A decision on compensation may only be made if the accused is found guilty. The request for compensation can only be initiated through a combined claim for compensation and criminal charges. The prosecutor often fails to make such claims. Victims may attempt to ensure that claims for compensation are integrated into the criminal charges, but this can be time demanding and is achieved through significant monetary expenses for the victim. Compensation claims are limited to material losses. Nonmaterial losses are not included.[77]

The Law on Witness and Victim Protection affirms victims right to restitution. This includes compensation for loss of wealth or income, compensation for suffering, and reimbursement of costs for medical or psychological treatment.[78] Victims can claim restitution through the Witness and Victim Protection Agency, either before or after the court issues a verdict. Restitution is further regulated in Government Regulation No. 44 of 2008. The Law on Witness and Victim Protection was amended in 2014, followed by the issuance of several government regulations to clarify the process of claiming and receiving restitution.[79] However, there are concerns among some law enforcement officials that the government regulations pertaining to restitution are weaker than the Criminal Procedural Code in the legal hierarchy. As a result, the right to restitution provided in the Law on Witness and Victim Protection is not always effectively enforced. The Law on Sexual Violence regulate victims' rights to restitution. For crimes punishable by four years of imprisonment or more, the law obliges the courts to determine the amount to be paid in restitution for the offence.

Despite these laws and regulation, victims' right to restitution is not always satisfactorily enforced. This can be attributed to several factors. First, the lack of awareness of the right to restitution among law enforcement officials can result in victims not being informed about their rights leading to failure in claiming restitution. This eventually leads to a prosecutor not claiming restitution.[80]

Second, even if the prosecutor makes demands for restitution, the court may not grant it.[81] For example, in a case involving a child victim of sexual abuse,[82] the prosecutor demanded restitution to the victim in the amount of IDR 12,445,000, with a subsidiary of six months confinement. The court found that the perpetrator had beyond reasonable doubt committed the crime of 'persuading a child to have sexual intercourse' and sentenced the perpetrator to eight years imprisonment and the restitution demanded by the prosecutor. However, the court did not grant the claim for restitution because it had not been filed from the beginning of the case, citing Government Regulation No. 43 of 2017 on the Implementation of Restitution as the basis for this decision.[83] One weakness of this regulation is that restitution is not a mandatory obligation to be imposed on the perpetrator. Therefore, whether the court decides to grant the claim for restitution or not depends on their reasoning and interpretation of the regulation.[84]

Third, even if the court obliges the perpetrator of the crime to pay for restitution, the scope may be limited. Various decisions examined reveals a pattern of differences between the amount of restitution claimed and the amount granted by the court.[85] This can be attributed to several reasons. First, the prosecutor may fail to prove all the losses suffered by the victim, resulting in the judge granting only the amount that can be substantiated.[86] Second, the severity of the criminal charges filed by the prosecutor in comparison to the defendant's guilt can lead the judge to reduce the amount of restitution awarded. Third, the defendant's mental, psychological, and financial capabilities may also be considered when setting lower amount of restitution. Losses that are immaterial in nature, may not be claimed. Some victims have tried to claim immaterial compensation, but their claims were considered inadmissible by the court ('*niet ontvankelijke*').[87]

In a trafficking case,[88] the defendant was charged for arranging sham marriages to foreign nationals, where the victims were women. The prosecutor demanded five years imprisonment, a fine of IDR 120 million and restitution payments to the victims of IDR 22.3 million. However, during the trial, the prosecutor was only able to present one single victim as a witness. The prosecutor also failed to prove that the calculation of restitution was reasonable. During the trial, the victim (also the witness) stated that she was not made aware of any restitution. As a result, the judge rejected the claim for restitution and sentenced the defendant to three years imprisonment and a fine of IDR 120 million.

Fourth, the right to restitution has strongest legal protection in cases related to trafficking in persons and sexual violence towards children, as it is regulated under their respective specific laws. This chapter has identified some such cases where the courts have granted restitution to victims. For example, in a sexual violence case, the court referred to Article 71D paragraph (2) of the Law on Child Protection and Government Regulation No. 43 of 2007 to provide restitution for the

victim.[89] The court considered the good faith of the perpetrator and his family to be financially responsible for material losses of the victim. It emphasized that the victim required medical and psychological treatment, and had to move to a new residence and school due to prolonged trauma and embarrassment. In another case,[90] the court stated that the victim's failure to claim restitution did not mean that restitution not ought to be given. Thus, the court ordered payment of restitution as stipulated in the Law on Trafficking in Persons.[91]

The right to restitution is not regulated in the Law on Domestic Violence, or the Law on Electronic Information and Transactions. Can it still be applied? In a case where a perpetrator raped his cousin who was living with him while studying at a secondary school, the court did not grant restitution on the grounds that the claim for restitution was not accompanied by receipts of expenditure and that the Law on Domestic Violence did not regulate restitution.[92]

However, in a case of extortion where the perpetrator threatened and intimidated the victim into sending photos with sexual content, the court accepted the prosecutor's claim for restitution and granted restitution to the victim. Despite the absence of specific provisions on restitution in the Law on Electronic Information and Transactions, the court recognized the victim's right to receive restitution based on the evidence presented during the trial, and ordered restitution amounting to over IDR 8.46 million, as demanded by the prosecutor.

The court provided an unusually detailed reasoning for its decision. It provided a definition of victims by referring to the Law on Witness and Victim Protection.[93] The court then referred to an article in the same law, which states that victims have the right to apply for restitution or compensation.[94] The court referred to a government regulation which defines restitution as compensation given to victims or their families by perpetrators or third parties.[95]

The cases in which the restitution was granted were based on available legal norms that regulate the rights of victims, such as the Law on Child Protection, the Law on Witness and Victim Protection, and the Law on Trafficking in Persons. In none of the examined cases did the courts explicitly relate the issue of victims' rights to the broader human rights framework. The judges reasoning tended to focus on narrowly defined normative and procedural aspects. Similar conclusions were found in a study conducted by Mahrus Ali et al. regarding restitution in other cases.[96]

Fifth, there are articles on actions committed by corporations, but these are rarely enforced. The reasons for this needs to be studied further. The Law on Trafficking in Persons stipulates sanctions against corporations in the form of fines. Courts also have the authority to impose additional sanctions, such as revocation of business licenses, confiscation of assets gained from criminal acts, revocation of legal entity status, dismissal of management, and/or prohibition of the said management from establishing any corporations in the same business field.[97]

In in the 2023 Criminal Code, there are significant changes on sentencing arrangements. One of them is that the term *restitution* has been replaced with the term *compensation*. The 2023 Criminal Code equates compensation and restitution, specifically as regulated in the Law on Witness and Victim Protection.[98]

Compensation is now categorized as an additional punishment,[99] and judges can decide to impose it on the defendant in the form of compensation for the victim or the victim's heirs.[100] However, there is a dualism in how compensation is regulated in the 2023 Criminal Code. One article stipulates that the imposition of imprisonment should be avoided as far as possible if the defendant has paid compensation to the victim.[101] This provision opposes the meaning of compensation stipulated in other articles that treats compensation as an additional punishment. The 2023 Criminal Code seems to suggest that compensation can be used as an alternative settlement prior to the criminal justice process.

From the various decisions analysed, the courts rationale requires strengthening through further elaboration of the evidence and witnesses considered, including juridical and social arguments. These aspects need to be considered in a balanced manner, not only in the interest of suspects and defendants or in the interest of society, but also in the interest of victims.

Conclusion

This chapter has provided a comprehensive overview of the criminal justice system from a human rights perspective. It has highlighted the developments that had been made in both substantive and procedural criminal law to ensure better harmonization with human rights law, particularly through the introduction of special criminal laws that specifically prohibit crimes that violate human rights. These laws include the Law on the Elimination of Domestic Violence, the Law on Trafficking in Persons, the Law on Child Protection, the Law on Terrorism, the Law on Sexual Violence, and the 2023 Criminal Code. Progress has been made in criminal procedural law in protecting the rights of suspects, defendants, and victims, including victim's rights to service, protection, remedy, restitution, and compensation.

There remains dissonance between judicial practice and human rights, particularly in cases involving freedom of expression and in cases applying the death penalty. There is ineffectiveness within the pretrial mechanisms in addressing arbitrary practices of law enforcement officers at the investigative level, as well as the problematic nature of decisions regarding restitution for victims that emphasize procedural or formal aspects, while failing to acknowledge the human rights aspects at stake.

While some courts have granted restitution, their reasoning tends to lack a clear connection to human rights. The special criminal laws discussed here are often not sufficiently considered and applied by the courts.

The courts are recommended to view criminal cases not only as a matter of applying criminal and procedural articles but also as efforts to protect human rights, both in the context of the rights of suspects, defendants, convicts as well as the rights of victims. The enforcement of criminal law should not be separated from human rights because the foundation of the criminal justice system is the principle of respect for human dignity and fundamental freedoms.

Notes

1 The National Commission of Human Rights of the Republic of Indonesia, 'Ringkasan Eksekutif Pemantauan dan Penyelidikan Penggunaan Kekuatan secara Berlebihan dalam Proses Pengukuran Lahan di Desa Wadas 8 Februari 2022' [Executive Summary on the Monitoring and Investigation of Excessive Use of Force during Land Survey in Wadas Village on 8 February 2022], *Press Release No. 006/HM.00/II/2022, 2022*, https://www.komnasham.go.id/files/20220224-keterangan-pers-nomor-006-hm-00-$YJR6AOIO.pdf.
2 See F. Tulkens, 'The Paradoxical Relationship between Criminal Law and Human Rights,' *Journal of International Criminal Justice* 9 (2011): 577–595.
3 See M. C. Bassiouni, 'Human Rights in the Context of Criminal Justice: Identifying International Procedural Protection and Equivalent Protections in National Constitution,' *Duke Journal of Comparative & International Law* 3 (1993): 233–297.
4 Ibid.
5 Article 622 of the 2023 Criminal Code.
6 The full name of this law is Law No. 5 of 2018 on Amendments to Law No. 15 of 2003 on Stipulation of Government Regulations in Lieu of Law No. 1 of 2002 on Eradication of Criminal Acts.
7 See E. O. Hiarej, *Prinsip-prinsip Hukum Pidana* (Cahaya Atma Pustaka, 2016), 16.
8 Ibid. See also R. Saleh, *Beberapa Asas Hukum Pidana Dalam Perspektif* (Aksara Baru, 1983).
9 The Criminal Code is enacted in Indonesia through the Law No. 1 of 1946 on the Criminal Code.
10 See a number of studies that indicates findings regarding the unclear direction of criminal law in Indonesia: N. D. I. and B. N. Arief, 'Urgensi Tujuan dan Pedoman Pemidanaan Dalam Rangka Pembaharuan Sistem Pemidanaan Hukum Pidana,' *Jurnal Pembangunan Hukum Indonesia, Program Studi Magister Ilmu Hukum* 3, no. 2 (2021): 217–227; N. A. Rahmawati, 'Hukum Pidana Indonesia, Ultimum Remedium atau Primum Remedium,' *Recidive* 2, no. 1(2013): 39–44; S. Harefa, 'Penegakan Hukum Terhadap Tindak Pidana di Indonesia melalui Hukum Pidana Positif dan Hukum Pidana Islam,' *UBELAJ* 4, no. 1 (2019): 35–56.
11 The quote is from the part of the 2023 Criminal Code that comes before article 1. In Indonesian, this is often referred to as '*Konsideran*, which could perhaps be translated aspreamble.'
12 See Moeljatno, *Asas-Asas Hukum Pidana* (Rineka Cipta, 2008).
13 Ibid.
14 Ibid.
15 Article 43 paragraph (1) of the Law on Human Rights Court states 'gross human rights violation which occurred prior to the enactment of this law, shall be examined and decided by an ad hoc Human Rights Court.'
16 The government's stance has been summarized D. Hansell and S. Butt,'The Masykur Abdul Kadir case: Indonesian Constitutional Court decision no 013/PUU-I/2003,' *Australian Journal of Asian Law* 6, no. 2 (2004): 176–196.
17 Constitutional Court Decision No. 013/PUU-I/2003.
18 Ibid.
19 Article 2 of the 2023 Criminal Code.
20 See Article 2 paragraph (2).
21 See W. Projodikoro, *Tindak-tindak Pidana Tertentu di Indonesia*,(Refika Aditama, 2003).
22 Article 87, Article 104, Article 106, Article 107, Article 139a, Article 139b, and Article 140 of the 1946 Criminal Code.
23 See R. N. Hakim, 'UU ITE yang Memakan Korban, dari Prita Mulyasari hingga Baiq Nuril' *Kompas*, 16 February 2021, https://nasional.kompas.com/read/2021/02/16/17092471/uu-ite-yang-memakan-korban-dari-prita-mulyasari-hingga-baiq-nuril?page=all.

