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Constitutional Review (CONSREV) Journal is an international law journal published by Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia. The purpose of this journal is to publish research, conceptual analysis, and writings related to constitutional issues. All articles written in CONSREV cover various topics on constitution, constitutional courts, decisions and issues on constitutional law in various countries.

This edition, May 2019, is the first edition in 2019. It covers six articles written by legal and constitutional scholars affiliated with universities and institutions from six different countries. The first article is authored by Juan Sebastián Villamil Rodriguez. The author is a Ph.D candidate at the Autonomous University of Madrid in Spain whose interest are about public and constitutional law. His current article is about the internationalization of judicial review happened in Colombian High Courts. The main aim of this article is to discuss how the relationship of national judiciaries with international law. It is best understood as reflecting the development of a pluralist legal dynamic, and sometimes referred to as jurisprudential dialogue, that involves the broadening of the normative horizon and the internationalization of the sources available for national judges in their reasoning; particularly in the cases that involve human rights violations.

The second article is provided by Dewi Nurul Savitri, a Ph.D candidate from University of Paris 1 Panthéon Sorbonne, majoring Comparative Law. Her article discusses about the comparison between the constitutional preview and review of international treaties between France and Indonesia. The author provides the literature on integrating international treaties and the rank of international treaties in the national legal system. Then, this article discusses the possibility of the Indonesian Constitutional Court to

examine judicial preview of international treaty bills and judicial reviews concerning ratified international treaties.

The next author is Sonja Stojadinovic, a researcher graduated from master of political science and international relation in Skopje, Macedonia. She discusses the political influence on the Constitutional Court in her country, Republic of Macedonia. She collected and analysed dissenting opinions in the Court during period of 2012-2015. She also provides short history of the Macedonian Constitutional Court before examining the dissenting opinions happened at that Court. At the end of the article, she concluded that the dissenting opinions are valuable source for the rules and guidelines of the voting behavior of the judges and important legal tool which can be a warning sign that something is going wrong within the Constitutional Court.

The fourth article is provided by M. Luthfi Chakim, an LL.M Candidate from Seoul National University and also a researcher at the Constitutional Court of the Republic of Indonesia. Chakim introduces the readers to the comparison of the perspective on constitutional complaint which covers the explanation of the models, procedures, and decision. The article argues that constitutional complaint represents the main part of the constitutional court, and through a comparative perspective among three countries in Europe and four AACC members in asia are expected to provide lessons for the other AACC members that do not have a constitutional complaint mechanism, such as Indonesia.

The fifth one is article authored by Syed Fadhil Hanafi Syed A. Rahman. He is a senior legal counsel at Bank Negara Malaysia and a Syarie lawyer of Federal Territories in Malaysia. In this article, the readers could see explanation about whether the Malaysian Federal Constitution belongs to an Islamic or a secular constitution. The readers are also provided about the debate on whether Malaysia itself is an Islamic or a secular state.

Finally, the last article is authored by Yance Arizona, a Ph.D candidate from Van Vollenhoven Institute for Law, Governance, and Society at Leiden University. His article has examined how political elites has been employed Pancasila to overcome the transnational Islamist movements. Furthermore, he argues that the return of Pancasila in recent years would be more complicated because of the narrative of Pancasila revivalism as an adversarial ideology is bounded by traditionalism and lack of progressive interpretation. At the end of the article, he proposed that instead of locating Pancasila as the counterpart to Islamism, what is needed is re-interpretation of Pancasila as a unifying ideology.

As conclusion for this publication, CONSREV 5.1, May 2019, the editors of CONSREV journal expect that all issues presented in this current issue might give some new judgement, insight, and understanding on constitutions, constitutional court decisions, and constitutional issues in broader nature to the reader of this journal.

Editors

The Internationalization of Judicial Review in the Colombian High Courts

Juan Sebastián Villamil Rodriguez

Constitutional Review, Vol. 5, No. 1, May 2019, pp. 001-038

The internationalization of adjudication in the Colombian high court refers to the growing importance that the American Convention on Human Rights has gained among the judicial forums of this country, but especially to the phenomenon that occurs when national judiciaries implement and appropriate the doctrine of the control of conventionality. The Convention has claimed a high ground in the Colombian constitutional system due to the appropriation of international law by national courts decisions, and to the process of the internationalization of the law. By consistently applying the control of conventionality doctrine, courts like the State Council have reaffirmed the binding nature and the effectiveness of the decisions of the Inter-American Court of Human Rights for the Colombian legal system. In contrast to a much more regressive posture assumed by the Constitutional Court in recent decisions, the State Council, drawing on the legal contents of international law, has broadened the range of legal sources for rights interpretation in Colombia. By this action, as it will be further stated in this article, the State Council has contributed to a move away from a paradigm of a legalism based solely on the state sovereignty and national constitutionalism, towards one that endorses the pluralist structure of post-national law. Against this background, this article aims to discuss how the relationship of national judiciaries with international law is best understood as reflecting the development of a pluralist legal dynamic, sometimes referred to as jurisprudential dialogue, that involves the broadening of the normative horizon and the internationalization of the sources available for national judges in their reasoning; particularly in the cases that involve human rights violations.

Keywords: American Convention on Human Rights, Control of Conventionality, *Ius Commune Constitutionale*, Block of Constitutionality, Internationalization of the Law.

Constitutional Preview and Review of International Treaties: France and Indonesia Compared

Dewi Nurul Savitri

Constitutional Review, Vol. 5, No. 1, May 2019, pp. 039-068

The Indonesian Supreme Court and the Indonesian Constitutional Court are experienced in examining international treaties, although the Indonesian constitution and national laws do not stipulate this matter explicitly. The Constitutional Council of France has the authority to examine judicial previews of bills concerning international treaties. Moreover, French judges can examine international treaties. There is also the European Court of Human Rights, which has an important role concerning the control of conventionality. This article aims to promote discussion about the examination of international treaty cases in Indonesia. It begins by considering the international scholarly literature on integrating international treaties and the rank of international treaties in the national legal system. Then, this article discusses the possibility of the Indonesian Constitutional Court to examine judicial preview of international treaty bills and judicial reviews concerning ratified international treaties.

Keywords: Constitutional Court, Constitutional Council, France, Indonesia, International Treaty.

Political Influence on the Constitutional Court in the Republic of Macedonia: Reflections through the Dissenting Opinions in the Period of 2012-2015

Sonja Stojadinovic

Constitutional Review, Vol. 5, No. 1, May 2019, pp. 069-095

The demo Christian political party VMRO-DPMNE had a long period of ruling of the Republic of Macedonia, (2006-2016). During that period many cases of political pressure on the state institutions have occurred. The Constitutional Court wasn't an excepted of that political pressure. Starting from the process of appointment of new judges, through the shocking decisions upon official citizens' complaints and human rights appeals, to a complete reflection of the political interference and pressure through the dissenting opinions written and published by some constitutional judges. The former government has used all the tools, legal and non-legal, to put under control the Constitutional Court. If we put aside the political interference into the appointment of new and incompetent judges, one of the most used tools as a form of resistance was the dissenting opinion. This legal tool is present in the Book of Rules of the Constitutional Court of the Republic of Macedonia, but also in the legal systems in the Eastern Europe, Germany, Spain, Greece and all other states whose legal systems are created by the German legal system. It gives space and chance for one or several constitutional judges to express disagreement upon a decision brought by the majority in the court. This tool was frequently used by several judges from the Constitutional Court in the Republic Macedonia in the given period through which we can see strong political influence on their work. Therefore, the research questions are as follows: What were the "models" of political influence that were used on the Constitutional Court during the period of 2012-2015? How were they used and what are the dissenting opinions reflecting? To answer the said questions, the model of qualitative research will be used together with several dissenting opinions as case studies. The aim of this approach is to explain the different aspects of political influence on the work of the Constitutional Court within the given period. The findings of this research can be used for further development of the interest for researching of the work and role of the Constitutional Court in the Republic of Macedonia.

Keywords: Political Influence, Dissenting Opinion, Misconduct, Constitutional Court, Judges.

A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions

M. Lutfi Chakim

Constitutional Review, Vol. 5, No. 1, May 2019, pp. 096-133

The constitutional complaint is one of the important constitutional court jurisdictions that can be described as a complaint or lawsuit filed by any person who deems his or her rights has been violating by act or omission of public authority. Currently, the constitutional court in many countries have adopted a constitutional complaint system in a variety of models. However, the first application of the constitutional complaint jurisdiction came from Europe. In Austria, the constitutional complaint is allowed against the administrative actions but not against the court decisions. While Germany and Spain have a similar model that is a complaint against an act of the public authority including court decisions. In Asia, it is imperative that the court in Asia actively participate in the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). The AACC members have adopted a system of constitutional adjudication in a variety of models, and when it comes to jurisdictions, out of sixteen AACC members, there are four countries (Azerbaijan, South Korea, Thailand, and Turkey) have the constitutional complaint in their jurisdictions. In Azerbaijan, constitutional complaint is comparatively broad. Azerbaijan's Constitutional Court can handle constitutional complaint against the normative legal act of the legislative and executive, an act of a municipality and the decisions of courts. In contrast, even though constitutional complaint in South Korea and Thailand can be against the exercise and non-exercise of state power, constitutional complaint cannot be filed against court decisions. In Turkey, the constitutional complaint mechanism is coupled with the regional system of human rights protection. The Turkish Constitutional Court handles complaints from individuals concerning violations of human rights and freedoms falling under the joint protection of the Turkish Constitution and the European Convention on Human Rights (ECHR). This paper argues that constitutional complaint represents the main part of the constitutional court, and through a comparative perspective among three countries in Europe and four AACC members are expected to provide lessons for the other AACC members that do not have a constitutional complaint mechanism, such as Indonesia.

Keywords: Comparative Law, Constitutional Complaint, Constitutional Court, Association of Asian Constitutional Courts and Equivalent Institutions.

The Malaysian Federal Constitution: An Islamic or a Secular Constitution?

Syed Fadhil Hanafi Syed A. Rahman

Constitutional Review, Vol. 5, No. 1, May 2019, pp. 134-163

Constitutionalism dictates that the government must only act within the four walls of the constitution. While adherence to this fundamental doctrine is proven to be difficult, it becomes more complicated when the walls are unclear. For decades, Malaysians struggle to ascertain the actual legal value of religion, particularly Islam, in its Federal Constitution and the impact of religion to the Malaysian legal system. Some opined that secularism is a basic structure of the Malaysian Federal Constitution and in the name of constitutionalism, religious laws cannot be the basis for administration of public law and must be confined to personal law matters. On the other hand, some opined that Islam constitutes a salient feature of the Constitution and the position of Islam as the religion of the Federation implies Malaysia as an Islamic state. This paper analyses the conflicting views, via qualitative studies of constitutional provisions which have religious element in the light of their history, together with relevant case laws which interpreted them. The analysis is done with a view to determine whether the Malaysian Federal Constitution is a secular instrument creating a secular state or a religious document establishing a theocratic state. From such analysis, the author presents that the Malaysian Federal Constitution, albeit giving special preference to Islam, is a religion-neutral document which is receptive to both religious and secular laws. This is based on the fact that the Constitution upholds the validity of both secular and religious laws for as long as they are enacted according to procedural laws required by the Constitution.

Keywords: Malaysian Federal Constitution, secularism, doctrine of basic structure, secular state, theocratic state.

The Return of Pancasila: Political and Legal Rhetoric Against Transnational Islamist Imposition

Yance Arizona

Constitutional Review, Vol. 5, No. 1, May 2019, pp. 164-193

The rise of transnational Islamist movements in Indonesia in the last two decades recurrences the old debate between Pancasila and Islamism. This kind of fundamental Islamic movements widespread with their conservative view and it has had detrimental effects on the Indonesian society's social cohesion. President Joko Widodo seeks to revive Pancasila to confront this threat. This is not for the first time Pancasila is used by the Indonesian government to resolve the tension between Islamic values and nation-state principles. Both President Sukarno and Suharto also used Pancasila as a vehicle to discipline their political opponents. Adopting a non-essentialist approach to Pancasila, I argue that the return of Pancasila in recent years would be more complicated because of the narrative of Pancasila revivalism as an adversarial ideology is bounded by traditionalism and lack of progressive interpretation. Instead of locating Pancasila as the counterpart to Islamism, what is needed is re-interpretation of Pancasila as a unifying ideology.

Keywords: Pancasila, Ideology, Transnational Islamism, Non-Essentialist Approach.

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The Internationalization of Judicial Review in the Colombian High Courts

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Abstract

The internationalization of adjudication in the Colombian high court refers to the growing importance that the American Convention on Human Rights has gained among the judicial forums of this country, but especially to the phenomenon that occurs when national judiciaries implement and appropriate the doctrine of the control of conventionality. The Convention has claimed a high ground in the Colombian constitutional system due to the appropriation of international law by national courts decisions, and to the process of the internationalization of the law. By consistently applying the control of conventionality doctrine, courts like the State Council have reaffirmed the binding nature and the effectiveness of the decisions of the Inter-American Court of Human Rights for the Colombian legal system. In contrast to a much more regressive posture assumed by the Constitutional Court in recent decisions, the State Council, drawing on the legal contents of international law, has broadened the range of legal sources for rights interpretation in Colombia. By this action, as it will be further stated in this article, the State Council has contributed to a move away from a paradigm of a legalism based solely on the state sovereignty and national constitutionalism, towards one that endorses the pluralist structure of post-national law. Against this background, this article aims to discuss how the relationship of national judiciaries with international law is best understood as reflecting the development of a pluralist legal dynamic, sometimes referred to as jurisprudential dialogue, that involves the broadening of the normative horizon and the internationalization of the sources available for national judges in their reasoning; particularly in the cases that involve human rights violations.

Keywords: American Convention on Human Rights, Control of Conventionality, *Ius Commune Constitutionale*, Block of Constitutionality, Internationalization of the Law.

* PhD candidate at the Autonomous University of Madrid and former advisor of the Colombia's General Attorney's Office. He has been an associate professor at the National University of Colombia and the Rosario University.

I. INTRODUCTION

The strengthening of human rights law that came along with the establishment of the United Nations and the foundation of the multiple regional human rights systems have profoundly affected the scope of judicial protection provided to victims of human rights violations. The institutionalization of actors that, as Bogdandy states, "speak in the name of the peoples and citizens whose freedom they ultimately shape"[1] has changed the way in which judicial review is done in the high courts of several countries. Importantly, it marks a strengthened process of internationalization of Constitutional law.

This phenomenon, conceptualized by Vogel as openness of the state[2], is especially evident in the reasoning of the high courts in charge of the interpretation of the Constitution. Many Constitutional Tribunals and Supreme Courts of the region of Latin America deal with the question of the reception of international human rights treaties and international courts decisions, and each of them has chosen one or several methods to do this. It seems that the task of defining the role of international human rights law in the domestic level partially relies on the high courts of the State members of the American Convention on Human Rights (hereinafter – the ACHR).

Due to the receptiveness of judicial actors to international law,[3] and to the open structure of constitutional law, doctrines such as the block of constitutionality[4] and the control of conventionality[5] have made judicial review,

1 Armin Von Bogdandy and Ingo Venzke, *Whose Name: A Public Law Theory of International Adjudication* (Oxford: Oxford University Press, 2014), 5.

2 Jo Eric Khushal Murkens, *From Empire to Union: Conceptions of German Constitutional Law since 1871* (Oxford: Oxford University Press, 2013), 117.

3 On the question of whether domestic courts can be cast as the natural judges of international law, see: A. Tzanakopoulos, "Domestic Courts as the "Natural Judge" of International Law: A Change in Physiognomy" in *Select Proceedings of the European Society of International Law,* ed. J.R. Crawford, S. Nouwen (Oxford: Hart Publishing, 2012).

4 On the aplications of the Block of Constitutionality in Colombia, see: Vanessa Suelt-Cock, "El Bloque de Constitucionalidad como mecanismo de interpretación constitucional: Aproximación a los contenidos del bloque en Colombia [The Block of Constitutionality as a mechanism of constitutional interpretation: Approximation to the contents of the Block in Colombia]," *Universitas Law Journal* (2016), doi: http://dx.doi.org/10.11144/Javeriana.vj133.bcmi. Available in http://revistas.javeriana.edu.co/index.php/vnijuri/article/view/17747; and Rodrigo Uprinmy, "El bloque de constitucionalidad en Colombia: Un analisis jurisprudencial y un ensayo de sistematización doctrinal [The Block of Constitutionality in Colombia: a jurisprudential analisis and trial of doctrinary sistematization]" in *Compilación de jurisprudencia y doctrina nacional e internacional* [Compilation of national and international jurisprudence and doctrine] (Bogotá: Oficina en Colombia del Alto Comisionado de Naciones Unidas para los Derechos Humanos, 2011), 98-154.

5 On the Control of Conventionality, see: Manuel Fernando Quinche Ramírez, *El Control de Convencionalidad* [The

and in general the exercise of administrating justice, an activity much more exposed to the contents of international law. The appropriation of the norms of international human rights law by national judicial authorities guarantees the enforceability of the international rule of law, while at the same time widens the set of actors involved in the implementation of these international agreements.

Because of the work of both international and domestic judges, there is now an almost uncontested recognition of the constitutional legal value that the ACHR has in the region, and many Constitutions and high courts in Latin America have enforced the Convention and granted its constitutional rank.[6] Thanks to the appropriation of international law by national courts, the ACHR has claimed a high ground in the Colombian constitutional system, in the latest stage of the widest process of the internationalization of the law. Nevertheless, it should be noted that the development of this process has not been free of controversy and that the matter is currently subject to a very intense judicial debate.

Despite the more or less universal acceptance of the constitutional role that the American Convention has in Colombia, the decisions of the high courts of this country can be classified as rejecting international law or as embracing the full extent of this legal system. This classification depends essentially on the level of recognition that the courts of the different states make to the decisions of the IACtHR.

In a regressive tendency, the Constitutional Court has started to demount its own jurisprudential constructions in favor of "new" interpretations that close constitutional law to the process of the internationalization. Through means of negating its own precedents, the Court, in decisions SU-712 of 2013[7] and

Control of Conventionality] (Bogotá: Temis, 2014), and *El Control de convencionalidad y las Cortes nacionales: La perspectiva de los jueces mexicanos* [The Control of Conventionality and the National Courts: The perspective of the Mexican judges], ed. Paula M. García Villegas (Mexico, Ed Porrua, 2014).

6 Luis-Miguel Gutiérrez Ramírez, "Control de constitucionalidad y control de convencionalidad: interacción, confusión y autonomía. Reflexiones desde la experiencia francesa [Control of Constitutionality and Control of Conventionality: Interaction, Confusion and Autonomy. Reflexions from the French experience]," *Revista IIDH*, no. 64 (January 2017): 254.

7 Decision SU-712 of 2013, T3005221, Legal consideration No 7.6.3 (Justice Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

C-327 of 2016,[8] has turned its back on some of its most important rulings on the matter of the binding power of the decisions of the IACtHR. On this, the Court has adopted a rather restrictive interpretation of the law, with severe consequences for human rights protection in Colombia. By adopting that position, the Court has restricted the possibilities for rights protection in this country and has further isolated the constitution from international law, as Quinche affirms, "the so-called rejection posture resists applying the standards of rights adopted by the decisions of this international tribunal to favor the principle of state sovereignty."[9]

In the opposite side, the acceptance of the binding nature of the precedents of the Inter-American Court acknowledges the role that the authorized interpreter of the international agreement has in the definition of these instruments of international law. The Colombian State Council has strengthened the process of the internationalization by consistently applying the Control of Conventionality, and has confirmed the binding nature of the decisions of the Inter-American Court of Human Rights for the Colombian legal order. With regard to the legal pluralism and the post-national character of modern constitutions,[10] domestic judges like the State Council (hereinafter – the SC) can contribute greatly to the enforceability of international human rights law in Colombia.

In contrast with the tendency of rejection to the precedents of international law that the Constitutional Court has assumed in later decisions, and based on the institutional and normative pluralism of human rights, the SC has managed to consistently interpret the law in a manner respectful to both the Constitution and the American Convention. The SC's rulings that have applied the control of conventionality bring a light to the way in which international law should

[8] Decision C-327 of 2016, D-11058, Legal consideration No.73 (Justice Gloria Stella Ortiz Delgado, Constitutional Court of Colombia).

[9] Manuel Fernando Quinche Ramírez, El Control de Convencionalidad [The Control of Conventionality] (Bogotá: Temis, 2014), 131.

[10] On the concept of the postnationalism in the constitutional law context see: Jürgen Habermas, "Europa: En defensa de una política exterior común" [Europe: In defense of a common foreign policy] in *El derecho internacional en la transición hacia un escenario posnacional* [The international law in the transition towards a postnational scene], (Buenos Aires: Katz, 2008), and Jürgen Habermas, "Does the Constitutionalization of International Law Still Have a Chance?" in *The Divided West* (Cambridge: Polity, 2006).

be viewed from the perspective of national tribunals, and to the virtues of a judicial interpretation that is not limited to the sources of domestic law.

The enforcement of international human rights law through domestic courts' decisions has amplified the possibilities of both international and constitutional law. The international conventions on human rights and the clauses of openness[11] have enabled the national judge to carry out the mission of integrating international law with constitutional law. This phenomenon is not limited to countries under the jurisdiction of one of the existent regional human rights courts: the Inter-American, the African and the European ones, but also to those countries that belong to the UN human rights system. Despite the lack of a regional court of human rights for the numerous Asian countries, many constitutional courts of this region, including the ones of the Republic of Indonesia[12] and the Republic of Korea,[13] have shown a growing interest in international law as a source of authoritative arguments for judicial decision-making.

International law contributes to the legal protection of human rights and supports the moral importance of the fundamental principle of human dignity; the appropriation of its contents by domestic high courts is a legitimate tool for judicial decision-making and involves domestic judges to a greater extent in the wider process of enforcing international law. This article intends to show that, despite of the sometimes problematic coexistence of both national and international tribunals, judicial dialogue promises to be an effective tool for extending the rule of law and the protection of fundamental rights.

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[11] Armin Von Bogdandy, "Ius constitutionale commune interamericanum: una aclaración conceptual" [Ius constitutionale commune interamericanum: a conceptual remark] in *Ius Constitutional Commune en América Laina: Rasgos, Potenciales y Desafios* [Ius Constitutional Commune in Latin-America, potential and challenges], (Mexico DF: Porrua, 2013), 19.

[12] About the relationship between the decisions of the Constitutional Court of the Republic of Indonesia and the International Law see: Bisariyadi Bisariyadi, "Referencing International Human Rights Law in Constitutional Adjudication," *Constitutional Review* 4, no. 2 (December 2018): 256; and Heribertus Jaka Triyana, "The Role of the Indonesian Constitutional Court for An Effective Economic, Social and Cultural Rights Adjudication," *Constitutional Review* 1, no. 1 (May 2015): 74.

[13] On the relationship between the Constitutional Court and international law, see Kang Il-Won, "Constitutional Globalization in Korea", in *Global Constitutionalism and Multi-layered Protection of Rights* (Seoul: SNU-Pacific Law Institute, Constitutional Court of Korea, 2016), 248.

