Constitutional Review, Volume 10, Number 2, December 2024
P-ISSN: 2460-0016 (print), E-ISSN: 2548-3870 (online)
https://doi.org/10.31078/consrev1027

Universality of Rights as an Interpretive Principle for the Indonesian Constitutional Court

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Received: 5 October 2023 | Last Revised: 4 June 2024 | Accepted: 28 October 2024

Abstract

This article discusses issues regarding constitutional interpretation in general, and the interpretation of human rights provisions in the constitution in particular. The setting of the discussion is the role of the Constitutional Court of Indonesia in reviewing the constitutionality of laws based on Chapter XA of the 1945 Constitution. Constitutional interpretation is pivotal in deciding the constitutionality of laws. Therefore, this article aims to propose an interpretive principle to the Constitutional Court when interpreting human rights provisions in deciding the constitutionality of laws. The interpretive principle is the universality of rights. In other words, this article suggests the Constitutional Court adopt the universality of rights principle in interpreting Chapter XA of the 1945 Constitution. The principle of universality of rights departs from the understanding that human rights are natural rights. The interpretive principles that can be derived from the principle of universality of rights are as follows. First, recognition of unenumerated rights. Second, minimalization of the exercise of human rights limitation norms. Third, prioritization of protection of minorities. Fourth, encouraging the use of comparative approach in interpreting

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constitutional human rights norms. These interpretive principles are discovered through a comparative approach, in this case referring to judicial practices in other countries as well as regional and international judicial bodies that are considered relevant. The rationale behind this proposal is that human rights interpretation using the universality of rights principle can enhance the protection of human rights. Suppose judicial review of the constitutionality of laws is dedicated to enhancing human rights. In that case, constitutional interpretation should be dictated by the universality of rights principle as the interpretive principle.

Keywords: Constitutional Interpretation; Human Rights; Universality

I. INTRODUCTION

This article discusses the theory of constitutional interpretation, specifically the interpretation of constitutional provisions of human rights. The main point of the discussion is constitutional adjudication by the Constitutional Court of Indonesia (the Constitutional Court), where human rights provisions in Chapter XA of the 1945 Constitution often form the basis of constitutional review.[1] Therefore, the ideal interpretive principles for interpreting these constitutional human rights provisions are urgently needed. The article argues for the adoption of universal human rights as the ideal interpretive principle rather than cultural relativism.[2]

[1] Titon Slamet Kurnia, *Interpretasi Hak-Hak Asasi Manusia oleh Mahkamah Konstitusi Republik Indonesia: The Jimly Court 2003–2008* [Interpretation of Human Rights by the Constitutional Court of Indonesia: The Jimly Court 2003–2008] (Bandung: Mandar Maju, 2015). Pan Mohamad Faiz, "The Role of the Constitutional Court in Securing Constitutional Government in Indonesia" (PhD diss., University of Queensland, 2016), 87–108. I.D.G. Palguna, Saldi Isra, and Pan Mohamad Faiz, *The Constitutional Court and Human Rights Protection in Indonesia* (Jakarta: RajaGrafindo Persada, 2022).

[2] Note that in the context of a literature review it is quite difficult to find specific literature that speaks comprehensively about the universality of human rights as a principle, especially the specific principles outlining interpretive principles in the interpretation of human rights provisions. See for example: Rainer Arnold, ed., *The Universalism of Human Rights* (Dordrecht: Springer, 2013). To the extent that we have been able to find, the universality of human rights as a principle is discussed in passing, or discussed in a more limited context, namely related to the concept of universality itself, or some are even being drafted that the universality of human rights has proven itself so instead of discussing the universality of human rights then a more strategic issue is, so that the universality of human rights can be applied, what human rights are universal. See for example: William J. Talbott, *Which Rights Should Be Universal?* (Oxford: Oxford University Press, 2005). Relatively easy to find is the meta-principle discussion of human rights universality, which focuses on the foundations of human rights universality. See for example: Christopher McCrudden, "Human Dignity and Judicial Interpretation of Human Rights," *European Journal of International Law* 19, no. 4 (2008): 655–724; Neomi Rao, "Three Concepts of Dignity in Constitutional Law," *Notre Dame Law Review* 86, no. 1 (2011): 183–271. While specifically on the issue of human rights adjudication, issues that tend to be very technical are related to doctrinal issues regarding how a judicial body builds its judicial opinion on the case based on very technical human rights law doctrines, for example: application of limitation clauses, application of proportionality tests, and so on. See in general · Liora Lazarus, Christopher McCrudden, and Nigel Bowles, eds., *Reasoning Rights: Comparative Judicial Engagement* (London-Portland: Hart Publishing, 2014).

The writing of this article was inspired by Ronald Dworkin's Moral Reading. Dworkin developed Moral Reading as an interpretive principle for the Bill of Rights of the United States Constitution.[3] Like Dworkin, this article is plagued by theoretical questions about how the interpretation of the constitutional provisions of human rights in Chapter XA of the 1945 Constitution should be carried out. Therefore, although addressed to the Constitutional Court, this article is not intended as a response to the Constitutional Court's problematic practice in interpreting human rights. The starting point of this article is purely theoretical about how to provide the best interpretation of the constitutional provisions of human rights with benchmarks of interpretation that are more capable of providing protection for human rights.

However, as factual background, the Constitutional Court's performance in interpreting human rights can also be provided with necessary information. The Constitutional Court's practice in interpreting human rights still ebbs and flows – and this is a common phenomenon in adjudication where apart from the best examples, contrary examples can also be shown. The Constitutional Court's positive judicial performance in interpreting human rights is often found in the field of political rights, such as: cases of political rights of former Indonesian Comunist Party,[4] individual candidates for chief of regional government,[5] and decriminalization of defamation to the president/vice president.[6] Meanwhile, the Constitutional Court's less positive contribution to human rights is the Constitutional Court's interpretation of the right to life in reviewing the constitutionality of death penalty provisions,[7] as well as the issue of the constitutionality of blasphemy in relation to the right to freedom of religion and opinion.[8]

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3 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (Oxford: Oxford University Press, 1996), 1–12.

4 Constitutional Court of the Republic of Indonesia, *Judicial Review of General Election Law*, Decision No. 011-017/PUU-I/2003 (2003).

5 Constitutional Court of the Republic of Indonesia, *Judicial Review of Local Government Law*, Decision No. 5/PUU-V/2007 (2007).

6 Constitutional Court of the Republic of Indonesia, *Judicial Review of Criminal Code Law*, Decision No. 013-022/PUU-IV/2006 (2006).

7 Constitutional Court of the Republic of Indonesia, *Judicial Review of Narcotics Law*, Decision No. 2-3/PUU-V/2007 (2007).