24 Law No. 1 PNPS/1965, often referred to as 'the Blasphemy Law.'
25 See N. Chairunnisa, 'Ini Kronologi Kasus Penistaan Agama Meiliana di Tanjung Balai,' *Tempo* (23 August 2018), https://nasional.tempo.co/read/1119663/ini-kronologi-kasus-penistaan-agama-meiliana-di-tanjung-balai.
26 Law No. 23 of 2004.
27 Law No. 35 of 2007.
28 Law No. 23 of 2002 which has been updated in the Law No.35 of 2014 in conjunction with Law No. 17 of 2016.
29 Law No. 11 of 2012.
30 Law No. 12 of 2022.
31 See S. W. Eddyono, *Urgensi Mempercepat Efektifitas Pelaksanaan UU No. 23 Tahun 2004 tentang Penghapusan Kekerasan Dalam Rumah Tangga*, (Komnas Perempuan-UN Women, 2018).
32 See S. W. Eddyono et al., *Gerakan Advokasi Legislasi untuk Perlindungan Pekerja Migran Indonesia*, (LGS FH UGM-Migrant Care, 2020).
33 Eddyono, *Urgensi Mempercepat*.
34 See S. W. Eddyono et. al., 'Trafficking in Persons in the Border Areas of Kalimantan-Indonesia' in *Research Report International Organization for Migration* (2020).
35 Article 1 paragraph 15(a) of the Law No. 23 of 2002 on Child Protection.
36 District Court Decision No. 2664/Pid.Sus/2017/PN.Sby supported by a High Court Decision No. 19/PID.SUS/2018/PT SBY and a Cassation Decision at the Supreme Court level No. 1167 K/PID.SUS/2018.
37 Eddyono et. al., 'Trafficking in Persons.'
38 Article 84 of the Law No. 18 of 2017 on Protection of Indonesian Migrant Workers.
39 The full name of the law is Law No. 5 of 2018 on Amendments to Law No. 15 of 2003 on Stipulation of Government Regulations in Lieu of Law No. 1 of 2002 on Eradication of Criminal Acts
40 See L. Suryadinata, 'Islamism and the New Anti-Terrorism Law in Indonesia,' *ISEAS* 39 (2018): 1–5.
41 See Asmawi, et.al., 'Measuring Human Rights and Islamicity of Indonesian Anti-Terorrism Law,' *AHKAM* 19, no. 2 (2019): 229–246.
42 Articles 218–220 of the 2023 Criminal Code.
43 Article 10.
44 Article 8 paragraph 2 of the Law No. 21 of 2007 on Eradication of the Criminal Acts of Trafficking in Persons.
45 Article 81 of the Law No. 17 of 2016 on Enactment of the Government Regulation in Lieu of Law No. 1 of 2016 on the Second Amendment of Law No. 23 of 2002 on Child Protection as a Law.
46 Law No. 31 of 1999 on Eradication of Crimes of Corruption, Law No. 26 of 2000 on Human Rights Court, Law No. 35 of 2009 on Narcotics, and the Law No. 5 of 2018 on the Amendment of Law No.15 of 2003 on Enactment of the Government Regulation in Lieu of Law No. 1 of 2002 on Eradication of Criminal Acts of Terrorism.
47 See Z. Abidin and S. W. Eddyono ed., *Politik Kebijakan Hukuman Mati di Indonesia dari Masa ke Masa* (ICJR, 2018), 16.
48 See M. Ali, 'Prolog Meninjau Ulang Positivisme Pidana Mati: Antara Objektivisme dan Formalisme Hukum,' *Jurnal Transisi* 10 (2015).
49 Y. Leechaianan and D. R. Longmire, 'The Use of the Death Penalty for Drug Trafficking in the United States, Singapore, Malaysia, Indonesia and Thailand: A Comparative Legal Analysis,' *Laws* 2 (2013): 115–149.
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51 District Court Decision No. 8/PID/B/2013/PN-GST. See Article 6 paragraph 5 of the ICCPR.

52 Supreme Court Decision No.96 PK/Pid/2016.
53 For example, compare sanctions stipulated in District Court Decision No. 837/Pid. Sus/2020/PN Srg and High Court Decision No. 36/PID.SUS/2021/PT BTN.
54 Ibid.
55 See N. H. Hasanah and E. Soponyono, 'Kebijakan Hukum Pidana Sanksi Kebiri Kimia dalam Perspektif HAM dan Hukum Pidana Indonesia,' *Jurnal Magister Hukum Udayana* 7, no. 3 (2018): 305–315.
56 See District Court Decision No. 52/Pid.Sus/2017/PN.Bln.
57 Article 51 of the 2023 Criminal Code.
58 Article 64 of the Law No.1 of 2023 on the Criminal Code.
59 Article 65 of the Law No. 1 of 2023 on the Criminal Code.
60 Article 67 and Article 97 of the Law No. 1 of 2023 on the Criminal Code.
61 Article 99 Paragraph 1 and 3of the Law No. 1 of 2023 on the Criminal Code.
62 Article 99 Paragraph 4 of the Law No. 1 of 2023 on the Criminal Code.
63 Article 100 of the Law No. 1 of 2023 on the Criminal Code.
64 See F. Afandi, 'Perbandingan Praktik Praperadilan dan Pembentukan Hakim Pemeriksa Pendahuluan dalam Peradilan Pidana Indonesia,' *Mimbar Hukum* 28no., 1 (2016): 93–106.
65 Bassiouni, 'Human Rights.'
66 Decision of the Constitutional Court No. 21/PUU-XII/2014.
67 See S. Eddyono et. al., Praperadilan di Indonesia, Sejarah, Teori dan,' *Institute for Criminal Justice Reform* (2014), https://icjr.or.id/wp-content/uploads/2014/02/Praperadilan-di-Indonesia.pdf.
68 Based on assessment of Supreme Court Decisions found online per October 2022.
69 District Court Decision No. 6/Pid.Pra/2017/PN.Sky.
70 See D. E. Beloof, 'Third Wave of Crime Victim's Right: Standing, Remedy and Review,' *BYU Law Review* 2002, no. 2 (2002): 256–265; P. Davies, P. Francisand C. Greer, 'Victims, Crime and Society: An Introduction,' in *Victims, Crime and Society*, ed. P. Davies, P. Francis, C. Greer (Sage, 2017), 1–26; K. Roach, 'Four Models of the Criminal Process,' *Journal of Criminal Law and Criminology* 89, no. 2 (1999): 671–716.
71 Law number 35/2009 on Narcotics.
72 Article 64.
73 Article 64 (3).
74 Eddyono, *Urgensi Mempercepat.*
75 Law No. 23 of 2006.
76 Article 98(1) of the 1946 Criminal Code.
77 See L. Hakim and E. Hadrian, 'The Issue of Restitution for Victims in Trafficking in Indonesia,' *International Journal of Solid State Technology* 63, no. 3 (2020): 1640–1647.
78 Article 7A of the Law on Witness and Victim Protection.
79 For instance, Government Regulation N. 43 of 2017 regulates restitution for children who are victims of crime. Government Regulation No.27 of 2018, regulates compensation, restitution, and assistance to witnesses and victims. It has been amended by the Government Regulation No. 35 of 2020 to further enhance the protection and rights of victims.
80 Informal discussion with several public prosecutors, see also Hakim and Hadrian, 'The Issue of Restitution.'
81 For example, see District Court Decision No. 61/Pid. Sus/2020/PN Cjr; District Court Decision Number 1218/Pid.Sus/2020/PN Tng; District Court Decision Number 798/Pid.Sus/2020/PN Jkt. Tim.
82 District Court Decision No. 140/Pid.Sus/2020/PN Dmk.
83 Ibid., 51.
84 Hakim and Hadrian, 'The Issue of Restitution.'

85 District Court Decision No. 80/Pid.Sus/2020/PN Olm, District Court Decision No. 77/Pid.Sus/2018/PN Soe, High Court Decision o. 91/Pid/2018/PT KPG, District Court Decision No. 85/Pid.Sus/2018/PN Soe, District Court Decision No. 20/Pid.Sus/2020/PN. Jkt.Tim, High Court Decision No. 101/Pid/2020/PT KPG and District Court Decision No. 79/Pid.Sus/2020/PN Olm.

86 Judges only calculate material losses, as for example in District Court Decision No. 79/Pid.Sus/2020/PN Olm, where the Panel of Judges only calculated the amount of restitution that falls into the category of loss of wealth or income (unpaid wages) without considering physical and psychological losses for the suffering experienced as legal facts presented in court (Article 1 (2) of the Law Ni.13 of 2006 and Article 1 (1) of the Government Regulation No. 44 of 2008).

87 District Court Decision No.360/Pid.Sus/2020/PN.Cbi.

88 District Court Decision No. 359/Pid.Sus/2020/PN Cbi.

89 District Court Decision No. 258/Pid/Sus/2019/PN Wtp, Supreme Court Decision No.49/PK/Pid.Sus/2018.

90 Supreme Court Decision No. 49/PK/Pid.Sus/2018.

91 Article 48, Article 49, and Article 50 of the Law No. 21 of 2007 on Eradication of the Criminal Acts of Trafficking in Persons.

92 District Court Decision No. 35/Pid.Sus/2021/PN WKB. Compare this with the High Court Decision No. 69/PID/2019/PT KPG. In the reasoning, the judge is of the opinion that the Article charged by the public prosecutor against the defendant does not require to determine the payment of restitution, so in this case the judge is not obliged to make a decision about the defendant's obligation to pay restitution. There is also a similar decision, namely, the District Court Decision No. 57/Pid.Sus/2021/Pn Mjl where the defendant was charged with Article 86 Letter b of the Law No.18 of 2017 on protection of migrant workers in conjunction with Article 53 paragraph (1) of the Criminal Code in conjunction with Article 55 paragraph (1) of the 1st Criminal Code.

93 Article 1(2) of the Law No.23 of 2006 on Witness and Victim Protection.

94 Ibid., Article 7(1).

95 Article 1 No. 5 of Government Regulation No. 44 of 2008.

96 M. Ali, A. Muliyono, W. Sanjaya and A. Wibowo, 'Compensation and Restitution for Victims of Crime in Indonesia: Regulatory Flaws, Judicial Response, and Proposed Solution,' *Cogent Social Sciences* 8, no. 1 (2022): 1–13.

97 Article 15 of the Law on Criminal Acts of Trafficking in Persons.

98 Elucidation of Article 1 paragraph 1 (d) of the Law No.1 of 2023 on the Criminal Code.

99 Article 66 of the Law No.1 of 2023 on the Criminal Code.

100 Article 93 and Elucidation of Article 93 of the Law No. 1 of 2023 on Criminal Code.

101 Article 53, in conjunction with Article 70 paragraph 1(e).

7 Human Rights Legal Reasoning in Private Cases

Shidarta

Introduction

This chapter builds on the understanding that all disciplines of law constitute a single entity that complement and influence each other. It addresses two questions. First, what is the relationship between human rights law and private law, and what is the most suitable theoretical model to describe this practice in Indonesia? Second, how do Indonesian courts consider human rights law in private law cases?

To answer these questions, this chapter will start by reviewing different theoretical models of the relationship between private law and human rights. It will then discuss relevant provisions in the civil code, analyse court practice, and finally examine Supreme Court circulars pertaining to human rights aspects of private law cases.

The relationship between human rights and private law

At the global level, human rights have gained increased influence in the field of private law. There are at least three reasons for this development. First, power asymmetries between large companies and individuals are so large that they require approaches like those applied in relationships between states and citizens. Second, the idea that human rights are universal values that permeate the entire legal system, both vertically and horizontally, has gained momentum. Third, human rights are increasingly integrated into state regulations governing private law relationships.[1]

In the literature, there are various theoretical models concerning the relationship between private law and human rights, including: (a) subordination or direct application; (b) complementarity or indirect application; (c) nonapplication; and (d) application in the judiciary.

To better understand these models, it is helpful to consider the effect of their influence, whether it is vertical or horizontal. Human rights have a vertical effect in relationships between individual rights holders and a state. They have a horizontal effect between legal nonstate entities, such as individuals, companies, or other entities that are subjects of private law.[2] According to Eric Engle, there are known direct and indirect horizontal effects.[3] He uses the term *Drittwirkung* (literally, 'third party effect'), which refers to the effects of constitutional rights of one private party on another private party. He differentiates between three different kinds of *Drittwirkung*:

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1 vertical direct effect: the states bind themselves to directly apply human rights protection to every person in each member state, as it is the case with the European Court of Human Rights or other regional human rights courts
2 horizontal direct effect: the applicable public law indirectly affects the civil law relationship between the civil law subjects
3 horizontal indirect effect: the applicable public law does not have a direct effect, but it can be used as a basis for interpretation in every civil law relationship. Engle's models have similarities to the models of Cherednychenko[4] and Aharon Barak,[5] which are presented in the following table

Table 7.1 The Relationship between Human Rights and Private Law

Model	*Description*	*Countries that apply it*
Subordination* or Direct Application**	This model puts private law under normative provisions of human rights law, which belongs to the public law, is coercive, legislated, and cannot be subverted. In some aspects, private rights can be considered a component of human rights. * Infringement on human rights is not only understood as an act committed by the State but also applies to private cases between individuals. **	Germany
Complementarity* or Indirect Application**	Human rights inspire and influence private law in understanding private rights. Parties to a case do not necessarily have to be subjected to human rights provisions as long as their relationship remains within the corridors of private law. * Constitutional human rights are not directly absorbed into private law, but private law develops it through the doctrines in the field of private law itself. **	The Netherlands, the United Kingdom, Italy, Spain, Japan Some cases are also identified in Germany
Non-application **	Human rights are only applicable in the sphere of public law, and can be invoked to sue the government. Rights within the realm of private law can still be used, but it is not defined as the enforcement of human rights. **	Canada
Application in the Judiciary **	Constitutional human rights are only protected when a person is confronted against the State. If a court as one of the State institutions issues a decision that is contrary to the guarantee of constitutional human rights, it means that the State has violated human rights and can be prosecuted. **	The United States of America

Source: by author

* Refers to Cherednychenko
** Refers to Aharon Barak

Which model can best describe the Indonesian legal system? Human rights issues are commonly seen through the eyes of constitutional law, which would mean they fall within the domain of public law. In some private law cases, private law is given greater importance than public law, while the opposite is true in other cases. Private law cases are handled either by courts of general jurisdiction, or by religious courts in cases of matters pertaining to family law. In both instances, the courts tend not to engage with other public institutions. This is different from criminal cases that involve the police, the public prosecutor and other state institutions.

The Civil Code contains some stipulations that could be interpreted in favour of subordination or direct application, and other stipulations that could be interpreted in line with the model of complementarity or indirect application. Article 1 states that enjoyment of private rights does not depend on constitutional rights.[6] This comes from the civil law tradition which puts private law within a legal regime that is parallel to public law, according to which private rights do not have to be made into positive law as *ius constitutum* (established law). This could be interpreted in favour of the complementarity model. However, other articles may indicate subordination. Article 1338 stipulates that:

> All legally executed agreements shall bind the individuals who have concluded them by law. They cannot be revoked except by mutual agreement, or pursuant to reasons which are legally declared to be sufficient. They shall be executed in good faith.

Article 1339 states that:

> Agreements shall bind the parties not only to that which is expressly stipulated, but also to that which, pursuant to the nature of the agreements, shall be imposed by propriety, customs, or the law.