II. THE JUDICIALIZATION OF INTERNATIONAL HUMAN RIGHTS LAW

Despite the importance of the movement towards the internationalization of the law that can be observed in the numerous treaties signed after 1945, the creation of international courts in charge of the protection of human rights was the shifting point that changed our understanding of the relationship between constitutional law and international law. As Ricoeur pointed out, we have found ourselves in the midst of "the blossoming of a multitude of centers of rights [composed] of new Postnational, if not suprastate, institutions, which themselves will give rise to rights."[14]

One of the consequences of this turn is that the protection of fundamental rights can no longer be solely understood from a local perspective, but should be considered as a field of permanent interaction with the international law of human rights.[15] Domestic courts often define the fundamental rights protected by their decisions using precedents of international law and in some cases even borrow from comparative law. As Eckes states, "International law becomes increasingly judicialized and domestic courts are increasingly and actively referring to each other's judicial decisions, as well as to international law."[16] For instance, in the United States of America, in the Filartiga case, the courts stated that the Alien Tort Statute should be construed as "opening the federal courts for adjudication of the rights already recognized by International law."[17]

Notwithstanding the vast diversity of cases involving human rights violations, most relevant threats posed to human rights are universal. There is some level of similarity between the human rights violations that arise across the globe,

[14] Paul Ricoeur, *The Just,* trans. D. Pellauer (Chicago: Chicago University Press 2000), 93.

[15] Manuel Fernando Quinche Ramírez and Rocio del Pilar Peña Huertas, "La dimensión normativa de la justicia transicional, el sistema Inter-Americano y la negociación con los grupos armados en Colombia [The normative dimension of the transitional justice, the Inter-American System and the negotiation with the Colombian rebel groups]," *ACDI – Anuario Colombiano de Derecho Internacional* 7 (2014): 118, doi: dx.doi.org/10.12804/acdi7.2014.04.

[16] Christina Eckes, "The Court of Justice's participation in judicial discourse: theory and practice. In *The European Court of Justice and external relations' law: constitutional challenges*, ed. M. Cremona & A. Thies (Oxford: Hart Publishing. 2014), 183- 210.

[17] Sung Teak Kim, "Adjudicating Violations of International law: Defining the Scope of Jurisdiction under the Alien Tort Statute – Trajano v. Marcos," *Cornell International law Journal* 27, no. 2, (1994): 393, Available at: http://scholarship.law.cornell.edu/cilj/vol27/iss2/5.

which permits judges to learn from foreign judicial experience. Due to this, many national courts refer to comparative law in the decision-making process as well as to decisions of international courts. After all, as Justice Breyer recognized, "American and foreign judges furthermore have the same desire – as well as the requisite experience – to advance the rule of law even as the world threatens to become more turbulent."[18]

This form of cross-judicial fertilization[19] is part of the wider process of internationalization of constitutional law that creates common ground for judicial action to remedy human rights violations; the parity between constitutional rights and the human rights defined by international law implies a connection between the decisions of the courts that interpret these rules. The dialogue, as a way of constructing judicial decisions is very important if we consider that human rights are more susceptible to discretionary judicial interpretation than other non-constitutional rights.[20] In a context where domestic judicial actors appropriate international law, the role of international judges and experts, interpreting the various international human rights treaties, gains a special relevance.

The so-called authorized interpreters of international law[21] have become a source that national judges increasingly cite in their arguments for cases related to human rights recognized by international law,[22] the institution of the *consistent interpretation* that demands the judges to interpret the human rights in the light of international agreements, reinforces this development.[23]

These factors have created an interaction known as the *jurisprudential dialogue,*[24] in which judicial decisions taken within the scope of the nation-state

[18] Stephen Breyer. *The Court and the World: American Law and the new global realities* (New York, Alfred A. Knopf, 2015), 683.

[19] On the concept of cross-judicial fertilization, see: Francis Jacobs, *"Judicial Dialogue and the Cross-Fertilization of Legal Systems: the European Court of Justice," Texas International law Journal* 38, no. 3 (2013), http://www.tilj.org/content/journal/38/num3/Jacobs547.pdf.

[20] Robert Alexy, *"Discourse Theory and Fundamental Rights"*, ed. Agustín José Menéndez and Erik Oddvar Eriksen (Dordrecht, Springer, 2006), 23.

[21] Decision C-370 of 2006, D-6032. Legal consideration No. 4.6 (Justice Manuel Jose Cepeda and others, Constitutional Court of Colombia).

[22] Margaret Hartka, "The Role of International law in Domestic Courts: Will the Legal Procrastination End?" *Maryland Journal of International law*, no. 7 (Spring 1990): 124, http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.425.6956&rep=rep1&type=pdf.

[23] Paola Acosta Alvarado, *Diálogo judicial y constitucionalismo multinivel: El caso Interamericano* [Judicial dialogue and multilayered constitutionalism: The Inter-American case] (Bogotá, Universidad Externado de Colombia, 2015), 61.

[24] On the concepts of Judicial Dialogue and cross judicial fertilization, see: Francis Jacobs, "Judicial Dialogue and

draw on the decisions of international courts as "authoritative borrowings."[25] This practice relates the decisions of ordinary judges to centralized international institutions, and transforms the domestic judge into an enforcer of international treaties, that boosts the value of international law through judicial action.

International law has come closer to the national high courts of the various states subject to the jurisdiction of the ACHR in a process of internationalization that seeks to give constitutional value to international law. The two main institutions that resulted from this judicial innovation are the block of constitutionality and the control of conventionality; both are judicial constructions that reflect the increasing interaction between international and constitutional law, for they are intended to promote the legal value of international law in domestic institutional environments.

Owing to these jurisprudential constructions, the application of international law by domestic judges is shifting from a non-standardized judicial practice to a more structured interaction between the international order and domestic constitutional systems. This communication, constructs a legal dynamic that defies the old debate between monist and dualist theories, in favor of a post-national understanding of the process of internationalization.[26]

III. THE BLOCK OF CONSTITUTIONALITY

In Colombia and other countries of the Americas the doctrine of the block of constitutionality has become the instrument to determine the legal nature of

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the Cross-Fertilization of Legal Systems: the European Court of Justice," *Texas International law Journal* 38, no. 3 (2013), http://www.tilj.org/content/journal/38/num3/Jacobs547.pdf; Eduardo Ferrer-Mac-Gregor and Alfonso Herrera García (eds.), *Dialogo Jurisprudencial en Derechos Humanos: entre Tribunales Constitucionales y Cortes Internacionales* [Jurisprudential Dialog on Human Rights between Constitutional Tribunals and International Courts] (Valencia: Tirant lo Blanc, 2013); Rafael Bustos Gisbert, "XV Proposiciones para una teoría de los diálogos judiciales [XV Proposals for a theory of the judicial dialogue]," *Revista Española de Derecho Constitucional*, no. 95 (May-August 2012): 13-63; and Victor Bazan, "Control de convencionalidad, aperturas dialogicas, e influencias jurisdiccionales reciprocas [Control of Conventionality, open dialogue and mutual jurisprundential influences]" in *Revista Europea de Derechos Fundamentales*, no. 18 (Valencia 2012): 63-104.

[25] Manuel Fernando Quinche Ramírez and Rocio del Pilar Peña Huertas, "La dimensión normativa de la justicia transicional, el Sistema Interamericano y la negociación con los grupos armados en Colombia [The normative dimension of the transitional justice, the Inter-American System and the negotiation with the Colombian rebel groups]", *ACDI - Anuario Colombiano de Derecho Internacional* 118, no. 7 (April 2014): 113-159. Available in: https://revistas.urosario.edu.co/index.php/acdi/article/view/acdi7.2014.04.

[26] On the concept of post-nationality applied for the context of the constitution, see: Nico Krisch, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law* (Oxford: Oxford University Press, 2010).

international human rights law, in relation to its normative integration with the national constitutional systems.[27] This jurisprudential construction is based on a distant precedent of French law denominated *le bloc de constitutionnalité,*[28] which was coined by the French Constitutional Council when it recognized that both the preamble of the Constitution of 1945 and the Declaration of the Rights of 1781 were an integral part of the binding constitutional regime.

This doctrine – an adaptation for the constitutional context of the concept of the block of legality, that recognized certain rules like the general principles of law as above the law[29] – widened the normative spectrum of the constitution of France, by giving constitutional hierarchy to legal contents that are not proscribed by the written fundamental text and, moreover, by using them as a normative reference for the exercise of the control of constitutionality.[30] The decision of the 16th of July 1971 of the Constitutional Council incorporated the Declaration of the Rights of the Man and of the Citizen of 1789 as a normative parameter for the study of the constitutionality of the laws in France, it provided a human rights charter to the French constitutional order[31] and enhanced constitutionalism in the Mediterranean country. Following the same parameter, latter decisions also recognized the Preamble of the Constitution of 1945 as an integral part of the French constitutional order, and by that incorporated into French constitutionalism a charter of social, economic and cultural rights with the same legal validity as the rights protected by the Declaration of the Rights of the Man and of the Citizen.[32]

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[27] The general mechanism for the implementation of international law established by the Constitution in the appendix 16 of the article 50 is the most traditional method for the normative integration between domestic law and international law in Colombia. However, for the specific purpose of integrating the rules of international humanitarian law and the international law of human rights into this normative order, article 93 of the Constitution allows the use of other methods of integration of international law, like the block of constitutionality and the control of conventionality.

[28] Marie-Pierre Granger, "The Preamble(s) of the French constitution: Content, status, uses and amendment", *Acta Juridica Hungarica* 52 (2011), 12. 10.1556/AJur.52.2011.1.1.

[29] Marcos Carpio, "Bloque de constitucionalidad y proceso de inconstitucionalidad de las leyes [Block of Constitutionality and the process of unconstitutionality of the law]," *Revista Iberoamericana de Derecho Procesal Constitucional* 4 (July 2005): 81.

[30] Graciela Rodríguez Manzo, Juan Carlos Arjona Estévez & Zamir Fajardo Morales, *Bloque de Constitucionalidad en Mexico* [Block of Constitutionality in Mexico] (Reforma DH, 2013), 26. http://www2.scjn.gob.mx/red/coordinacion/Bloque%20de%20constitucionalidad.pdf.

[31] Decision C- 067 of 2003, D-4111, Legal consideration No 3ª, (Justice Marco Gerardo Monroy, Constitutional Court of Colombia).

[32] Louis Favoreau, "El Bloque de Constitucionalidad [The Block of Constitutionality]," *Revista del Centro de Estudios*

In the case of Latin America, the block of constitutionality focuses on expanding the Constitution and the parameters of the control of constitutionality, not only to incorporate other rules present in the sphere of the domestic law, but also to bring into the constitutional context the rules of international human rights law[33]. The distinctive element of the Latin-American version of the block of constitutionality, which contrasts with the Spanish and the French version, is the degree of receptiveness towards international law found in the constitutions of countries like Colombia.[34] According to Gongora, "while in Europe the concept of the block of constitutionality refers mainly to a set of norms of domestic origin used as a parameter for the control of constitutionality, in Latin America, the block incorporates norms of international origin, essentially human rights instruments, as a parameter of constitutionality."[35]

The decision of the Supreme Court of Panama on 24 July 1990 was the first precedent in which a high court in Latin America applied this doctrine with the aim of reconciling the Constitution with the contents of international law. Based on the article 4th of the constitutional text, this decision granted constitutional hierarchy to international law. Unexpectedly, this ruling influenced the definition of the block in the region and soon other high courts would apply this particular understanding of the institution; these were the cases of the Constitutional Chamber of the Supreme Court of Costa Rica and the Colombian Constitutional Court.

This understanding of the block can be found in early decisions of the Colombian Constitutional Court. For instance, decision C-225 of the year 1995, that defined the normative value of the clause of supremacy of international law, stated that

Constitucionales, no. 5 (Madrid 1990): 46.

33 Manuel Fernando Quinche Ramírez, *El Control de Convencionalidad* [The control of conventionality], (Bogotá: Editorial Temis, 2014), 139.

34 Ann Peters, *Constitucionalismo compensatorio: Las funciones y el potencial de las normas y estructuras internacionales* [Constitutionalism of compensation: the functions and the potential of the norms and international structures] (Valencia: T. l. Blanch, 2010), 211.

35 Manuel Gongora Mera. *La difusión del bloque de constitucionalidad en la jurisprudencia latinoamericana y su potencial en la construcción del ius constitucionale commune latinoamericano* [The difusion of the block of constitutionality in the Latin-American jurisprudence and its potential for the construction of the Latin-American *ius constitucionale commune*], Revista juridical de la Universidad Autónoma de Mexico (2014): 308 http://biblio.juridicas.unam.mx/libros/8/3655/16.pdf.

> beyond the formal constitutional text there is the block of constitutionality, consisting not only of the written formal constitution but of those norms and principles that, without appearing formally in the articles of the constitutional text, are to be utilized as parameter for the control of constitutionality of the laws, for they have been normatively integrated in the constitution through different means and by direct order of the constitution itself.[36]

Ever since, this doctrine has been frequently applied in the jurisprudence of the Colombian Constitutional Court as a tool to further legal and judicial protection of human rights. Given the context of impunity that prevailed in Latin America and the lack of legal protection afforded to victims of grave human rights violations in that region, the block of constitutionality proved to be a useful tool to expand the range of normative resources available for judges to give protection to rights; as well as a source of additional legitimacy for judicial actors in their decisions.[37] In order to be able to correlate with the ever-changing reality of rights, the theory of the block of constitutionality gives a prominent place to international human rights law and international humanitarian law in the Colombian domestic order. It coordinates international law with domestic law and prevents the constitution from becoming passive in front of the new social, political and legal dynamics.

IV. THE CONTROL OF CONVENTIONALITY

Although certain precedents of the Inter-American Court of Human Rights (hereinafter IACtHR) are cautious when framing its role in the definition and protection of fundamental rights in the region, and have stated that the jurisdictional function of the Court consists merely in declaring the violation of the Convention and therefore ordering the State to repair such transgression[38], the truth is that the legal capacities of this international court in defining the normative grounds of fundamental rights in Latin America are of a much greater importance. In reality, both the decisions of the Court and its advisory opinions have contributed greatly to the protection of fundamental rights in

[36] Decision C- 225 of 1995 , L.A.T.-040. Legal consideration No. 12, (Justice Alejandro Martínez, Constitutional Court of Colombia).

[37] Manuel Fernando Quinche Ramírez, *El Control de Convencionalidad* [The Control of Conventionality] (Bogotá: Temis, 2014): 130.

[38] IACtHR "Perozo v Venezuela" Decision of the 28th of January 2009, Series C No. 175, 65.

the region and, despite the obstacles and the adverse conditions, these two features of the IACtHR have been consolidating and have reaffirmed the judicial authority of the Court over the whole normative content of the countries under its jurisdiction.[39]

The IACtHR contributes to the progressive interpretation of the meaning and scope of the rights protected by the American Convention on Human Rights when it rules on cases and interprets the reach of the rights written in this international instrument. In that sense, despite that in principle the basic normative ground of the Inter-American System of Human Rights is the ACHR, the decisions of the Inter-American Court of Human Rights have become an integral part of the *Ius Commune Constitutionale Inter-Americanum* and, therefore, a central element of the Inter-American System of Human Rights.[40]

In the year 2006, the doctrine of the control of conventionality appeared in the legal field as a normative resource for the integration of the ACHR with domestic law, which gives a leading role to the domestic judges in the interpretation of international law of human rights. The basic concept of the control of conventionality establishes that both the judicial and administrative authorities of the States that subscribed the ACHR, should apply in their decisions a control based on this international instrument. The IACtHR, in precedents like Workers of the Congress v. Peru[41] or the case of Heliodoro Portugal v. Panama[42] has defined the Control of Conventionality as an obligation of the judges of the various member states, not only to exercise in their judicial decisions the control of legality or the control of constitutionality, but also to incorporate into their decision-making process a control based on the ACHR.[43]

[39] Kai Ambos, "Tribunal Europeo de Derechos Humanos y Corte Interamericana de Derechos Humanos: ¿Tribunal tímido vs. Tribunal audaz*?* [European Court of Human Rights and Inter-American Court of Human Rights: Shy Tribunal v. Audacious Tribunal]," in *Diálogo jurisprudencial en derechos humanos: Entre Tribunales Constitucionales y Cortes* Internacionales [Jurisprudential dialogue on Human Rights: Between constitutional tribunals and international Courts], ed. Ferrer MacGregor (Mexico: DF, Tirant lo Blanch, 2013), 1058.

[40] On the Ius Commune Internationale Interamericanum, see: Armin von Bogdandy, Eduardo Ferrer Mac-Gregor, Mariela Morales Antoniazzi, Flavia Piovesan (eds.). *Transformative Constitutionalism in Latin America: The Emergence of a New Ius Commune* (Oxford: Oxford University Press, 2017).

[41] IACtHR "Trabajadores Cesados del Congreso v. Peru" Decision of the 24th of November 2006, Series C No. 158.

[42] IACtHR "Heliodoro Portugal vs. Panamá" Decision of the 12st of August, 2008, Series C No. 186.

[43] Antonio Moreira Maués, "Supra-legality of International Human Rights Treaties and Constitutional Interpretation," *International Journal on Human Rights* 10, no. 18 (June 2013) http://sur.conectas.org/en/supra-legality-international-

Despite the importance of the institution of the block of constitutionality, the consolidation of the doctrine of the control of conventionality in the jurisprudence of the Inter-American System of Human Rights and its diffusion throughout the different constitutional orders in the region, has proven to be crucial for the fulfillment of human rights and the advancing of the process of internationalization of the law in Latin America. The control of conventionality is one of the most important jurisprudential constructions when it comes to the judicial protection of human rights in Latin America and a key feature for the current functioning of the Inter-American System of Human Rights. This doctrine assesses the way in which the jurisdiction of the Court relates to the different constitutional systems under its authority, and it determines the role that national judicial authorities have in the context of the internationalization of the law.[44]

The very nature of the control of conventionality – that demands all judicial authorities to directly implement the ACHR – is an invitation for judicial actors at the domestic level to preventively apply this doctrine before the activation of the jurisdiction of the IACtHR, in fact, "International law increasingly designates domestic judges as 'natural judges' of International law to ensure the opportunity for the state to comply with its international obligations."[45]

The process of constitutionalization and internationalization of the law seems to indicate that the rules and standards applied by international tribunals of human rights are now valid and enforceable rules for the different States under the jurisdiction of these tribunals. This reasoning is supported by the fact that the primary nature of the human rights prescribed in the American Convention on Human Rights provides to the judicial interpreter of the Convention an important margin of interpretation. The fact that human rights are structured as principles, and considering their rooting at the constitutional level, has distanced the normative interpretation of human rights away from the classic and strict legalist approach, that leaves no room for judicial law-making. The

human-rights-treaties-constitutional-interpretation/.

44 André de Carvalho Ramos, "Control of Conventionality and the struggle to achieve a definitive interpretation of human rights: the Brazilian experience," *Revista IIDH*, no. 64 (2016): 11-32.

45 Yota Negishi, "The Pro Homine Principle's Role in Regulating the Relationship between Conventionality Control and Constitutionality Control," *The European Journal of International Law* 28, no. 2 (2017): 458.

so-called dynamic interpretative approach has stated that the human rights charters should be viewed as flexible normative standards, that are to be adjusted by judicial decision to the changing social realities.[46] According to this interpretation, "tribunals exercise their supervisory authority by infusing assumed present-day perceptions of human rights tolerance into the treaty provision for the purpose of effective treaty protection."[47]

In this scenario, the degree of internationalization of the judicial control, in contrast with the tendency of rejecting international court precedents, depends on the degree of deference that the rulings of national judges show towards the decisions of international courts. In the case of Colombia, this tension is evident in the case of the interpretation of the political rights contained in article 23, where the authority of the Court and the binding nature of its decisions are subject to the most intense judicial discussion, creating the need of a final decision by the Inter-American Court of Human Rights.

It is clear that domestic courts have appropriated intensively the legal discourse of human rights, most judicial authorities in Latin America accept at least nominally the normative priority of these normative principles, and the block of constitutionality is a widely accepted rule of integration. However, the difficulty for drawing the limits of the full extent of the American Convention of Human Rights in Colombia appears to be the question of the binding nature of the precedents of the IACtHR, which is currently subject to the most intense judicial debate.

In the case of Colombia, the discussion over the binding nature of the decisions of the IACtHR can be observed in the opposite jurisprudential positions of the State Council and the Constitutional Court. On the one hand, and following the example of the Supreme Court of Justice of Mexico,[48] the

[46] See: William Eskridge Jr, "*Dynamic Statutory Interpretation*" (Paper, Faculty Scholarship Series, 1987), 1505, http://digitalcommons.law.yale.edu/fss_papers/1505.

[47] Research Group on Internationalization of Law, "International tribunals: legalization and constitutionalization – implications for national constitutional structures" (Norwegian Research Council, University of Oslo, March 06), https://www.jus.uio.no/english/research/areas/intrel/projects/international-tribunals/documents/ISPprojectdescription_rev.pdf.

[48] On the relationship between the Supreme Court of Mexico and the doctrine of the Control of Conventionality see: *El Control de convencionalidad y las Cortes nacionales: La perspectiva de los jueces mexicanos* [The Control of Conventionality and the National Courts: The perspective of the Mexican judges], ed. Paula M. García Villegas

State Council has adopted a *receptive position* towards international human rights law, in which this judicial authority fully acknowledges the binding nature of the precedents of the IACtHR.[49] On the other hand, adopting the *restrictive approach*, th`e Constitutional Court of Colombia, in an awkwardly similar position to that of the Supreme Court of Venezuela,[50] has resisted the binding power of the decisions of the IACtHR, and "cut the rope" that "tied" the Constitutional Court with the precedents of this international tribunal.

The legal discussion opened in Colombia around the implications of the right to be elected stipulated by article 23 of the Convention, in the context of domestic law, exposes the tensions that can arise between the positions of the courts in the context of internationalized rights. The legal debates opened around the destitution of the Mayor of Bogota, and the latter decisions taken around the reach of article 23, are prove of the tensions that challenge judicial stability, and call out for a jurisprudential solution that assesses how these cases should be resolved from the perspective of the internationalization of the law.

V. THE JUDGMENTS ON THE CONVENTIONALITY OF THE DISCIPLINARY FUNCTIONS OF THE GENERAL PROSECUTOR OFFICE IN COLOMBIA

The former Guerrilla member, Gustavo Petro Urrego, served as mayor of Colombia's capital city for over two years, before his political rights were restricted and was removed from the office by a disciplinary sanction initiated by Colombia's General Prosecutor, Alejandro Ordonez; in a decision that was later deemed unlawful and widely considered as an act of political persecution.[51]

(Mexico: Ed Porrua, 2014).

[49] Decision of November 2017, 1131-2014. 48, (Justice César Palomino Cortéz, State Council of Colombia).

[50] About the relationship of the Supreme Court of Justice of Venezuela with the decisions and precedents of the IACtHR, see: Decision No.1939, December 18, 2008, Constitutional Chamber of the Supreme Court of Justice of Venezuela; and Allan Brewer, *"La interrelacion entre los tribunales constitucionales de America Latina y la Corte Interamericana de Derechos Humanos, y la cuestion de la inejecutvabilidad de sus decisiones en Venezuela"* [The interdependence between the Constitutional Tribunals of Latin America and the Inter-American Court of Human Rights, and the question of the non-enforceability of its decisions in Venezuela] in Gaceta Constitucional. Análisis multidisciplanrio de la jurisprudencia del Tribunal Constitucional, Editorial Gaceta Juridica (Lima, 2009).

[51] The decision of the General Prosecutor against the mayor of Bogota was motivated on the basis that this disciplinary authority, understood that the plan of disposal of garbage proposed by Petro, had violated the principles of public contract law stipulated on article 48, and therefore had committed a grave fault to the disciplinary code. However, in later decision, the State Council declared the unlawfulness of such sanction,

Based on articles 227 and 228 of the Constitution and on the law 743 of 2002, the Office of the General Prosecutor sanctioned Petro with the so-called political death – a prohibition to hold public positions for a period of 15 years – and ordered his removal from the office. In consequence, the President of Colombia had to enforce this decision and remove the mayor, in order to designate a person to be in charge of the office while elections were held.