8 Constitutional Court of the Republic of Indonesia, *Judicial Review of Blasphemy Law*, Decision No. 140/PUU-VII/2009 (2009).

The normative issue of adopting the universality of rights or cultural relativism as an approach to human rights adjudication has been introduced previously. However, it is contextualized by the capacity of the Constitutional Court to provide human rights protection, given the dominance of human rights provisions as the basis for constitutional review. While this issue is more prevalent in the field of international relations as a response to the monitoring of State compliance with human rights norms (especially in the 1990s),[9] it remains relevant in the context of constitutional review by the Constitutional Court, as the best interpretation of human rights provisions is believed to be based on the principle of the universality of human rights. Therefore, the universality of rights serve as the standard for the Constitutional Court in deciding the constitutionality of laws based on human rights.

The article defends adopting the universality of rights as an approach to human rights adjudication by the Constitutional Court in the context of interpretative principles in constitutional human rights provisions (Chapter XA of the 1945 Constitution). The approach is the most functional to enhance human rights protection through constitutional review. To justify the claim, the article elaborates on the interpretive principles of human rights provisions derived from the concept of universal human rights. The concept of universal human rights departs from the understanding that human rights are natural rights. This means that human rights are rights that are inherent in all human beings. The discussion will start with the concept of the universality of rights[10] and then derive interpretive principles from this concept to support the claim that the universality of rights is an adequate approach to advancing human rights protection through constitutional review.[11] These interpretive principles are as follows. First, recognition of unenumerated rights. Second, minimalization of the exercise of human rights limitation norms. Third, prioritization of protection of minorities. Fourth, encouraging the use of comparative approach in interpreting

[9] R.J. Vincent, *Human Rights and International Relations* (Cambridge: Cambridge University Press, 2001); Peter R. Baehr, *Human Rights: Universality in Practice* (London: MacMillan Press, 1999); Peter R. Baehr and Monique Castermans-Holleman, *The Role of Human Rights in Foreign Policy* (London: Palgrave, 2004).

[10] *Infra* Part 2.1.

[11] *Infra* Part 2.2.

constitutional human rights norms. These interpretive principles are discovered through a comparative approach, in this case referring to judicial practices in other countries as well as regional and international judicial bodies that are considered relevant.

II. DISCUSSION

2.1. On Universality of Rights

Every 10th of December, the world commemorates Human Rights Day. The basis for the commemoration is the adoption of the Universal Declaration of Human Rights (UDHR) by the United Nations General Assembly. The document itself, a General Assembly Resolution, needs to meet the criteria as an authoritative legal document according to Legal Positivism standards. Therefore, the document was elaborated to formally create binding obligations in two international treaty instruments (for countries willing to become parties): the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR). These three documents are collectively known as the International Bill of Rights.[12]

What is the essential meaning behind the commemoration of Human Rights Day, based on the birth of the UDHR? The recognition of the universality of rights principle as the foundation of human rights by the UDHR, not just in the name of the Universal Declaration. Therefore, regarding the concept of universality, we need to be aware of the possibility of confusion in meaning: the universality of rights itself with the implications of the universality of rights (regarding the scope of the validity of human rights norms). The recognition of the universality of rights as the foundation of human rights is evident in Article 1 of the UDHR, which states, "All human beings are born free and equal in dignity and rights."[13] Meanwhile, the term "universal", which explains "declaration", essentially only contains a meaning that is an implication of the universality of human rights

[12] John P. Humphrey, "The International Bill of Rights: Scope and Implementation," *William and Mary Law Review* 17, no. 3 (1976): 527–41.

[13] Firmer statements are *Preamble* ICCPR and ICESCR: "*Recognizing that these rights derive from the inherent dignity of the human person*."

itself, in this case, the hope that the declaration (including human rights within it) can have universal validity in line with the universality of human rights as a principle.[14] The second meaning is evident in the opinion of René Cassin, the French delegation, prior to the adoption of the UDHR: "The chief novelty of the declaration was its universality … because it was universal, it could have a broader scope than national declarations and drew up the regulations that were essential to a good international order."[15]

In this article, as the primary issue, we will explain the universality of rights in the first sense, the universality of rights as a legal principle for the foundation of human rights. The universality of rights here means that "human rights must be universal" as a prerequisite for their existence. Eric Engle describes the functional meaning of the universality of rights: "Not in the sense of being the same positive laws, at all times and places, but rather as being aspirational goals, at all times and places."[16] This opinion is consistent with the opinion of William Talbott: "To say that some basic human rights should be universal is to make a normative moral claim. It is different from the purely descriptive (and false) claim that basic human rights are universally respected; and it is different from the purely descriptive (and also false) claim that everyone agrees that basic human rights should be universally respected."[17]

As a principle, understanding the universality of rights is normative, not descriptive, in relation to human rights provisions. This statement is consistent with the understanding of principles in legal theory, which according to Humberto Ávila, are "norms whose up-front quality is exactly to determine the realization of a legally relevant purpose."[18] Based on this, the conclusion as an implication of the role of universality of rights as a principle is that the universality of rights is a standard that underlies, or serves as the foundation for, the existence of

[14] This conclusion appears in the preamble to the UDHR which states: "Now, therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations … to secure their universal and effective recognition and observance …"

[15] As quoted in Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intents* (Philadelphia: University of Pennsylvania Press, 1999), 33.

[16] Eric Engle, "Universal Human Rights: A Generational History," *Annual Survey of International and Comparative Law* XII, no. 1 (2006): 219.

[17] Talbott, *Which Rights*, 19.

[18] Humberto Ávila, *Theory of Legal Principles* (Dordrecht: Springer, 2007), 138.

human rights provisions. In this sense, the universality of rights as a principle has two functions. First, it provides a prescription for the existential basis of human rights. Second, as a consequence, it provides a prescription for the scope of applicability of human rights norms that determines that human rights norms should be applied equally to all human beings everywhere.[19]

Analytically, the universality of rights has a meaning as a prescription for the basis of human rights existence: "every human being has certain rights, capable of being enumerated and defined, which are not conferred on him by any ruler, nor earned or acquired by purchase, but which inhere in him by virtue of his humanity alone."[20] Considering this understanding, when we turn to other issues, in this case, the issue of the concept of human rights, it is transparently apparent that the standard definition, which has been mutually agreed upon, for the concept of human rights by experts is a definition of human rights formulated based on the principle of universality of human rights.[21] Not only at the theoretical level but also at the juridical level, for example; Law Number 39 of 1999 formulates the definition of human rights based on the principle of universality of rights.[22]

The basis of the existence of human rights or the requirement for ownership of human rights indicates that all human beings must possess human rights.