It makes sense to interpret these articles together, as they immediately follow each other.

It is also relevant to consider Article 3, which states that no punishment shall result in civil death, or the loss of all citizens' rights.[7] *Civil death* is a term used to describe the loss of civil rights, such as the right to work, marry, and have an offspring. In essence, there must be no sanction that may erase these fundamental civil rights.[8] Even if a person is diagnosed with HIV, for example, and it is feared that he might transmit the virus to his wife or child, it is still not justified in the eyes of the law that he loses the right to marry.[9] The stipulation on civil death may indicate the subordination of private law to human rights. The prohibition of punishment resulting in civil death under the Civil Code should not be limited to private law only but apply to all types of punishment in various legal fields. It should be considered relevant in criminal law. However, in practice, Article 3 is undermined by various laws and regulations, and rarely given proper consideration by the courts. For example, the 2002 Law on Child Protection, and its implementing regulations, allow for chemical castration, to protect children's rights. This law has been amended several times.[10]

In a case of sexual abuse against minors, the District Court of Mojokerto sentenced the perpetrator to 12 years in prison and to a fine of IDR 100 million with subsidiary imprisonment of six months, and an additional punishment of chemical castration.[11] On appeal, the decision was upheld by the High Court of East Java. The courts did not consider Article 3 of the Civil Code (i.e., whether chemical castration would impact the perpetrator's ability to have sex with his wife, if he was to marry, and put an end to any aspirations he may have of having children after serving the sentence), resulting so in civil death.

In the realm of legal thought in Indonesia, much emphasis is put on freedom of contract.

The Law of contract (or obligations) is regulated through Book III of the Civil Code. If absolute, freedom of contract would indicate that the complementarity model could describe the relationship between private law and human rights. However, there are three elements that must be considered in any contract. The element of *essentialia* (essential terms) concerns mandatory provisions that cannot be compromised, usually directly related to statutory laws. Such terms are always legally binding in civil law relationships, even if not explicitly regulated by contract. If there is a contract that goes against such essential terms, the contract may be flawed and not legally binding. The element of *naturalia* (natural/inherent terms), concerns aspects that are regulated in statutory laws or other legal provisions, but that nevertheless could be omitted if the contract stipulates that they should be omitted. If not explicitly mentioned in the contract, these provisions will still be binding. The element of *aksidentalia* concerns aspects that are only regulated in the contract alone, and that fully depend on the terms of the contract.

This distinction shows that the principle of the freedom of contract is not absolute, as it does not allow for overriding essential civil law norms. The provisions of legal norms that are of mandatory or essential nature must be perceived as inherent in every agreement, even if they are not explicitly stated in the agreement (see Article 1339 of the Civil Code quoted above). Civil law provisions, which fall into the category of *naturalia*, could be overridden or set aside if this is explicitly stipulated in the contract. Thus, for such provisions, the principle of *partij autonomie* (freedom of contract) may be given precedence over the principle of *lex dura sed tamen scripta* (literally, 'a hard law but still written').

Exceptions to *lex dura sed tamen scripta* principle are very rarely found, but some exist. In the case of the mining firm PT. Newmont Nusa Tenggara against the Governor of West Nusa Tenggara, the Supreme Court treated the contract between Newmont and the Indonesian Government as *lex specialis* (special law).[12] This contract that is in the private law domain could then override laws and regulations that are positioned as *lex generalis* (general law).

Such ambiguity is not unique to Indonesia. According to Cherednychenko, it can also be found in Germany, among other jurisdictions.[13] After the emergence of constitutional courts, there arose a tendency that has been called 'the constitutionalization of private law': a private right could become a human right if it can be looked at from the perspective of the constitution. This understanding is also adopted by Aharon Barak.[14]

In Indonesia, the understanding of the content of human rights should not be solely based on the constitution. The human rights provisions in the constitution intersect with many other laws, such as the 1998 People's Consultative Assembly Decree on Human Rights[15] and a number of laws.[16]

Intersection between human rights and various subdomains of private law

The concept of private law is broad. W. L. G. Lemaire used the terminology *'burgerlijk recht'* (citizens law) that contains *'privaatrecht'* (private law).[17] Stephen Waddams says that private law is *'the law governing mutual rights and obligations of individuals.'*[18] Indonesia's Civil Code consists of four books, namely the law on persons, on property, on obligations, and on evidence and expirations.[19] In addition, the Commercial Code is also a part of the private law domain. The biggest part of the Civil Code covers the law of obligations, or contract law.

Human rights are also broad and intersect with many areas of private law. For example, the rights covered by the two first articles of the Universal Declaration of Human Rights are the right to equality, and the right to freedom from discrimination. Both are central in private law matters.

In the domain of private law concerning persons and family, there are many human rights aspects. Individual law and family law intersect and overlap in many ways. For example, the right to be recognized as a subject of law, and have legal standing before a court, is a right of a person that could be represented by their

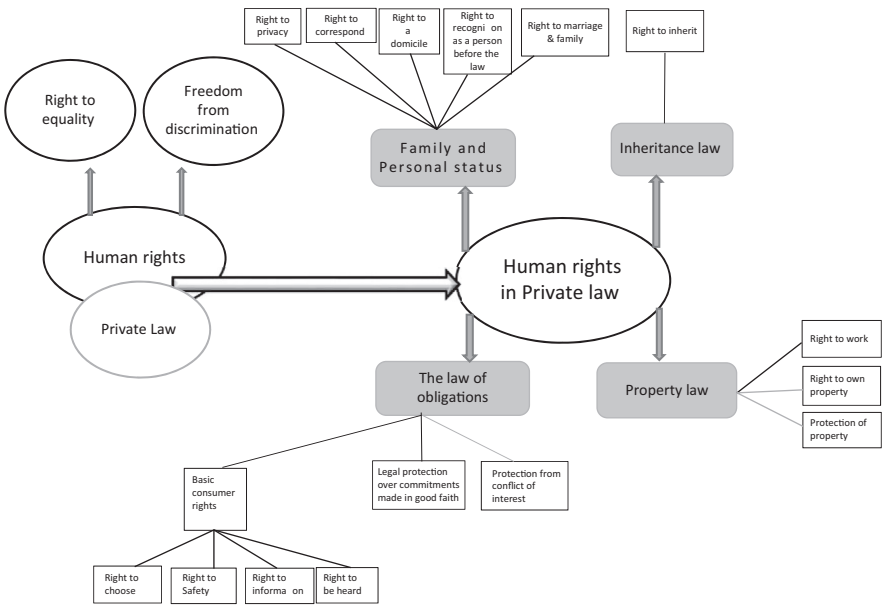

Figure 7.2 Human Rights in Private Law

family. The right to marry or form a family is part of family law, but conditions like maturity is part of the law of persons. In the last few years, there have been quite a few cases of children asking for the certainty of their legal relationship with their biological fathers. Likewise, the right to have a domicile, which is obviously related to the human right to housing, applies to individuals and families.[20] This also intersects with administrative law related to population identification, in particular the laws regulating the Resident Identification Card and the Family Card. Within family law, questions of inheritance have clear human rights aspects related to the right to equality and protection from discrimination.

The right to privacy is connected to privacy of both person and family. Family is also emphasized in relation to the right of correspondence. Article 12 of the Universal Declaration of Human Rights proclaims, 'freedom from interference with privacy, family, home, and correspondence.' The right of correspondence is a right that is close to the right to privacy of a person to communicate with another.[21]

The domain of private wealth law (*hukum harta kekayaan*) is clearly related to the right to own property, which is guaranteed by the constitution[22] and recognized in the Universal Declaration of Human Rights.[23] In property law, a number of rights are closely intertwined with human rights, such as the right to own property, the right to have a decent employment, the right of property protection.

The human right to desirable work is guaranteed by the constitution[24] and by the International Covenant on Economic, Social, and Cultural Rights.[25] The latter covers decent working conditions, vocational-technical assistance, and a fair wage. Manpower was originally regulated by the Civil Code due to the contractual nature of the relationship between employees and employers.[26] Human rights aspects are generally integrated in the protection of employee rights.

The right to protect property one owns stems from the right to own property, but with emphasis on different aspects. The right to own property can be understood as related to the freedom to conduct a legal act (i.e., to buy, to rent, to exchange, to donate, and so on) concerning a particular property. This is an individual right because it is attached to the person. Meanwhile, the right of protection of property pertains to a right to have a legal guarantee that the property is not contested or taken arbitrarily by anyone.

In the law of obligations, there are various rights and freedoms, such as the freedom of contract.[27] Another is the link between legal protection and commitments being made in good faith, which is important in contract law. For example, the Civil Code ensures that the law shall protect a good faith buyer.[28] If the meaning is expanded, the word *buyer* could be interpreted as referring to the good faith of all parties to a contract. This approach finds its origins in the principle of good faith found in public law, including international law, as discussed in chapter 1. According to Barak:

> The obligations of trustworthiness, fairness, and reasonableness – applicable to the government in its relations with private parties in the spheres of public law – have infiltrated private law, initially in private law relationships between the government and private parties, and subsequently in private law relationships between private parties.[29]

Trade law is a specific civil law domain that regulates the relationship between businesses and consumers. Consumers are at the end of the transaction chain (i.e., those consuming the product or service concerned), meaning that the product is not to be re-traded. There are several basic consumer rights, which may intersect with human rights. For example, human rights law imposes an obligation on the state to protect individuals from instances of fraud, including fraud committed by a business entity.

Case analysis

This section will discuss five cases. The cases have been deliberately chosen to cover the various fields within the private law domain: namely, individual law, family law, property law, the law of obligations and inheritance law.

The case of Ripin vs. Gunawan Chandra and Yulwati*: on inheritance and unwanted guardianship*

The 47-year-old man Ripin was under guardianship of his older sibling and her husband. He sued them to claim his share of the inheritance from his parents, which was physically controlled by the defendants. According to the petitioner, his share of the inheritance was used for the personal benefit of the defendants. He also challenged the guardianship, and his status as having 'mental illness,' which was not based on any medical or psychologist examination. About three years prior to the case, the defendants had submitted a request to the District Court to put Ripin under their guardianship due to Ripin's alleged mental illness. The court granted this request.[30] As a result, Ripin was considered unable to take responsibility for himself, unable to perform any legal acts, and incapable of managing and controlling his property.

In this civil lawsuit, Ripin claimed that (a) the guardianship was illegitimate on the grounds that the defendants had committed a tortious act; (b) the control and management of his property by the defendants was illegitimate; and (c) Ripin's share of the inheritance should be returned to him. Ripin also requested the court to declare him to be in a state of good health and capable of performing all legal acts. The latter claim was supported by a letter from a psychologist stating that Ripin was emotionally stable, able to function independently and be responsible for himself. However, Ripin was said to be a slow learner, and he often stuttered when he spoke. Ripin also submitted proof that he had finished middle school. The defendant insisted that Ripin was mentally unstable and brought in several witnesses to testify in support of this claim – ordinary people who had observed Ririn, not experts. One of them testified she had seen Ripin stand alone and laugh by himself.

The District Court rejected Ripin's claims based only on its own observations of how Ripin spoke during trial, reading out points from a list of answers and not engaging much with the witnesses. It concluded that Ripin was unable to be responsible for himself.[31] However, upon appeal, the High Court of Jambi found Ripin in good health, revoked the guardianship, and ordered the defendants to

return and hand over Ripin's property.[32] The High Court's decision was later upheld by the Supreme Court.[33]

Although this case had clear human rights aspects, the courts considered it purely from the private law perspective, focusing solely on assessing whether Ripin was limited by mental illness or not. They did not consider, for example, whether guardianship was in line with Ripin's best interest.

The term *human rights* was absent from the court documents as well, even though the 2016 Law on Persons with Disabilities guarantees the right to justice and legal protection for persons with disabilities.[34] Persons with disabilities are guaranteed, among other things, the right: (a) to equal treatment before the law; (b) to be recognized as a legal subject; (c) to own and inherit property; (d) to control financial affairs or designate another person to represent their interests in financial affairs; and (e) to have access to banking and nonbanking services. If considered in relation to the theoretical models discussed earlier, the practice of this case could be categorized as complementarity or indirect application.

The case of Omni Hospital vs Prita Mualyasari*: on submitting complaints*

Prita Mulayasari was sued for defamation after sending an email in which she complained about the services at Omni International Hospital. At the same time, she was also sued for conducting a tortious act. Prior to this email, Prita went to Omni hospital due to various symptoms she suffered. She was subjected to various tests and treatments over five days, but her condition only got worse.[35] In consequence, she decided to continue her treatment in Bintaro International Hospital, and she requested her medical records from Omni Hospital. The hospital refused to share the lab result to which the patient was supposedly entitled. She was still transferred to Bintaro International Hospital, where she was diagnosed with severe mumps. She was treated, recovered and sent home after one day. Some days later, Prita then sent an open email to customer care, entitled 'Fraud by OMNI International Hospital Alam Sutera Tangerang.' This email was circulated to multiple email addresses and went viral. Approximately three weeks later, Omni Hospital reported Prita for defamation. In addition to the criminal defamation charge, the hospital also filed a civil lawsuit against Prita.

Thus, two cases were running in parallel. The civil case was initially decided in favour of the petitioner,[36]at a stage where the criminal case had not reached a final and binding decision. Prita appealed the former, but the appellate court still ruled in favour of Omni Hospital.[37] After cassation, the Supreme Court overturned the previous rulings and ruled in Prita's favor.[38] The criminal case against Prita also reached the Supreme Court. Here, Prita was convicted for defamation. Therefore, Prita filed a request for judicial reconsideration (*Peninjauan Kembali*) due to the two conflicting Supreme Court decisions. Judicial reconsideration is the final legal avenue available for challenging the correctness of a Supreme Court judgement, which can be requested on various grounds including a case of a clear judicial error.[39] The Supreme Court accepted the request for reconsideration and annulled the previous criminal ruling.[40] Thus, in the end, the Supreme Court ruled in

favour of Prita in both cases. According to the final judgement, Prita's actions were not intended to be defamatory, and it could not be proved that she had taken tortious action.