This controversial decision, that would be finally deemed as contrary to article 23 of the Inter-American Convention on Human Rights, opened a complex case that involved different lines of litigation and different jurisdictions (both national and international). This situation would ultimately lead to three different but not necessarily mutually exclusive judicial interpretations of the international law, that would show the degree of pluralization of the sources in national fundamental rights litigation; as well as the crucial role that the American Convention of Human Rights has in relation to the definition of constitutional rights in Colombia.

There are various coexistent jurisdictions in Colombia and just like the Inter-American Court of Human Rights, they are aimed to protect human rights and to give normative priority to the Convention. However, these institutions are independent and distinctive courts, that cohabit with the Inter-American Court within the legal spectrum of the *Ius Commune Constitutionale Inter-Americanum,* therefore, they behave independently and seek their own means for protecting and interpreting the rights proscribed in the Convention. The legal actions taken by the former mayor of Bogota activated various jurisdictions for he filed: i) an action of nullity and re-establishment of rights to be decided by the State Council as head of the Contentious Administrative Jurisdiction and; ii) an application to the Inter-American System of Human Rights to be decided by the Inter-American Court of Human Rights.

After Petro turned to the Inter-American Commission of Human Rights (hereinafter IACHR) to review his case, the Commission had to tackle the

restituted Petro to his position and, later, in the frame of an investigation for irregularities in his appointment, removed from the General Prosecutor Alejandro Ordoñez from the office.

question of the conventionality of the sanctions held against him. Considering the risk that the penalties against Petro posed to the rights proscribed in the Convention, the Inter-American Commission of Human Rights enacted resolution 5 of 2014, with the order to concede the precautionary measures requested by Petro, and therefore ordered president Santos to "suspend immediately the effects of the decisions of January 13, 2014 and therefore keep in office Mr. Petro". The precautionary measure N.374-13 found that the matter of this disciplinary sanction "*prima facie* meets the requirements of seriousness, urgency and irreparable harm contained in article 25 of its rules of procedure" and decided that, to ensure the exercise of political rights of Mr. Gustavo Francisco Petro Urrego, he shall remain in his position while there is a definitive answer from the Commission on the individual petition P-1742-13.

Despite the importance and validity of the decisions of the IACHR, president Juan Manuel Santos failed to observe the precautionary measure ordered by this international institution and suspended the mayor. The precautionary measure ordered in favor of Petro, would then have to be complied by Colombia through a decision of the State Council.[52] This decision arrived in November 2017, when the State Council finally solved the matter in favor of the mayor. Nevertheless, after ordering the precautionary measure, the IACHR continued with the matter that had now reached the Inter-American Court.

The case of Petro made evident the tension between the capacity to remove democratically elected officials stipulated in Articles 227 and 278 of the constitution and the Article 23.2 of the American Convention that stipulates that the "law may regulate the exercise of the rights and opportunities referred to in the preceding paragraph, only on the basis of age, nationality, residence, language, education, civil and mental capacity, or sentencing by a competent court in criminal proceedings." The different cases and court decisions involved in determining the reach of this right have created in Colombia a situation that can be described as a clash between three important courts. As we will see, the matter of the disciplinary sanctions that the General Prosecutor activated

[52] Decision of November 2017, 1131-2014, 23, (Justice César Palomino Cortéz, State Council of Colombia).

against the mayor of Bogota – consisting of a restriction of his political rights – sets an example of the degree of indetermination as to what is required by international human rights law. The diverging opinions of two high courts and the eventual decision of an international court concerning the scope of the right to participate in government, has led to a situation in which a more constructive dialogue between court decisions is urgently needed.

Before we move on to analyze the consequences of these opposing judicial views – that occur within the frame of the so-called jurisprudential dialogue – we should first examine the jurisprudence of the Constitutional Court, the State Council and the Inter-American Court of Human Rights, concerning the right to participate in government as established in Article 23 of the Convention, which became the subject of the clash between the Constitutional Court and the State Council.

5.1. Interpretation of Article 23 by the Inter-American Court of Human Rights

With respect to the meaning and scope of Article 23 of the ACHR, the IACtHR has maintained in the cases Castañeda Gutman v. The United States of Mexico,[53] Yatama v. Nicaragua[54] and Lopez Mendoza v. Venezuela,[55] that the States have limited and conditioned competences when it comes to restrict political rights, more specifically, the right to participate in government positions. On this matter, the IACtHR has stated that democratically elected officials can only be deprived of their positions by a judicial authority following a criminal procedure, for instance, in the case of Lopez Mendoza v. Venezuela, the Court was clear to affirm that no administrative authority is authorized by the Convention to remove from office democratically elected officials, moreover, it affirmed that the State could only do such thing through the means of a decision produced by the competent judicial authority, in the course of a criminal procedure.

According to the Court, the political rights prescribed in Article 23 constitute "an end in itself and, a fundamental mean that democratic societies have to

53 IACtHR "Castañeda Gutman v. The United States of Mexico", Decision of the 6th of August 2008. Series C, No. 184.
54 IACtHR "Yatama v. Nicaragua", Decision of the 23rd of June, 2005, Series C, No. 127.
55 IACtHR "Leopoldo Lopez v Venezuela", Decision of the 1st of September, 2011, Series C, No. 233, p. 49.

ensure that other human rights enshrined in the Convention are guaranteed."[56] In that sense, they occupy a privileged position amongst the normative principles of this international instrument. Furthermore, the Court has stated that the restrictions of these rights should be reduced to the minimum, and that any limitation to Article 23 must be subject to the most rigorous judicial control. On this, the Court affirmed clearly that in order to limit this political rights it is mandatory the participation of a judicial authority and the occurrence of a crime like corruption.

5.2. Interpretation of Article 23 by the Colombian State Council

The State Council, a key actor in the field of human rights adjudication in Colombia, has shifted its understanding of the relationship between constitutional and international law, in order to become a tribunal that is actively involved in the enforcement of the American Convention on Human Rights. This court, through the application of the control of conventionality, has granted the normative superiority of Article 23, and concluded that the sanctions against the Mayor of Bogotá are against this international instrument.

As indicated by Juliana Sanchez Vallejo, the State Council has repeatedly applied the doctrine according to which all state authorities are unconditionally bound by the American Convention and by the rulings of the Inter-American Court of Human Rights. Since 2012, this court has handed down more than 40 decisions that refer to precedents of the Inter-American Court of Human Rights, while at the same time exercising the diffuse control of conventionality.[57] The SC has voluntarily assumed its role as a judge of the Convention and in this sense it has become a fundamental tool for the enforceability of this international instrument in domestic law.[58]

In this context, the SC was faced with the question of the compatibility of the sanctions emitted by the General Prosecutor with the law, the Constitution

[56] *Ibid*. Legal consideration No. 108.

[57] Juliana Sanchez Vallejo, "Entre la recepcion y la omission de una obligacion internacional: el control de convencionalidad en el Consejo de Estado [Between the reception and the omission of an international obligation: the control of conventionality in the State Council]," *Revista Academia & Derecho*, no 11,: 183-226. ISSN 2215-8944.

[58] Decision of November 2017, 1131-2014, (Justice César Palomino Cortéz, State Council of Colombia).

and the American Convention on Human Rights. The SC had to decide whether the norms that conceded to the General Prosecutor the faculty to remove from office democratically elected officials, for charges that did not relate to corruption, are compatible to the Convention or, whether in the contrary, the function that assists the General Prosecutor to apply these kind of sanctions is unlimited and fully compatible with the Convention.

For this case, based on the precedents of the decisions C-028 of 2006 and C-500 of 2014 of the Constitutional Court, the State Council stated that article 23 of the Convention could only be restricted in order to grant a more systematical interpretation of international law. The SC ruled that the prerogative of the General Prosecutor to remove from office publicly elected officials is restricted by international law to those cases where charges of corruption had been demonstrated. At the end, since the case of Petro did not relate to charges of corruption, the SC decided that the disciplinary sanction was not only illegal, but also unconstitutional and contrary to the American Convention on Human Rights.[59]

The SC declared to be acting as judge of the Convention, and exercised the control of conventionality that granted it enough power and legitimacy to set a precedent capable of normatively integrating international and domestic law. By acting on behalf of the American Convention on Human Rights, while at the same time referring to the block of constitutionality[60], the Council managed to bridge two different interpretations of the law in order to solve a controversial case.

5.3. Interpretation of Article 23 of the Convention by the Colombian Constitutional Court

Before we move on to analyze the value that the Constitutional Court assigned to the political rights contained in article 23 of the Convention, and its position in relation with the disciplinary sanctions, it is important to consider the vision of international law provided by the Constitutional Court;

[59] Decision of November 2017, 1131-2014, 38, (Justice César Palomino Cortéz, State Council of Colombia).
[60] *Ibid.*, 34.

this is essential for a better understanding of the growing amount of restrictive decisions that this court has produced in ignorance of international law. Despite the fact that the greater advances of the process of internationalization have come from the heart of the decisions of this court, its most recent rulings are restricting the role that these international instruments have in the protection of rights in the region. Numerous decisions of the Constitutional Court refer to the role that the American Convention on Human Rights has in the domestic realm, however, these decisions do not represent a stable jurisprudential line capable of staking out the degree of influence that the international law has in Colombian law.

In addition to this, in recent years the Constitutional Court has decided to demount its own precedents (rich in references to international law) by simply not using the available instruments for furthering the internationalization of the law, like the control of conventionality. In recent decisions, the Constitutional Court has adopted a position of negation, falsely affirming that the jurisprudence of the court has never recognized the binding nature of the decisions of the IACtHR, and therefore further restricted the process of internationalization of the law. However, the reality seems to indicate that in many occasions, paradigmatic decisions of the Constitutional Court have referred to the decisions of the Inter-American System of Human Rights and have used its authoritative arguments to fix specific standards for the protection of rights.[61]

Unfortunately, in relation to the application of article 23 in Colombia, the Court has adopted the restrictive approach and opted to resist the precedents of the Inter-American Court of Human Rights. For instance, in an early decision of 2006 the Court was challenged with the question of the compatibility of the disciplinary sanctions with the American Convention. In this case, the Court considered that, even though the Block of constitutionality establishes that the Constitution should be interpreted through the lens of the Convention, in

[61] The Court have applied the standards of rights fixed in the precedents of the IACtHR, in decisions, such as: Decision T-025 of 2004, T-653010 (Justice Manuel José Cepeda, Constitutional Court of Colombia); Decision T-576 of 2008, T-1247553, (Justice Humberto Sierra Porto, Constitutional Court of Colombia); Decision C-659 of 2016, D-11354, (Justice Aquiles Arrieta Gómez, Constitutional Court of Colombia); and Decision C-936 of 2016, D-813, (Justice Luis Ernesto Vargas Silva, Constitutional Court of Colombia).

the case of article 23, this should be done in a systemic way with the Inter-American Convention Against Corruption of 1996.[62] According to this decision, the ACHR and the Colombian Constitution do not oppose the establishment of sanctions to remove from office democratically elected officials, as long as these sanctions apply "exclusively" for the cases in which a crime against the public patrimony has been proven. According to the Court, the Convention does not oppose the establishment of these kind of disciplinary sanctions, as long as these "are aimed at combating the phenomenon of corruption, that harms severely the fulfillment of the economic, social and cultural rights stipulated in the San Salvador protocol."[63]

Years after, despite the new precedent set in the case of Lopez Mendoza v. Venezuela, the Constitutional Court further resisted the binding powers of the precedents of the IACtHR. The Court, in the decision SU-712 of 2013 established that the case of Venezuela differed much of the institutional regime of the Colombian Constitution[64] and that such precedent did not apply for the interpretation of the article 23. By this, the Court has chosen to ignore that the IACtHR had again ruled that the States "in order to be able to restrict the political rights contained in article 23, by means of a sanction, must do so through the means of the decision of a judge, in the context of a criminal procedure."[65]

Contrary to the position adopted by the decision SU-712 of 2013, it is clear that the case of Lopez Mendoza is relevant and illustrative for the Colombian case, because the sanction subject of study was produced by an administrative official (General Controller), in the context of and administrative procedure, and for faults that did not constitute any crime. From my perspective, and following the line of the dissenting opinions of justices Vargas and Calle[66],

[62] Decision C-028 of 2006, D-5768, Legal consideration no. 6.5 (Justice Humberto Antonio Sierra Porto, Constitutional Court of Colombia)

[63] *Ibid.*, legal consideration no. 6.4.

[64] Decision SU-712 of 2013, T3005221. Legal consideration no. 4 (Justice Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

[65] IACtHR "Lopez Mendoza v. Venezuela" Decision of the 1th of September 2011, Series C No. 233, 65.

[66] Decision SU-712 of 2013, T3005221, Dissenting opinions of Maria Victoria Calle Correa and Luis Ernesto Vargas Silva (Justice Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

the natural consequence of this affirmation is that the case of Venezuela is homogenous to the case of Colombia: both the General Prosecutor and the General Controller are administrative authorities that own the faculty to affect and restrict political rights. Unfortunately, the Court explicitly decided that a new decision of the Inter-American Court of Human Rights is not a sufficient reason to change its own precedents.[67]

On opposition to this regressive decision – that severely harms the process of internationalization and the possibility for courts to strengthen the judicial protection of the rights prescribed in the Convention – the dissenting opinions of Maria Victoria Calle and Luis Ernesto Vargas Silva sustained that the case of Venezuela is indeed comparable to the case of Colombia. According to these judges, the Court should not ignore the precedent of Lopez Mendoza and should have declared the unconformity of the controverted functions of the General Prosecutor with the American Convention on Human Rights.[68]

According to this view, the Constitutional Court, in the decisions SU-712/13[69] and C-101/2018,[70] should have correctly applied the case of Lopez Mendoza and granted the supremacy of the article 23 of the Convention. However, despite the importance and relevance of this precedent, the Constitutional Court decided to consciously omit the application of the full standard of protection established by these rulings, and decided to refer to this decision of the Inter-American Court in a way that does not serve justice; for instance, the Constitutional Court opted to falsely state that the decisions of the IACtHR assimilated the administrative procedure to the judicial procedure, and stated that in consequence, the Convention didn't seem to contradict this kind of sanctions[71]; something that the decisions of the IACtHR have never affirmed.

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[67] Decision C-111 of 2019, D-12604/D-12605, legal consideration no. 30, (Justice Carlos Bernal Pulido, Constitutional Court of Colombia).

[68] Decision SU-712 of 2013, T3005221, Dissenting opinions of Maria Victoria Calle Correa and Luis Ernesto Vargas Silva (Justice Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

[69] *Ibid*., legal consideration No 7.6.3.

[70] Decision C-101 of 2018, 12306, Legal consideration No. 4.6, (Justice Gloria Stella Ortiz Delgado, Constitutional Court of Colombia).

[71] Decision SU-712 of 2013 T3005221, Legal consideration No, 7.6.3, (Jorge Iván Palacio Palacio, Constitutional Court of Colombia).

Finally, in the decision C-111 of 2019, the Court was asked again to apply the control of conventionality against the Disciplinary Code. In this context, the Constitutional Court, acting preventively ahead of an eventual decision by the Inter-American Court of Human Rights, further restricted article 23 and declared that the disciplinary sanctions of the General Prosecutor should remain intact, for they are perfectly compatible with the Constitution and the American Convention. This late decision of the Constitutional Court has wrongly declared the compatibility of the ACHR with the function to remove from office democratically elected officials that assist the General Prosecutor,[72] and has further restricted international law in the domestic realm. The Court seems to have misunderstood that the Inter-American Court of Human Rights allows for non-judicial authorities, that fulfill certain requirements, to restrict the rights prescribed in article 23. However, there are no precedents of the IACtHR to back this interpretation of article 8 and 25, and the reality is that the rule that creates these sanctions is far from meeting the standards of the IACtHR.

The Constitutional Court has falsely stated that the IACtHR somehow allows for a margin of interpretation when it comes to restricting the political rights contained in the ACHR[73] and, in that sense, has sustained that the administrative procedure can be as good as the judicial one.[74] However, the precedents of the IACtHR have clearly exposed the risk that the political motivation of the administrative decision can pose for democratic choice when the function is abused in the service of a sector of power. In the case of Venezuela, it has become clear that the exercise of this important function and responsibility can diverge into severe violations of the political rights of citizens, in particular the right to be elected stipulated in the Article 23 of the ACHR.

Moreover, the decision of the State Council was clear to indicate that the procedure of the General Prosecutor Office in Colombia does not meet the standard needed by international law. The State Council declared that the

[72] Decision C-111 of 2019, D-12604/D-12605, Legal consideration No. 26.3, (Justice Carlos Bernal Pulido, Constitutional Court of Colombia).

[73] *Ibid.*, Legal consideration No. 28.

[74] Decision C-111 of , D-12604/D-12605, Legal consideration no. 26.2.4, 2019 (Justice Carlos Bernal Pulido, Constitutional Court of Colombia).

General Prosecutor had abused the faculty to remove from office democratically elected officials, and highlighted the risk that this disproportionate faculties pose to democracy.[75] Unfortunately, the Court ignored the decisions of the SC and the IACtHR, and considered that the disciplinary procedure of the General Prosecutor Office meets all the international standards of due process.

For all of these reasons, the decision C-111 of 2019 of the Constitutional Court of Colombia constitutes a severe regression of the process of the internationalization of the law and a clear restriction of the tools available for human rights protection in this country. The Court has negated and restricted the role that the international human rights law has for the protection of human dignity in this South American Country, and has limit the judicial dialogue in Colombia. This decision contradicts the current jurisprudence of both the State Council and the Inter-American Court of Human Rights, on the matter of article 23 of the Convention and, in my point of view, has forced the Inter-American Court to declare this interpretation as contrary to the ACHR.

Given the context, it seems that the case of Colombia will be the next precedent in which the Inter-American Court of Human Rights will have to insist on the necessity to respect the guarantee of the political rights contained in article 23. Unfortunately, the judicial choices of the Constitutional Court have placed this tribunal in a position of rejection against the fulfillment of the rights contained in the ACHR; a position very similar to the one adopted by the Supreme Court of Justice of Venezuela, when it declared that the decisions of the IACtHR where not enforceable.[76]

This unfortunate interpretation of the international law could have been avoided if the court had only exercised a real judicial dialogue, and had honestly consulted its own precedents and those of the IACtHR. The tool of the advisory opinion, as Roa suggests, would have been a reasonable point of departure for such dialogue.[77] On the contrary, the decisions adopted by the

[75] Decision of November 2017, 1131-2014, (Justice César Palomino Cortéz, State Council of Colombia).
[76] Decision No.1939, 08-1572 (Constitutional Chamber, Supreme Court of Venezuela, December 2008).
[77] Jorge Ernesto Roa Roa, "La Aplicación Nacional de la Jurisprudencia de la Corte Interamericana sobre Derechos Políticos [The application of the precedentes of the Inter-American Court of Human Rights regarding political

Constitutional Court have plainly ignored the *pro homine* principle stipulated in article 29 of the ACHR, and have favored an interpretation that restricts the political rights of the Colombians. Instead of giving priority to the arguments related to the rights protected by international law, the Constitutional Court has decided that the sovereignty of its jurisdiction is superior to the realization of the rights contained in these international instruments.

Given the fact that the Constitutional Court has so far opted to openly resist the precedents of international law, the Inter-American Court of Human Rights will have to settle the dispute around the matter of the interpretation of article 23. It will have to grant the efficacy of its own decisions and declare that the regulation that allows the General Prosecutor to remove from office democratically elected officials continues to be unable to meet the standard of protection of the Court, and therefore should be deemed as a clear violation of the Convention.

The Inter-American Court needs to insist on the binding nature of its precedents for all the judicial authorities under its jurisdiction, and reaffirm its authority as authorized interpreter of the Convention. Hopefully, the Court will settle the dispute around the interpretation of Article 23 of the Convention through a constructive dialogue with the courts of Colombia, and by looking carefully to the decisions that have been taken within the scope of the Colombian domestic judiciary. If that is the case, the Inter-American Court will find that the Courts in Colombia, particularly the State Council, are still institutions capable to further the internationalization of the law and to construct the much needed dialogue between tribunals.

VI. INTERNATIONALIZATION OF JUDICIAL CONTROL V. JURSPRUDENTIAL REJECTION OF INTERNATIONAL LAW

As we have seen in the decisions that interpret the scope of article 23, despite the maturity of the internationalization process in Colombia, the discussion on

rights]", (Documentos de Trabajo, Departamento de Derecho Constitucional, Universidad Externado de Colombia), serie 37, 7.

the way in which international human rights law should be integrated with domestic law is a question that challenges the administration of justice, and a matter of the highest interest for the realization of the rights prescribed in the Constitution and the Convention. The relationship between the rulings of the Inter-American Court of Human Rights and the judges of the States under the jurisdiction of the American Convention is still a subject of discussion. In contrast to the Inter-American Court of Human Rights, that has a clear position on the legal value that its decisions have in relation to the application of the Convention, domestic judges oscillate between the model described by Quinche as: "model of rejection,"[78] and the model that recognizes the Convention as a general obligation that forces all judges to apply the precedents of the Court.

The two main Colombian courts for adjudication of fundamental rights cases have diverse and shifting precedents that relate to the matter of the legal value that the jurisprudence of the IACtHR has in domestic law. These decisions move between two extremes that can be described as opened or closed to international courts decisions. On the one hand, the Constitutional Court of Colombia has adopted the position of resisting the role of the jurisprudence of Inter-American Court of Human Rights, while, on the other hand, courts like the State Council have unconditionally attributed great value to that jurisprudence. In essence, these decisions can be classified according to the level of receptiveness shown towards international human rights. As we have seen, the tendency of rejection displayed by the Constitutional Court implies a diminution not only of the level of compliance of courts in Colombia with international human rights obligations, but a clear decrease in the protection of basic rights.

6.1. Control of Conventionality: a Dialogue or a Discussion?

As we have seen, the degree of openness that the State Council has shown towards the law of the Inter-American Human Rights System, contrasts

[78] On the so-called "model of rejection of the rules and standards of international law of human rights", see: Manuel Fernando Quinche Ramírez, *El control de convencionalidad* [The control of Conventionality] (Bogotá: Temis, 2014), 130, and Manuel Fernando Quinche Ramírez, *El precedente judicial y sus reglas* [The judicial precedent and its rules] (Bogotá: Doctrina y Ley, 2014), 101.

significantly with the approach taken by the Constitutional Court, that felt its constitutional competences threatened by the harmonic dialogue between the SC and the IACtHR. This newly created clash of jurisdictions, that will only be solved once the Inter-American Court of Human Rights produces a final decision, adds a chapter in the long and complicated relationship between the different Colombian high courts. However, despite the contradictory positions of these courts towards the role that international human rights law has to play in adjudicating fundamental rights' cases, the fact that the Constitutional Court has stated at all times to be granting the Convention, demonstrates that judicial dialogue, despite many possible diverse outcomes, was the chosen method by both high courts to relate with the decisions of the IACtHR.

The risk of contradictory positions in the administration of justice is outweighed by the potential benefits of the judicial dialogue between courts and the appropriation of the rules of International law by domestic judges. This contributes greatly to the process of internationalization, and enriches the legal scope of human rights with new active actors that are the key for making international human rights law effective. Despite the tension created by these contradictory decisions, at least nominally, the rulings of both the State Council and the Constitutional Court refer to international human rights law and seek to carry out a consistent interpretation of the law, that is respectful and coherent with international human rights treaties ratified by Colombia.