[19] As a comparison, Donnelly uses the term conceptual universality for the first meaning, and substantive universality for the second meaning. Jack Donnelly, "The Relative Universality of Human Rights," *Human Rights Quarterly* 29, no. 2 (2007): 282–83. https://doi.org/10.1353/hrq.2007.0016. Meanwhile, for the first sense, Arnold called it the inner dimension of universality. For the second meaning, Arnold calls it propensity towards global acceptance. Rainer Arnold, "Reflections on the Universality of Human Rights," in *The Universalism*, ed. Rainer Arnold, 1.

[20] Paul Sieghart, *The International Law of Human Rights* (Oxford: Clarendon Press, 1983), 8.

[21] The following is an enumeration for the definition of human rights put forward by experts for illustration purposes only. Henkin, "rights that all human beings everywhere have – or should have – equally and in equal measure by virtue of their humanity." Louis Henkin, *The Rights of Man Today* (New York: Center for the Study of Human Rights – Columbia University, 1988), 3. Rhoda E. Howard, *HAM: Penjelajahan Dalih Relativisme Budaya [Human Rights: An Exploration of the Argument of Cultural Relativism]*, trans. Nugraha Katjasurkana (Jakarta: Pustaka Utama Graffiti, 2000), 1. Vincent, *Human Rights*, 13. Jack Donnelly, *Universal Human Rights* (New York-Ithaca: Cornell University Press, 2013), 7.

[22] Article 1 number 1 Law Number 39 of 1999 concerning Human Rights defines "Human rights are a set of rights that are inherent in the nature and existence of human beings as creatures of God Almighty and are His gifts that must be respected, upheld and protected by the state, law and Government, and everyone for the honor and protection of human dignity." The definition of human rights in Law Number 39 of 1999 emphasizes the element of religiosity with God Almighty as the highest authority that bestows these human rights on human beings. Of course the universality of this definition can be reduced if it is related to the critical question of its applicability to human beings who do not acknowledge or recognize the existence of God: do they not have human rights because no one provides them?

Based on this understanding, it can be identified that the basis of universality is the concept of human nature, or more precisely, the nature of being human, which is universal.[23] Because the basis of human rights is humanity, which is the human nature of human beings, conceptually, human rights per se are universal rights - as universal as human nature itself. Therefore, human rights are nothing but natural rights. This understanding is explicitly stated by Jack Donnelly: "A natural right is one which is, by definition, possessed simply by virtue of being a human being. Since it is grounded in human nature, it is held universally and equally by all people, in that human nature is possessed equally by all human beings."[24]

On this basis, just as James Nickel claims, characteristics such as race, gender, religion, social status or citizenship are irrelevant to questioning whether someone has human rights.[25] In positive proposition form, all human beings, everywhere, must have human rights: "regardless of sex, race, perhaps also of age; regardless of high or low 'birth', social class, national origin, ethnic or tribal affiliation; regardless of wealth or poverty, occupation, talent, merit, religion, ideology, or other commitment."[26] Such understanding does not mean that all human beings are the same, but all human beings are the same only in terms of their nature as human beings. Therefore, the more specific meaning of the principle of universality of human rights is that all human beings are entitled to the same protection of their human rights, as emphasized by Paul Sieghart: "regardless of their many differences, they are entitled to protection from those man-made and avoidable impositions of oppressive power which would restrict the development of the individual potentials."[27]

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[23] In general see Donnelly, *Universal*, 13-7; Ana Maria Guerra Martins and Miguel Prata Roque, "Universality and Binding Effect of Human Rights from a Portuguese Perspective," in *The Universalism*, ed. Rainer Arnold, 299-300.

[24] Jack Donnelly, "Human Rights as Natural Rights," *Human Rights Quarterly* 4, no. 3 (1982): 397, https://doi.org/10.2307/762225. See also Mortimer Sellers who specifically talks about the universality of human rights from a constitutional perspective in the United States. Mortimer Sellers, "Universal Human Rights in the Law of the United States," in *The Universalism of Human Rights*, ed. Rainer Arnold, 13–14.

[25] James W. Nickel, *Refleksi Filosofis atas Deklarasi Universal Hak Asasi Manusia [Philosophical Reflection on the Universal Declaration of Human Rights]*, trans. Titis Eddy Arini (Jakarta: PT. Gramedia Pustaka Utama, 1996), 4.

[26] Henkin, *The Rights*, 3.

[27] Sieghart, *The International*, 18.

Next, it is regarding about the relationship between the principle of universality of rights and the scope of the applicability of human rights norms. The principle of universality of rights implies that human rights norms should be applied equally to all human beings, regardless of where they are located. However, the universality of the applicability of human rights provisions, as an implication of the universality of rights, does not automatically correspond to the universality as the foundation of human rights.[28] The universal applicability of human rights, based on the principle of universality of rights, is an aspirational statement. However, realistically, not all human rights can be universally applied. This is in line with Donnelly's statement: "conceptual universality says nothing about the central question in most contemporary discussions of universality, namely, whether the rights recognized in the Universal Declaration of Human Rights and the International Human Rights Covenants are universal. This is a substantive question."[29] Donnelly further explains that the universality of a particular conception or list of human rights refers to substantive universality.[30]

Here, concerning the universal applicability of human rights, the general agreement among experts on the universality is narrower than the universality in the first sense. Donnelly explicitly calls it relative universality.[31] Other experts, such as Talbott, attempt to develop a list of human rights that should be universal by adding special qualifications to the concept of human rights with the term "basic human rights", which includes their justification.[32] Peter Baehr uses the term "core rights" to indicate that the demanded human rights must be capable of being universally applied:

> Core rights are rights that are indispensable for an existence in human dignity and therefore need absolute protection. They include the right to life and the right to the inviolability of the human person, including the prohibition of slavery, serfdom, and torture, wrongful detention, discrimination and other acts that violate human dignity. In addition, the right to freedom of religion is often mentioned in this list.[33]

[28] Nickel, *Refleksi*, 65-7 and 85-7.
[29] Donnelly, "The Relative," 283.
[30] Donnelly, "The Relative," 282.
[31] Donnelly, "The Relative," 299.
[32] Talbott, *Which Rights*, 48-206.
[33] Baehr, *Human Rights*, 4.