In the cassation of the civil case (i.e., earlier in the process, before the request for judicial reconsideration had been submitted), the Supreme Court stated that 'a criminal act of defamation cannot be proven,' and stated that no criminal act of defamation had been proven.[41] This reasoning shows that the Supreme Court had based its decision on assessing whether a tortious act of defamation had occurred or not, on the decision in a criminal case, which was subject to appeal and thus not final.

We need to appreciate the courage of the Supreme Court judges in relying on a novel source of law (i.e., the verdict of the criminal law case), in this manner. At the same time, the judgement is ambiguous as to whether the outcome of the civil case depended on the criminal case. The judgment framed Prita's correspondence in light of the constitutional right to communication,[42] but supplemented this with considerations of whether this correspondence was tortious or not, based on a criminal verdict. It so happened that the criminal verdict was consistent with the framing. Thus, the judgment raises one hypothetical question: if the criminal case verdict had found Prita guilty of committing a tortious act, would the cassation judges in the civil case still find Prita's action reasonable and in line with the constitution? The answer could depend on how the court considered the relationship between human rights and private law: subordinate or complementary.

In these two parallel court processes, the two different cases affected each other at least twice: when the criminal case constituted part of the basis for the judgement in the cassation of the civil case, and when and the conflicting judgements of the two cassation cases triggered a request for judicial reconsideration.

The case of KM vs the Indonesian State*: on customary land rights*

In this case, the plaintiff (referred to only as KM) sued the Indonesian state, represented by the Indonesian military. The plaintiff contested the legality of the Indonesian military's occupation of land, which he claimed was the property of himself and his sibling, inherited from his grandfather and parents. The claim was based on a land document issued by the Dutch colonial authorities in 1814. The military unit based at the land under dispute, Paldam XVI Pattimura, possessed legal documents from the Land Agency, one dating from 1958 and one dating from 2004. Both these documents stated that the land concerned was state-owned. Before Indonesia claimed its independence, the Dutch Colonial Army had also occupied the land under dispute. According to witness testimonies, the houses surrounding the military establishment where initially built by members of the local population, based on permission given by the plaintiff's family. At present, however, many paid rents to the military for the land on which they were living. The plaintiff claimed he had suffered losses of IDR 3,3 billion.

The case was handled by the District Court of Ambon, which completely rejected the plaintiff's claim. The plaintiff was ordered to pay the case costs. In its

reasoning, the court emphasized that the plaintiff could not clearly explain the size of the claimed land, unlike the defendant, which held a letter issued by the state, containing information about the exact size and location of the land under dispute.

A human rights dimension of this case concerns the rights of Indigenous peoples. The (nonbinding) United Nations Declaration on the Rights of Indigenous Peoples affirms that Indigenous people have the right to own the lands, territories, and resources that they traditionally own or occupy. It also states that military activities should not be conducted on Indigenous peoples' lands or territories. Indonesian law, including the constitution, recognizes the concept of traditional law communities, or *masyarakat hukum adat*. As discussed in the introduction, this concept is sometimes used interchangeably with the human rights concept of Indigenous peoples' rights, although the history, as well as the normative position of these two concepts differ. The constitution recognizes *adat*-rights:

> The State recognizes and respects units of traditional law communities (*kesatuan-kesatuan masyarakat hukum adat*) along with their customary rights as long as these remain in existence (literally, 'alive') and in accordance with the societal development and the principles of the Unitary State of the Republic of Indonesia, which is regulated by law.[43]

More specifically with regards to land rights, the basic agrarian law recognizes *adat* claims, with a disclaimer, or limitation comparable to that found in the constitution:

> agrarian law valid on the earth, water and space, is *adat* law **as long as it is not in conflict with the interests of state and nation**, that are based on unity of the nation, Indonesian socialism as well as regulations of this law and other laws. . . .[44]

According to the official elucidation of the law, the highlighted text should be understood as 'as long as it is not in conflict with the interests of the nation and the state.' This condition makes it difficult to use *adat* claims against the state in a court. The court recognized that there were *adat*-claims to the disputed land, but it did not frame it as a human rights case and handled the case as a private law matter instead. This is in line with the models of complementarity or indirect application. In this model, the judiciary has additional discretion to interpret the dispute. Since the defendant is part of the state, the court could have examined the defendant's performance within the framework of the state's human rights obligations.

The case of Sumito Viansyah vs Secure Parking*: on unilateral construction of agreement*

This case concerns the loss of a motorcycle owned by Sumito Viansyah in a parking area managed by the parking company Securindo Packatama Indonesia (Secure Parking) in South Jakarta. Sumito had parked his vehicle and received a

parking ticket. When he returned after a few hours, he found that the motorcycle had disappeared. The parking ticket, motorcycle keys, and vehicle registration papers were still in his possession.

The parking ticket stated that the loss of a parked vehicle and the goods contained within was the vehicle owner's sole responsibility and that the company would provide no compensation of any kind. Sumito asked Securindo Packatama Parking to take responsibility for the loss, and referred to a regional regulation according to which the loss of a vehicle would fall under the responsibility of the parking service provider.[45] The company refused this claim, and Sumito filed the case to the Body for Handling Consumer Disputes. The Secure parking offered compensation amounting to IDR 7 million, but Sumito refused because this amount was much lower than the actual value of the vehicle. Sumito filed a legal complaint, claiming that the parking company violated the law, as it had failed to check the vehicle when it left the parking area. He referred to various articles in the Civil Code.[46] He also referred to the Dutch Arrest Ostermann, who claimed that negligence could constitute a legal violation. Sumito also claimed that the disclaimer used by Secure parking violated the 1999 Law on Consumer protection, which regulates the issuance of such disclaimers.[47]

The Jakarta District Court, in its decision,[48] stated that defendant had violated the law, and ordered the defendant to pay compensation amounting to 30,950,000 IDR, pay the costs of the case, and stop issuing nonliability disclaimers. Secure Parking appealed. The High Court of Jakarta upheld a part of the ruling, but reduced the amount of compensation to 20,700,000.00 IDR, and did not order Secure Parking to stop issuing disclaimers.[49] Both parties appealed this decision. The Supreme Court upheld the ruling of the High Court.[50] With regards to Secure Parking's practice of issuing no liability clauses on their parking tickets, it found this practice was not directly related to loss suffered by Sumito.

This latter aspect of the decision failed to consider the interest of other people who could potentially face the same situation as Sumito. The Civil Code provides a sound legal basis for ordering the defendant to stop issuing nonliability clauses on their parking tickets.[51] The judgment reflects the model of complementarity or indirect application, as the court did not refer to any relevant human rights, such as the right to property or the right to equality before the law.

The case of Langtewas and others against Benih Ginting *on gender equality in inheritance among the people of Karo*

Indonesia recognizes traditional inheritance law, in which there is great diversity, as well as Islamic inheritance law. The Indigenous people of Karo has a patriarchal culture with deep-rooted gender inequalities concerning inheritance rights. In a case from 1961, the petitioner demanded more equitable distribution of the inheritance. The case went all the way to the Supreme Court, which ruled as follows:

> The Supreme Court, for humanity and justice and equality of rights between men and women, consider all living laws in Indonesia, including in the land of

> indigenous people of Karo, [decides that] any daughter should be treated as a legal heir and entitled to receive a portion of the inheritance from her parents.[52]

This case has been commonly referred to by Indonesian courts in inheritance cases involving any of the customary communities (*masyarakat adat*) in Indonesia. In 2017, the Supreme Court issued a regulation stating that culture, customs or traditional practices could not justify discriminatory practices.[53] Even so, women are still often disfavoured in inheritance. There are at least two possible explanations for this. First, even though judgments generate certain rules, these have low status and do not appear as a legal source binding for the public. The influence of these rules can only be seen when a dispute is brought to a court. Second, one might refer to custom to justify unequally divided inheritance based on patrilineal practices. Court decisions are not impactful enough to cause social change; only a minority of cases are settled through courts.

Human rights legal reasoning in private cases

In the five cases discussed above, the judgements were in line with the complementarity model in the cases concerning *Sumito Viansyah vs Secure Parking, Ripin vs Gunawan Chandra and Yulwati*, and *KM vs the Indonesian State*. In these three cases, the courts did not consider human rights (beyond acknowledging the existence of *adat*-claims to the land under dispute, in the latter case). In the *Omni Hospital vs Prita Mulyandari* case, the final judgements did take human rights into consideration, apparently in line with the subordination model, though ambiguities remained. In the case concerning equality in traditional heritage, there was not so much explicit human rights law to draw on, but the court nevertheless drew on overarching concepts of justice (i.e., '. . . humanity and justice and equality of rights between men and women. . .') in a manner consistent with the subordination model.

When courts deal with cases within the corridors of private law, without examining human rights issues, there is a risk that too little attention will be given to the effects of the case beyond the conflicting parties. This is illustrated by the *Sumito Viansyah vs Secure Parking* case, in which nothing that was done to stop the company's practice of issuing nonliability disclaimers on its parking tickets, even though the company concerned was clearly liable.

The complementarity model is illustrated in the diagram below. This is inspired by the works of Hans Kelsen and Hans Nawiasky, which has had much influence on Indonesian legal thought. Law is seen like a systemic building with multiple levels. However, the model of complementarity or indirect application does not follow a sequential approach. Hence, it is inevitable for human rights norms or values to be used directly to fit the context of a case. The most abstract level is where the values of state ideology are located, which might influence or inspire judges in deciding any civil case (as also discussed by Widodo in chapter 3) These values are reflected on to the foundational state norms (*Staatsfundamentalnorm*). The ideological and philosophical essence of the two levels do not need to be

explicitly stated in a court's consideration. The word 'humanity' found in the 1961 inheritance case discussed above, is an example of such application.

In the hierarchy of sources of law in Figure 7.3, the regulations lower than national laws have very strong impact. There are very many such regulations. According to the 2011 Law on Law-making,[55] regulations may be issued by executive government (through various line departments), by regional authorities, by the Supreme Court, by the Constitutional Court, by the Judicial Commission (an independent state body with a mandate to supervise and build judges' competence), amongst others.

In addition to guiding the courts through regulations and jurisprudence, the Supreme Court also issues circulars, which instruct courts and civil servants how they shall deal with certain issues. Table 7.4 shows circulars with human rights dimension in relation to private law issued by the Supreme Court.[56]

The more recent circulars are generally of better quality compared to the older ones. Nowadays, a circular must undergo a relatively lengthy discussion before it can be issued – from chamber session, to plenary session of chamber, and lastly to the leadership meeting. Such a mechanism is expected to generate better legal harmonization and minimize possible inconsistency with other positive law sources. However, it cannot eliminate possible collision.[57] Correction might be undertaken through another plenary session.[58]

Circulars may contain elements of jurisprudence (i.e., reference to case law). This is done to promote more consistency in judgements, as circulars are considered to be more binding than stand-alone case law. It can also address erroneous application of case law, which constitutes a challenge. For example, on the issue of custody over children, there is a case from 1973 that is often referred to to justify giving custody rights to the mother.[59] This is erroneous because the Supreme Court did not take a stance on whether the biological mother or the

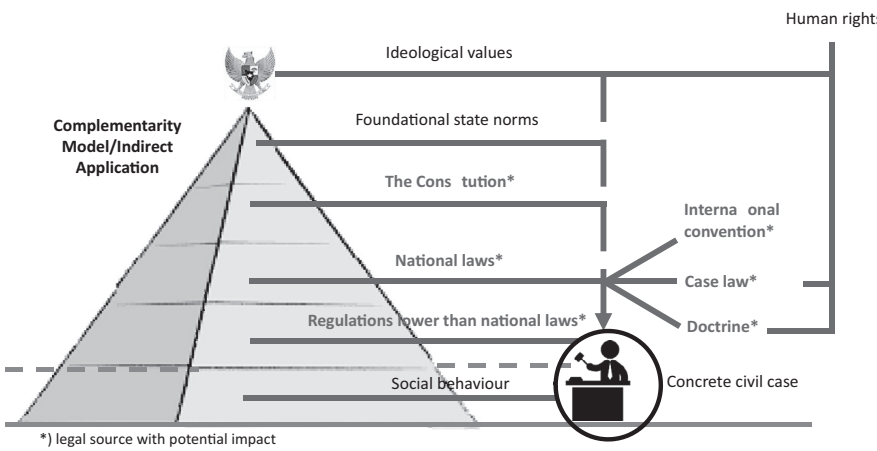

Figure 7.3 Human Rights Sources in Private Law Decisions[54]

Table 7.4 Human rights related circulars issued in relation to private law, the Supreme Court

Circular	*Chamber*	*Issue addressed*	*The circular's direction*
No. 07 Year 2012	Private law	Legal consequences of divorce.	Divorce shall not absolve parental authority and does not establish trusteeship. The court should appoint one of the parents as the party who should raise and educate the child.
No. 04 Year 2014	Private law (special private law)	Corporate merges where (some) workers do not want to join.	The workers concerned will still be entitled to receive severance payment.
No. 04 Year 2014	Religious law	Basis for separation; must husband and wife have lived separately for three months in order to justify divorce, or can one month in some cases be enough ?	A divorce can be granted if the facts indicate that the marriage is broken. Indicators include: -Reconciliation measures are undertaken but not successful. -No good communication -One of the parties abandoned his or her duties as a husband or wife. -The spouses have separate beds or separate places of residence -Other matters revealed during trial including *WIL* (mistress), *PIL* (lover), domestic violence, gambling.
No. 03 Year 2015	Religious law	Child support	Any ruling on child support should consider an annual increment of 10% to 20%, excluding education and healthcare support.
No. 04 Year 2016	Criminal law	Marriage between a man and a second wife without consent from the first wife	This can be charged with Article 279 of the Criminal Code.
No. 1 Year 2017	Private law	Parental responsibility after divorce	Custody rights may be transferred from the mother to the biological father if assumed to be in line with the best interest of the child, taking into account the wishes of the child
No. 1 Year 2017	Special private law	Lawsuit regarding cancellation of a famous trademark due to bad-faith	Such lawsuits are formally admissible without expiration date.