Regarding the right to participate in government protected by article 23 of the Convention, the decisions of the State Council demonstrate the active role that judges have begun to play in the daily life of international law. The precautionary measures of the 13th of May of 2014 – that provisionally suspended the controverted disciplinary sanction for finding it disproportionate – perfectly represent the connection between international courts' decision-making and the relevant role that national high courts have to play in its implementation. This ruling took the first step to make enforceable the precautionary measure ordered by the Inter-American Commission of Human Rights, while at the same time strengthened the rule of international law in Colombia.

Later, the decision of 15th November of 2017 of the State Council would apply to its full extent the control of conventionality doctrine to solve this matter. This decision studied the compatibility of Articles 227 and 278 of the Colombian Constitution – that give the General Prosecutor the competence to remove from the office democratically elected officials – with article 23.2 of the Convention, that establishes that States can regulate political participation and therefore the eventual removal of a democratically elected public servant, only on the basis of incompliance with the prescribed requirements to age, nationality, residence, language, education, civil and mental capacity, or the sentencing of a competent court in the due criminal proceedings.[79]

These State Council's decisions are good examples of the different ways in which domestic judges can relate to international law; the enforceability of International law through domestic judicial scenarios is fundamental for supporting the intrinsic value of the ACHR and the binding nature of International law of Human Rights. These rulings have found a way to conceal the normative priority of the Constitution and the legal value of the international human rights instruments. They do so by appropriating not only the use of the block of constitutionality shaped by the Constitutional Court, but also by exercising the diffuse control of conventionality, ordered by the Inter-American Court of Human Rights. The decisions of the SC are the clear representation of the expansion of the normative tools available to judges in their decisions, and of the growing relevance that the international human rights law has in relation to the domestic realm.

If we take into account that the SC applied the control of conventionality to interpret the functions of the General Prosecutor in the light of the jurisprudence of the Constitutional Court and the jurisprudence of the Inter-American Court of Human Rights, we can conclude that the way in which decision-making is done in the context of the process of internationalization differs greatly from those systems that are strictly State-driven. Moreover, the interpretation made by the State Council in the case of the political rights stipulated in Article

[79] See Decision of November 2017, 1131-2014, (Justice César Palomino Cortéz, State Council of Colombia).

23 granted normative preference to the law of the Inter-American System of Human Rights over domestic legal practices and precedents. By ruling that the law should be interpreted under the scope not only of the Constitution but also of the ACHR[80], the courts that have established and adopted the Control of Conventionality have caused a major shift in Colombia's legal tradition.

It is important to acknowledge the transcendental role that the process of internationalization of the law has in the protection of human rights in Colombia. The International Law of Human Rights has been a key tool for judges to expand constitutionalism and the protection of rights in this country. In this context, the regressions of the Constitutional Court of Colombia, on the matter of the binding power of the decisions of the Inter-American Court of Human Rights, severely harm the efficacy and effectiveness of international human rights law.

VII. CONCLUSION

The jurisprudential evolution of the relationship between Colombian constitutionalism and international human rights law, more specifically with the Inter-American System of Human Rights, stands out for: i) the appropriation of the normative contents of the Convention and the jurisprudence of the Inter-American Court of Human Rights by national high courts; ii) the deference shown to International law by national judiciaries through the use of doctrines such as the block of constitutionality, and the subsequent adoption of the control of conventionality, by Courts like the State Council; and iii) the highly internationalized nature of human rights, that transit freely between international, national and comparative law.

These three features of the relationship between the Colombian legal tradition and international law introduce us to a very different institutional horizon from the one prior to the internationalization process in Europe and America. The increasingly strong dynamic of normative interdependence between distinctive legal orders forces us to rethink judicial adjudication of human rights cases not

[80] *Ibid.*, 38.

only from the perspective of Constitutionalism but also from the perspective of international law.

The concurrent judicial precautionary measure granted almost simultaneously by both the Inter-American Commission of Human Rights and the State Council, in favor of the former mayor of Bogota, shows that national and international courts are coming in closer contact when it comes to the judicial protection of human rights. The common structure and identity of the rights proscribed in the Constitution and the Convention, and the application of international law by domestic judges bring together all the contents of human rights, both national and international, into one single frame of litigation.

Against this background, the block of constitutionality and the control of conventionality provide jurisprudential criteria for the application of international law by the judges of the countries under the jurisdiction of the American Convention, for they have assigned a specific legal status to each component of the Inter-American System. These precedents seem to indicate that national judges are also called to apply international law when it comes to the protection of rights contemplated in international instruments. This reality, is changing the way in which some judiciaries see themselves, for now they can also be identified as actors belonging to the wider scenario of the postnational law[81] and as grantors of the international rule of law; a new cosmopolitan way of decision-making.

The pluralist character of the modern Constitutions and the postnational structure of human rights have created a new normative scenario in which national judges are meant to solve the legal disputes related to human rights from the new argumentative sources of the judicial dialogue. High courts have a great tool in International law for expanding the reach of human rights, in a context where national judicial organs can no longer be acknowledged only as the enforcers of the fundamental rights granted in the Constitution, but

[81] Jürgen Habermas, "La Constelación y el futuro de la democracia" [The postnational constellation and the future of democracy] in *La constelación posnacional* [The postnational constellation] (Barcelona, Paidos, 2000), 95.

also as crucial means for the application, interpretation and enforcement of International law.

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Constitutional Preview and Review of International Treaties: France And Indonesia Compared

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Abstract

The Indonesian Supreme Court and the Indonesian Constitutional Court are experienced in examining international treaties, although the Indonesian constitution and national laws do not stipulate this matter explicitly. The Constitutional Council of France has the authority to examine judicial previews of bills concerning international treaties. Moreover, French judges can examine international treaties. There is also the European Court of Human Rights, which has an important role concerning the control of conventionality. This article aims to promote discussion about the examination of international treaty cases in Indonesia. It begins by considering the international scholarly literature on integrating international treaties and the rank of international treaties in the national legal system. Then, this article discusses the possibility of the Indonesian Constitutional Court to examine judicial preview of international treaty bills and judicial reviews concerning ratified international treaties.

Keywords: Constitutional Court, Constitutional Council, France, Indonesia, International Treaty.

I. INTRODUCTION

In the globalize era, the dynamics of foreign policy are very important when implemented by each country as a subject of international law. Discussion on the subject of foreign policy and international treaties has been very interesting because it reflects not only the legal system and the political dynamics between

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the president, the House of Representatives and the courts, but also the legal culture of a state. An interesting question raised by an Asian student: why does an international treaty have a higher position in France than the national law? At the same time, the highest position an international treaty can achieve in Indonesia is no more than equal to the national law.

Based on the legal culture of France, an international treaty plays a highly valuable role in securing peace between countries, particularly countries in Europe. Following the Second World War, the European Convention on Human Rights was signed in Rome on 4 November 1950, engaging 47 states from Western, Central and Eastern Europe.[1] The idea of the European Convention on Human Rights was inspired directly by the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948. The European Convention on Human Rights is the work of the Council of Europe, whose statutes specifically require any member states to recognise the principle of the rule of law and the principle that any person placed under its jurisdiction must enjoy human rights and fundamental freedoms.

According to the legal culture in Indonesia, the primary position in law is given to the sovereignty of Indonesian people, as stated in the second paragraph of the Constitution preamble: "Indonesia has now reached the moment of rejoicing to guide the Indonesian people safely and soundly to the threshold of the independence of the State of Indonesia, which is independent, united, sovereign, just and prosperous."[2] Indonesia also participated in the world order based on its independence, perpetual peace and social justice, as mentioned in the fourth paragraph of the Constitution's preamble.[3] Furthermore, Indonesia also created the ASEAN Human Rights Declaration, signed on 18 November 2012 and committed to by 10 member states in the Association of Southeast Asian Nations for the purpose of promoting and protecting human rights and fundamental freedoms.[4]

[1] The European Convention on Human Rights has an official name, the "Convention for the Protection of Human Rights and Fundamental Freedoms" and it came into effect on 3 September 1953.
[2] Second paragraph of the Preamble of Indonesian constitution of 1945, dated 18 August 1945.
[3] Fourth paragraph of the Preamble of Indonesian constitution of 1945, dated 18 August 1945.
[4] See point 6 for the general principles of the ASEAN Human Rights Declaration. The 10 countries of ASEAN

Concerning the European Convention on Human Rights, France implemented the control of conventionality *(le contrôle de conventionnalité)* as a control to secure conformity to international conventions with the aim of assuring the superiority of the international convention. On the contrary, Indonesia does not have the legal system of the control of conventionality, although commitments were made to the ASEAN Human Rights Declaration. Nevertheless, the Indonesian public applied cases relating to international treaties to the Supreme Court and the Constitutional Court. However, these two courts consider the legality of international treaties differently.

In this article, the author aims to demonstrate the examination of international treaty cases in France and Indonesia and also how the Indonesian Constitutional Court can examine judicial previews of international treaty bills and judicial reviews concerning ratified international treaties. The author compares the legal system between France and Indonesia because based on the history, Indonesia was colonized by the Netherlands. On the other hand, the Netherlands was conquered by France during Napoleon Bonaparte's imperialism and he appointed his brother, Louis Napoleon, as a King of Netherlands in 1806[5]. After Indonesia's independence on 17th August 1945, Indonesia adopted Netherland's laws based on Article II of the Indonesian Constitution[6]. Therefore, Indonesia assents Code of Napoleon such as Code civil and Code criminal by the concordance principle. However, this article does not compare the international treaty reviewed. by Netherlands because based on Article 120 of the Netherlands Constitution "The constitutionality of Laws of Parliament and treaties shall not be reviewed by the courts"[7]. Moreover, France has experienced in solving international treaties problems in its legal system.

members that signed the ASEAN Human Rights Declaration are Brunei Darussalam, the Kingdom of Cambodia, the Republic of Indonesia, the Lao People's Democratic Republic, Malaysia, the Republic of the Union of Myanmar, the Republic of the Philippines, the Republic of Singapore, the Kingdom of Thailand and the Socialist Republic of Viet Nam.

5 Article 2 of the Treaty of 24 May 1806 between the Republic of Batavia and the French Emperor who established the Royalty of Holland.

6 Article II of the Indonesian Constitution stipulate, "All existing state institutions shall remain functioning to the extent of executing the provisions of the Constitution and no new ones are provided according to this Constitution".

7 The Netherlands Constitution, Art. 120, 2008.

The discussion begins by explaining the integration of international treaties in the national legal system, which consists of theories of monism and dualism, as well as the procedure of ratification approval. Furthermore, the author discusses the rank of international treaties in the national legal system by describing the hierarchy of norms. Finally, the author describes international treaty cases examined by courts in France and Indonesia before trying to resolve the legal problems in examining international treaty cases encountered by the Indonesian Constitutional Court.

II. DISCUSSION

In the separation of powers, the president as the executive branch and the parliament as the legislative branch are the political actors that make laws. As a judicative branch, judges play their role as political actors to the extent that they examine the conformity of laws to the constitution. They also harmonize with political dynamics, including the implementation of international law into the national legal system. In this context, David Sloss and Michael Van Alstine were of the opinion that "domestic courts are created by their home polity, so that the relative influence of law and politics in the work of domestic judicial bodies, therefore, is of intense scholarly interest."[8]

This article uses the method of comparison approach as a function consisting of the discovery of a legal way to solve a legal problem and justify the solution according to a specific context.[9] In the context of the constitutionality of international treaties, France and Indonesia have the president and the parliament to integrate international treaties into the national law, and also the court to examine laws related to international treaties. According to the Venice Commission, "courts are key actors which exercise in a meaningful way the review of the compatibility of domestic legislation with international human rights

[8] David Sloss and Michael Van Alstine, "International Law in Domestic Courts" (Paper at Santa Clara Law Digital Commons, 2015), 2. https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=1891&context=facpubs.

[9] Barrué-Belou, "Méthode et enjeux de la démarche comparative: la question de la comparabilité *[Methodology and challenges of the comparative approach : the question of comparability],"* http://www.droitconstitutionnel.org/congresNancy/comN4/barrueBelouTD4.pdf.

treaties".[10] However, the legal system between these two countries is completely different due to their diverse legal cultures. We can study this comparison in order to complete the national legal system concerning the implementation of international treaties in accordance to the legal culture in Indonesia.

2.1. Integration of International Treaties in the National Legal System

International treaties are legal rules negotiated by several states with the purpose of making a commitment mutually in certain fields such as defence, trade and justice. The integration of international treaties is transformed into domestic law, either through international treaties becoming national law automatically or becoming incorporated into national law.[11]

France and Indonesia have their own procedures in order that international treaties can be implemented in their national legal systems. However, these two countries use different theories in integrating international treaties: namely, the theories of monism and dualism. The Presidents of the Republic in France and Indonesia have an important role as the head of state in integrating international treaties. Moreover, the parliament can intervene in the ratification process of international treaties. Therefore, this part is divided into discussing theories of monism and dualism, as well as the ratification approval in integrating international treaties.

2.1.1. Theory of Monism vs. theory of Dualism

Referring to the report of the Venice Commission on the implementation of international human rights treaties in domestic law and the role of courts,

The distribution of competences between the legislator, the executive and the courts varies greatly depending on the monist or dualist approach of the country concerned, on the internal effect of the specific international legal provision, on the status of international human rights treaties and on the powers of the

[10] Veronika Bilkova. *et. al.*, "Report on the Implementation of International Human Rights Treaties in Domestic Law and the Role of Courts" (Report, Report, European Commission for Democracy through Law (Venice Commission), 2014), 3. https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2014)036-e.

[11] Christine Kaufmann and Johannes Chan, "The relationship between international and national law in China, Hong Kong, and Switzerland" (Paper at Seinar Comparative Constitutional Law, 2008), 8-9. http://www.ivr.uzh.ch/dam/jcr:ffffffff-ec76-c8f9-0000-00004e58ddad/Pleisch_Rafaela.pdf.

courts. The theories of monism and dualism evolved from the end of nineteenth century until the beginning of the twentieth.

Based on the theory of monism, there is a continuity between the international order and the national order, but the postulates are radically different. The subject is necessarily an individual, with the ultimate objective of any rule of law to govern individual behaviour. Whatever the form of monism, the state only serves to designate those who will have to implement international rules.[12] According to Damos Dumali Agusman, the theory of monism places international law and national law both as parts of a unified legal system. The international law applies within the scope of the national without passing through a transformation process.[13] A country which has embraced the monism theory cannot reject international law because international law is a part of the national legal system.[14]

The monism theory is divided in two branches: namely, the monism of the superiority of national law and the monism of the superiority of international law. The monism of the superiority of national law considers that international law derives from the domestic, so that the domestic law is superior to the international, and the international law is only a kind of the public external law of the state.[15] On the other hand, the monism of the international law considers that the domestic derives from the international law, so that the international law is superior to the domestic, which it conditions, and the relations between international and domestic law would be comparable to those existing between the law of member states and national law.[16]

Hans Kelsen developed the monism theory. According to Kelsen, the international legal order not only requires the national legal orders to form

[12] "L'application du droit international dans l'ordre internet [The application of international law in the internal order]," Le cours de droit.net. http://www.cours-de-droit.net/integration-du-droit-international-en-droit-interne-dualisme-monisme-a1216l0042.

[13] Damos Dumali Agusman, "Status Hukum Perjanjian Internasional Dalam Hukum Nasional Republik Indonesia, Tinjauan Dari Perspektif Indonesia [The Legal Status of International Treaties in the National Law of the Republic of Indonesia, A Review of Indonesia's Perspective]," *Indonesia Journal of International Law*, vol. 5 (2008): 489.

[14] Kaufmann and Chan, "The relationship between" 8.

[15] "Les rapports du droit international et du droit interne" *[The reports of the international law and the domestic law]*, http://droit.univ-lille2.fr/fileadmin/user_upload/enseignants/lavenue/DIP/dip_1_5.pdf

[16] *Ibid*.

a necessary complement, but it also determines their sphere of validity in all respects. The national law and international law forms are inseparable.[17] For Kelsen, the supremacy of international law is one possible option for constructing the hierarchical monistic legal universe to explain how international law could be used to implement policy projects by new institutions and laws related to national and international levels, for example, by directly authorising and holding to account private actors of international law in the monism legal system.[18]

A student of Hans Kelsen, Alfred Verdross (1890 - 1980), stated that monism theory establishes the primacy international law in the hierarchy of legal orders where universalism is applied to positive law.[19] Moreover, Verdross express his opinion that the universalist concept is rooted in the Stoic-Christian view that, on the whole, humanity forms a moral-legal unity rooted in natural law.[20] Natural law retains its relevance in international legal theory in order to understand the changing norms fora political organisation in a global community.[21]

France embraces the monism theory. Based on paragraph 14 of the Preamble of the French Constitution, "The French Republic shall respect the values of Public International Law".[22] Furthermore, paragraph 15 of the Preamble of the French Constitution stipulates, "France shall consent to the limitations upon its sovereignty necessary for the organization and preservation of peace".[23] Since the constitutional accession of France to monism in 1946, international treaties have been ratified and published in order to be integrated into the internal legal order and have direct effects on national law.[24] In this regard, monism theory

[17] Hans Kelsen, *General Theory of Law and State* (New Brunswick: Transaction Publishers, 2006): 351. Hans Kelsen says that a state is an international body acting as a person. Therefore, the creation and the execution of an order is a function of its organ and the international legal order is created and executed by the state. Nevertheless, the norm of international law is incomplete and it needs legalisation of the norm of national law.

[18] Jochen Von Bernstorff, "Hans Kelsen and the Return of Universalism," in *The Oxford Handbook of the Theory of International* Law, ed. Anne Orford, Florian Hoffman and Martin Clark (United Kingdom: Oxford University Press, 2016), 210.

[19] Bruno Simma, "The Contribution of Alfred Verdross to the Theory of International Law," *Eur. J. International* 6, L.33 (1995): 37.

[20] *Ibid*.: 38

[21] Geoff Gordon, "Natural Law in International Legal Theory, Linear and Dialectical Presentations,", in *The Oxford Handbook of the Theory of International Law*, ed. Anne Orford, Florian Hoffman and Martin Clark, 305. United Kingdom: Oxford University Press, 2016.

[22] The Preamble of the French Constitution, par. 14, 27 October 1946.

[23] *Ibid*., par. 15.

[24] Roger Errera, "L'application de la Convention internationale relative aux droits de l'enfant et l'incidence de

assumes that there is no distinction between the national legal order and the international legal order since ratification laws are still needed to transform and create the international legal order alongside and within the national legal order.[25]

Concerning the dualism theory, national law and international law are hermetically separated with no relationship between the two and each law evolves in its own sphere so that the international law cannot be applied to the national for two reasons. The first reason is that the objects and the subjects of the national and international laws are completely different. The subjects of the international law are the states and the relationships are horizontal, whereas in national law the subjects are the private persons and the relationships are vertical. The second reason that the sources are different is that the rules in national law come from the individual and the highest volition comes from the state. On the other hand, in international law there is a common willingness to create legislation.[26]

Christine Kaufmann and Johannes Chan express that dualistic countries need to incorporate international treaties into their national legal systems and each country decides where to place an international treaty in its national hierarchy of norms.[27] According to Hans Kelsen, dualism is the theory that international law and state law do not constitute a unified system of law but exist instead independently of one another.[28] As Kelsen puts it, dualism sees "international law and state law as two different systems of norms, independent of each other and reciprocally isolated because of resting on two different basic norms".[29]

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la Convention Européenne des droits de l'homme sur les droits de l'enfant, Comité franco – britannique de coopération judiciaire [The application of the international Convention of the Rights of the Child and the impact of the European Convention on Human Rights to the Child, Franco-British Committee on Judicial Cooperation]" (Paper at the Rennes Symposium, 19 – 21 May 2005. https://www.courdecassation.fr/IMG/File/errera_fr.pdf.

25 David Capitant and Karl-Peter Sommermann, "Actualité du Droit Public Comparé en France et en Allemagne: Actes des Séminaires Franco-Allemandes de Droit Public Comparé 2006-2007 *[Actuality of the Public Law compared in France and Germany: Acts of the Seminars French-Germany of Comparative Public Law 2006-2007]*", *Société de legislations compare [Comparative Legislation Society]* (2009): 28.

26 "L'application du droit international."

27 Kaufmann and Chan, "The relationship between" 10.

28 Hans Kelsen, *Introduction to the Problems of Legal Theory* (Oxford: Oxford University Press, 1992). Cited in Torben Spaak, "Kelsen on Monism and Dualism" in *Basic Concepts of Public International Law: Monism & Dualism*, ed. Marko Novakovic, 322-343 (Belgrade: Alter DOO and Faculty of Law, University of Belgrade, Institute of Comparative Law), 2016.

29 *Ibid.*

Protocol Number 13 Year 2002 of the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all circumstances[30] is a good example that describes the theories of monism and dualism regarding the signature and ratification of international treaties. In this context, Article 6 stipulates,

This protocol shall be open for signature by member States of the Council of Europe which have signed the Convention. It is subject to ratification, acceptance or approval. A member state of the Council of Europe may not ratify, accept or approve this Protocol without previously or simultaneously ratifying the Convention. Instrument of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.[31]

In this regard, we can see that a state who embraces monism theory accepts and directly applies an international treaty. On the other hand, a state that embraces dualism theory does not apply an international treaty directly because it binds a state at the international level and cannot be applied directly by national justices[32]. Therefore, ratification by transforming the international treaty must be discussed in parliament in order that an international treaty can be implemented into the national legal system.

From my point of view, the Indonesian constitution does not clearly stipulate the correlation between international and national law. It is very different in France where the correlation between these two laws are stipulated firmly in Article 55 of the French constitution: "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party."[33]

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[30] This protocol was signed by France on 3 May 2002. France ratified the Protocol Number 13 Year 2002 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all circumstances on 10 October 2007 and it came into force on 1 February 2008.

[31] The Protocol Number 13 Year 2002 to the Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty in all circumstances, Art. 6, 3 May 2002.

[32] Franck Moderne, *La Convention Européenne des Droits de l'Homme: texte integral de la Convention de sauvegarde des droits de l'homme [The European Convention on Human Rights: full text of the Convention for the protection of human rights]*,Edition Dalloz (2012): 10.

[33] The French Constitution, Art. 55, 4 October 1958.

Furthermore, based on the Indonesian national law, particularly Law Number 24 Year 2000 regarding the International Treaties and Law Number 12 Year 2011 regarding the Formation of the Establishment of Regulation of Law, these two laws guarantee the ratification of international treaties becoming integral parts of national law. Article 10 of Law Number 24 Year 2000 regarding International Treaties and Article 10 paragraph (1) of Law Number 12 Year 2011 regarding the Formation of the Establishment of Regulation of Law stipulate that the legalisation of international treaties is performed by law. However, it does not mean that the Indonesian legal system does not have any problems concerning international treaties.

The explication of Law Number 24 Year 2000 declares,

> As the most important part of the process of making the treaty, the ratification of the treaty needs to be deeply concerned considering at that stage a state is officially committed to the treaty. In practice, the form of legalization is divided into four categories, namely (a). ratification if a country which will ratify a treaty agrees to sign the treaty; (b). accession if the country which will validate an international agreement does not sign the agreement; (c). acceptance and approval are a statement of acceptance or approval of a State party in an international agreement to amend the treaty. In addition, there are also international agreements that do not require validation and they can be applied directly after signing.[34]

Noticing the explanation above, we can recognise a legal problem in that Indonesia imposes international treaties differently into national law. Moreover, Law Number 24 Year 2000 regarding International Treaties and Law Number 12 Year 2011 regarding the Formation of the Establishment of Regulation of Law do not explain clearly the reasons and criteria that international treaties require a legalisation process, but on the other hand, there are international treaties that may be applied directly after signing. As a result, there is no clarity concerning the position of international treaties in the national law of Indonesia.