What is the meaning of our defense that human rights must be universal - a principle that we call the principle of universality of rights? By claiming that human rights must be universal, we do not want to leave room for the possibility of "human beings without human rights" - including no government action that can legitimize conditioning human beings not to have human rights - or lose their human rights.[34] Based on this, the precondition for universal human rights is that human rights must be independent of positive law.[35] With this precondition, the universality of human rights is nothing but a "rebranding" of the concept of natural rights applied to human rights.[36] Human rights must be constructed as natural rights so that universal human rights exist without any authority of the State or government to create or eliminate human rights. Therefore, in addition to being universal, human rights are also inalienable - as an implication.[37]

The authoritative opinion of Judge Kotaro Tanaka of the International Court of Justice in the South West Africa Cases between Ethiopia & Liberia v. South Africa (1966) is considered the vigorous defense of the universality of rights associated with the concept of natural rights. Regarding the construction of human rights as natural rights, Judge Tanaka explained: "A State or States are not capable of creating human rights by law or by convention; they can only confirm their existence and give them protection. The role of the State is no more than declaratory."[38] Furthermore, to explain the essence of his statement, Judge Tanaka stated: "If a law exists independently of the will of the State and, accordingly, cannot be abolished or modified even by its constitution, because it is deeply rooted in the conscience of mankind and of any reasonable man, it may be called 'natural law' in contrast to 'positive law'."[39] Human rights, as

[34] Nickel, *Refleksi*, 63.
[35] Nickel, *Refleksi*, 56.
[36] On historical explanations for the foundation of human rights based on natural rights, see in particular Henkin, *The Rights*, 5-13.
[37] Jack Donnelly, "Human Rights and Human Dignity: An Analytic Critic of Non-Western Conceptions of Human Rights," *The American Political Science Review* 76, no. 2 (1982): 303-6, https://doi.org/10.2307/1961111.
[38] Shiv R.S. Bedi, *The Development of Human Rights Law by the Judges of the International Court of Justice* (London-Portland: Hart Publishing, 2007), 57.
[39] Bedi, *The Development*, 129-30.

natural rights, have a pre-existing status - they exist prior to the existence of the State or government, a concept developed by John Locke.[40]

As mentioned above, the universality of rights cannot only be justified by normative arguments. For instance, Rhoda Howard justifies the universality of human rights based on factual or sociological reasons, taking into account the phenomenon of the existence of modern States and their tendency towards authoritarianism.[41] However, Howard's argument is weak because it is consequentialist. If such phenomena do not exist, then discussing the universality of rights would not be relevant.[42] Nevertheless, whether such phenomena exist or not, the universality of rights is the starting point when discussing human rights (because its basis is human nature).

How can the validity of the universality of the human rights principle be justified without being considered naive by stating that it is self-evident based on human nature? We do not fully agree with the Realist approach used by Louis Henkin in his attempt to justify the validity of the universality of human rights, not as a self-evident morality, but rather empirically through State acceptance or at least the absence of explicit rejection of the existence and applicability of human rights.[43] This approach is more suitable for addressing the issue of the scope of the applicability of human rights norms as an implication of the universality of human rights based on the principle of universality of human rights.[44] If the validity of the principle of universality of human rights is questioned, a more elegant approach is Bertrand Ramcharan's factual approach called the "democratic test of universality":

> There is an irrefutable democratic test that confirms the concept of the universality of rights. It is a simple matter. Just ask any human being: Would you like to live or be killed? Would you like to be tortured or enslaved?

[40] This conception will be explained infra Part 2.2.

[41] Howard, *HAM*, 2.

[42] This was also realized by Howard, who firmly stated that his position was to defend the universality of human rights because of weaknesses at the practical level where human rights in practice (in reality) did not belong to everyone. Howard, *HAM*, 1.

[43] Louis Henkin, "The Universality of the Concept of Human Rights," *Annals of the American Academy of Political and Social Science* 506 (1989): 10-6.

[44] Compare with Hurst Hannum, "The Status of the Universal Declaration of Human Rights in National and International Law," *Georgia Journal of International and Comparative Law* 25, no. 1 (1995/96): 287-397.

> Would you like to live freely or in bondage? Would you like to have a say in how you are governed? If there is any critic of universality who would argue that an individual would choose execution to life, and bondage or serfdom to freedom, let him or her come forth.[45]

The explanation above shows a very close functional relationship between the universality of rights principle and the concept of natural rights. However, the concept of natural rights here has a contemporary meaning that is different from its classical meaning – as Locke originally put it – because it is more egalitarian, less individualistic, and is an international right.[46] Of course, the construction of human rights based on natural rights so that it is universal does not please adherents of communitarianism or communalism, which departs from the view that the concept of rights should be constructed by society, cannot be separated from society – by relying on human nature. Human rights with such construction have made human beings into a-social beings, regardless of society. This background explains why the universality of rights is controversial in some societies.[47]

Why is the universality of human rights, as a principle, controversial so that it is responded with counterarguments called cultural relativity to deny the legitimacy of their existence? The emergence of counterarguments against the universality of human rights is based on the assumption that human rights are identified as an exclusive product of Western culture – in this case, the concept of natural rights as the basis for the existence of human rights – with the implication, as Donnelly said, "Human rights are inherently 'individualistic'; they are rights held by individuals concerning, even against, the State and society."[48] Therefore, not all people are familiar with the concept of such human rights.[49] Especially over the possibility that individuals with human rights can claim their rights to society and the State without fulfilling their obligations.[50] Such misunderstanding

[45] Bertrand G. Ramcharan, "The Universality of Human Rights," *The Review – International Commission of Jurists* 53 (1994): 106.
[46] Nickel, *Refleksi*, 9-18.
[47] Rhoda E. Howard, *HAM*, 28-32; Vincent, *Human Rights*, 37-9.
[48] Jack Donnelly, "Cultural Relativism and Universal of Human Rights," *Human Rights Quarterly* 6, no. 4 (1984): 411, https://doi.org/10.2307/762182.
[49] Nickel, *Refleksi*, 97-118; Talbott, *Which Rights*, 39-47.
[50] Howard, *HAM*, 17.

was sponsored by the American Anthropological Association, which made a counter statement on June 24, 1947, before the UDHR was passed, as follows:

> Because of the great numbers of societies that are in intimate contact in the modern world, and because of the diversity of their ways of life, the primary task confronting those who would draw up a Declaration on the Rights of Man is thus, in essence, to resolve the following problem: How can the proposed Declaration be applicable to all human beings, and not be a statement of rights conceived only in terms of the values prevalent in the countries of Western Europe and America.[51]

The above statement explains rationally the pejorative claim that the universality of human rights, referring to their formalization into the UDHR, is a new imperialist practice.[52]

In its original sense, we must reject the response of the establishment of cultural relativity to the issue of the basis for the existence of human rights, especially the view that requires the existence of human rights to be based on a particular societal culture with the assumption that there are no universal norms.[53] The establishment of cultural relativity opens up space for negating the existence of human rights – cultures that are not "close" to human rights, for example, collectivism or communalism, have the potential to reject the existence of human rights.[54] This understanding is quite relevant if it is associated with, for example, Soepomo's opinion when rejecting demands for constitutional protection of human rights in the process of forming the 1945 Constitution because it was based on the teachings of individualism, which contradicted the stance he believed in, namely an integralistic State.[55] Furthermore, the establishment of

[51] Quoted in Todung Mulya Lubis, *In Search of Human Rights: Legal-Political Dilemmas of Indonesia's New Order, 1966-1990* (Jakarta: PT. Gramedia Pustaka Utama & Yayasan SPES, 1993), 20.