Circular	*Chamber*	*Issue addressed*	*The circular's direction*
No. 1 Year 2017	Religious law	Women's legal rights after divorce	Court decisions on divorce may state that alimony (i.e. *iddah, mut'ah*, and *madliyah*) 'should be paid before the divorce is final.' Divorce may also be considered final if the wife has no objection that the husband did not pay alimony.
No. 1 Year 2017	Religious law	Custody rights over children	Rulings on child custody *(hadlanah)* should oblige the custody right holder to allow for meetings between the child and the parent with no custody rights. Judges should also consider that refusal to provide such access can be used to revoke the custody right.
No. 3 Year 2018	Private law	Filing of divorce for marriages not registered in the civil registry	A filing for a divorce can be conducted, provided that the marriage took place according to tradition/religion that existed before the enactment of Law No. 1 of 1974 in conjunction with Government Regulation No. 9 of 1975.
No. 3 Year 2018	Special private law	Employee's right to wage during the termination process:	When an employee's Specified Employment Agreement is amended into an Unspecified Employment Agreement, the employee concerned will not be entitled to wages during the termination process in the event that employment is terminated.

Source: by author

biological father should be the custodian of the child in question. Instead the Supreme Court ordered the *judex facti* court (i.e., the lower court with competence to assess the facts of a case) to re-examine the case, and to listen to the opinions of the child's closest relatives (beyond the mother and the father), by blood and by marriage – something that had not been previously done, either by the District Court or the High Court handling the case. The takeaway from this case law is not whether the mother or the father should be prioritized, but that the courts should consider the opinions of the closest relatives of the child concerned.[60]

Another often quoted court decision from 1975 says that the mother should be prioritized (*diutamakan*) as custodian, especially when the child is small, due to the child's best interest, except when the mother is proven to be unfit for raising children.[61] This ruling preceded the ratification of the Convention on the Rights of the Child.[62]

In 2012, the Supreme Court issued a circular addressing the issue, which stipulates that:

> according to Article 47 and 50 of the Marital Law, divorce shall not absolve parental authority and does not establish trusteeship (compared with Article 299 of the Civil Code), the judge should appoint one of the parents as the party who should raise and educate the child (Article 41 of the Marital Law).[63]

In 2017, this was again addressed in a circular. The 2017 circular on custody rights stipulates:

> the custody right of the biological mother over an underage child after divorce may be transferred to the biological father provided that such transfer will have positive effect on the growth and development of the child, by taking into account the child's interest/existence/wishes during the divorce process.[64]

Conclusion

Indonesia does not have a clear standardized model for the relationship between human rights and private law. Both in legal provisions and in actual practice, there are certain articles or cases that seem to indicate complementarity or indirect application, yet others that can be interpreted in favour of the subordination model.

Indonesia has more than adequate substantive legal instruments concerning human rights as a source of reference for judges. Yet, they have not been utilized optimally, due to some key challenges. First, some believe that courts should be passive in private law cases, which discourages them from using human rights framework, unless perhaps when it is especially relevant and raised by any party to the case. Courts generally focus more on limiting the discourse into the core dispute presented by parties. Second, human rights regulations are seen as part of the public law. In general, human rights will only be incorporated by judges in extreme cases involving vulnerable subjects, of a massive scale, and /or attract public attention.

A complementarity or indirect application model applied to human rights and private law relationship offer judges freedom in interpreting human rights essence in civil law cases. Since the judiciary is sacred, one should be careful not to interfere with the principle of judicial freedom and independence and human rights application should rather be encouraged from within the judiciary itself. The Supreme Court needs to take more initiatives to protect legal subjects vulnerable to violation of human rights. This could be done through regulations and technical guidelines, and by continuing to issue circulars based on the plenary sessions of Supreme Court chambers. However, these circulars should be enriched with more elaborative notes in order to understand the background and the rationale of its issuance. It is important to note that these circulars have not been integrated in case law. By developing the format and content of circulars further, they can be made more accessible for courts.

Notes

1 See S. Shidarta, S. C. van Huis and E. Riyadi, 'How Do Indonesian Judges Approach Human Rights in Private Law Cases? A Comparative Exploration,' *Journal of East Asia and International Law* 15, no. 2 (2022): 293–314.
2 See V. Trstenjak and P. Weingelr, *The Influence of Human Rights and Basic Rights in Private Law* (Springer, 2016), 8.
3 See E. Engle, 'Third Party Effect of Fundamental Rights (Drittwirkung),' *Hanse Law Review* 5, no. 2 (2009): 165–167.
4 See O. Cherednychenko, 'Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?,' *Utrecht Law Review* 3, no. 2 (2007): 3.
5 See A. Barak, 'Constitional Human Rights and Private Law,' in *Human Rights and Private Law*, ed. D. Friedmann and D. Narak-Erez (Hart Publishing, 2001), 14.
6 Article 1 of the Civil Code. Original text: Het genot van burgerlijke regten is onafhankelijk van staatkundige regten.
7 Original text: Geenerlei straf heeft den burgerlijken dood of het verlies van alle burgerlijke reghten ten gevolge.
8 On 23 October 1985, Indonesia signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was approved by the General Assembly of United Nations in its session on 10 December 1984. However, its ratification took place more than 10 years later with Law No. 5 of 1998 on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Indeed, the punishment that may result in civil death is not specifically mentioned in this Law No. 5 of 1998 as a violation of human rights, but it is logically understood that such punishment in inhuman.
9 Article 10 (1) of the 1999 Human Rights Act and Article 28 B (1) of the Constitution guarantees the right to form a family and continue their lineage through legal marriage. See S. Shidarta, 'Kebiri dan Kematian Perdata [Castration and Civil Death],' *Binus University Business Law* (October 2015), https://business-law.binus.ac.id/2015/10/30/kebiri-dan-kematian- perdata.
10 Law No. 23 of 2002 on Child Protection.This Law has been amended several times, lastly with Law No. 17 of 2016 on the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 on Second Amendment to Law No. 23 of 2002 on Child Protection to become Law. In 2020, Government Regulation No. 70 of 2020 on the Procedure for Carrying out Chemical Castration, Installation of Electronic Detection Device, Rehabilitation, and Publication of the Identity of Sexual Offenders against Minors.
11 Case number 69/Pid.Sus/2019/PN Mjk.
12 . Supreme Court Decision No. 13/B/PK/PJK/2013, discussed in O. Shidarta and P. Lakonawa, 'Lex Specialis Derogat Legi Generali: Makna dan Penggunaannya,' *Binus University Business Law* (March 2018), https://www.researchgate.net/publication/354694235_Lex_Specialis_Derogat_Legi_Generali_Makna_dan_Penggunaannya.
13 Cherenychenko, opt.cit.
14 A. Barak, 'Constitutional Human Rights and Private Law,' in *Human Rights and Private Law*, ed. D. Firedmann, D. Narak-Erez (Hart Publishing, 2001), 13–42.
15 Ketetapan majelis permusyawaratan Rakyat Republik Indonesia Nomor XVII/MRP/1998
16 Laws with a human rights component that intersect with private law include Law No. 39 of 1999 on Human Rights; Law No. 23 of 2002 on Child Protection as amended by Law No. 35 of 2014 and second amended by Law No.17 of 2016; Law No. 8 of 1999 on Consumer Protection; Law No. 13 of 2003 on Manpower and others including all international human rights instruments that have been ratified by the Indonesian government.
17 W. L. G. Lemaire, *Het Recht in Indonesia* (Uitgeverij W. van Hoeve, 1955), 159.
18 S. Waddams, *Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning* (Cambridge: Cambridge University Press, 2003), 1.

19 Indonesian Civil Code: Burgerlijk Wetboek voor Indonesie/ Kitab Undang-Undang Hukum Perdata
20 Article 11 (1) of the International Covenant on Economic, Social and Cultural Rights, stipulates that States parties 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing. . . .'
21 UN Human Rights Committee (HRC), General Comment No. 16 on Article 17 (Right to Privacy), 8 April 1988, HRI/GEN/1/Rev.9, https://www.refworld.org/docid/453883f922.html., last accessed 24 March 2023.
22 Article 28H(4) of the Constitution of the Republic of Indonesia (last amended 2002), 1945.
23 Art. 17 Universal Declaration of Human Rights.
24 Article 27 (2) of the of the Constitution of the Republic of Indonesia (last amended 2002), 1945.
25 Article 7 of the International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, 3.
26 Article 1601, 1602 and 1603 of the Civil Code.
27 According to N. S. Wilson, 'Freedom of contract is perhaps one of the most cherished aspects of individual liberty and it is therefore unfortunate that its ambivalent nature has resulted in its abuse. For present purposes, freedom of contract has two distinct meanings: first, the freedom to enter into agreements and secondly, the freedom from interference with a contract once made.' N. S. Wilson, 'Freedom of Contract and Adhesion Contracts,' *The International and Comparative Law Quarterly* 14, no. 1 (1965): 172–193.
28 Article 1338 of the Civil Code. Circular of the Supreme Court No. 4 of 2016 on the Implementation of the Plenary Session Result of the Supreme Court Chamber of 2016 as Guidelines for the Implementation of Duties for the Court, specifically the private law chamber formulation item 4. The formulation in full states that: 'The criteria of a good faith buyer that must be protected under Article 1338 paragraph (3) of the Civil Code are as follows: (a) conduct sale of a land object with legal procedure and documents as determined by laws and regulations, i.e.: – purchase a land via public auction or; – purchase a land before the Conveyancer (in accordance with the provisions in Government Regulation No. 24 of 1997 or; – purchase a customary/unregistered land conducted in accordance with customary law, i.e.: – conducted in cash and openly (before/known by the local village chief/subdistrict head); – preceded by a research on the land object about its status and based on the research it shows that the land object belongs to seller; – purchase is conducted with a decent price; (b) exercise caution by researching matters relating to the land object that has been agreed upon, among other things: – seller is the person who has the right to the land that becomes the object of sale, according to the title, or; – land/object to be sold is not in confiscation, or; – the land object to be sold has no lien/security interest on it, or; – on a titled land, has obtained a certification from the National Land Agency and the legal relationship history between the land and the title holder.'
29 See A. Barak, 'Constitutional Human Rights and Private Law,' *Review of Constitutional Studies* 3, no. 2 (1996): 223–281.
30 The conservatorship is based on the Sungai Penuh District Court Decision No. 9/Pdt.P/2016/PN.Spn.
31 Decision No.13/Pdt.G/2018/PN.
32 Decision No. 75/Pdt/2018/PT.Jmb.
33 Supreme Court Decision No. 714/PK.Pdt/2019.
34 See Article 9, Law No. 8 of 2016 on Persons with Disabilities.
35 More details on the chronology of hospital treatment is available in Shidarta, 'Membidik Penalaran Hakim di Balik Skor 'Kosong-Kosong' dalam Kasus Prita Mulyasari [Scrutinizing Judges Logic behind the 'Zero-Zero' Score in the Case of Prita Mulyasari],' *Jurnal Yudisia*l 4, no. 3 (2011): 251–255.

36 Decision of the Tangerang district court No. 300/Pdt.G/2008/PN.TNG.
37 The High Court of Banten Appeal DecisionNo. 71/Pdt/2009/PT.BTN.
38 Decision No. 300 K/Pdt/2010.
39 This is regulated by Article 67 of Law number 14/1985 on the Supreme Court, and discussed in S. Butt and T. Lindsey, *Indonesian Law* (Oxford University Press, 2018), 93–95.
40 Supreme Court Decision No. 225PK/PID.SUS/2011.
41 District court Decision No. 1269/Pid.B/2009/PN.TNG.
42 Article 28F of the Constitution.
43 Art 18B (2) of the Constitution of the Republic of Indonesia (last amended 2002), 1945.
44 Article 5 of the Basic Agrarian Law, Law number 5/1960 (emphasis added).
45 Article 36 (c), Regulation of the Jakarta government No. 5 of 1999.
46 Article 1365, 1366, 1367 of the Civil Code.
47 Sumito referred to Article 18 (a) and 18 (3) of the Law No.8 of 1999 on Consumer Protection.
48 Decision No. r 345/Pdt.G/2007/PN.JKT.PST.
49 Decision No. 513/Pdt/2008/PT.DKI.JKT.
50 Supreme Court Decision No. 2078 K/Pdt/2009.
51 Consider Article 1365, 1366 and 1377 of the Civil Code.
52 Supreme Court Decision No. 179 K/Sip/1961.
53 The Supreme Court Regulation No. 3 of 2017 on Guidelines to Preside on Cases where Women in Conflict with the Law based its consideration on Law No. 12 of 2005 on the Ratification of the International Covenant on Civil and Political Rights (ICCPR), and Indonesia's position as a state party to the Convention on Elimination of All Forms of Discrimination against Women (CEDAW). When providing guidelines for judges, Article 5 of the Supreme Court Regulation No. 3 of 2017 does not mention 'religion.' Letter b of this article states: 'In examination of women in conflict with the law, the judge should not . . . justify any discriminatory practice against women under the pretext of culture, custom, and other traditional practice or any expert interpretation that is gender bias.' The word 'culture' cannot be automatically assumed to include 'religion.'
54 The pyramid is frequently used to illustrate the legal hierarchy in Indonesia. Hans Nawiasky places the basic state norms *(Staatsfundamentalnorm)* as the overarching norm. This illustration does not explain the position of legal ideas *(Rechtsidee)*. A. Hamid S. Attamimi positioned legal ideas at the top of the pyramid. He also placed Pancasila at the top, constituting both constitutive law *(Constitutive Rechtsidee)* and regulatory law *(Regulative Rechtsidee)*. This, he did by quoting Rudolf Stamler, Gustav Radbruch, and van Eikma Hommes. Attamimi claimed that the drafters of the Constitution placed Pancailsa as both a legal idea and a basic state norm. See A. H. S. Attamimi, 'Peranan Keputusan Presiden Republik Indonesia dalam Penyelenggaraan Pemerintahan Negara: Suatu Studi Analisis mengenai Keputusan Presiden yang Berfungsi Pengaturan dalam Kurun Waktu Pelita I – Pelita IV,' PhD Dissertation (Universitas Indonesia, 1990), 310.