It is possible to develop the theory of dualism by assigning superiority to international law. In this regard, the author suggests that Indonesia should

[34] The explication of Law Number 24 Year 2000 regarding International Treaties, dated 23 October 2000, additional of Official Gazette number 4012.

embrace the dualism theory of the superiority of international law for two reasons. The first reason the character of the Indonesian constitution is dualists that it does not explain the position of international treaties in its legal system. Moreover, the character of the Indonesian constitution is to protect the state's sovereignty and *adat* law societies/customary law along with their traditional rights as mentioned in Article 18B paragraph (2) of the Indonesian Constitution. A French jurist, Adéhar Esmein, suggests the sovereignty doctrine that

> public power and government exist only in the interest of all the members who compose the nation. From which one may readily conclude that what is established in the interest of all ought to be ruled by those interested, by the general will, by all the citizens participating in its establishment, subject only to the rule of the majority.[35]

Thus, the international cooperation between countries and/or international organisations must prioritise the interest of people national necessities. The second reason is that national law cannot be used to justify an infringement of international law, so that every country is bound to perform the international law in good faith as mentioned in Articles 26 and 27 of the Vienna Convention on the Law of Treaties 1969. In other words, Indonesia should prioritize the international law after its ratification into the national legal system.

2.1.2. The Ratification Approval of the Integration of International Treaties into the National Legal System

France and Indonesia regulate the ratification of international treaties in their constitutions and laws. The presidents of these two countries have a very important role in conducting foreign policies. In this context, Article 52 of the French constitution stipulates, "The President of the Republic shall negotiate and ratify treaties. He shall be informed of any negotiations for the conclusion of an international agreement not subject to ratification".[36] On the other hand, Article 11 paragraph (2) of the Indonesian constitution stipulates, "The President when concluding other international treaties that give rise to extensive and

[35] Adéhar Esmein, *Eléments de droit constitutionnel* [Elements of Constitutional Law], 6th edition (Paris: Recueil Sirey, 1914): 280.

[36] Article 52 of the France Constitution, Official Journal of the Republic of France number 9151, dated 5 October1958.

fundamental consequences to the life of the people related to the financial burden of the state, and/or compelling amendment or enactment of laws shall be with the approval of the People's Representative Council."[37] However, Article 11 of the Indonesian constitution has not stipulated the mechanism of making international treaties and the position of international treaties in the Indonesian national legal system.[38]

As the executive branch of power, the government is also responsible for diplomatic questions because matters of foreign affairs are under its authority, in particular the Ministries of Foreign Affairs in both France and Indonesia. However, the Presidents of the Republic in both countries have a real superiority, especially when customarily imposed as the head of state.

In ratifying international treaties, the French parliament[39] also makes an intervention as stated in Article 53 of the French Constitution:

> Peace treaties, commercial treaties, treaties or agreements concerning international organization, those who modify provisions of legislative nature, those who are relative to the state of the people, those who contain exchange or addition of territory, cannot be ratified or approve that by virtue of law. They come into effect only having been ratified or approved. No disposal, no exchange, no addition of territory is valid without the consent of the interested populations.[40]

In other words, this article means that international treaties require legislative authorisation. If the parliament refuses the authorisation, the president cannot ratify international treaties. The Committee on Foreign Affairs plays an important role in this procedure. It is, in particular, responsible for the examination of all agreements submitted to Parliament. However, parliamentary assemblies cannot

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[37] Article 11 paragraph (2) of the Third Amendment of the Indonesian Constitution, dated 1-9 November 2001. Moreover, Article 11 paragraph (3) of the Indonesian constitution stipulates that further provisions regarding international treaties shall be regulated by laws. The law is needed because the Indonesian Constitution only regulates basic norms of international treaties.

[38] Dhiana Puspitawati and Adi Kusumaningrum, "Reposisi Politik Hukum Perjanjian Internasional Dalam Rangka Mewujudkan Tertib Hukum di Indonesia [Law Political Reposition of International Treaty in order to implement legal order in Indonesia]," *Jurnal Media Hukum* 22, no. 22 (2015): 270.

[39] Based on Article 24 of the French constitution, the French parliament is the bicameral legislature of the Republic of France which consists of the National Assembly and the Senate. The National Assembly consists of 577 directly elected members, and the Senate consists of 348 indirectly elected members who represent the territorial collectivities.

[40] Article 53 of the French Constitution, Official Journal of the Republic of France number 9151, dated 5 October1958

amend the text of international conventions.[41]After Parliament has authorised or approved the ratification of international treaties, it does not necessarily intervene immediately when all states of the European Union decide to ratify an agreement on the same day.[42] The French constitution also stipulates in Article 55, "Treaties or agreements duly ratified or approved shall, upon publication, prevail over Acts of Parliament, subject, with respect to each agreement or treaty, to its application by the other party."[43] In Indonesia, the parliament also intervenes in the ratification of international treaties. It is determined in Article 11 of paragraph (1) of the Indonesian constitution that "The President with the approval of the People's Representative Council declares war, makes peace and concludes treaties with other countries".[44]

The national law can ratify an international treaty that a state has approved in the manner of commitment to international treaties. It is the same manner as stipulated in Article 3 of Law Number 24 Year 2000 regarding International Treaties that the Indonesian government binds itself to international treaties through signing, ratification, the exchange of treaty documents/diplomatic notes and other ways as agreed by the parties concerned.[45] However, there are differences between a signature and ratification regarding international treaties. A signature does not legally bind the signatories of international treaties because it only shows their willingness to complete the negotiation process to the end.[46] If there is a commitment, it is only a moral willingness. In order that international treaties have legally binding power and come into force, they must be ratified by the competent authority, namely the President and the House of Representatives. After the process of ratification is completed, international treaties are published in the official journal or official gazette in order to bind citizens nationally.

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41 Assemblée Nationale *[National Assembly]*, "Fiche de synthèse n° 42 : La ratification des traités [Summary sheet number 42: Ratification of Treaties]."

42 *Ibid*.

43 The French constitution, Art. 55, Official Journal of the Republic of France,number 9151, 4 October 1958.

44 The Indonesian Constitution, Art. 11, par. 1, amend. 4, 1-11 Augusts 2002.

45 International Treaties, Art. 3, Law Number 24, 2000.

46 It is in line with the explanation of Article 6 paragraph (2) of Law Number 24 Year 2000 regarding International Treaties, which stipulated that the signing of an international treaty cannot be interpreted as a commitment to the agreement. The signing of an international treaty that requires ratification does not bind the parties before the treaty is ratified.

There is an interesting question: why is the signature itself not legally binding to a country? The answer is when a state signs international treaty, it is only the executive who signs. It does not reflect the will of the whole country. Therefore, the opinion of the House of Representative is needed to consider whether a state needs to ratify international treaties for the national purpose. However, the constitutional law in France does not recognise "acceptance" but only "approval"; the executive will adopt a national measure of approval and will announce it as being worth "acceptance" in the meaning of treaty.[47]

The influence of international treaties can also be indirect or diffuse. It means that international treaties are signed, but perhaps they are not ratified by a state and they have not come into effect nationally; however, occasionally it is admitted that the text of international treaties can be applied immediately, although it is not an obligation.[48]

2.2. The Rank of International Treaties in the National Legal System

It is important to discuss the rank of international treaties in the national legal system. The author refers to the Venice Commission's report on the implementation of international human rights treaties in domestic law and the role of courts, which expresses that the status of treaties in the domestic legal order and their place in the hierarchy of norms has an impact on the implementation of human rights treaties.[49]

2.2.1. The Superiority of International Treaties over the National Laws in France

The principle of superiority means that international law (i.e. all positive international law and not only treaties) prevails over the whole body of domestic law, constitutional norms, legislative, regulatory, judicial decisions and international judges.[50] France has stated this in its constitution, with international recognition as

[47] Raphaële Rivier, *Droit international public* [*Public International Law*], Presses Universitaires de France/Humensis (2017): 60.

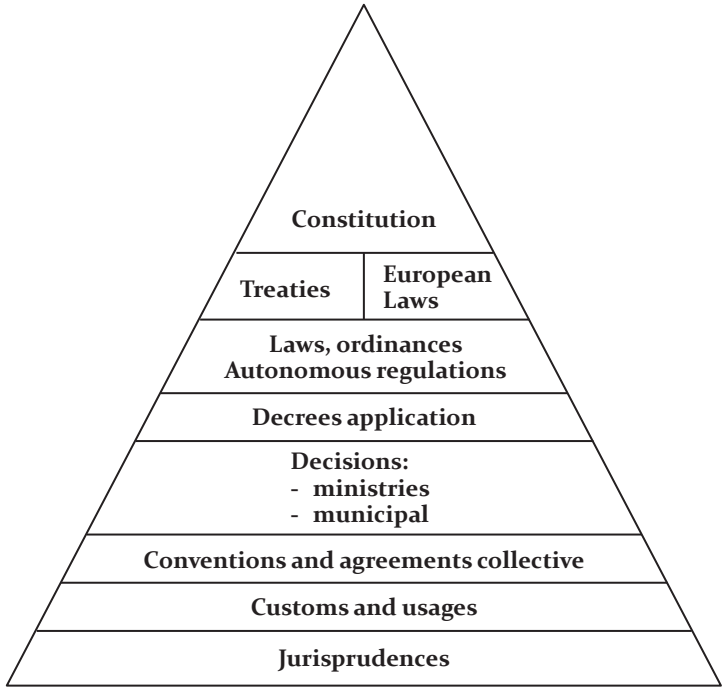
[48] Michel Prieur, "L'influence des conventions internationales sur le droit interne de l'environnement" *[The influence of international convention on the environment of internal law]*, Acts of the essential meeting of the committee on the environment of the AHJUCAF (June 2008): 294.

[49] Bilkova, "Report on the," 6.

[50] Dominique Carreau and Fabrizio Marrella, *Droit International [International Law]* (Paris : Pedone, 2012): 80.

part of their internal system. In this regard, ratified international treaties are the source of international law. Once international treaties are ratified by Parliament, international treaties have a binding legal force superior to the national law.[51]

Noticing the norms pyramid below, we can see the position of international treaties in the French legal system:[52]



Based on the hierarchy of norms above, we notice that the Constitution is the fundamental norm of the French legal system. Moreover, we see that international treaties are below the Constitution, but above national laws. However, the French constitution does not mention this hierarchy of norms and Article 55 of the French constitution only indicates that international treaties have a value superior to national laws.

[51] Université Paris 1 Panthéon Sorbonne, "Introduction Générale au système juridique français et à la méthodologie [General Introduction to the French Legal System and Methodology]" (2016), 3.

[52] *Ibid*., 9.

In the context of the control of conventionality, the European Convention on Human Rights is considered as a standard international humanitarian treaty.[53] In this regard, the judges' role is at the international level exclusively. They will not interpret the contested national legal rulings in matters of international law norms. If they find a contradiction between a national legal ruling and the international legal ruling, they will declare that the national legal rule is "ineffective", or quite simply "not applicable", at the international level.[54]

Under Article 46 of the European Convention on Human Rights, a state is bound to abide by a judgment to which it is a party and so their supreme and constitutional courts are bound by the Court's interpretation of the Convention and findings as to a violation of the Convention. If the court or the supreme or the constitutional courts of a state are of the opinion that the origin of a violation is a result of the state's constitution, the national courts should first seek to interpret the national constitution in accordance with the Convention. If this is not possible, the state should amend its constitution to bring it in line with the Convention (as interpreted by the Court). This is the case even where a state's national constitution has a higher rank in the state's hierarchy of laws than the Convention.[55]

2.2.2. The Equal Position and the Inferiority of International Treaties to National Laws in Indonesia

In Indonesia, the ratification of certain international treaties must be regulated by national laws.[56] Therefore, certain international treaties have the same position as national laws. The definition of certain international treaties is mentioned in the explication of Article 10 paragraph (1) letter c:

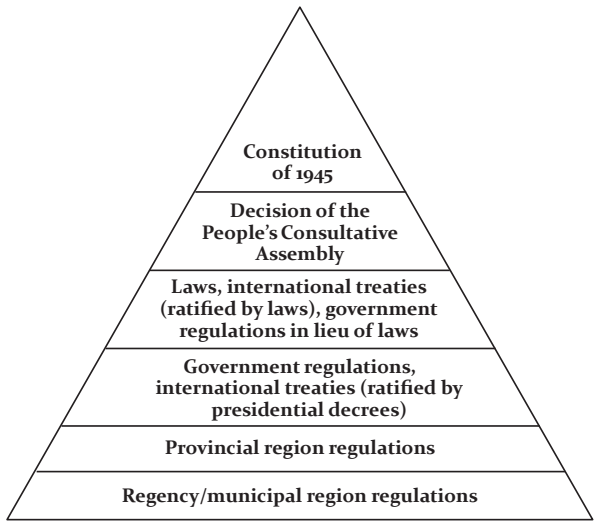
> Certain international treaties are international treaties which cause widespread and fundamental consequences for the lives of people related to the state's financial burden and/or those treaties require changes or the establishment of law with the approval of the House of Representatives.[57]

[53] France ratified the European Convention on Human Rights on 3 May 1974.
[54] Carreau and Marrella, *Droit International [International Law],* 85.
[55] Council of Bars and Law Societies of Europe, "The European Court of Human Rights, Questions and Answers, Brussels (2016)" 21.
[56] Law Number 12 Year 2011 regarding the Establishment of the Laws and Regulation, Art. 10, par. 1, letter c.
[57] The explication of Law Number 12 Year 2011 regarding the Establishment of the Laws and Regulation.

Article 10 of Law Number 24 Year 2000 regarding International Treaties stipulates,

> The ratification of international treaties is made by the national law for the following matters: a. issues of national politics, peace, defense and national security; b. the change of territory or the determination of the Indonesian territory; c. sovereignty or sovereign rights of the state; d. human rights and environment; e. the establishment of new legal rules; f. foreign loans and/or grants.

On the other hand, Article 11 paragraph (1) of Law Number 24 Year 2000 regarding International Treaties stipulates, "The ratification of an international treaty whose matter is not included in Article 10 is made by a presidential decree". Based on these two articles, the rank of international treaties is the same as national laws and also below national laws. Therefore, international treaties occupy two positions in the national legal system in Indonesia depending on their content. We can see the rank of international treaties in the norms pyramid below:[58]



Concerning the hierarchy of norms, in Decision number 13/PUU-XVI/2018, the Indonesian Constitutional Court was of the opinion that the Indonesian constitution does not require certain legal forms to express the approval of the

[58] Law Number 12 Year 2011 regarding the Establishment of the Laws and Regulation, Art. 7, par. 1.

House of Representatives for international agreements ratified by a Presidential Decree. It gives freedom to the President to implement government functions, particularly in relation to international relations, and the President considers both Indonesia's national interests and the norms accepted universally by the international community.[59]

2.3. The Practices in Examining Cases of International Treaties in France and Indonesia

Before discussing international treaty cases in France, the author discusses the similarity and the difference of constitutional case examinations in France and Indonesia.

France and Indonesia share similarities in the context of reviewing the conformity of law with their constitutions after promulgation. In Indonesia, the Constitutional Court review laws against the Constitution.[60] In France, the Constitutional Council controls the conformity of law with the Constitution after the promulgation of law.[61] It is called *contrôle concret* (concrete control) in French. Officially, this control is called "QPC" *(question prioritaire de constitutionnalité*/ Priority Question of Constitutionality) and came into effect on 1 March 2010.[62]

France and Indonesia have three differences in examining constitutional cases. The first difference is access to the Court. The Indonesian Constitutional Court implements direct access to the Court.[63] However, the Constitutional Council *(le Conseil Constitutionnel)* of France implement indirect access to the Court because the Cassation Court *(la Cour de Casssation)* and the State Council *(le Conseil d'Etat)* filter the case before the Constitutional Council examine it.[64] The second difference is judicial preview of law. In France, judicial preview of law is called *contrôle a priori* or *contrôle abstrait,* which means reviewing the

[59] The Decision of the Constitutional Court of Indonesia Number 13/PUU-XVI/2018, dated 19 November 2018: 261.
[60] The Indonesia Constitution 1945, Art. 24C and Law Number 24 Year 2003 regarding the Constitutional Court Art. 10, par. 1 letter a.
[61] The French Constitution Art. 61-1 and Law Number 2008-724 on 23 July 2008 regarding the modernisation of the institutions of the Fifth Republic of France, Art. 29.
[62] https://www.conseil-constitutionnel.fr/nouveaux-cahiers-du-conseil-constitutionnel/entree-en-vigueur-de-l-article-61-1-de-la-constitution-discours-de-jean-louis-debre.
[63] It is in line with Article 29 of Law Number 24 Year 2003 on the Constitutional Court, which stated, *"A petition shall be filed in writing in Indonesian by the petitioner or his/her proxy to the Constitutional Court".*
[64] The French Constitution, Art. 61-1 and Law Number 2008-724 on 23 July 2008, Art. 29.

conformity of law with the constitution before its promulgation.[65] In contrast, Indonesia does not have a system of judicial preview of law. *Contrôle abstrait* and *contrôle concret* are controls of norms with an aim to control the conformity of norms applied to the constitution and the fundamental rights.[66] The third difference is the control of conventionality. In this regard, France implements *le contrôle de conventionnalité* (control of conventionality) conducted by European Court of Human Rights. On the other hand, Indonesia does not implement any control of conventionality.

The European Court of Human Rights has the authority to control the human rights conventions not only in France but also 47 states around Europe. To submit an application to the European Court of Human Rights, an applicant must exhausted all the remedies in the state concerned that could provide redress for their situation (usually, this will mean an application to the appropriate court, followed by an appeal, where applicable, and even a further appeal to a higher court such as a supreme court or constitutional court, if there is one).[67]

In reaching its decision, the European Court of Human Rights considers if there is an infringement of the European Convention on Human Rights. Three cases (Mugenzi v. France[68], Tanda-Muzinga v. France[69] and Senigo Longue and Others v. France[70]) concerned the difficulties in obtaining visas for the applicants' children. The applicants alleged that the refusal by the consular authorities to issue visas to their children for the purpose of family reunification had infringed their right to respect for their family life. The European Court of Human Rights observed in particular that the procedure for examining applications for family reunification had to contain a number of elements, having regard to the

[65] Articles 54 and 61 of the French constitution; Articles 17 and 18 of the Ordonnance Number 58-1067.

[66] David Capitant, Les Effets Juridiques des Droits Fondamentaux en Allemagne [Legal Effects of Fundamental Rights in Germany], Libraire Générale de Droit et de Jurisprudence [General Library of Law and Jurisprudence, E.J.A and David Capitant], E.J.A et David Capitant (2001), 98.

[67] European Court of Human Rights, "Questions and Answers", Council of Europe, Strasbourg: 6. Article 35 paragraph (1) of the European Convention on Human Rights stipulates,"The European Court of Human Rights may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized rules of international law, and within a period of a six months from the date on which the final decision was taken. After that period, the application cannot be accepted by the Court".

[68] The Decision of European Court of Human Rights No. 52701/09.

[69] The Decision of European Court of Human Rights No. 2260/10.

[70] The Decision of European Court of Human Rights No. 19113/09.

applicants' refugee status on the one hand and the best interests of the children on the other, so that their interests as guaranteed by Article 8 (right to respect for private and family life) of the European Convention on Human Rights from the point of view of procedural requirements were safeguarded. In all three cases, the Court held that there had been a violation of Article 8 of the Convention. Since the national authorities had not given due consideration to the applicants' specific circumstances, it concluded that the family reunification procedure had not offered the requisite guarantees of flexibility, promptness and effectiveness to ensure compliance with their right to respect for their family life. For that reason, the French state had not struck a fair balance between the applicants' interests on the one hand, and its own interest in controlling immigration on the other.[71]

The implementation of international treaties in domestic law is often achieved by an interpretation of domestic courts in their decisions. The confrontation between national and international law can be avoided by harmonising the domestic courts' decisions as we can see in the decisions below.

In France, a preliminary review of the compatibility of international treaties is required to examine whether international treaties can be ratified and their norms are not contradictory to the Constitution. According to the Venice Commission, courts are needed to resolve the conflict between international treaties and national law. The Venice Commission explains, "two main options are available: the first one consists in the harmonisation of the conflicting provisions through interpretation; the second one is based on the hierarchy of norms, which implies either the disapplication of domestic law or ignoring the international human rights treaty".[72]

The Constitutional Council of France uses the European Convention on Human Rights in a judicial review procedure of non-ratified treaties.[73] Based

[71] "The Children's Right," The European Courts of Human Rights, https://www.echr.coe.int/Documents/FS_Childrens_ENG.pdf.

[72] Bilkova, "Report on the...," 35.

[73] Faculté de Droit est Sciences sociales Université de Poitiers [Faculty of Law and Social Science of Poitiers University], *Les Normes de Référence du Contrôle de Constitutionnalité* [Reference Norms of Judicial Review] (LGDJ, 2017), 40.

on Article 54 of the French constitution,[74] the Constitutional Council made a reference to the European Convention of Human Rights and the judgement of the European Court of Human Rights in Decision Number 2004-505, dated 19 November 2004. It is a decision concerning the compatibility of the European and French constitutions. In Point 13 of its decision, the Constitutional Council of France concluded that, based on the primacy principle of the European Union, there would be no need to amend the French constitution.[75] Moreover, in Point 17 of its decision, the Constitutional Council mentioned that the explanations drawn up as a way of providing guidance for the interpretation of the Charter of Fundamental Rights shall be given due regard by courts of the Union and of member states.[76] Then, it was noted that Article 9 of the European Convention on Human Rights guarantees the protection of the rights and freedoms of others.[77]

Another important case examined by the Constitutional Council of France is Decision Number 74-54 DC of15 January 1975. In its decision, the Constitutional Council of France decided, pursuant to Article 61 of the French Constitution,[78] it did not have any authority to examine the conformity of law to international treaties because its authority was in examining the conformity of law to the constitution. Furthermore, the Constitutional Council of France decided that the control of international treaty superiority (the control of conventionality) should be done by the ordinary courts under the supervision of the Cassation Court and the State Council.[79]

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[74] Article 54 of the French Constitution stipulates, "*If the Constitutional Council, on a referral from the President of the Republic, from the Prime Minister, from the President of one or the other Houses, or from sixty Members of the National Assembly or sixty Senators, has held that an international undertaking contains a clause contrary to the Constitution, authorization to ratify or approve the international undertaking involved may be given only after amending the Constitution.*"

[75] The Decision of the Constitutional Council of France number 2004-505 DC, point 13: 4, dated 19 November 2004.

[76] *Ibid*., point 17: 5.

[77] *Ibid*., point 18: 5.

[78] Article 61 of the French Constitution stipulates, "Institutional Acts, before their promulgation, Private Members' Bills mentioned in article 11 before they are submitted to referendum, and the rules of procedure of the House***s*** of Parliament shall, before coming into force, be referred to the Constitutional Council, which shall rule on their conformity with the Constitution. To the same end, Acts of Parliament may be referred to the Constitutional Council, before their promulgation, by the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, sixty Members of the National Assembly or sixty Senators. In the cases provided for in the two foregoing paragraphs, the Constitutional Council must deliver its ruling within one month. However, at the request of the Government, in cases of urgency, this period shall be reduced to eight days. In these same cases, referral to the Constitutional Council shall suspend the time allotted for promulgation.*"

[79] The Decision of the Constitutional Council of France number 74-54 DC on 15 January 1975.