[52] Baehr, *Human Rights*, 9-10.

[53] Fernando R. Teson, "International Human Rights and Cultural Relativism," *Virginia Journal of International Law* 25, no. 4 (1985): 870-1; Baehr and Castermans-Holleman, *The Role*, 25.

[54] In reality, this argument tends to be elitist, used mainly by those in power for cultural reasons to refuse to monitor their compliance with human rights norms. Such rulers are usually rulers who rule authoritarianly. Therefore, such arguments are arguments that abuse the concept of cultural relativity. Donnelly, "Cultural," 411-4.

[55] Marsillam Simanjuntak, *Pandangan Negara Integralistik [Integralistic View of the State]* (Jakarta: Pustaka Utama Grafiti, 1997), 227-30; Adnan Buyung Nasution, *Aspirasi Pemerintahan Konstitusional di Indonesia: Studi Sosio-Legal atas Konstituante 1956-1959 [Aspirations of Constitutional Government in Indonesia: A Socio-Legal Study of the Constituent Assembly 1956-1959]*, trans. Sylvia Tiwon (Jakarta: Pustaka Utama Grafiti, 2009), 91-3; Lubis, *In Search*, 91-6.

cultural relativity harms international oversight mechanisms if universal norms are not recognized.[56]

The view of cultural relativity, especially what Donnelly calls weak cultural relativism, can play a role in determining the range of applicability of specific human rights norms. Suppose the view of weak cultural relativism prevails. In that case, it will have implications for the universality of the applicability of specific human rights norms, which can be relaxed – and protection for certain human rights can be carried out according to culture or local conditions.[57] Nevertheless, Todung Mulya Lubis provides conditionality for this position: "The diversity of cultures is preserved as long as the right to life, liberty, security and property are not threatened."[58] It means: "to avoid permissible killings of other gross violations of human rights in certain cultures."[59] On that basis, in the final analysis, we need to return to the priority issue regarding the scope of applicability of human rights norms as an implication of the universality principle of human rights as previously mentioned above: there are certain human rights whose application must be universal, and there are certain human rights whose application can be adjusted with the local culture.

In the context of human rights law, the universality of rights and cultural relativity is challenging to separate because the two form a dialectical relationship strictly. The universality of rights approach determines the substantive aspects of human rights. While the cultural relativity approach has had much influence on issues regarding the implementation of human rights, in particular, being one of the justifiable reasons for human rights limitation (on the exercise).[60] Such dialectics is unavoidable. The regulation on human rights in Chapter XA of the 1945 Constitution explicitly describes this phenomenon.

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[56] Baehr, *Human Rights*, 9.
[57] Donnelly, "Cultural," 417-9.
[58] Lubis, *In Search*, 21.
[59] Lubis, *In Search*, 21.
[60] Robert Spano, "Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity," *Human Rights Law Review* 14, no. 3 (2014): 494. https://doi.org/10.1093/hrlr/ngu021.Spano, following Lord Hoffman's opinion, differentiates the concept of "level of abstraction," where human rights are universal, with "level of application," where domestic conditions can influence the application of human rights.

As for pre-conditions for implementing human rights, Article 28J paragraph (1) of the 1945 Constitution stipulates: "Every person shall respect human rights of others in the order of life of society, nation and State."[61] This provision adheres to a principle known as a duty-based approach – similar to the American Declaration of the Rights and Duties of Man.[62] Then, regarding the standard for the legitimacy of restrictions on human rights by the government, Article 28J paragraph (2) of the 1945 Constitution stipulates: "In the exercise of his/her rights and freedom, every person shall abide by the limitations to be stipulated by the laws with the purpose of solely guaranteeing the recognition as well as respect for the rights and freedoms of the others and in order to comply with just demands in accordance with considerations for morality, religious values, security, and public order in a democratic society."[63] The two provisions of the 1945 Constitution prove that the cultural relativity approach has found a place in the Constitution – at the same time, the Constitution is talking about substantive human rights provisions whose basis is the universality of human rights itself.[64] Therefore, when this article discusses specifically the defense of the universality of rights to describe our preference for prioritizing the interests of protecting human rights instead of other considerations – while recognizing that, as a normal provision, the application of restrictions in implementing of human rights is always possible. In such a position, restrictions on implementing of human rights should be implemented at the minimum level.

As a restatement, this section focuses on explaining the concept of universality of rights. This explanation functions to provide an understanding of the universality of rights so that on that basis a set of interpretive principles for the interpretation of human rights can be deductively derived. Reaffirming the understanding previously explained, based on the concept of universality of

[61] United Nations, *Universal Declaration of Human Rights*, Article 29, no. 1: "Everyone has duties to the community in which alone the free and full development of his personality is possible."

[62] Lubis, *In Search*, 25-6.

[63] United Nations, *Universal Declaration of Human Rights*, Article 29, no. 2: "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."

[64] So that the discussion does not drag on, we deliberately do not specifically criticize Article 28J paragraph (1) and Article 28J paragraph (2) of the 1945 Constitution.

rights, human rights are natural rights so that as an implication, according to Paul Sieghart, the underlying principles are "universal inherence" and "inalienability".[65] The next part of this article will elaborate this understanding into interpretive principles in the interpretation of human rights.

2.2. Universality of Rights As an Interpretive Principle

This part will discuss the universality of rights as an interpretive principle in constitutional interpretation, precisely the interpretation of human rights provisions in the Constitution. Prior to that, we will explain the universality of rights in general. The interpretive principle prescribes how a constitutional interpretation should be made.[66] The interpretive principle functions as "legitimize interpretive activity".[67] The interpretive principle in constitutional interpretation ensures that constitutional interpretation products contain "truth", whether according to the Constitution or vice versa. This understanding is concluded from pre-understanding, called the supremacy of the constitution principle. Due to the supremacy of the Constitution, the constitutional interpretation "shall not conflict with the Constitution." The constitutional interpretation should represent fidelity to the Constitution,[68] where the interpretation of the constitutional human rights provisions must strengthen human rights protection.