Darji Darmodiharjo and Shidarta agrees, The legal idea of Pancasila give 'ideological colours' to the Indonesian legal system. Pancasila contains values, which are more abstract than norms. At the same time, being positioned as a fundamental state norm, Pancasila is also more concrete as it is mentioned in the preamble of the Constitution.

See D. D. dan Shidarta, 'Penjabaran Nilai-Nilai Pancasila dalam Sistem Hukum Indonesia,' *Raja Grafindo Persada, Jakarta* (1996), 195.
55 Article 8, Law No. 12 of 2011 on Law-making.
56 The explanation of the Circular Letter in this section is based on Shidarta and S. C. van Huis and E. Riyadi, 'How Do Indonesian Judges Approach Human Rights in Private Law Cases? A Comparative Exploration,' *Journal of East Asia & International Law* 15, no. 2 (2022): 309–310.

57 The annotation is not fundamental enough to be debated if the Supreme Court's 'legal breakthrough' through its circulars is seen as a measure for legal interpretation. It is another story, if the Supreme Court creates new legal constructs as a law creation, which will have more opportunity to collide with positive law norms. For example, an annual increment of 10% to 20% of child support, excluding education and healthcare support, is a legal construct because it contravenes with other provisions that prohibit judges to grant something beyond the request as stipulated in Article 178 paragraph (2) and (3) HIR and Article 189 paragraph (2) and (3) RBG in conjunction with Article 67 letter of Law No. 14 of 1985 on the Supreme Court.
58 Online interview with a judge from the Supreme Court of Indonesia, on 24 February 2022.
59 As per May 2023 there are slightly above 2,000 judgments referring to this case, according to the Supreme Court's directory of cases (not counting the cases that are not registered in the directory).
60 Shidarta, 'Karakterisasi Yurisprudensi No: 102K/Sip/1973.' https://karakterisasi.komisiyudisial.go.id/?view=t5nsyMraxMLmx9%2Fn2uDj18bg0g%3D%3D&id=pGSr.
61 Decision No. 102 K/Sip/1973.
62 The Convention has been ratified by the Government of Indonesia with Presidential Decree No. 36 of 1990 on the Ratification of the Convention on The Rights of The Child.
63 Circular of the Supreme Court No.07/2012.
64 Circular of the Supreme Court No. 1/2017, from the Private Law Chamber.

Epilogue

Adriaan Bedner

This book is probably the first one about Indonesian law that takes international human rights as its point of departure and then focuses on how the judiciary has applied these rights domestically across various legal disciplines. Providing a broad context of international human rights application and Indonesia's position in the international human rights system, the authors have not limited themselves to presenting a series of cases, but they have also tried to outline the main factors that shape judicial human rights interpretation. In so doing they focus mainly on legal rules and approaches, but most chapters discuss politics and institutional features as well.

The contributions to this book are part of a trend in recent studies on Indonesian law that look seriously at legal reasoning. An increasing number of publications discuss, criticize and expose legal – mostly judicial – reasoning in Indonesia and how this reasoning relates to Indonesian legal scholarship more generally. Most of these publications focus on the Constitutional Court, whose existence has given an enormous impetus to such studies,[1] but others have looked at the Supreme Court,[2] and lower courts feature in an increasing number of PhD dissertations and Master theses.[3] The majority of publications is obviously written in Indonesian, but many are accessible to an English-speaking audience as well.

This trend in scholarship is important, not only for the sake of legal development but also because legal reasoning is at the heart of legal and judicial autonomy (see the introduction by Aksel Tømte). As I have argued elsewhere, such autonomy is built on the uniform principles, rules and interpretation that guide legal decision making. Sound legal decision making ought to differentiate according to the features of a given case, but it should be uniform and predictable in how it proceeds and in the justifications it provides of the choices made along the way to a decision.[4]

The questions I will discuss in this epilogue are the following: What can we learn from the chapters in this book? What are the main themes that emerge from them? What are the main characteristics of Indonesian judicial human rights interpretation? What is its political and institutional context? Some of these questions build on Tømte's introduction, while others stand more on their own or are based on comparisons with other literature. I will end with some thoughts about a human rights research agenda.

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However, before starting this discussion I would like to make a link between the book's contents and the so-called Spiral Model of human rights interpretation developed by Risse, Ropp and Sikkink.[5] First published in 1999, this Model provides a framework for implementing human rights from the international to the domestic level. The steps towards implementation are caused by the actions and reactions of three types of actors in particular: international human rights institutions, national governments and transnational and national NGOs. In 2013, the authors published an adjusted version of the model, addressing the criticism it had received over the years. The first concern was the original model's optimism in its assumption that human rights would progressively cascade down from the international to the grassroots level, whereas in fact back sliding is quite common. The second one was that to move from adherence to international human rights treaties towards respect for human rights at the grassroots level is much more challenging than the model assumed. Hence the importance of research exploring implementation at the domestic level.[6]

The present book has done precisely this. Its value is in the detailed attention it pays to the role of the judiciary in implementing human rights in particular, but also in its attention to the influence of the international law context and the role actors other than the judiciary play in this process. Those familiar with the Spiral Model will have no difficulty in seeing where the different chapters fit in. I should also add that the book is clear about what it does not do: the focus is on the judicial process, not on the realisation of human rights at the grassroots level. No matter how important the latter, I think the editor made an appropriate choice in focusing on the judiciary and judicial reasoning, leaving realisation at the grassroots level to other studies and perhaps future publications.

Indonesia in the international human rights field

The first important observation from the book is that at least at the formal level Indonesia has wholeheartedly embraced international human rights since 1998. This has provided a solid legal foundation for judges to apply human rights in the cases they decide. In line with the argument of the Spiral Model, human rights activists have played an important role in this process of integrating international human rights into the Indonesian legal order. This concerns in the first place the adoption of new legislation, whether the issue is child protection, human trafficking, or the death penalty (see chapter 6). Many politicians too have been supportive of including human rights into Indonesia's legal system, even if their support today seems far less common than it was during the time of the amendment process of the constitution between 1999 and 2002.

At first blush the position of international human rights is also helped by the fact that Indonesia's legal approach is not fully dualist when it comes to their implementation. Many even argue that formally speaking Indonesia adheres to a monist system. However, in practice the Supreme Court does apply a dualist approach and uses international human rights to fill gaps in domestic law. Courts in Indonesia do refer to human rights treaties, but only when they offer

convenient support for decisions that they already took on other grounds (see chapter 4). In other words, judges use international human rights as a secondary source rather than a primary one.

In this regard the position of the Constitutional Court is ambivalent, as it often seeks inspiration from international law in the interpretation of human rights. Yet, in particular cases involving religious values and freedom of expression the court has been less enthusiastic in embracing such interpretations. A good example is the cases where the court was petitioned to review the Blasphemy Law and where it upheld the provision that the promotion of 'religious interpretations of a religion that is adhered to in Indonesia' is prohibited if such interpretations 'deviate from the core teachings of the religion concerned.'[7] Likewise, the court also found that the use of religious values as a limitation on human rights could be justified on grounds other than the ones recognized by the International Convention on Civil and Political Rights (ICCPR). The court held that the grounds provided by the Indonesian Constitution are 'different,' thus opening an avenue for imposing limitations on grounds other than the ones recognized by the ICCPR (see chapter 4).

One factor influencing international human rights application in Indonesia is the absence of a regional human rights court. As Fraser shows in chapter 2, a regional mechanism such as the European Court of Human Rights has had major influence on human rights interpretation in European countries like the Netherlands. The African Court on Human and Peoples' Rights and the Inter-American Court of Human Rights may not be as powerful as the European Court, but they do have influence; their judgments are too authoritative to be plainly ignored in human rights interpretation by national courts in these regions.

While ASEAN has had a Human Rights Declaration since 2012 and an ASEAN Intergovernmental Commission of Human Rights (AICHR) since 2009, the caution of the Declaration and the lack of powers of the commission are typical for Southeast Asia's tenuous approach to international human rights.[8] As a consequence Indonesian courts cannot refer to a regional, prestigious institution, which might serve as a source of inspiration or even a beacon for human rights interpretation. This probably contributes to the frequent references Indonesian courts make to judgments of regional or even national human rights courts elsewhere in support of their own judgments (e.g., introduction and chapters 4 and 5).

Frequency of human rights application by the judiciary

The various contributions paint a diverse picture of the frequency with which judges apply human rights in cases where this would be possible or even required. Tømte states that 'Indonesian courts rarely consider human rights in their judgments' (see p. 1),

a view corroborated by Sri Wiyanti Eddyono, who holds that 'human rights are rarely considered at all in criminal cases' (see p. 114). However, Riyadi (chapter 5) – referring to a study by Universitas Islam Indonesia's Center for Human Rights – shows that if one looks for them, human rights can be found in a fair number of court judgments. Much depends of course on the standard one uses to

call a given number of cases high or low, and this standard is open to debate. As yet, a systematic study of this subject is not available.[9]

There is no disagreement that the Constitutional Court has given an enormous impetus to human rights awareness and human rights interpretation. This includes the influence the Constitutional Court has exercised on the Supreme Court, the latter now regularly passing judgments featuring human rights – however, without always following the interpretations of the former. Even lower courts apply human rights in some cases, as we can see in the cases referred to in various chapters (e.g. chapters 5 and 6). One reason is that many human rights have been incorporated in special laws and even in implementing regulations (see chapters 4 and 6). As a result, human rights may be applied indirectly, in the sense that the judge applies the standards in these laws without explicit reference to human rights. The importance of such special laws can hardly be overstated because of the formalist approach to legal interpretation of many – if not most – Indonesian judges (see chapter 3). Not of direct relevance to judicial interpretation but of great importance for the realisation of human rights at the grassroots level is Riyadi's observation that likewise various law enforcement agencies have created internal regulations to ensure the implementation of human rights, just as the fact that Komnas HAM has developed Standard Norms and Regulations to serve as guidance for government agencies in integrating human rights into their practices.

As already mentioned, the question whether courts apply human rights frequently or not depends largely on the standard one uses. The observation by Fraser that Australian courts tend to be just as reluctant in their application of human rights as the Australian government is in adopting them puts the bar quite low. On the opposite end, Fraser describes Dutch courts which almost habitually apply human rights directly from internal treaties. However, only 30 years ago, the application of human rights in fields such as private law in the Netherlands was almost nonexistent and in other legal disciplines, it was rare.[10] In short, when we take a longer-term perspective Indonesia's human rights application is developing quite rapidly.

Legitimacy of human rights

Another moot point in different chapters is to what extent human rights are legitimate in the eyes of the Indonesian public. Tømte's introduction mentions a figure from a survey of 98 per cent of Indonesians 'believing that human rights, as mandated by the Constitution, should be fought for' (see p. 4). On the other hand, he refers to antihuman rights discourses such as the 'Asian Values,' and more recent ones focused on 'westernisation' and 'Indonesian culture, and religion' (see p. 4). According to Riyadi '[m]ore than a decade after a human rights chapter was incorporated into the constitution, public resistance to human rights is still relatively strong.' (see p. 73).

A first observation is that Indonesian constitution-makers have never seen 'human rights' as 'un-Indonesian,' with the exception of the main drafter of the 1945 Constitution, Soepomo. No constitutional debate in Indonesia after 1945

has come even near a refusal of human rights generally,[11] and the human rights in the present constitution are overwhelmingly seen as an Indonesian product.[12] Secondly, even if I cannot sustain this with empirical data, I think these different assessments can be explained without much difficulty if we take into account the variation in legitimacy of different types of human rights. Human rights defining the limits of state power, such as the principle of retroactivity, due process, the prohibition to torture, etc., seem to receive support from most Indonesians. These include the rights that are considered absolute within the international system (see chapter 1). In addition, the support for socioeconomic rights is probably even stronger. Throughout Indonesian history, there has been overwhelming demand for the inclusion of such rights into the constitution (see chapter 5).

These two types of rights both concern claims vis-à-vis the state, either to protect citizens against it or to ensure that the state provides or guarantees certain services. It seems obvious that Indonesian courts are inclined to adopt international law interpretations of these rights without much resistance. A good example is the *amicus curiae* brief submitted by the UN Special Rapporteur on Human Rights and the Environment, which served as a basis for the judgment in the Jakarta air pollution case (see chapter 3).

However, when it comes to rights which primarily concern relations between citizens, such as the personal freedom of sexual orientation and professing one's religion, the situation is different. This is already clear from the constitutional amendments' Article 28 J (2), which provides an official ground for religiously inspired limitations on human rights:

> restrictions established by law for the sole purposes of guaranteeing the recognition and respect of the rights and freedoms of others and of satisfying just demands *based upon considerations of morality, religious values*, security and public order in a democratic society (emphasis added).[13]

In practice this means that petitioners have little to expect from the Constitutional Court in cases claiming a right to for instance same sex relations.[14] In addition the Constitutional Court has been quite reluctant in protecting freedom of religion. The clearest example is the five subsequent petitions against the Blasphemy Law it rejected – four of which on substantive grounds (see chapter 5).[15] The problem is that the Blasphemy Law is not only used against people expressing feelings of hatred against a given religion, but also against people who publicly profess non-mainstream religions. This jeopardizes the rights of those who do not adhere to one of these six mainstream religions mentioned in the Blasphemy Law, and the situation is even worse for those who consider themselves Muslims but who adhere to interpretations of Islam considered heretical by institutions on the Indonesian Ulama Council (*Majelis Ulama Indonesia*) or the leadership of the major Muslim organisations Nahdlatul Ulama and Muhammadiyah.[16]

On the other hand, to the outside world Indonesia is rather careful in its attitude to freedom of religion. Thus, Tømte observes that in an international context Indonesia uses the wordings regarding freedom of religion found in international

treaties, where in a domestic context the government refers to the texts found in Indonesian national law. It seems that the government tries to balance domestic conservatism with a progressive face internationally, an assumption supported by the fact that the officials representing Indonesia on the international scene are from the Ministry of Foreign Affairs, while nationally, such debates are dominated by officials from the Ministry of Religious Affairs.[17]

Given this tension it is remarkable that few authors in this book refer to Islamic law, where many of the controversies concerning human rights globally have to do with the incompatibility of common, conservative interpretations of Islamic law and human rights concerning LBHTIQ+ and gender equality. It is in this field that the most insoluble conflicts concerning human rights occur, as they hinge on diametrically opposed value systems.[18]

Problems involving Islam also appear regarding the right to freedom of expression, but here a more general problem has emerged as well. When we compare freedom of expression with freedom of religion, it seems located between human rights primarily focusing on protection from the state and human rights primarily focusing on the relations between citizens. The central issue for judges is weighing the importance of disclosing information against the interests of individuals that certain information is not disclosed. That private persons are entitled to more protection against defamation than the government has been confirmed by the Constitutional Court. In two landmark decisions the court declared unconstitutional the articles on insulting the president, the vice-president or the government, but upheld the general articles on defamation in the (old) Criminal Code involving common persons (see chapter 5).[19] The court's justification was that the defamation articles are needed to protect the 'right to reputation and dignity' of others.