The Cassation Court of France responded to the decision of the Constitutional Council on 24 May 1975 in the case of Société des Cafés Jacques Vabre (Jacques Vabre Coffee Company) while the State Council of France took longer to respond to the decision of the Constitutional Council on 20 October 1989 in the case of Nicolo.[80] The legal consideration of French judges to exclude the application of law contrary to international treaties is the same as the legal arguments of Chief Justice Marshall in the case of Marbury v. Madison in 1803 in the Supreme Court of the United States of America.[81]

In Indonesia, the Supreme Court and the Constitutional Court are experienced in examining cases regarding international treaties. In the judgement of the Supreme Court Number 2944K/PDT/1983 on the case of PT Nizwar vs Navigation Maritime Bulgare, the Supreme Court did not accept the application of PT. Nizwar because the applicant did not apply the minutes of cassation which contains the legal reasons as stipulated in Article 115 paragraph (1) of Law regarding the Indonesian Supreme Court. Moreover, the Supreme Court was of the opinion that the decision of the foreign court and the decision of a foreign arbitration judge cannot be implemented in Indonesia unless there is an agreement between the Republic of Indonesia and a foreign country to implement the decision of the foreign court/the decision of the arbitration judge. The Supreme Court was also of the opinion that Presidential Decree Number 34 of 1981, dated 15 August 1981, regarding the Ratification of the Convention of the Recognition and Enforcement of Foreign Arbitral Awards must be regulated further as to whether the execution request of a judge's arbitration decision can be submitted directly to the District Court or the request for execution is applied to the Supreme Court in order to consider whether the judge's arbitration decision does not contain matters which are contradictory to the law in Indonesia.[82]

In 2011, the Indonesian Constitutional Court examined a judicial review case concerning the Ratification of the Charter of the Association of Southeast Asian Nations. In the decision number 33/PUU-IX/2011, the Constitutional Court

[80] Olivier Dutheillet de Lamothe, "Contrôle de conventionnalité et contrôle de conventionnalité en France [The Control of Conventionality and the Judicial Review in France]."

[81] *Ibid.*

[82] The Decision of the Supreme Court of Indonesia Number 2944K/PDT/1983, dated 29 November 1984.

referred to Article 2 paragraph (1) letter b of the Vienna Convention of the Law of Treaties which stipulates, *"ratification", "acceptance", "approval"* and *"accession"* mean in each case the international act so named whereby a state establishes on the international plane its consent to be bound by a treaty.[83]

In 2018, the Indonesian Constitutional Court examined a judicial review of Law Number 24 Year 2000 regarding the International Treaty. In this case with the decision number 13/PUU-XVI/2018, the Constitutional Court also referred to the Vienna Convention as follows:

> Whereas in the field of international law, regulations regarding international agreements between countries apply the provisions stipulated in the Vienna Convention 1969 concerning the Law of International Treaties, it is emphasized in Article 1 of the Vienna Convention 1969, which stated, "The present Convention applies to treaties between States." In addition, based on Article 2 paragraph (1), the Vienna Convention 1969 also does not apply to unwritten international agreements between countries. Whereas international treaties between countries and international organizations or among international organizations are stipulated in the Vienna Convention 1986 (Vienna Convention on the Law of Treating Between and International Organizations). It is affirmed in Article 1 of the Vienna Convention 1986 which states, "The present Convention applies to: (a) treaties between one or more States and one international organization, and (b) treaties between international organizations." Article 3 of the Vienna Convention 1986, states that this Convention does not apply: (i) to international agreements in which one or more countries, one or more international organizations and one or more subjects of international law other than the state or international organization are parties; (ii) to international agreements where one or more international organizations and one or more subjects of international law other than the state or international organization are parties; (iii) towards international agreements that are in an unwritten form between one or more countries and between one or more international organizations, or between international organizations. Thus, the Vienna Convention 1969 and the Vienna Convention 1986 acknowledged implicitly the existence of an unwritten international agreement between countries and international organizations. However, it is beyond the scope of the regulation of the two conventions. In other words, implicitly, the regulation of international agreements in an unwritten form is ceded to practice that applies outside the provisions of the two conventions mentioned."[84]

[83] The Decision of the Constitutional Court of Indonesia Number 33/PUU-IX/2011, dated 26 February 2013: 195.
[84] The Decision of the Constitutional Court of Indonesia Number 13/PUU-XVI/2018, dated 19 November 2018: 252-253.

> The intention of the House of Representative's approval in Article 11 paragraph (1) and paragraph (2) of the Constitution 1945 is an international treaty whose process of formation is through 3 stages. In this regard, the Court affirms that according to the Vienna Convention 1969, statements to be bound in an international treaty can be made through signature, exchange of instruments constituting a treaty, acceptance, approval, accession or statement of participation, or any other means if so agreed. It is also affirmed in Article 6 paragraph (2) of Law 24 Year 2000, in conjunction with Article 15 paragraph (1). Article 6 paragraph (2) of Law 24 Year 2000 states, "The signing of an international treaty is an agreement on the text of the international agreement that has been resulted and/or is a statement to bind itself definitively in accordance with the parties' agreement".[85]

Noting the decisions of the Indonesian Supreme Court and the Indonesian Constitutional Court above, we can see the ambivalence of international treaties implementation by Indonesian courts. In this regard, the Supreme Court refused the implementation of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, although this convention had been ratified by Presidential Decree Number 34 of 1981 on 5 August 1981. On the other hand, the Constitutional Court referred to the Vienna Convention of the Law of Treaties although Indonesia did not ratify this treaty. The constitutional justices used the Vienna Convention of the Law of Treaties to strengthen their legal opinion in the decision and they decided based on their beliefs, independently.

The interesting question is how to resolve the problem of international treaty implementation in Indonesia. In the opinion of the author, national law cannot obstruct the implementation of international law. Therefore, we should clarify the relationship between international and national law. The author has suggested this in order that Indonesia might embrace the dualism theory of the superiority of international law.

In the context of judicial power, we cannot impede a court from examining an international treaty. Therefore, we should create a legal invention in order that a court can examine an international treaty. In his article, Noor Sidharta was of the opinion that, "the Indonesian Constitutional Court can do judicial preview of the ratification of international treaties by adding the rights of the Constitutional

[85] The Decision of the Constitutional Court of Indonesia Number 13/PUU-XVI/2018, dated 19 November 2018: 258.

Court into the Constitution of 1945 and through the state of administration, namely at the request of the People's Representatives Council".[86] The author would like to complete his opinion that judicial preview by the Constitutional Court can be applied by the President of the Republic of Indonesia, the President of the House of Representatives or at least one tenth of the members of the House of Representatives. It means that the minority of members of the House of Representatives can apply for judicial preview the Constitutional Court.

The question is why a case of judicial preview should be applied by one tenth of the members of the House of Representatives. Compared to France, an international agreement can be applied to the Constitutional Council before its ratification by the President of the Republic, by the Prime Minister, by the President of one or the other Houses, or either by 60 (sixty) members of the National Assembly or 60 (sixty) senators.[87] The National Assembly consists of 577 members and the Senate consists of 348.If we count, 60 (60 refers to the 60 members of the National Assembly who apply for a judicial preview case to the Constitutional Council) divided by 577 (577 refers to the amount of members of the National Assembly) equals to one tenth. Based on this calculation, the author concludes a case of judicial preview on international treaty can be applied to the Indonesian Constitutional Court at least by one tenth of the members of the House of Representatives. The judicial preview is a legal effort as a preventative measure in order to protect Indonesia's national interests from unjust international treaties.

Another legal problem which must be resolved is whether a court in Indonesia might examine an international treaty after it has been ratified and which court might examine it. Therefore, the author suggests that the Indonesian Constitutional Court can examine the ratified international treaty because the nature of the control of conventionality is the same as a judicial review of the law. Moreover, the form of the international treaty is law after being ratified. In line with the author's opinion that Indonesia should embrace the dualism

[86] Noor Sidharta, "Laws of Ratification of an International Treaty in Indonesian Laws Hierarchy," *Constitutional Review* 3, no. 2 (2017): 186.

[87] Article 54 of the French Constitution, Article 18 of the Ordonnance Number 58-1067 on the Constitutional Council, dated 7 November 1958.

theory of the superiority of international law, the Constitutional Court should make an interpretation of an international treaty based on the constitution and assume that an international treaty is valid.

III. CONCLUSION

Every state has its own legal system in accordance to its legal culture. Therefore, it is necessary to make a comparison legal study in order to solve legal problems and complete the national legal system inspired by the foreign legal system. In the context of international treaty implementation, the comparison of legal systems in France and Indonesia is useful for improving the judicial system in Indonesia. However, the absorption of the French legal system should be modified in accordance to the Indonesian legal culture.

France embraces the monism theory and the position of international treaties are above the national law. Otherwise, Indonesia adopts the dualism theory because international treaties must be ratified and transformed into national laws. The Indonesian sovereignty is the most important element and *adat* law societies/customary law along with their traditional rights must be protected. However, the national law must not inhibit the implementation of ratified international treaties. Therefore, the dualism of the superiority of international law in the logical theory should be implemented in Indonesia. In this regard, Indonesia should prioritize the international law after its ratification into the national legal system.

A legal invention should be constructed in order that Indonesia can resolve the problem of international treaty implementation. In this regard, the Indonesian Constitution should be amended by adding a new authority for the Indonesian Constitutional Court to conduct judicial preview of international treaties bills. This legal effort is a preventative measure in order to preserve Indonesia's importance nationally from unfair international treaties. In addition, Indonesian Constitutional Court examines ratified international treaties with the reason that the legal nature of the control conventionality is the same as a judicial review of law. In this context, the Indonesian Constitutional Court interprets international treaties referred to the constitution.

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Political Influence on the Constitutional Court in the Republic of Macedonia: Reflections through the Dissenting Opinions in the Period of 2012-2015

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Abstract

The demo Christian political party VMRO-DPMNE had a long period of ruling of the Republic of Macedonia, (2006-2016). During that period many cases of political pressure on the state institutions have occurred. The Constitutional Court wasn't an excepted of that political pressure. Starting from the process of appointment of new judges, through the shocking decisions upon official citizens' complaints and human rights appeals, to a complete reflection of the political interference and pressure through the dissenting opinions written and published by some constitutional judges. The former government has used all the tools, legal and non-legal, to put under control the Constitutional Court. If we put aside the political interference into the appointment of new and incompetent judges, one of the most used tools as a form of resistance was the dissenting opinion. This legal tool is present in the Book of Rules of the Constitutional Court of the Republic of Macedonia, but also in the legal systems in the Eastern Europe, Germany, Spain, Greece and all other states whose legal systems are created by the German legal system. It gives space and chance for one or several constitutional judges to express disagreement upon a decision brought by the majority in the court. This tool was frequently used by several judges from the Constitutional Court in the Republic Macedonia in the given period through which we can see strong political influence on their work. Therefore, the research questions are as follows: What were the "models" of political influence that were used on the Constitutional Court during the period of 2012-2015? How were they used

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and what are the dissenting opinions reflecting? To answer the said questions, the model of qualitative research will be used together with several dissenting opinions as case studies. The aim of this approach is to explain the different aspects of political influence on the work of the Constitutional Court within the given period. The findings of this research can be used for further development of the interest for researching of the work and role of the Constitutional Court in the Republic of Macedonia.

Keywords: Political Influence, Dissenting Opinion, Misconduct, Constitutional Court, Judges.

I. INTRODUCTION

Within the period of 2006-2016, Republic of Macedonia was ruled by the conservative demo Christian political party VMRO-DPMNE in coalition with the Albanian party DUI (Democratic Union for Integration). This period of ruling was marked by complete political divide and politicization of the whole state system, a state classified by the High European Union commissioners as state capture, "Democracy and rule of law have been constantly challenged, in particular due to state capture affecting the functioning of democratic institutions and key areas of society."[1]

The whole state system functioned with high level of political corruption followed by realization of private business interest through political decisions. Implementation of the state policies went through stake holders and companies whose owners were already established politicians, members of the ruling coalition.

The political influence and interference within the state institutions was highly present. The Constitutional Court, seen by the citizens as the last bastion of justice, was not spared from political pressure and influence by the governmental coalition as the mandate of the judges previously elected was expiring and new ones were appointed. This was obvious in the process of appointing new judges, who were of low quality or had already proven their political affiliation through their decisions, which they had adopted at their previous work positions and were

[1] "Commission Staff Working Document," European Commission, 2016, 4, accessed 10 August 2018, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf.

in favor of the ruling political party. Some processes of appointing new judges were unpredictable. Such was the example of appointing a judge for the position of president of the Constitutional Court who was already retired and who had flagrant family attachment to the ruling party (Elena Gosheva). The period of her presidency of the court was marked by her unprofessional behavior towards her colleagues and journalists and she was known for prohibition of presence of the media during certain court sessions important for the public interest.[2] One of the controversial decisions that were brought by the Constitutional court was the start of a procedure for assessment of the constitutionality on the Pardon Law in March 2016. In spite of the reactions and warnings by the civil and academy sectors, the Constitutional Court repealed the amendments on the Pardon Law from 2009 which were published on the Akademik's web site[3]. With this repeal, the Court has allowed the president to pardon convicts for criminal activities in election processes, drug dealers, pedophilia but above all the high officials of the then ruling VMRO DPMNE who were accused of series of crimes and corruption cases by the Special Public Prosecutor followed on the Akademik's website.[4]

The policy implemented by the governmental coalition led by VMRO-DPMNE was false and it was a product of personal and business interests. The reports by the European Union Commission on within the enlargement policy for year of 2016 have declared Republic of Macedonia as politically captured state which is clearly showing how the personal interests of the politicians have influenced public policies.[5] This situation pushed the citizens to start using legal tools to initiate procedures for assessment of the constitutionality of governmental decisions and articles of laws in front of the Constitutional Court. This legal

[2] Gordana Duvnjak, "Уставен суд нова фаза [Constitutional Court new phase]," link last active 30.04.2017, utrinski.com.mk.

[3] Marija Sevrieva, "Уставниот суд ги укина измените на законот за помилување [The Constitutional Court have abolished the amendments on the Law on abolition]," accessed 10 August 2018, https://www.akademik.mk/ustavniot-sud-gi-ukina-izmenite-na-zakonot-za-pomiluvanje-so-nego-se-ogranichuvalo-ustavnoto-pravo-na-pretsedatelot-na-rm/.

[4] Marija Sevrieva, "Објавени помилувањата [The abolition are published]," accessed 10 August 2018, https://www.akademik.mk/objaveni-pomiluvanjata-gruevski-mijalkov-crvenkovski-obviniteli-vo-sjo/.

[5] "Commission Staff Working Document," European Commission, 2016, accessed 10 August 2018, https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_the_former_yugoslav_republic_of_macedonia.pdf.

tool offers a chance for common citizens to challenge the policies of the current or the previous governments. Also, the Article 25 from the Rule of Procedure of the Constitutional Court allows expression of different opinion by one or several judges whose standpoint is not in line with the majority of the votes.[6] This tool is the *dissenting opinion* and is a qualitative legal matter through which a certain governmental policy can be evaluated. One of the most persistent judges who followed the "letter of the law" and used the tool of dissenting opinion very often, was the now former Constitutional judge Natasha Gaber Damjanovska whose mandate has expired in October 2017.[7] She was known to be one of the few judges from this court who were seen in the public sphere as true protectors of the Constitution. After the end of her 9-year-mandate in the court, she has published a book with selected dissenting opinions clearly drawing the political situation in the given period of 2012-2015. Through the dissenting opinions on the amendments of the Law on Abortion, Law on Civic Responsibility of Insult and Slander, articles of the, Law on Determination of Condition for Limitation on Performing Public Function, Access to Documents and Publications of Cooperation with the Authorities of State Security, the negative implications of the false state policy implemented by the government of VMRO-DPMNE can easily be located.

Therefore, the aim of the research question is to uncover the models of the political influence on the Constitutional Court and how the political influences have been reflected on the decisions of the Court through the dissenting opinions in the given period. In order to answer the given questions, the model of qualitative research will be used, together with analyses of three dissenting opinions on Constitutional Court decisions which had the most reactions in the public.

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[6] Article 25 from the Rule Book of the Constitutional Court: A judge who voted against the decision or believes that it should be based on other legal grounds may set aside his opinion and elaborate in writing. The dissenting opinion shall be published in the "Bulletin of the Court" and in the official journal in which the decision of the Court is published.

[7] "Short Biography of Dr. Natasha Gaber-Damjanovska," Website of The Constitutional Court of the Republic of Macedonia, accessed 11 August 2018, goo.gl/5cm1jo.

II. DISSENTING OPINION AS A LEGAL TOOL

The first tracks of existence of dissenting opinion have been noted in the 15th century in Spain under the name of *voto reservado*, which is a form of expression of judges' disagreement written in a secret, unpublished book.[8] This practice has been preserved in the Spanish judicial system until 1985 when the use of dissenting opinion was expanded into the whole judicial system. Despite on these early signs of existence of the dissenting opinion, the first state that has implemented this legal tool into the system of the constitutional courts is Germany. In 1952 the Federal Constitutional Court in Western Germany allowed publication of anonymous dissenting opinions. The next following this upgrade of the judicial system were Greece and Portugal who allowed the use of dissenting opinion within their Constitutional courts. The Portuguese legal system allowed for the judges to add the term *vencido* next to their signature on a court's decision, expressing their disagreement.[9] Later, in 1982, when the Constitutional Court was established, publishing of dissenting opinions was introduced into the practice of the Court. The system in Greece, for example, is the common law type. Although the publishing of dissenting opinions is compulsory, the practice to keep them anonymous, has remained.[10] Contrary to this examples, the Constitutional Courts in Italy, France and Belgium do not offer the possibility for the judges to write and publish their dissenting opinions.

In comparison to the above-mentioned European states, the situation in Central and Eastern Europe is little different. All Constitutional Courts are allowing publication of dissenting opinions. In Slovenia, opinions are published on the web site of the court because publishing in the Official Gazette has to be paid. Dissenting opinion of the judges from the Constitutional Court in the Republic of Macedonia are also published on the web page of the court. One question arises from this brief comparison of Constitutional Courts in Eastern

[8] Chapter XIV of the Ordenanzas de Medina, in Novíssima r ecompilación de las leyes de España,Tomo II, Boletín Oficial del Estado 350 (1976) [Chapter XIV of the Ordinances of Medina, in New compilation of the Laws of Spain, Volume II, Official Gazette of the State 350 (1976)]. accessed 12 July 2018, http://pares.mcu.es/ParesBusquedas20/catalogo/description/184080.

[9] Katalin Kelemen, "Dissenting opinions in Constitutional Courts," *German Law Journal* 14, no.08 (2013).

[10] *Ibid.*

and Western Europe. Jullia Laffranque[11] claims that the freedom to write and publish dissenting opinion as a Constitutional judge is important in states where the legal culture is not fully developed yet, like are the countries from Central and Eastern Europe. Additionally, constitutional law is more affected by political regimes than by other branches of the law. That is one of the reasons why the dissenting opinion as a legal tool is so important for the independence of the work of the Constitutional Court.

There is only one fact which is not in favor of the constitutional courts and their importance to the legal system. Apart from the Austrian Constitutional Court which was established in 1920 by the model of the legal theorist Hans Kelsen, all other constitutional courts in Europe are established after the Second World War.[12] In comparison to the influence of the Supreme Court, the Constitutional Court was forced to build authority and legitimacy through its work from the very beginning. The dissenting opinion is a tool which guarantees transparency that is of huge importance for the strong role of the constitutional court. Even in Germany, on which structure the legal systems of several other legal systems rely, specially from the Central and Eastern Europe, needed almost 20 years to establish full transparency of the tool of dissenting opinion. On the other hand, the fact that goes in favor of the Constitutional Courts is that their *sui generis* nature is created with the right on dissenting opinion. By the nature of their work, constitutional judges use different interpretation techniques and are less bind by the traditional style of argumentation.[13]

Regardless of how much the public opinion is in favor of dissenting opinions by constitutional judges, in order to have more access to the work of the court, two principles that are little complicated to handle arise. The question of whether or not judicial independence and transparency of the decision making process can be influenced by dissenting opinion is a subject dealt by academic debate.

[11] Julia Laffranque, "Dissenting Opinion in the European Court of Justice. Estonia's Possible Contribution to the Democratisation of the European Union Juridical System," *Juridica International* 14 (2004).

[12] Federico Fabbrini, "France's Constitutional Reform and the Introduction of a Posteriori Constitutional Review of Legislation," *German Law* Journal 9, no.10 (2008): 1297.

[13] Andras Jakab, "Judicial reasoning in Constitutional Court – A European perspective" *German Law Journal* 2, no. 29 (2013): 1215-1278.

The answer is, yes, it does have influence, especially when it comes to the possibility of economic or political pressure on one or several judges that have published their dissenting opinions. The case is similar when it comes to the possibility of re-election of judges. The dissenting opinion can be used for gaining popularity in the public by the judge whose aim is to be re-elected. In order to avoid this kind of pressures on judges when it comes to re-election and possible misuse of the dissenting opinion tool, the Venice Commission has recommended prohibition of its use during re-elections.[14]

On the other hand, when it comes to expressing judicial independence, this is highly used tool by judges to practice the freedom of expression. One of the most impressive practice of the dissenting opinion tool is the publishing of all of the dissenting opinions by the Hungarian Constitutional judge Imre Voros. "*Dixi et salvavi animam meam*" which means "I spoke, and I saved my soul". Even though the dissenting opinion is not legally binding, its presence is remarkably useful tool for future generations of researchers of the constitutional law and courts and the descending judges.[15]

Within the U.S. Supreme Court, for example, voting is public, which is not the case in most of the European Constitutional Courts. The dissenting opinion tool provides information on how certain judges voted based on their published opinion. As a legal tool, dissenting opinion offers valuable insight on how constitutional courts work.[16]

III. SHORT HISTORY OF THE MACEDONIAN CONSTITUTIONAL COURT

In the period of 1945 to 1991, Republic of Macedonia was a socialist republic within the federation of the Socialist Federal Republic of Yugoslavia. The Constitutional Following the development of the judicial system in Europe, the

[14] "The Composition of Constitutional Courts, in Science and Technique of Democracy No.20pt.4.2," Venice Commission , 1997, http://www.venice.coe.int/webforms/documents/CDL-STD(1997)020.aspx. Accessed 02.08.2018.

[15] Imre Vörös, *Dixi et salvavi. Különvélemények, Párhuzamos Indokolások* [Dixi et salvavi. Dissenting and concurring opinions] (2000).

[16] David Lazarus, "The Supreme Court's Excessive Secrecy: Why It Isn't Merited," Find Law Legal News, Sept. 30,2004, accessed 2 August 2018, http://writ.news.findlaw.com/lazarus/20040930.html.