So, how does the universality of rights direct the interpretive activity in interpreting the constitutional human rights provisions? Based on the definition of the universality of rights, which covers human rights' existential basis and the scope of human rights enforceability, the interpretation of the constitutional human rights provisions, which is based on the universality of rights, must represent those aspects. As a starting point, we will begin with the natural rights concept as a general theoretical basis on the interpretive principle in interpreting constitutional human rights norms. Next, we will break down the general theoretical basis to derive four specific interpretive principles. First,

[65] Sieghart, *The International*, 17.
[66] William Baude and Stephen E. Sachs, "The Law of Interpretation," *Harvard Law Review* 130, no. 4 (2017): 1083–1084. Both authors use the term the law of interpretation with a description of the meaning as stated above.
[67] Aharon Barak, *Purposive Interpretation in Law* (Princeton, NJ: Princeton University Press, 2005), 40–41.
[68] Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (Oxford: Oxford University Press, 2007), 13–15.

recognition of unenumerated rights. Second, minimalization of the exercise of human rights limitation norms. Third, prioritization of protection of minorities. Fourth, encouraging the use of comparative approach in interpreting constitutional human rights norms.

For the general theoretical framework related to the application of the principle of universality of human rights as an interpretive principle for human rights provisions in the Constitution, we will start specifically from the theory of natural rights put forward by John Locke, whose teachings contain the prescription "rights first – government second".[69] The contextual meaning of this theory, which is the theoretical basis for the principle of universality of human rights as an interpretive principle, is that the interpretation of human rights provisions is burdened with demands to promote human rights protection further rather than being oriented towards considering the interests of the government - or society. This conclusion refers to a general restatement of Locke's natural rights teachings carried out by Randy Barnett: "Government is not seen as the source of rights, but rather the legal protection of pre-existing rights is seen as the reason why a government is created."[70] This understanding has the implication: "If government is a cure for some malady involving the legal protection of individual rights, it must be a cure that is better than the disease. The Standard for assessing government performance is its efficacy in enforcing the preexisting rights of individuals."[71]

As explained above, the theory of natural rights has specific consequences in responding to human rights protection with an enumeration approach by positive law. Because starting from the definition of "rights first - government second", the enumeration of human rights by positive law is an opened list - rather than a closed list - which in the United States Constitution is represented by the Ninth Amendment - that the existence of human rights is not only those

[69] The concept of natural rights, in this sense, as stated by John Locke, refers to the protection of natural rights as a goal for the existence of government. John Locke, *Two Treatises of Government and A Letter Concerning Toleration*, ed. C.B. Macpherson (New Haven, CT: Yale University Press, 2003), *Second Treatise*, "An Essay Concerning the True Original, Extent and End of Civil Government."

[70] Randy E. Barnett, "Are Enumerated Constitutional Rights the Only Rights We Have? The Case of Associational Freedom," *Harvard Journal of Law and Public Policy* 10, no. 1 (1987): 103..

[71] Barnett, "Are Enumerated," 103.

enumerated by the constitution but also those that are not enumerated.[72] The first interpretive principle here, by implication, provides an incentive for judicial bodies to "discover" unenumerated rights. A well-known concrete example of applying this interpretive principle is the case of Griswold v. Connecticut by the United States Supreme Court. After Griswold, the Supreme Court of the United States, until 1988, succeeded in elaborating unenumerated rights under the authorization of the Ninth Amendment to the United States Constitution by adding 13 new types of rights outside the enumeration of the Bill of Rights of the United States Constitution.[73]

The role of the judiciary in "discovering" unenumerated rights is described by Barnett as having a positive function as a source of legitimation for legislation because otherwise: "A constitutional process that ignored unenumerated rights when evaluating legislation would give citizens no reason to believe that such legislation did not violate the rights retained by the people. Without this review, legislation would enjoy a weaker presumption that it is bound in conscience or perhaps no such presumption at all."[74] However, what if the opposite view prevails – constitutional protection of human rights using a positivist perspective that requires an enumeration approach as a closed system of listing human rights? This will force us, including the judiciary, to accept that human rights do not exist because, in this way, the government – the framer of the Constitution – is above the Constitution (i.e. human rights itself). Judge Diarmuid O'Scannlain put forward this conclusion: "the view that the government created constitutional rights could elevate the government above the Constitution."[75]

The technical question is: Can the Constitutional Court "discover" unenumerated rights even though the 1945 Constitution does not provide authorization like the Ninth Amendment to the United States Constitution?

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[72] Randy E. Barnett, "Foreword: The Ninth Amendment and Constitutional Legitimacy," *Chicago-Kent Law Review* 64, no. 1 (1988): 56. *The Ninth Amendment* of the United States Constitution states: "*The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retain by the people.*"

[73] Barnett, "Foreword," 58; Randy E. Barnett, "Reconceiving the Ninth Amendment," *Cornell Law Review* 74, no. 1 (1988): 32.

[74] Barnett, "Foreword," 64.

[75] Diarmuid O'Scannlain, "The Natural Law in the American Tradition," *Fordham Law Review* 79, no. 4 (2011): 1527.

Even without authorization, a similar approach like that of the United States Supreme Court is very open to being carried out because there is no signal that Chapter XA of the 1945 Constitution was intended by its drafters to be constitutive. We believe the Chapter follows the human rights basis as a pre-condition to human rights based on natural rights, so the enumeration is only declarative.[76] Therefore, if practices such as Griswold v. Connecticut wants us to adopt it, so this practice reflects our adherence to the principle of universality of rights, namely the natural rights that are the basis of universal human rights.

Second, with the theoretical basis explained above, the interpretive principle applying the principle of universality of human rights is that the interpretation of human rights provisions in the constitution has priority to minimize the application of provisions limiting human rights. Restrictions on applying provisions restricting human rights are a strategic issue in protecting human rights following the rights first – government second principle. Human rights are not a gift from the State or government but are inherent in all human beings, and therefore, human rights are universal rights whose existence, theoretically, precedes that of the State i.e. government. Therefore, the interpretive principle offered as a prescription is that the State's authority to limit human rights is objectively limited, so it must not reduce the essence of human rights, which aims to benefit human beings as rights holders.[77] Applying the natural rights conception of human rights is important because the interpretation of human rights provisions is based on the nature of human rights themselves as natural rights.