If we recollect the point made by Saul that 'certain judicial bodies understand human dignity to have more of a communitarian emphasis (more concern for equality), whilst others place more emphasis on individual autonomy (more concern for liberty),' we can make two observations (see p. 000). The first is that Indonesian judges tend to prefer the communitarian emphasis. However, the second is that this communitarian emphasis is of a different nature than the one mentioned by Saul, as it does not refer so much to equality, but rather to interpretations of dignity adhered to by dominant groups in society. Hence, the Constitutional Court allows the government and religious authorities a wide scope of discretion in bringing cases against individuals based on majoritarian religious sensitivities. And as pointed out by Tømte, the Constitutional Court – or at least the current majority in it – is more concerned about these sensitivities than about the interpretations of the relevant provisions by international human rights institutions. The dangers inherent in this approach have been exposed in chapters 5 and 6, who discuss several cases where critics of decisions or behaviour of universities or hospitals were accused of defamation and, at least in some instances, found guilty by lower courts.

Finally, the state seems to deploy such sensitivities for its own purposes as well, by limiting freedom of expression through statutes and by actively prosecuting individuals who oppose economic projects supported by the state or projects

involving private interests of state officials. A current example is the case against Fatia Maulidiyanti and Haris Azhar who have been charged with defamation on the instigation of Coordinating Maritime Affairs and Investment Minister Luhut Panjaitan for his alleged involvement as a private citizen in mining companies.[20]

Returning to the issue of legitimacy of human rights generally, we encounter one factor throughout the book that has been of key importance: the relentless advocacy of NGOs and activist-academics, who have continued to familiarize the concept and tried to give it practical meaning. They are also the ones who through their advocacy have made abstract concepts concrete and forced judges to at least think about the relevance of human rights – even if the latter may decide not to respond to such arguments in their judgments.[21]

Special reference should also be made here to Indonesia's national human rights institution Komnas HAM, which by virtue of its position as a special state body is less vulnerable to attacks from antihuman rights forces than NGOs. Komnas HAM had in a way to reinvent itself in the new political constellation after the political and legal reforms following Suharto's fall from power, but it has managed to regain much of its initial zeal.[22] There are a few similar bodies concerned with special human rights, for instance women's rights, children's rights or the rights of people with disabilities, which also find themselves somewhere between civil society and the government (see chapter 4). However, they lack the status and resources of Komnas HAM, and their jurisdiction and scope of action are also more limited. In any case, Komnas HAM has managed to keep human rights on the political agenda and promoted their enforcement.

Quality of legal reasoning

The quality of legal reasoning, or rather the problems with it, are a recurring issue in most of the chapters. Such problems have also been observed by other scholars, even regarding the Constitutional Court, which stands out relatively favourably compared to other courts.[23] The study of human rights application by Universitas Islam Indonesia, referred to by Riyadi, finds that the considerations in judgments are often 'mediocre.'[24] Eddyono in chapter 6 makes a similar argument about criminal law, arguing that 'the majority of courts provide scant reasoning behind how they apply criminal law provisions' (see p. 000).

Fortunately, there are also examples to the contrary, including in Eddyono's own chapter (chapter 6), and several in Shidarta's (chapter 7). One of the most remarkable is the judgment in the Papua Internet case – discussed in several chapters – where the judges of the administrative court argued that the right to freedom of expression as linked to other human rights prohibited the government from shutting down the internet in West Papua. Not only did the court refer directly to 'national' human rights for its interpretation of these, but it also discussed international law and even 'soft' international law. While perhaps the judges did not 'invent' these arguments themselves but rather adopted them from the plaintiffs and their legal experts (see below where I discuss the influence of the latter) this remains a remarkable show of careful judicial reasoning.

I should also mention here that in the past years the reasoning of the Supreme Court in matters involving human rights has improved. Human rights trainings and other international cooperation programmes, the introduction of a chamber system in the court – both mentioned by Tømte – as well as the continuing influence of reform efforts institutionalized through the presence of the Judicial Reform Team have all contributed to this. However, there is a difference here between fields of law, as in private law the court has generally been reluctant to include human rights considerations (see chapter 7).

Yet, considerable obstacles in the way of better legal interpretation remain. One of them is the formalist tendency in legal reasoning mentioned in several chapters. Under the New Order, the major obstacle to human rights application by judges was the absence of international or national statutory rights to implement. This problem no longer exists following the enactment of the Constitutional amendments, the Human Rights Law and many other statutes containing human rights. This makes it in principle easy for formalist judges to apply human rights (see chapter 3). However, the fact that human rights are general in nature and not easily applied directly still poses an important hurdle for lower court judges in particular.

It seems that the easiest way out of this dilemma is for judges to assume that there is a 'legal void' (*kekosongan hukum*), which requires them to invent a rule. Precisely because of their lack of determinacy human rights offer a viable option for filling in such gaps, of which the case of Agus discussed by Putro (chapter 3) offers a good example.

One specific factor contributing to the quality of judgments involving human rights is the possibility to submit an *amicus curiae* brief. In principle this possibility is open to anyone – including the UN Special Rapporteur – and it is regularly used (see chapter 4). Komnas HAM has a special role in this, because submitting *amicus curiae* briefs is part of their mandate. According to Riyadi, these *amicus curiae* briefs have been successful in several cases.

Even more important in practice is the similar option to have legal experts provide their opinion in the form of spoken expert testimony in court, an option used quite frequently in Indonesia. In a country like the Netherlands, such testimony by legal experts is quite unusual, as judges feel that they themselves are the legal experts and hence do not need expert testimony on the law. However, one should know that in the Netherlands and other European countries exchange of legal knowledge takes place primarily in written form, meaning that judges do take into account the opinions of legal experts, but they do so by reading articles in legal journals rather than by listening to them during court procedures. In the oral legal culture in Indonesia this is different and hence legal experts can present useful information to judges on concepts and issues they are unlikely to immediately consider.

As also noted in the foreword, many observers from common law systems consider short judgments with few legal arguments as typical for civil law jurisdictions. While this may be true for some jurisdictions, it certainly is not for judicial reasoning in the Netherlands. Thus, the brevity of legal reasoning in most Indonesian judgments is

not something inherited from the colonial period. Other factors such as political pressure on the judiciary, combined with lack of funding, a heavy workload, inadequate education, loss of status, the transition from Dutch to Indonesian as the legal language, and the sheer complexity of the legal system together led to a decline of standards in legal reasoning.[25]

So, while in this regard the civil law heritage does not matter, I think it does in two other aspects. The first is that judges in the common law tradition perceive themselves as lawmakers in their own right. While judges in civil law countries such as the Netherlands now finally admit that they do create law, this is not how they traditionally presented themselves. As Putro argues in chapter 3, judges in Indonesia have taken on the traditional Dutch way in between making new law and simply applying statutes to *finding* the law – which already is a big step forward compared to judges pretending to be no more than appliers of legislation.

The second and related aspect is that judges trained in the common law tradition are likely to have a degree of self-consciousness that judges in the civil law tradition lack, or at least have to a lesser degree.[26] Even if they acknowledge the supremacy of parliament, judges trained in the common law tradition tend to be more independent minded than civil law judges. However, this is not a clearcut matter. In chapter 2, Fraser finds Australian judges to be quite deferential to the legislative and the government when it comes to the interpretation of human rights. The opposite is true about Indonesia's Constitutional Court, whose judges in many cases have shown an independence of mind no one had predicted before the court became operative.[27] Here, it seems that the institutional positioning of judges as a specialized court has created exactly the kind of self-consciousness ordinary Indonesian judges tend not to have, including most judges of the Supreme Court.[28]

Legal (un)certainty

As has become clear from the previous section, the quality of legal reasoning concerning human rights has developed considerably. However, this has not necessarily led to more legal certainty in human rights interpretation, or at least not to their stable interpretation over time. This is somehow ironic, as the ground most used to petition the Constitutional Court has been 'the right to legal certainty.'

There are several conditions which promote such lack of legal certainty. The first one – mentioned in the introduction by Tømte – is of a legal nature. Although it should be applauded that many human rights provisions have been incorporated into special laws, their formulation sometimes differs considerably from the original text. This causes a continuing tension between the international and the national human rights. Usually, such tension will be resolved in favour of the national provision, but the latter will remain open to challenge until the meanings of the two have been aligned.

A similar issue is that key legislation, such as the Code of Criminal Procedure, dates from the New Order period and has not yet been replaced. The code provides few controls over the use of coercive means by the police and the public

prosecutor, who frequently abuse their powers.[29] The use of the pretrial procedure, where defendants in criminal cases may petition the court to review the operations by the police and the prosecutor, falls short of guaranteeing due process. Although the main reason is that its underlying legislation is problematic, judicial restraint in interpreting the relevant provisions also plays a role (see chapter 6).

A third reason of a legal nature is that not even the Constitutional Court has developed the 'host of tests and thresholds' Saul mentions as a mechanism to create predictability in judging (chapter 1). The cases discussed in this book sometimes display sound or even ingenious reasoning, but not in the systematic way required for legal predictability. For instance, to my knowledge the major ground for review of the right to legal certainty has never been fully operationalized.[30] The same applies to the principle of proportionality, which internationally is understood as whether the advantage of pursuing the aim outweighs the costs included – an approach I have not seen adopted by the Constitutional Court or other judicial bodies. Cammack has observed on this account that the court applies a very narrow doctrine of precedent, instead of interpreting constitutional texts consistently in its reasoning in subsequent cases that do not address the same issue.[31] This is an area where much is to be gained.

The fourth reason is institutional. It concerns the continuation of a legal system in which there is a lack of communication between the different actors involved, particularly between judges. In other words, judges are not sufficiently aware of the decisions taken by their colleagues in comparable cases.[32] For many years, this was a major problem even within the Supreme Court, and although the situation has improved considerably by the introduction of a chamber system in the court, this has not fully resolved the matter. In short, although the situation seems to be improving, it is a slow process that will take time.

A fifth reason is a struggle for status between the Supreme and the Constitutional Court. Formally both institutions are at the same level (see introduction), but as the Constitutional Court has the explicit task of constitutional review of statutes, a logical consequence is that in their judicial review of lower-level provisions the Supreme Court should follow the interpretations of relevant Constitutional Court judgments. Unfortunately, the Supreme Court does not always do so.[33] That lower courts act in a similar way is shown in chapter 5, where he argues that the criminal provision on *makar* is still applied contrarily to the Constitutional Court interpretation.

The importance of politics

This epilogue would be incomplete without mentioning the political context in which judicial human rights interpretation in Indonesia takes place. Several chapters refer to this context. Its most poignant characterisation is found in the chapter 5, which discusses the oligarchic powers and 'their ability to dominate the very instruments of democratisation' (see p. 92). As one Supreme Court judge confirmed during my visit to the court in May 2023, the government's pressure on judges has mounted considerably over the past few years.

Most of the pressure exercised by the government is not immediately visible. However, the government and parliament have become increasingly open in their attempts to get more of a grip on the judiciary and the Constitutional Court. The most shocking example is the replacement of Justice Aswanto by parliament and the claim by the Head of the House Commission III Bambang Wuryanto, that 'a judge nominated by the House of Representatives must represent and protect their interests' (see p. 98 and chapter 5).

Other instances of the government demonstrating contempt for the Constitutional Court may not be as shocking, but in practice they are as damaging. One is that the government simply does not obey court judgments, as happened for instance in the Papua Internet case. More generally, Wiratraman argues that '[d]ecisions of the Constitutional Court have often been subverted in the 'interest of ruling powers' (see p. 110). How far this contempt goes is mentioned in passing by Eddyono (chapter 6), who points out that in the new Criminal Code, the legislature included the very articles on insulting the president and vice-president which the Constitutional Court declared unconstitutional in 2006.

Another instance is the decision by the Jokowi government to reintroduce the Job Creation Law by a government decree in lieu of law, after the Job Creation Law had been declared conditionally unconstitutional by the court. The president is only allowed to issue such a decree in case of an emergency and needs the consent of parliament.[34] In this case, the president and parliament agreed that the economic situation of Indonesia qualified as an emergency and that this allowed them to ignore the Constitutional Court, unconcerned by the fact that they thus acted in violation of constitutional law. What makes this case even more cynical is that the president himself suggested that those who rejected the law petition the Constitutional Court.[35]

A final note is that the courts may contribute to the reduction of their powers themselves, by removing cases from judicial scrutiny. Once again, the example is from chapter 5, where Wiratraman discusses the petition to the Constitutional Court to review Article 40 of the Information Technology Law because it would allow the government to shut down the internet or take similar measures without issuing a decree. According to the government the reason would be that this enables speedy action. However, that cannot be a serious argument, as the government can issue such a decree just as quickly as it can block the internet. However, the Constitutional Court accepted the government's defence and thus made it impossible to bring such cases to court for lack of an administrative decree. The court thus broadened the scope of emergencies that shield government action from judicial scrutiny, bringing Indonesia one step closer to 'the rule of exception.'

When we think of the Spiral Model mentioned at the start of this chapter, the conclusion can only be that presently Indonesia is back sliding towards a situation where human rights matter less. While the country has passed all the phases of adopting international human rights legislation and took important steps towards implementing these rights directly or after judicial intervention, at present the government is stepping back on both counts. It remains to be seen how robust the current framework is and whether national and transnational activism as well as international law mechanisms can slow down this process and possibly assist in reversing it.