Constitutional Court in the Socialist Republic of Macedonia was established in 1964. Its position and competence were governed by the Constitution, and the procedure and the legal effect of its decisions were governed by the Law on the Constitutional Court of Macedonia from 1963. In 1991, the Republic of Macedonia became independent state and the Constitutional Court continued with its work in the newly founded state.[17]

The work of the Constitutional Court is governed by Articles 108 to 113 of the Constitution. The competences of the Macedonian Constitutional Court are as follows: control of constitutionality and legality, protection of freedoms and rights of the individual and citizen, resolution of conflicts of jurisdiction, deciding on the responsibility of the President of the republic, deciding upon constitutionality of the programs and statues of the political parties and civil organizations.[18] The court has 9 judges with mandate of 9 years, without possibility of re-election. Constitutional judges are proposed by the Parliament (5), the President (2) and the Judicial Council (2).[19] One of the differences in the work of the Constitutional Court from the period when Republic of Macedonia was federal unit within Yugoslavia is that the work of the Court is regulated by the articles of the Constitution, the Rules of Procedure brought by the Court itself and the Rule book for work. The Law on the Constitutional Court that existed in the period of Yugoslavia is abolished. One of the states that is successor of Yugoslavia and still has a Law on the Constitutional Court is Serbia.[20]

When it comes to the right of constitutional judge to write a dissenting opinion, this is regulated by Article 25 of the Rules of Procedure of the Court: "A judge who has voted against the decision or believes that it should be based on other legal grounds may set aside his opinion and elaborate in writing. The dissenting opinion shall be published in the "Bulletin of the Court" and in the official journal in which the decision of the Court is published."[21]

17 Macedonian Constitutional Court, short history (official page), ustavensud.mk Accessed 05.08.2018
18 *Ibid.*
19 "Macedonian Constitutional Court (official page)," ustavensud.mk, Accessed 5 August 2018.
20 "Serbian Constitutional Court," http://www.ustavni.sud.rs/ Accessed 05.08.2018.
21 *Ibid.*

3.1. Disadvantages of the Functioning of the Constitutional Court

When it comes to the procedure for voting for new judges, the Parliament has the right to candidate the majority of judges, five from nine from the whole number of judges from the Court. This condition leaves big space for political pressure and appointing judges which are affiliated to the ruling political party. Since the independence of the state. the situation was used countless of times by all political parties who were in the government, which had the majority in the Parliament and influenced on the reputation of the judges and the Constitutional Court. In addition, the voting for new constitutional judges needs only simple majority of the votes in the Parliament. In this case, Denis Preshova argues and gives his suggestion for change of the voting system and decrease of the political influence on the constitutional judges[22] He suggests that it is much better for Macedonia to adopt the Hungarian model, according to which all political parties from the Parliament have to have equal number of representatives in the Parliamentary Commission that creates the list of candidates. In continuance, judges will be elected in the Parliament by two thirds of the majority. This model will force political parties on both sides (ruling and the opposition) to cooperate more in order to elect judges with higher quality.

The following instance raising eyebrow is the only condition for one to be elected as a constitutional judge. Article 109 of the Constitution states: 'The judges of the Constitutional Court are elected from among distinguished lawyers.' What are the standards for a candidate to be regarded as a distinguished lawyer and who establishes them? Who sets the rules? This is another condition allowing space for personal and political interpretation of the term "distinguished lawyer" and it always goes in favor and interest of the political parties. In search for maybe not the best but better solution of this loophole, we can take the solution from the Constitutional Court and the Law on the Constitutional Court in Croatia as an example. The Law says: A judge of judges may be selected from among distinguished lawyers especially from the ranks of judges, public prosecutors,

[22] Denis Preshova, *Реформи на Уставниот суд или реформа на свеста?Реформа на институциите и нејзиното значење за развој на Република Македонија* [*Reforms of the Constitutional Court or reforms of consciousness? Reform of the institutions and its meaning for development of Republic of Macedonia*] (Skopje: MANU, 2009), 171-202.

lawyers and university professors who emphasized in their profession with their own scientific or professional work, or with public action. Additional condition is to have minimum 15 years of working experience or 12 years of experience if they hold a PhD title.[23] By establishing concrete standards and definitions of what is a distinguished lawyer and what kind of experience the future constitutional judge should have, maybe we can not erase the political influence on this court completely, however, at least we can increase the reputation of the judges and the court itself and set standards that can guarantee full protection of the Constitution and the citizens' rights in future.

IV. POLITICAL INFLUENCE THROUGH THE DISSENTING OPINIONS IN THE MACEDONIAN CONSTITUTIONAL COURT IN THE PERIOD OF 2012-2015

The ruling of the right-wing demo Christian political party VMRO-DPMNE in the period 2006-2016 was marked as one of the darkest periods in the Macedonian democracy. Not only was the level of corruption high, level 35 by the Transparency International ranking, but the state was hit by the wire-tapping scandal in which it was uncovered that the state secret police was unlawfully wire taping conversations of 20.000 citizens.[24] When the opposing Social Democratic Party in 2015 started publishing certain wire-taped conversations, the public found out that not only were minimum 4 out of 8 elections since 2006 (presidential, local and parliamentary) fraud, but the former minister of interior attempted to hide a murder. Scandals, political pressure, threats and blackmail were quite common in the political scene in the decade which completely devastated the state institutions. The Constitutional Court was not exempt from those political games and maneuvers which in the given period inflicted enormous damage on the reputation of the court.

As mentioned in the beginning, the ruling political party, VMRO-DPMNE, has installed its judge as a president of the court, from retirement, Elena

[23] "Croatian Constitutional Court," accessed 8 August.2018, https://www.usud.hr/.

[24] "Annual Reports," Transparency International, accessed 2 August 2018, https://www.transparency.org/news/feature/corruption_perceptions_index_2017.

Gosheva as well as one more, Jovan Josifovski. The damaging policy of the former government will be analyzed through the published dissenting opinions of now former constitutional court, Natasha Gaber Damjanovska. Following the example of the Hungarian judge Imre Voros, she, as well, has published a book of her dissenting opinions from the period of her mandate as a constitutional judge (2009-2018), "In defense of the Constitution and civilization values."[25] The edition in which her dissenting opinions are published keeps a track of the period 2012-2015 in which the damaging governmental policy reached its pick. The analysis of the dissenting opinion on the amendments on the Law on Abortion, Law on Civil Responsibility, Insult and Slander, Law on Financial Discipline and several other laws and governmental decisions and civic requests can give clearer and deeper picture on how one undemocratic regime, full of corruption and state incorporated criminal, can systematically ruin the state. The following chapters presents the dissenting opinions on challenged articles of the amendments on the Law on Abortion, requests on protection of freedom of public expression and challenged articles of the Law on Determination of the Condition for Limitation of Performing Public Function, access to documents and publication of cooperation with the authorities of state security. Her dissenting opinions can also be found in the Bulletin published on the Court's web site.

4.1. Challenged Act: Articles of the Law on Abortion

In the following chapter will be given an introduction, excerpts of the dissenting opinion and explanation about the case of challenged articles of the Law on abortion. This case in the modern Macedonian history is one of the most direct attempts of the government to limit the right of abortion, using tools of bureaucracy and diminishing the woman's personality as a free human being to freely bring decisions for her own body.

4.1.1. Short Introduction of the Case Example

With the amendments of the Law on Abortion in 2014, the government of the coalition of VMRO-DPMNE and DUI attempt to diminish the access to abortion

[25] Natasha Gaber-Damjanovska, *In defense of the Constitution and civilization values*, (Skopje, 2016), accessed 5 August 2018, www.scribd.com/people/documents/2996697.

to women and without direct prohibition, to make the practice of this right of women more complicated. A group of civil organizations for protection of health, women's rights, sexually marginalized groups, the Helsinki Committee and a professor from the Faculty of Law in Skopje submitted initiative to the Constitutional Court for assessment of the constitutionality of the amendments of the Law. Unfortunately, the Constitutional Court with the decision brought on 08.10.2014 decided not to act upon the submitted initiative. The explanation of the Court, in summary, is that all of the challenged articles are in line with the Constitution.

4.1.2. Dissenting Opinion on the Courts Decision upon the Challenged Articles of the Law on Abortion, Decision Number 137/2013 08/10/2014

The respective articles on what the position of the Constitutional Court upon this inappropriate decision was will not be dealt with, but the decision will be explained through discussion on the dissenting opinion of the judge Gaber Damjanovska. It is needless to say that her vote and position were opposite to the decision of the Court. In her dissenting opinion, she explains her position in detail, article by article, in favor of the protection of women's right on safe abortion.

Excerpt of the dissenting opinion No. 1:

> The Law, initially in Article 2, affirms the free will of the pregnant woman.[26] However, part of the further legal provisions, in their legal entirety and mutual reciprocal action, is in contradiction to the initially declared principle. The whole process of approval of the termination of pregnancy creates clear and, at the same time, hidden obstacles which impose numerous formal conditions that a woman has to meet before she can have her pregnancy terminated; this imposes time limitation as well as psychological obstacles which need to be overcome or "skipped" in order for the pregnant woman to prevail in her initial decision. These legal and administrative preconditions when analyzed separately might not leave an impression that they represent an obstacle for realization of the this right, but analyzed collectively and in relation to one another, they create a disabling legal context placing the

[26] Law on abortion, Article 2: Termination on pregnancy is special medical intervention on which woman can freely decide.Right for interruption on pregnancy can be limited only because of protection on health and life of the pregnant woman. Official Gazette of the Republic of Macedonia No.87/2013.

> woman in a race against time and deadlines so as to meet all legal conditions an finally exercise her right on abortion. [27]

The subtlety of the attempt of the former government to diminish the right on abortion can be seen from this excerpt of the opinion. One of the standards that a state must fulfill to be considered democratic is the right and free access to safe abortion for women. This attempt of the previous government has pushed back Republic of Macedonia directly into the dark age of humanity. One of the examples of the complexity of exercising the right on abortion was the amendment of Article 9. This article listed the documents that a woman must submit for her request for abortion to be approved. In addition to the submission of the required confirmation on the decision to undergo an abortion, as well as documentation of ultrasonographic examination, women were asked to submit confirmation of pregnancy from specialist gynecologist, confirmation of being informed of the possible advantages and risks that derive from pregnancy, confirmation of the public prosecutor that a criminal proceeding has been initiated, confirmation concerning certain illnesses from another doctor, confirmation from the central for social care. The whole process of collecting these documents pushes women in unequal position and cuts the time for the medical intervention short, which directly puts women's life in danger.

Excerpt of the dissenting opinion No. 2:

> When a doctor has determined that the termination of pregnancy is not possible due to a medical condition the pregnant woman is suffering from, or that such termination might be threatening the life and health of the woman, or if more than ten weeks have passed from the conception, Article 7 provides that the doctor is obliged to refer the pregnant woman to a first degree commission for pregnancy termination.[28] In addition to the obligation of the medical staff to refer the pregnant woman to a first-degree commission, it is not clear why Article 9 again requires the woman to file a written request for termination of the pregnancy (evidently, there is a lack in the automatization of the procedure when it comes to this type of patients). In this case, again, the pregnant woman is obliged to submit all previously submitted documentation again.[29]

[27] Natasha Gaber-Damjanovska, *In defense of the Constitution and civilization values*, (Skopje, 2016), accessed 5 August 2018, www.scribd.com/people/documents/2996697.
[28] Article 7 of the Pregnancy Termination Law, Official Gazette of the Republic of Macedonia No. 87/2013.
[29] Supra note 26, 19.

The second excerpt of the dissenting opinion pictures the further complexity to exercise the right on abortion. The endless list of the documents is not required to be submitted once but twice during the abortion process. It is important to have in mind the several attempts of doctors and health commissions to force the woman to change her mind during this humiliating procedure. This is a direct attack on the independence and sovereignty of women to make decisions for their own lives and bodies.

Excerpt of the dissenting opinion No.3:

> The Law states but does not provide for concrete urgent procedure when it comes for urgent cases. This is a serious overlook given that because of the administrative labyrinths and under threat of harsh financial penalties for the medical staff, it can come to tragic consequences. It is in my view that, given the intimacy and sensitivity of the question concerning termination of pregnancy as well the its impact on the health, the very absence of concrete and carefully standardized regulation results in limitation of the constitutionally guaranteed rights. As an illustration of a violation of a constitutional right and due to absence of appropriate legal procedure concerning health issues, I cite the decision of the Constructional Court of Slovenia on the subject U-I-127/01. The Constitutional Court was on opinion that the challenged Law on Immunization was not in accord with the Constitution because it failed to provide for regulation of the procedure and of the individuals' right to determination of justified reasons for not taking the mandatory vaccines and because it did not provide for regulation of the responsibility of the state for the damages caused to such individuals.[30]

Excerpt of the dissenting opinion No. 4:

> In the end, I would like to emphasize that during the procedure for assessment of the constitutionality of the challenged articles, the Court should have taken into account the international documents ratified in accordance with the Constitution, and which are part of our internal legal system and cannot be amended by law (Article 118 of the Constitution): the European Convention of Humans Rights, the Convention for Elimination of All Forms of Discrimination of Women, the Convention on the Rights of Individuals with Disability, the Convention on the Rights of the Child.[31]

[30] *Ibid.*
[31] *Ibid.*, 21.

As can be seen from the excerpts of the dissenting opinion, the intrusion into the women right on abortion by the former government was on a level of humiliation and subtly attempt through administrative barriers to diminish the right on choice. The dissenting opinion on this case did not changed the official decision of the Constitution Court, but was seen as a dignified and bold step forward in the protection freedom of choice and free access to safe abortion by legal experts and the public in general in Macedonia.

4.2. Challenged Act: Request for Protection of the Freedom of Public Expression

Breaking of freedom of expression of journalists during the period of ruling of VMRO-DPMNE was unusual. The following case will put a light on the most violent breaking of freedom of expression that Macedonian journalists have experienced.

4.2.1. Short Introduction of the Case Example

One of the biggest scandals and violations of the freedom of expression during the ruling of the government of VMRO-DPMNE took place on the 24th of December 2012. The draft of the state budget for year 2013 was on the agenda of the Parliament session. Due to the conflict between MP's of the opposition and the ruling coalition resulting from the violation of the procedure for adoption of the budget, this session was of big interest to the public. In one moment, the security of the Parliament started removing the journalists from of the Parliament gallery by force. During this situation, security used excessive force thus violating the journalists right to free reporting. The explanation by the president of the Parliament that they were removed from the press gallery due to security threats was unfounded.

The Association of Journalists in Macedonia reacted and submitted a complain to the Ministry of Internal Affairs, Sector for Internal Control, asking for the identity of the security guards who used excessive force and the identity of the person who gave the order for the security to act. In their response, the Ministry of Internal Affairs claimed that everything had been within the

frames of the Law on the Parliament, Article 43. Contrary of this response, the Ombudsman found that in this case the right on freedom of expression and the right on information were violated.

A group of journalists who were removed from the Parliament by force filed a request to the Constitutional Court for protection of their freedom and rights in accordance with the Article 110 of the Constitution concerning the freedom of public expression. Upon deliberation on this request, the Constitutional Court found that the force removal of the journalist from the Parliament did not constitute a violation of their right on freedom of expression and information. Here, it should be pointed out that Article 43 of the Law on Parliament concerning security measures, on which the response of the Ministry of Internal Affairs and part of the decision of the Constitutional court were based, does not provide for the possibility for Parliament security to remove journalists by force.

4.2.2. Dissenting Opinion on the Court's Decision on Denying the Request for Protection of the Freedom and Rights of the Article 110 from the Constitution, Decision Number 27/2013, 16.04.2014

The judge Gaber Damjanovska expressed her disagreement with the decision of the Court stating that there was no violation of the journalists' right to public expression and free information. Her dissenting opinion explains that the Constitutional Court during its session and while deciding upon the request of the journalists, considered only one side of the whole case, the side of the Parliament and the Ministry of internal affairs.

Excerpt of the dissenting opinion No. 1:

> The adopted decision clearly shows that the Court deliberated on the merits of the case thus finding the grounds to assess if the claimants have had their right to freedom of speech violated by a particular activity and in accordance with Article 110 of the Constitution of the Republic of Macedonia (Article 51 of the Rule of Procedure of the Court). I reckon that it is completely unacceptable that the decision was adopted based on solely trusting the statements and actions recounted in the submission of only one of the parties in this case, without conducting a public discussion for

> the purpose of evaluating and specifying the evidence in accordance with the Constitution, the principles of the European Convention of Human Rights and the jurisprudence of the European Court of Human Rights.[32]

The excerpt demonstrates that, in this case, the Court considered only one side and indirectly expressed bias in favor of the Parliament and the Ministry of Internal Affairs.

Excerpt of the dissenting opinion No.2:

> *It is a widely accepted standpoint that healthy democracy presumes indirect control not by the legislator and the judicial authorities only, but by the public and the media as well, who cherish the vitality of public debate. The freedom of accepting information and ideas covers the right to request, access and collect information via possible legal sources. This, of course, means that beside media and journalists who provide information for publishing, this freedom also encompasses the right of the public to be adequately informed especially when it comes to questions of public interest. In this regard, the European Court of Human Rights has a clear position that the states cannot put themselves between the provider and the recipient of information, because they have a right to come in direct contact at their own will. Journalists have a duty to transfer information and ideas on all questions of public interest in a manner which is in line with their obligations and responsibilities thus respecting the public's right to obtain such information. Otherwise, journalism would not be able to practice its role of a "public supervisor," critic, and guardian of progress and democracy.*[33]

This comment of the judge clearly shows that the state (in this case Republic of Macedonia and its institutions) has come between the source of the information and the public. By cutting off and disabling the communication whilst throwing out the journalists from the Parliament, the government played the role of a bully and ultimate controller of the public opinion.

Excerpt of the dissenting opinion No. 3:

> With the aim to establish the factual situation and conduct a valid assessment of the necessity for removal of the journalists from the gallery, it was necessary to clarify the reasons for the security of the Parliament to decide to remove the journalists from the gallery even though all incidents and unrest were physically isolated and far from the journalists. The assertion

[32] *Ibid.*, 28.
[33] *Ibid.*, 29.

> that this was done for the "safe of the journalists" is absurd since it was an obvious fact that they just set in their places, completely passive and without any activity participating in the events, but only observed, which is their legitimate right since this is part of their professional reporting activity. It is also a fact that the journalists did not contributed to the conflict situation in any manner (this is not denied in the missive of the Parliament either), did not violate the order in the building of the Parliament, did not have direct contact with the President of the Parliament, neither with the MPs, nor the events outside of the Parliament building. Considering this factual situation, aside from the absence of clarity regarding certain questions, it is clear that there was no "imperative necessity" contentious action to be undertaken, since the individuals present in the gallery, due to its physical detachment from the Parliamentary Hall, could not be directly involved into the events in the Parliament, neither to contribute to an incident of bigger proportions related to the ongoing events. It is also evidently that the journalists did not feel that their integrity was endangered, therefore did not ask for, nor expected protection.[34]

The black stain on the Macedonian democracy that happened in 24 of December 2012 has not been cleared yet. Beside the established facts and recommendations given by the Parliamentary Commission, which was established to investigate this incident, nobody from the security was found nor the name of the person who gave the order was published. This part of the political mosaic filled with political pressure and low standards among professionals, specially within the police, clearly expresses how much the Republic of Macedonia was devastated during the ruling of VMRO-DPMNE coalition.

It is valuable to mention that after this decision of the Constitutional Court, the journalist has filed a complaint to the European Court of Human Rights which sentence was that the Parliament and the security have violated the rights of expression of the journalists. The Court in the explanation of the decision have quote the dissenting opinion of the judge Gaber Damjanovska which is very rare in practice of the Court.[35]

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[34] *Ibid.*, 29.

[35] European Court of Human Rights, Case: Selmani and others against Republic of Macedonia, appeal number67259/14, accessed 10 August 2018, https://hudoc.echr.coe.int/eng#{%22fulltext%22:[%22macedonia%22],%22appno%22:[%2267259/14%22],%22documentcollectionid2%22:[%22CLIN%22],%22kpdate%22:[%222017-02-09T00:00:00.0Z%22,%222017-02-09T00:00:00.0Z%22]}.

4.3. Challenged Act: Articles of the Law on Determination of Condition for Limitation on Performing Public Function, Access to Documents and Publication of Cooperation with the Authorities of State Security

Several socialist-communist states from the former Eastern block took a step in dealing with the past in form of opening the classified documents of the secret police. Republic of Macedonia took that path in with the act named Lustration act or Law on Lustration in 2012. Unfortunately, this act did not uncover the former collaborators with the secret police from the previous system, but it was used by VMRO-DPMNE for public embarrassment and discrediting of the political opponents.

4.3.1. Short Introduction of the Case Example

As a fore mentioned, the Republic of Macedonia was a republic and a federal unit within Yugoslavia in the period of 1945 to 1991. In 2012, the government of VMRO-DPMNE passed a law officially named as the Law on Determination of the Conditions for Limitation of Performing Public Functions, Access to Documents and Publication of Cooperation with the Authorities of State Security. This Law was colloquially known as the Law on lustration. The explanation of the legislator was that the basic aim of this Law is to prevent current and former politicians, who were cooperating with the secret police in the period when Macedonia was part of Yugoslavia, to perform public functions. However, this Law, enacted by the government of VMRO-DPMNE, was not used for purposes of lustration and so-called "cleaning" of the institutions of the residues of the old system, but for complete discreditation of the political opponents and public shaming. This practice of the former government encountered loud public reactions and complete disagreement with the whole process and aim of the Law. A group of citizens together with the Helsinki Committee submitted a request for challenging the constitutionality of several articles of the Law. The Constitutional Court, by adopting Decision number 111/2012, decided not to start assessment of the constitutionality of the challenged articles. It must be mentioned that the Constitutional Court was deciding upon requests concerning the same Law previously, when the challenged acts were abolished. This third and last decision of the Court is completely opposite to the previous ones.

4.3.2. Dissenting Opinion on the Court's Decision not to Start Assessment of the Constitutionality of the Challenged Articles of the Law on Determination of Condition for Limitation on Performing Public Function, Access to Documents and Publication of Cooperation with the Authorities of State Security

Excerpt of the dissenting opinion No.1:

> My position concerning the challenged articles is opposed and based on the previous practice and position of the Court of the Republic of Macedonia on this question (decision number 42/2008, 77/2008, 52/2011 and 76/2011), the Amicus Curiae opinion of the European Commission for Democracy through Law (Venice Commission) prepared specifically to address this challenged law upon a request from the Constitutional Court of the Republic of Macedonia, the Resolution No. 1096 from 1996 with the supporting Guidelines for its application and the Resolution No. 1481 from 2006 of the Council of Europe, European Convention on Human Rights and Fundamental Freedom as well as the Jurisprudence of the European Court for Human Rights.[36]

Contradictions in the decisions of the Court concerning the same Law are obvious. Given the fact that the Venice Commission already had already given an opinion on this Law, the decision not to start the assessment of the challenged articles directly contradicted the prior practice of the Court. An absurdity of the Law concerned the determination of the period that the process of lustration should cover. Considering that Macedonia had had a new Constitutional order since 1991, it was more than logical for the exact period of lustration to cover the time from 1944 to 1991. However, the new amendments were to extend the period until 2019, 10 years after the establishment of the Commission governed by the Law. With these blurry legal solutions, it was more than obvious that the Law will not succeed in its previous mission, but it will be used only for daily politics and dirty discrediting of political opponents.

Excerpt of the dissenting opinion No.2:

> *Article 3 lists the "individuals" covered by the Law* [Law on Lustration] *and includes the President of the state, MP's, some members of the executive and legislative authority, but also certain employees in commercial broadcasting*

[36] Supra note 26, 64.

> *companies, certain officials of political parties and religious groups or heads of organizations part of the civil sector which are named "organizations of public character," including some non-state related functions, for example, lawyers and individuals who have gained capital of more than 5% from previous state-owned companies.*

In its previous decisions, the Constitutional Court has established that the state cannot go beyond the individuals who are employed in state institutions and the ones who are on positions to make decisions thus being in position to violate human rights. The repeated expansion of the list results in interference of the state into the work of affected individuals and organizations who do not fall under the domain of state institutions. Thus, the state exceeds the constitutionally "guaranteed freedom of association to exercise and protect their political, economic, social, cultural and other rights and convictions." (Article 20 of the Constitution) and violates the "constitutional determination of separation of the church from the state (Amendment VIII). The state does not have authority to suggest the "lustration" conditions which are to be provided for individuals operating in private and semi-private organizations, neither can it impose conditions which could negatively impact the work of these organizations which are not part of the state domain.[37]

It is clear that the former government, through the state institutions and this Law, has attempt to expand the political battle in all possible sectors of the state. The labeling of the political opponents as collaborators with the secret police within the previous regime to gain some beneficial or material wealth, was the ultimate goal of VMRO-DPMNE.