Limitations in the application of constitutional provisions aimed at limiting human rights should refer to the case of Söring v. United Kingdom (1989) where the European Court of Human Rights stated the interpretive principle: "the object and purpose of the Convention as an instrument for the protection of individual human beings require that its provisions be interpreted and applied

[76] Titon Slamet Kurnia, *Konstitusi HAM: Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 dan Mahkamah Konstitusi Republik Indonesia* [*Human Rights Constitution: The 1945 Constitution and The Constitutional Court of Indonesia*] (Yogyakarta: Pustaka Pelajar, 2014), 85–97.

[77] Kurnia, *Interpretasi [Interpretation]*, 324.

so as to make its safeguards practical and effective."[78] This interpretive principle contains two prescriptions. First, "This excludes a narrow interpretation in favour of State sovereignty and the freedom of State organs whenever effective protection necessitates restrictions on State power." Second, "the Convention permitting restrictions of the individual freedoms must be interpreted narrowly."[79]

Dieter Grimm, regarding the German Constitutional Court decision in the case BverGE 19, 342 holds as a principle related to the limitation of human rights: "human rights were superior to the law. Laws could restrict human rights, but only in order to make conflicting rights compatible or to protect the rights of other persons or important community interests."[80] On that basis, as an implication, "any restriction of human rights not only needs a constitutionally valid reason but also has to be proportional to the rank and importance of the right at stake."[81] This opinion also provides a specific signal regarding the form of restrictions on the authority of legislators to implement provisions limiting human rights in law, better known as the principle of proportionality.[82]

Third, priority in protecting minorities. If the principle of representation works as it should, we will get aspirational legislation. Laws, the product of democratic political decisions, cannot please all. Under democratic principles, the minimum we can obtain, and the most realistic, is a law that is aspirational (only) for the majority. In such a situation, the law can create tension in majority-minority relations. This issue was addressed very well by the United States Supreme Court in paragraph 3, footnote 4 of the case of United States v. Carolene Products Co. (1938), which describes the proper role of the judiciary in responding to this situation, the working of representative democratic mechanisms, related to constitutional restrictions on laws, in protecting minorities from the majority. Paragraph 3, footnote 4 of Carolene case for specifics states:

[78] Rudolf Bernhardt, "Human Rights and Judicial Review: The European Court of Human Rights," in *Human Rights and Judicial Review: A Comparative Perspective*, ed. David M. Beatty (Dordrecht: Martinus Nijhoff Publishers, 1994), 306.

[79] Bernhardt, "Human Rights," 306.

[80] Dieter Grimm, "Human Rights and Judicial Review in Germany," in *Human Rights and Judicial Review: A Comparative Perspective*, ed. David M. Beatty, 275.

[81] Grimm, "Human Rights," 275.

[82] Alec Stone Sweet and Jud Matthews, "Proportionality Balancing and Global Constitutionalism," *Columbia Journal of Transnational Law* 47, no. 1 (2008): 72–164.

> Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious … or national … or racial minorities …; whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political process ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.[83]

What are the essential juridical points of understanding from the statement above? John Hart Ely explained, "the Court should also concern itself with what majorities do to minorities, particularly mentioning laws 'directed at' religious, national, and racial minorities and those infected by prejudice against them."[84] Paragraph 3, footnote 4 Carolene case describes the commitment of the judiciary to apply the strictest control over laws (strict judicial scrutiny) when the laws contain prejudice against: "religious, national, and racial minorities." Specifically for the issue of discrimination based on race, Paul Brest emphasized that the sensitivity of the role of the judicial body, with a strict judicial scrutiny approach, contains the consideration: "It prevents and rectifies racial injustices without subordinating other important values."[85] Brest specifically refers to the judicial opinion of the United States Supreme Court in the case of Korematmu v. United States (1948), which uses a strict judicial scrutiny approach states: "All legal restrictions which curtail the civil rights of a single racial group are immediately suspect … Courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can."[86]

How can the strategic meaning of paragraph 3 footnote 4 of the Carolene case be theoretically understood in the context of the judicial body's role in reviewing the constitutionality of laws related to the majority-minority relationship in the democratic legislative process in general? Tom Ginsburg's opinion, which presents the insurance model of judicial review as a justification for the constitutional

[83] John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge, MA: Harvard University Press, 1980), 76.
[84] Ely, *Democracy*, 76.
[85] Paul Brest, "The Supreme Court 1975 Term – Foreword: In Defense of the Antidiscrimination Principle," *Harvard Law Review* 90, no. 1 (1976): 5. https://doi.org/10.2307/1340306.
[86] Brest, "The Supreme Court," 7.

judicial review institution with a background in democracy, is highly relevant here. According to Ginsburg:

> By ensuring that losers in the legislative arena will be able to bring claims to court, judicial review lowers the cost of constitution making and allows drafters to conclude constitutional bargains that would otherwise be unobtainable. As democratization increases electoral uncertainty, demand for insurance rises. Although other institutions can also serve to protect minorities, judicial review has become particularly focal. This theory goes a long way toward explaining the rapid spread of judicial review in recently adopted constitutions.[87]

Ginsburg appreciates the constitutional court as a counter-majoritarian institution in a positive sense: "judicial review can ensure that minorities remain part of the system, bolster legitimacy, and save democracy from itself."[88] Based on that, Ginsburg claims: "Judicial review may be countermajoritarian but is not counterdemocratic."[89]

By encouraging a greater role for the judicial body as the protector of minorities - an opinion that is not represented in the majority opinion of legislators - then such interpretive principles explicitly depart from the anti-utilitarian premise for the role of the judicial body. The anti-utilitarian premise is that "one cannot maximize utility at the expense of rights" - in this case, the rights of the few/least.[90] Legislators are very likely to do this because "legislatures tend towards utilitarianism because of their: (a) desire for a common metric; (b) majoritarian nature; (c) representative nature." The judicial body's position is the opposite because "(a) courts are not majoritarian, not representative. The judiciary is independent; (b) courts are used to reasoning by norms."[91] Therefore, prioritizing the protection of minorities is best done by the judicial body, which, because it is independent, must be able to distance itself from the majority.

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87 Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 33.

88 Ginsburg, *Judicial Review*, 22.

89 Ginsburg, *Judicial Review*, 31.

90 Michael S. Moore, "Justifying the Natural Law Theory of Constitutional Interpretation," *Fordham Law Review* 69, no. 5 (2001): 2108.