Research agenda

Finally, I would like to make a few remarks on the research agenda concerning judicial interpretation of human rights. To me, the most important step to take is to gather more systematic knowledge about the topic. Much information is currently available, but it is hard to find since it is scattered across publications that often discuss various human rights at the same time. To provide a solid basis for critique and judicial development of human rights interpretation we need to know how judges have interpreted specific rights in different cases. Such overviews potentially contribute to better human rights practices in the courts, as they provide authoritative information that can be submitted to the courts in similar cases.

A good example is Wiratraman's study on press freedom, which provides a comprehensive overview of both judgments and relevant literature.[36] Such inquiries can also yield valuable insights into legal reasoning by Indonesian judges. Right now there is a lot of critique, but it would be good to get to a deeper level: in what way is legal reasoning in human rights cases shallow and what exactly are the steps judges take in them?

A second topic concerns the legitimacy of human rights in Indonesia. Here as well I think it is important to gather more systematic and deeper knowledge about what Indonesians think about them. Next to surveys asking about human rights in general, this requires more qualitative work that explores ideas Indonesians have about the values and interests underlying specific human rights rather than general ones. This will also enable a better appreciation of the validity of differentiating between support for communitarian, individualist and perhaps still other forms of human rights interpretations. Given the size of the country and the differences across regions, classes, religions and other categories, such an effort will require a lot of work, but it can be done step by step, each contributing to a result that can only be achieved in the long term.

It would also be worthwhile to examine human rights legitimacy within the judiciary: What are judicial attitudes to human rights? What do judges in various courts think of them? Are there any differences between judges of older and younger generations? Do judges see the relevance of human rights in fields other than 'typical' human rights fields as constitutional law? Why do some judges apply them while others do not? Answering such questions would require a combination of studying judgments and interviewing judges, which has the advantage that it produces both legal-dogmatic and sociolegal knowledge.

A related and more specific subject worth exploring is the role of legal expert testimony and *amicus curiae* briefs. What do judges think about them? Why are they such a common phenomenon? How effective are they in practice? And what makes them effective? Once again, such studies would not only be of scholarly interest but also important for those bringing human rights cases to court.

The fifth topic I would like to mention goes one step beyond judicial reasoning, towards genuine realisation of human rights. It concerns the implementation of human rights judgments by the government, or put more generally: How do

government officials respond to judgments that put them in the wrong? Above I already mentioned a few examples where officials refused to implement judgments or found ways around the duty they have to do so. Are these cases related to types of human rights? Are they typically cases concerning value-laden issues? Or do they rather concern cases where economic interests are at stake? A related question is how NGOs and other parties involved react to such refusals: Do they manage to get public support for their case to force the government to take steps towards implementation after an initial refusal, or do they only get publicity gains?

And finally, a smaller but quite important subject concerns jurisdictional politics: What exactly is the relation between the Constitutional and the Supreme Court? How do they relate to one another at various levels? What factors drive the Supreme Court to sometimes ignore or reject Constitutional Court interpretations of particular human rights provisions? The same concerns the relations between the Constitutional Court and political actors such as parliament, the government and potential allies, such as Komnas HAM, the Judicial Commission (*Komisi Yudisial*), NGOs and academia.

These are only a few ideas, and many useful ones can be added. I hope they will be taken on by a wide range of scholars, outside but mainly inside Indonesia. The present book offers a good starting point and if the themes I highlighted in this epilogue can contribute to articulate this starting point, I think it has achieved its objective.

Notes

1 See among many other examples S. Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge, 2018); S. Butt, *The Constitutional Court and Democracy in Indonesia* (Brill, 2015); M. Crouch, 'Constitutionalism, Islam and the Practice of Religious Deference: the Case of the Indonesian Constitutional Court,' *Austl. J. Asian L.* 16 (2015): 195–209; M. A. Safaat, A. E. Widiarto, and F. L. Suroso, 'Pola Penafsiran Konstitusi dalam Putusan Mahkamah Konstitusi Periode 2003–2008 dan 2009–2013,' *Jurnal Konstitusi* 14, no. 2 (2017): 234–261. A search using the words 'kajian putusan Mahkamah Konstitusi' (evaluation jdugments Constitutional Court) yields an almost endless list of Indonesian publications on particular Constitutional Court judgments.

2 Important ones are S. Butt, ' Judicial Reasoning and Review in the Indonesian Supreme Court,' *Asian Journal of Law and Society* 6, no. 1 (2019): 67–97; and R. Assegaf, 'The Supreme Court: Reformasi, Independence and the Failure to Ensure Legal Certainty,' in *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia*, ed. M. Crouch (Cambridge University Press, 2019), 31–58.

3 Similar as with my observation in the first note; the list of articles and theses is almost without end. However, there are clearly differences in representation of various legal fields; a majority seems to focus on (Islamic) family law while fields as 'common' civil law are underrepresented.

4 A. Bedner, '*Autonomy of Law in Indonesia*,' *Recht der Werkelijkheid* 37, no. 3 (2016): 10–36; see also chapter 1.

5 T. Risse, S. C. Ropp, , K. Sikkink ed., *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press 1999). and T. Risse, S. C. Ropp, , K. Sikkink ed., *The Persistent Power of Human Rights: From Commitment to Compliance* (Cambridge University Press, 2013).

6 See also chapter 2 by Fraser on this issue. More generally, see B. Oomen and A. Bedner, *The Relevance of Real Legal Certainty–An Introduction*, in *Real Legal Certainty and Its Relevance*, ed. B. Oomen and A. Bedner (Leiden University Press, 2018).
7 The Constitutional Court approach has been criticized by many scholars, both from inside and outside Indonesia, see for instance M. A. Crouch, 'Law and Religion in Indonesia: The Constitutional Court and the Blasphemy Law,' *Asian Journal of Comparative Law* 7 (2011): 1–46; A. Tømte, 'Constitutional Review of the Indonesian Blasphemy Law,' *Nordic Journal of Human Rights,*' 30, no. 2 (2012): 174–204; D. Peterson, *Islam, Blasphemy, and Human Rights in Indonesia: The Trial of Ahok* (Routledge, 2020); M. K. Pertiwi, *Religious freedom and the Indonesian constitution: a case study of the Blasphemy Law, Marriage Law, and Civil Administrative Law*, PhD dissertation (Macquarie University, 2022); C. S. Pratiwi, 'Rethinking the Constitutionality of Indonesia's Flawed Anti-Blasphemy Law,' *Const. Rev.* 7 (2021): 273.
8 See for instance A Duxbury and H. L. Tan, *Can ASEAN Take Human Rights Seriously?* (Cambridge University Press, 2019) and Hien Bui, 'The ASEAN Human Rights System: A Critical Analysis,' *Asian Journal of Comparative Law* 11, no. 1 (2016): 111–140.
9 Methodologically this is quite challenging, as it is not so easy to determine in which cases courts could have applied human rights where they did not. Perhaps one way would be to see whether parties presented human rights arguments that were either dismissed or ignored by the courts in their judgments. But even in that case one should be careful, because the court may have been right in doing so. I therefore think that the best way so far would be to look at cases where human rights seem quite relevant but are ignored – as done by several authors of the chapters in this book.
10 See for instance C. Mak, *Fundamental Rights in European Contract Law: A Comparison of the Impact of Fundamental Rights on Contractual Relationships in Germany, the Netherlands, Italy and England* (Wolters Kluwer, 2008).
11 See A. Bedner, 'The Need for Realism: Ideals and Practice in Indonesia's Constitutional History,' in *Constitutionalism and the Rule of Law: Bridging Ideals and Reality*, ed. M. Adam, A. Meuwese, and E. Hirsch Ballin (Cambridge University Press, 2017), 159–194. Very recently Jakob Tobing has argued that only the preamble of the 1945 Constitution, with the Pancasila in it, should be considered as 'genuinely Indonesian' and that the other parts were drafted inspired by Japanese fascism. See J. Tobing, 'Constitutional Democracy and the Rule of Law. The Essence of 1999–2002 Constitution Reform in Indonesia,' PhD dissertation (Leiden University, 2023).
12 I am grateful to Aksel Tømte for mentioning this in his comment on an earlier draft of this chapter.
13 My translation of the original text: "pembatasan yang ditetapkan dengan undang-undang dengan maksud semata-mata untuk menjamin pengakuan serta penghormatan atas hak dan kebebasan orang lain dan untuk memenuhi tuntutan yang adil sesuai dengan pertimbangan moral, nilai-nilai agama, keamanan, dan ketertiban umum dalam suatu asyarakat demokratis".
14 A case often referred to in this context is the one brought to the Constitutional Court by the Family Love Alliance with the aim of criminalizing same-sex sexual relations. Although the court rejected the petition to review the Criminal Code accordingly, many activists and academics were disappointed that the majority opinion of the court did not state that such relations are protected by the Constitution. By contrast, Abdurrachman Satrio has defended the court's decision, arguing that it was a pragmatic stance given widespread public support for the petition and also given the fact that the court had been very close to a majority accepting it A. Satrio, 'LGBT Rights and the Constitutional Court: Protecting Rights Without Recognizing Rhem?' in *Constitutional Democracy in Indonesia*, ed. M. Crouch (Oxford University Press, 2022), 261–273.
15 See also M. Crouch, 'Constitutionalism, Islam and the Practice of Religious Deference: The case of the Indonesian Constitutional Court,' *Austl. J. Asian L.* 16 (2015): 195.

16 For a critique see A. Rofi and N. Hosen, 'The Constitutionalization of "Religious Values" in Indonesia,' in *Constitutional Democracy in Indonesia*, ed. M. Crouch (Oxford University Press, 2022), 241–259.
17 Once again my thanks go to Aksel Tømte for sharing this insight.
18 See for an in-depth discussion of the debate concerning this issue and the various positions Y. Nugraha, 'Understanding Conflicts Between Constitutions and International Human Rights Law: Sexual Minority Rights as a Case Study,' PhD dissertation (Hasselt University, forthcoming), chapter 6.
19 But also see Eddyono's essay (chapter 6) and below on how the legislator reintroduced the relevant articles in the new Criminal Code.
20 See for instance https://www.thejakartapost.com/indonesia/2023/04/03/luhuts-defamation-trial-against-activists-kicks-off.html, accessed 13 August 2023.
21 About the influence of NGOs on the Constitutional Court see D. J. Nardi Jr, 'Can NGOs Change the Constitution? Civil Society and the Indonesian Constitutional Court,' *Contemporary Southeast Asia* 40, no. 2 (2018): 247–278.
22 K. M. P. Setiawan, *Promoting Human Rights: National Human Rights Commissions in Indonesia and Malaysia* (Leiden University Press, 2013).
23 See for instance S. Butt, *The Constitutional Court and Democracy in Indonesia* (Brill, 2015).
24 Mark Cammack has noted that 'the Court often identifies one or more provisions of the Constitution as the basis for the decision without identifying the specific language that it has relied on or explaining how the text of the law applies to the facts of the case.' M. Cammack, 'Legal Certainty in Indonesia's Constitutional Court,' in *Constitutional Democracy in Indonesia*, ed. M. Crouch (Oxford University Press, 2022), 276.
25 Standard studies are S. Pompe *The Indonesian Supreme Court: A Study of Institutional Collapse* (Cornell University Press, 2005) and A. Massier, A. *The Voice of the Law in Transition: Indonesian Jurists and Their Languages, 1915–2000* (Brill, 2008).
26 See for instance M. Cappelletti, 'Judicial Review in Comparative Perspective,' *Calif. L. Rev.*, 58 (1970): 1017–1053.
27 See in particular S. Hendrianto, *Law and Politics of Constitutional Courts: Indonesia and the Search for Judicial Heroes* (Routledge, 2018).
28 A small observation from my side is that Supreme Court judges are clearly aware of this and have tried to support their status by 'artificial' means such as demanding to be addressed as 'your honour' (*yang mulia*) and even doing this themselves. I am not sure when this practice was introduced, but during the 1990s and early 2000s no judge would ever be addressed in this manner.
29 F. Afandi and A. W. Bedner 'Between Upholding the Rule of Law and Maintaining Security: Criminal Justice Actors in Indonesia's Constitution,' in *Constitutional Democracy in Indonesia*, 67–88.
30 Mark Cammack has demonstrated that the Constitutional Court uses the right to legal certainty strategically, in such a broad way that almost any petition can be subsumed under that ground. In other words, it is a device to broaden jurisdiction (see Cammack, 'Legal Certainty in Indonesia's Constitutional Court').
31 Cammack, 'Legal Certainty in Indonesia's Constitutional Court,' 296.
32 See generally M. Crouch ed., *The Politics of Court Reform: Judicial Change and Legal Culture in Indonesia* (Cambridge University Press, 2022), in particular the chapter by A. W. Bedner and H. P. Wiratraman, 'The Administrative Courts: The Quest for Consistency,' 133–148.
33 Examples are two cases concerning the Election Law of 2018 and 2019, see M. Ibrahim, 'Does the Indonesian Judicial Review System Need Reform?' *Austl. J. Asian L.*, 22 (2022): 22–23. The case numbers are Supreme Court Decision 65 P/HUM/2018 and 44 P/HUM/2019.
34 A. Sumodiningrat, 'Constitutional Disobedience Putusan Mahkamah Konstitusi: Kajian Terhadap Perppu Cipta Kerja,' *Constitution* 2, no. 1 (2023): 59–84.

35 CNN Indonesia, Jokowi: Jika tidak puas, Omnibus Law silakan bawa ke Mahkamah Konstitusi, https://www.cnnindonesia.com/nasional/20201009164945-32-556624/jokowi-jika-tak-puas-omnibus-law-silakan-bawa-ke-mk, accessed 15 August 2023.
36 H. P. Wiratraman, *Press Freedom, Law and Politics in Indonesia: A Socio-Legal Study*, PhD dissertation (Leiden University, 2014).

Index

Page numbers in **bold** refer to figures, page numbers in *italic* refer to tables