91 Moore, "Justifying," 2105.

The priority in protecting minorities demonstrates the importance of the role of the judicial body in endorsing the principle of the universality of human rights, as it emphasizes (1) human rights as natural rights based on human nature, and (2) human rights as inalienable rights based on human nature. If legislators have a role in shaping policies oriented towards the common good, then the judicial body is the opposite. The judicial body must be sensitive to the gap in those policies concerning the legitimate interests of individuals whom legislators potentially ignore because they are oriented towards the common good (the interests of the majority). Michael Moore describes the unique institutional character of the judicial body as follows:

> what courts do is decide particular cases involving particular people. If courts are tempted to create or enforce some generally desirable social policy, they can do so only through imposing the costs of such a policy on the flesh-and-blood litigants before them. If it is tempting to sacrifice the rights of some innocent so that the rights of others will be left inviolate, a court must stare into the eyes of that innocent person as it sacrifices his rights.[92]

Unlike the judicial body, legislators do not face such discipline. It is natural to think the legislative role is necessarily consequentialist about rights. Since there is no particular person whose rights are at issue before a legislature, it is natural to regard all people's rights as interchangeable, meaning that some can be sacrificed to minimize rights violations in total.[93]

Human rights, even if they belong to only one person, are fundamental to uphold vis-à-vis the majority's interests. Here, we agree with Ronald Dworkin, who stated: "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[94] An interesting example of applying an anti-utilitarian rights approach is the case of Pub. Comm. Against Torture in Isr. v. Gov't of Israel (1994), where the issue was the legality of interrogation practices involving violence by security forces

[92] Moore, "Justifying," 2106-7.
[93] Moore, "Justifying," 2107.
[94] Ronald Dworkin, *Taking Rights Seriously* (Cambridge, MA: Harvard University Press, 1978), xi.

against terrorism suspects. Israel faced a highly latent terrorism issue, but the Israeli Supreme Court's response was more pro-human rights than security-oriented, so "violent interrogation of a suspected terrorist is not lawful, even if doing so may save human life by preventing impeding terrorist acts." The Israeli Supreme Court acknowledged the implications of its judicial opinion, which could hamper the government's efforts in combating terrorism. However, this position is undoubtedly a form of compliance with "the rule of law and recognition of individual liberties."[95]

Fourth and finally, the application of a comparative approach is based on the assumption that the interpretation of human rights provisions should not hesitate to refer to the best practices of other jurisdictions in providing the best protection of human rights through the adjudication process. This practice may be controversial if we adopt a nationalist stance,[96] but it is positive if we are willing to have an open mind.[97] This interpretive principle addresses the issue of the implications of human rights universality for the scope of the applicability of human rights norms, especially for certain human rights whose universality is no longer in question. The universality of human rights provides the most substantial incentive for using a comparative approach in interpreting the constitution, i.e., human rights provisions, because of the similarity of the constitutional issues faced, as emphasized by Ian Cram.

> the existence within liberal democracies of broadly similar constitutional problems that require a balancing of competing individual and societal interests according to certain values. To a greater or lesser extent, individuals in all liberal democracies enjoy fundamental human rights to equality, liberty of the person, expression etc. and benefit from institutional arrangements such as the separation of powers and a commitment to the rule of law.[98]

[95] Aharon Barak, "A Judge on Judging: The Role of a Supreme Court in a Democracy," *Harvard Law Review* 116, no. 1 (2002): 148. https://doi.org/10.2307/1342624.

[96] This practice has become a problem in the United States, even causing debates outside the courtroom between Justice Antonin Scalia whose nationalist orientation and Justice Stephen Breyer whose internationalist orientation was sparked by the Roper v. Simmons and the Lawrence v. Texas. Hadar Harris, "'We Are the World' – Or Are We? The United States' Conflicting Views on the Use of International Law and Foreign Legal Decisions," *Human Rights Brief* 12, no. 1 (2005): 6–8.

[97] Margaret H. Marshall, "'Wise Parents Do Not Hesitate to Learn from Their Children': Interpreting State Constitutions in an Age of Global Jurisprudence," *New York University Law Review* 79, no. 5 (2004): 1635–1641.

[98] Ian Cram, "Resort to Foreign Constitutional Norms in Domestic Human Rights Jurisprudence With Reference to Terrorism Case," *Cambridge Law Journal* 68, no. 1 (2009): 127. See also Mark C. Rahdert, "Comparative Constitutional Advocacy," *American University Law Review* 56, no. 3 (2007): 614–635.

The opinion above is reinforced by Judge Margaret Marshall, who stated:

> the key factor giving rise to global interest in individual rights is the growing recognition that every person ... is endowed with fundamental rights that no government can extinguish. Coupled with this understanding is a development I consider to be one of the most striking and profound in world politics over the last several decades: the emerging consensus in the world's democracies that a written charter of rights, enforced by an independent judiciary, is central to the protection of personal liberty.[99]

The application of universal human rights as a universally applicable norm means that best practices in interpreting human rights provisions by judicial bodies in other jurisdictions should be a reference for interpreting human rights provisions in Indonesia by the Constitutional Court.

The four interpretive principles offered - and generally called the principle of universality of rights - as interpretive principles for Chapter XA of the 1945 Constitution can contribute positively in providing protection for human rights through the constitutional adjudication process for the following reasons. First, the incompleteness of constitutional provisions regarding human rights is no longer a problem. Second, protecting human rights becomes more meaningful if the government's capacity to limit human rights can be monitored to a minimum level by the Constitutional Court so that limitations on human rights are only carried out in conditions that are absolutely necessary. Third, the Constitutional Court can make an important contribution to safeguarding the principle of inalienability by paying great attention to minorities (especially ethnic, race and religion) that even though laws are the product of majority decisions, they must not ignore their existence. Fourth, the Constitutional Court can use best practices in interpreting human rights in other countries as a reference, so that using this opportunity can make judicial protection of human rights even more meaningful.

[99] Margaret H. Marshall, "Interpreting," 1639.

III. CONCLUSION

This article proposes the thesis that the universality of rights should be a judicial approach in the reviewing of laws by the Constitutional Court, particularly as an interpretive principle in interpreting Chapter XA of the 1945 Constitution, with the expectation that the Court can play a more significant role in advancing human rights protection in Indonesia. To justify the thesis, this article elaborates on interpretive principles for interpreting Chapter XA of the 1945 Constitution derived from the principle of the universality of rights (after explaining the concept of the principle itself). The universality of rights departs from the understanding that human rights are natural rights. This means that human rights are rights that are inherent in all human beings. Based on the principle of the universality of rights, the interpretation of human rights provisions in the Constitution should be based on principles such as (1) recognition of unenumerated rights, (2) the application of human rights limitation provisions at the minimal level; (3) the priority of minority protection; and (4) the application of comparative approach.

We believe that if these four interpretive principles based on the universality of rights are consistently applied, the result will provide the best protection for human rights. Therefore, we encourage the Constitutional Court to adopt the approach of the universality of rights in interpreting human rights provisions that form the basis for reviewing the constitutionality of laws.

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