Excerpt of the dissenting opinion No.3:

> A further absurdity is that in addition to individuals owning over 5% of the capital of previously state-owned companies, the lustration process also includes, as indicated by paragraph 25, "individuals related them' including natural persons who are: in relation to them through marriage or adoption, children and parents, brothers and sisters, half-brothers and half-sisters, grandmothers, grandfathers and nephews and nieces, their twice removed kin, those who have continuously lived together for five

[37] *Ibid.*, 66.

> years in a parent/guardian-child relationship, stepmother or a stepfather, adopted children, daughter in law, son in law and the couples' parents. It is clear that these explicitly listed categories of individuals, based only on the personal connections with the individuals who own more than 5% of the capital, do not have access to a public position and do not have the opportunity to directly endanger the public and state security or the rights and freedoms of others. This overwhelmingly wide scope of individuals on which the lustration process should be applied, having in mind that could literally involve anyone, including minors, has reached its absurd boundaries and produces a possibility for harsh voluntarism and directly violates the constitutionally guaranteed right on privacy.[38]

The attempt for lustration of political opponents, even the ones who were already deceased, failed. In the arena of this political battle, one of the losers was the Constitutional Court as well. By adopting a decision completely opposite of the Constitution and its previous practice, the Court lost its dignity and reputation. The judges appointed by the majority of MPs, who at the time were in favor of VMRO-DPMNE, were installed through the Parliament and responsible for the current reputation of the Constitutional Court. It can be argued that the dissenting opinion on the case of lustration will be of immeasurable value for future researchers and legislators and serve as an example of how the tool of lustration is not to be practiced. Moreover, it exemplifies the consequences of adopting a decision contrary to a Court's established practice resulting in additional destruction of a Court's reputation and derogation of its major role as a protector of the Constitution and citizens' rights.

V. CONCLUSION

As a young state, the Republic of Macedonia has passed through a rough period of a political regime during which all tools for political pressure were used by the ruling VMRO-DPMNE. From shameless appointing of new judges and a president of the Court directly from retirement, to contradictory decisions which the Court itself has directly renounced. The evident sort comings within the functioning of the Constitutional court must be rectified in order to prevent further political pressure and interference into the work of the Court. The model

[38] *Ibid.*, 66.

is not perfect, but if there is a will and if we take into consideration that the Constitutional Court is a relatively young institution, it can be a subject to changes and improvements. There are already existing legal solutions which can be implemented to increase the integrity of the judges and the Court, to make amendments to the standards of appointing constitutional judges and to establish the values and conditions a judge has to hold.

The dissenting opinions paint a clear picture of the intrusion that the former government attempted to install and minimize women rights on abortion. Unfortunately, in this case, the Constitutional Court was the "partner in crime" to the former government. Furthermore, by adopting the decision to deny the protection of the rights on freedom of expression of the journalists, the Constitutional Court put another label of shame on its face. The trend of controversial decisions reached its pick when the decision concerning the challenged Articles of the Law on Lustration was adopted. However, the dissenting opinions of the former Constitutional judge Natasha Gaber Damjanovska have not only given deeper insight into how the Court ruled in favor of the interests of the former government, but also exemplified the legal tools that the same Court should have used so as to protect the Constitution and the citizens' rights. Every written piece of opinion, comment, disagreement, article that condemns the harmful governmental policy is an educational source for learning lessons about what to do to improve in the future and not repeat the same mistakes.

During the ruling period of VMRO-DPMNE (2006-2016), the public and the citizens saw the Constitutional Court as the last sanctuary from the corruption and criminal plaguing the state institutions. As illustrated by the cases discussed above, the Court has made mistakes which cannot be forgotten. The matter comprising the dissenting opinions and the uncovered shortcomings in the functioning of the Court may not be enough to enable the creation of a perfectly functioning Court, but they can at least help improve it and raise it to a respectable level and re-assume its role of the biggest protector of the Constitution, civil and human rights of its citizens.

In order to minimize the damage and to start upgrading the system of the Constitutional Court, primarily, the standards and rules of appointment new judges have to be changed, to prevent appointing judges from retirement and with strong political affiliation. The dissenting opinions are valuable source for the rules and guidelines of the voting behavior of the judges and important legal tool which can be a warning sign that something is going wrong within the Constitutional Court. We have the base and the tools, now we only have to implement them.

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A Comparative Perspective on Constitutional Complaint: Discussing Models, Procedures, and Decisions

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Abstract

The constitutional complaint is one of the important constitutional court jurisdictions that can be described as a complaint or lawsuit filed by any person who deems his or her rights has been violating by act or omission of public authority. Currently, the constitutional court in many countries have adopted a constitutional complaint system in a variety of models. However, the first application of the constitutional complaint jurisdiction came from Europe. In Austria, the constitutional complaint is allowed against the administrative actions but not against the court decisions. While Germany and Spain have a similar model that is a complaint against an act of the public authority including court decisions. In Asia, it is imperative that the court in Asia actively participate in the Association of Asian Constitutional Courts and Equivalent Institutions (AACC). The AACC members have adopted a system of constitutional adjudication in a variety of models, and when it comes to jurisdictions, out of sixteen AACC members, there are four countries (Azerbaijan, South Korea, Thailand, and Turkey) have the constitutional complaint in their jurisdictions. In Azerbaijan, constitutional complaint is comparatively broad. Azerbaijan's Constitutional Court can handle constitutional complaint against the normative legal act of the legislative and executive, an act of a municipality and the decisions of courts. In contrast, even though constitutional complaint in South Korea and Thailand can be against the exercise and non-exercise of state power, constitutional complaint cannot be filed against court decisions. In Turkey, the constitutional complaint mechanism is coupled with the regional system of human rights protection. The Turkish Constitutional Court handles complaints from individuals concerning

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violations of human rights and freedoms falling under the joint protection of the Turkish Constitution and the European Convention on Human Rights (ECHR). This paper argues that constitutional complaint represents the main part of the constitutional court, and through a comparative perspective among three countries in Europe and four AACC members are expected to provide lessons for the other AACC members that do not have a constitutional complaint mechanism, such as Indonesia.

Keywords: Comparative Law, Constitutional Complaint, Constitutional Court, Association of Asian Constitutional Courts and Equivalent Institutions.

I. INTRODUCTION

The protection of fundamental rights means that when a breach of the constitution occurs, the rights holder must be given legal remedies to maintain his or her rights, which are guaranteed by the constitution. In many countries, the protection of fundamental rights is a significant issue, the first point of note is that fundamental rights protection is complicated and continues to pose challenges.

The idea of constitutionalism and the guarantee of the protection of fundamental rights are one manifestation in modern democracies. This assurance has been supported by the establishment of various legal instruments in order to ensure the protection of the fundamental rights as a responsibility of the state. In this context, the constitutional complaint is one of the legal mechanisms designed to reinforce the guarantee of the protection of citizens' rights against any state action, in all branches of power that violates the rights of citizens.

According to Palguna, the history of constitutional complaints begins and is directly related to and even a logical consequence of the requirements of the constitutional state. In brief, the theoretical construction is explained as follows. The first characteristic of a modern constitutional state is constitutionalism, which means that state administration is based on and (therefore) may not contradict with the constitution. Thus, the constitution must be actually applied or complied with in practice, instead of merely playing an aspirational role.

In order to secure strict compliance and performance of the constitution in practice, the idea to establish a constitutional court emerges.[1]

The term "constitutional complaint" applied in this paper refers to an individual citizen claiming that one of his or her constitutional rights has been violated by an act or omission of the public authority. Gerhard Dannemann characterized constitutional complaint by four factors. First, they provide a judicial remedy against violations of constitutional rights; second, they lead to separate proceedings which are concerned only with the constitutionality of the act in question and not with any other legal issues connected with the same case; third, they can be lodged by the person adversely affected by the act in question; and, fourth, the court which decides the constitutional complaint has the power to restore to the victim his or her rights.[2]

Currently, the constitutional court in many countries have adopted a constitutional complaint system in a variety of structures and models.[3] However, the first application of the constitutional complaint jurisdiction came from Europe. Austria, with Hans Kelsen playing a major role, established the first constitutional court as we understand constitutional courts today. The Austrian Constitutional Court (*Verfassungsgerichtshoft*) has the authority to decide complaints against laws, regulations, international treaties, and against administrative actions, but there is no constitutional complaint against acts of the judiciary.[4] In Germany, as one of the most advanced mechanisms among countries in dealing with this issue, the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) has the authority to handle constitutional complaint cases related to an act of a public authority. This therefore includes complaints concerning the constitutionality of a law, an administrative act, and even a court decision.[5] Another interesting model of the protection of fundamental

1 I Dewa Gede Palguna, "Constitutional Complaint and the Protection of Citizens the Constitutional Rights," *Constitutional Review* 3, no. 1 (May 2017): 2-3.

2 Gerhard Dannemann, "Constitutional Complaints: The European Perspective," *the International and Comparative Law Quarterly* 43, no. 1 (January 1994): 142.

3 Explanation on the model of constitutional complaint is discussed in Chapter II and III of this paper.

4 Austria Constitution, Art. 139, Art. 140 and Art. 144.

5 The authority of the German Constitutional Court to decide constitutional complaint cases is described in Article 93 paragraph (1) number 4a and 4b of the German Constitution (*Grundgesetz).*

rights can be found in Spain. The Spanish Constitutional Court (*Tribunal Constitucional de España)* also has the power to examine constitutional complaint cases known as the *recurso de amparo,* which is an appeal for constitutional protection of fundamental rights against parliamentary decisions, governmental and administrative decisions, and judicial decisions.[6]

In Asia, it is imperative that the court in Asia actively participate in the Association of Asian Constitutional Courts and Equivalent Institutions (AACC), an Asian regional forum for constitutional justice which provides the opportunity for AACC member institutions to regularly exchange ideas and share their experiences of constitutional adjudication to promote the development of democracy, rule of law and fundamental rights in Asia. The AACC members have adopted a system of constitutional adjudication in a variety of models. Then, when it comes to jurisdictions, out of sixteen AACC members, there are four countries hold a power to examine constitutional complaint cases,[7] such as Azerbaijan,[8] South Korea,[9] Thailand,[10] and Turkey.[11] In this context, a comparative perspective among AACC members state is expected to provide lessons for the other AACC members that do not have a constitutional complaint mechanism, particularly for Indonesia.

With constitutional complaint mechanism, the issue of fundamental rights, and the rights of citizens can be accommodated and carried out to a high level of competence by the constitutional court. But, of course, there must be limitations first of what can be deliberated or tried at the constitutional court. What matters can be considered under a constitutional complaint mechanism? These questions are discussed in detail based on the experiences and practises in several countries through a comparative perspective.

Therefore, this paper aims to explain the constitutional complaint mechanism from a comparative perspective: discussing models, procedure, and decision. The

[6] The Constitution, Art. 53(2) and the Spanish Constitutional Court Law, Art. 41, 42, 43, and 44.
[7] Explanation on the constitutional complaint at the AACC members' countries is discussed in Chapter III of this paper.
[8] The Constitution of Azerbaijan, Art. 130 (3).
[9] The Constitution of Korea Art. 111.
[10] The Constitution of Thailand, sec. 51, 82, 200-214.
[11] The Constitution of Turkey, Art. 69, 85, and 148.

study is conducted through a theoretical inquiry concerning the constitutional complaint and comparing the constitutional complaint in three countries in Europe and four AACC member countries.

II. EUROPEAN MODELS OF CONSTITUTIONAL COMPLAINT

The constitutional complaint is one of the essential issues to be dealt with by many countries issues adopting the constitutional court. Each country has different circumstances and experiences regarding the practice of constitutional complaint, which are influenced by different legal systems, historical backgrounds, and the various different conditions that exist in each country. In Europe, there are three countries that have interesting models of constitutional complaints, such as Austria, Germany, and Spain.

In this part, the author attempt to summarize the constitutional complaint in Austria, Germany, and Spain that were the subject of a comparative study, and then provide some explanations of the differences among them. Therefore, the exchange of information and practical experience is necessary and brings significant benefits for the citizens and the protection of their constitutional rights in their respective countries.

2.1. Austria

Austria has been chosen as a reference since Hans Kelsen established the first Constitutional Court of Austria (*Verfassungsgerichtshoft*) in 1920, rejected the American model and adopted the European model of constitutional review. The United States adheres to the Anglo Saxon system and the institution who has functioned as the guardian of the constitution is the Supreme Court. So it is different from Austria which embraces the Continental European system. The Austrian model has a separate judicial institution outside the Supreme Court, which carries out the function of the constitutional review.

The organization and structure of the Austrian Constitutional Court consist of a president, a vice-president, 12 additional members and six substitute members, all of them appointed by the Federal President on the recommendation of the

Federal Government, and these members and the substitute members shall be elected from among judges, administrative officials, and professors of law. The federal government of Austria has the right to recommend candidates for appointment as president, vice-president, six members, and three substitute members; three members and two substitute members are elected on the basis of proposals submitted by the National Council; another three members and one substitute member are proposed by the Federal Council.[12]

Regarding the jurisdictions, the Austrian Constitutional Court has jurisdictions to examine judicial review cases,[13] review of regulations,[14] review of state treaties,[15] review of rulings by the administrative tribunals,[16] decisions in a conflict of jurisdiction arising under constitutional laws,[17] establishment of jurisdiction (the Constitutional Court has to establish whether an intended act of legislation or enforcement is within the authority of the federal or provincial government),[18] electoral jurisdiction,[19] and jurisdiction over entities of the state.[20]

2.1.1. Models of the Constitutional Complaint

The Austrian Constitutional Court refers to constitutional complaint as *Individualantrag-Bescheidbeschwerde* that can be given by any person who claims to be harmed directly in respect of one of their rights by regulation, a law, or an international treaty.[21]

The constitutional review of laws represents the core of constitutional court jurisdiction. Article 140 of the Austrian Constitution states that the Court pronounces furthermore whether laws are unconstitutional when an applicant claims a direct violation of personal rights through such unconstitutionality in

[12] The Austrian Constitution (*Bundes-Verfassungsgesetz* (BVG)), Art. 147. See also "Brochure: the Constitutional Court of Austria," the Constitutional Court of Austria, 13, accessed August 22, 2018, https://www.vfgh.gv.at/verfassungsgerichtshof/publikationen/information_material.en.html.

[13] The Austrian Constitution (BVG), Art. 140.

[14] The Austrian Constitution Art. 139.

[15] The Austrian Constitution, Art. 140a.

[16] The Austrian Constitution, Art. 144.

[17] The Austrian Constitution, Art. 138 paragraph (1).

[18] The Austrian Constitution, Art. 138 paragraph (2) and 148f.

[19] The Austrian Constitution, Art. 141.

[20] The Austrian Constitution, Art. 142 and 143.

[21] The Austrian Constitution, Art. 139, 140, and 140a and The Austrian Constitutional Court Statute (*Verfassungsgerichtshofgesetz* (VerfGG)), Art. 57.

so far as the law has become useful for the applicant without the delivery of a judicial decision.

While the Constitutional Court jurisdiction to review international treaties stipulated in Article 140a of the Austrian Constitution, the Constitutional Court is not in a position to revoke a state treaty that has been found to be against the law; it can only establish its unconstitutionality or unlawfulness.

The Austrian Constitutional Court also has the vital authority of pronouncing on complaints against rulings by the administrative tribunals. In such a complaint, the appellant may claim either the violation of a constitutionally guaranteed right through the ruling or the violation of rights through the application of a general unlawful norm underlying the ruling, above all an unconstitutional law. The complaint can be filed after all other stages of legal remedy have been exhausted.[22]

Unlike at the Federal Constitutional Court of Germany, the constitutional complaint handled by the Austrian Constitutional Court is not allowed to challenge a court decision although the court's decision is alleged to violate fundamental rights.

2.1.2. Admission Procedures

The procedure for filing a constitutional complaint before the Austrian Constitutional Court is stipulated in the Articles 139 and 140 of the Constitution for the unconstitutionality of statutes and on the illegality of regulation, and Article 144 of the Austrian Constitution for direct individual complaints against an administrative decision.

In the case of a review of the lawfulness of regulations, Article 139 of the Constitution indicates that the Austrian Constitutional Court pronounces on the illegality of regulations. In order for the constitutional complaint to be admissible, Article 57 (1) of the Constitutional Court Act stipulated that if such request is filed by a person claiming direct infringement of his rights by the unlawfulness of the regulation it shall also state to what extent the person has

[22] The BVG, Art. 144 and The VerfGG, Art. 82.

been affected by such regulation without a court decision having been rendered or administrative decision having been issued.

In the case of examining the constitutionality of statutes (Article 140 of the Austrian Constitution), in order for the complaint to be admissible, Article 62 (1) of the Constitutional Court Act stated that the request to repeal a statute on the grounds of being unconstitutional shall claim that either the full contents of the statute or certain of its parts be repealed on the grounds of being unconstitutional. The request shall detail the objections put forward against the constitutionality of the law.

In the case of complaints about the against an administrative decision violating a person's rights through the application of an illegal general norm (Article 144 of the Austrian Constitution), the period for submitting a complaint against a decision is six weeks of its delivery.[23] The applicant is requested shall contain, the classification of the disputed decision and the Administrative Court that declared it, the facts of the case, the statement whether the complainant claims that the disputed decision has infringed constitutionally guaranteed rights or violated his rights, a specific request, and the information required to decide whether the complaint has been filed in due time.[24]

2.1.3. Decisions

The Austrian Constitutional Court decisions are generally taken by the plenum of the Constitutional Court and this is constituted if the President and at least eight other justices are present,[25] the decisions of the Constitutional Court shall be taken after a public oral hearing to which applicant, opponent, and any other involved parties shall be summoned.[26]

The Constitutional Court may revoke a law as unconstitutional only to the extent that its rescission was expressly asked or the Court would have to apply the law in the suit pending with it.[27] The decision by the Constitutional Court

[23] The VerfGG, Art. 82(1).
[24] The VerfGG, Art. 82(4).
[25] The VerfGG, Art. 7.
[26] The VerfGG, Art. 19.
[27] The BVG, Art. 140(1).

which revokes a law as unconstitutional imposes on the Federal Chancellor or the Governor the obligation to publish the rescission without delay.[28]

The circumstance is different if the complaint's subject-matter regards an international treaty. In this case, the Constitutional Court cannot revoke the treaty as unconstitutional but can only declare it non-applicable, and this decision binds all institutions which are required to execute that treaty.[29]

2.2. Germany

Germany as a reference was due to the fact that Germany is one of the countries who have the most advanced and established the constitutional court system, even though it is not the oldest. Since its founding in 1951, the Federal Constitutional Court has been playing a significant role in the securing of basic democratic order, the rule of law and fundamental rights protection, and through its decisions have strengthened the constitutional system in Germany.

The Federal Constitutional Court consist of two Senates and each Senate has eight justices.[30] Each Senate has its own authorities but always decides as "the Federal Constitutional Court." The First Senate is concerned predominantly with conflicts between the state and citizens, which the first Senate has authority to examine judicial review cases in which the main issue is the alleged incompatibility of a legal provision with fundamental rights or rights under Articles 33, 101, 103 and 104 of the Basic Law, and constitutional complaint cases with the exception of constitutional complaints pursuant to Article 91,[31] as well as constitutional complaints concerning electoral law.[32]

Meanwhile, the Second Senate decides on conflicts between state organs,[33] which the second Senate is authorized to examine the forfeiture of constitutional

[28] The BVG, Art. 140(5).
[29] The BVG, Art. 140. See also Mario Patrono, "The Protection of Fundamental Rights by Constitutional Court – Comparative Perspective," *Victoria University of Wellington Law Review* 31, no. 2, (May 2000): 417.
[30] The Federal Constitutional Court, Art. 2 par. (1) and (2).
[31] The Act on the Federal Constitutional Court, Art. 91, regulates about municipalities may submit a constitutional complaint claiming that federal or Land law violates the provisions of Article 28 of the Basic Law.
[32] The Act on the Federal Constitutional Court, Art. 14(1).
[33] The Act on the Federal Constitutional Court, Art. 14(2).

rights,[34] the dissolution of the political party,[35] complaints in proceedings involving the scrutiny of elections,[36] impeachment of the Federal President,[37] constitutional disputes between federal organs,[38] review of statutes upon application by a constitutional organ,[39] constitutional disputes between the Federation and the Laender,[40] impeachment of federal and *Land* judges,[41] Status of a provision of public international law as part of federal law,[42] and disagreements on whether law continues to be valid as federal law,[43] as well as for review proceedings and constitutional complaints not assigned to the First Senate.

2.2.1. Models of the Constitutional Complaint

The German Federal Constitutional Court refers to the constitutional complaint mechanism known as *verfassungsbeschwerde*.[44] Everybody (not just specific public authorities) has an access to this jurisdiction, and the number of those who make use of this opportunity is much more significant than in other jurisdictions.[45] Therefore, the Court has a high-level workload, which receives some 6.000 constitutional complaints per year. From 7 September 1951 to 31 December 2018, a total of 238.048 proceedings were brought before the Federal Constitutional Court.[46]

As underlined in article 93(1) of the Basic Law for the Federal Republic of Germany stated that a constitutional complaint might be lodged by an individual

[34] The Basic Law for the Federal Republic of Germany, Art. 18.
[35] The Basic Law for the Federal Republic of Germany, Art. 21(2).
[36] The Basic Law for the Federal Republic of Germany, Art. 41(2).
[37] The Basic Law for the Federal Republic of Germany, Art. 61.
[38] The Basic Law of Germany. Art. 93(1) number 1.
[39] The Basic Law for the Federal Republic of Germany, Art. 93(1) number 2.
[40] The Basic Law of Germany, Art. 93(1) number 3 and Article 84(4) second sentence.
[41] The Basic Law for the Federal Republic of Germany, Art. 98(2) and (5).
[42] The Basic Law of Germany, Art. 100(2).
[43] The Basic Law for the Federal Republic of Germany, Art. 126.
[44] The Federal Constitutional Court's authority to decide constitutional complaints cases stated in Art. 93 (1) number 4a and 4b of the Basic Law for the Federal Republic of Germany and Art. 90 to 95 of the Act on the Federal Constitutional Court.
[45] Caroline Elisabeth Wittig, "Ideological Values and their Impact on the Voting Behavior of Justices of the Federal Constitutional Court of Germany" (Thesis Master of Public Administration, Bowling Green State University, August 2009), 27.
[46] German Federal Constitutional Court, "Annual Statistic 2018," published on February 2019, accessed on 22 February 2019, https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Statistik/statistics_2018.pdf?__blob=publicationFile&v=4.

citizen claiming that one of his or her rights has been violated by the public authority (law, administrative act, or court decision).

The reason submitted in the constitutional complaint must explain the constitutional right which has been violated, and the act or omission of the organ or authority by which the complainant claims his or her rights have been violated.[47] In detail as stipulated in the Federal Constitution, it is stated that a constitutional complaint can be made if any of the following rights are violated by the public authority, particularly the fundamental right contained in Article 20 (Basic principles of state order, Right of resistance), Article 33 (Equal citizenship – Public service), Article 38 (election), Article 101 (Ban on extraordinary courts), Article 103 (Fair trial), and Article 104 (Deprivation of liberty).[48]

2.2.2. Admission Procedures

The application for constitutional complaint shall be submitted to the Federal Constitutional Court in writing, it must state reasons, and the necessary evidence must be listed.[49] As determined by Article 93(1) No. 4a of the Basic Law, the constitutional complaint, which may be filed "by any person" alleging that one of his fundamental rights has been infringed "by public authority.[50]

The article above means several things. First, the phrase of "any person" means every physical person or legal person, including foreigners. Second, the phrase "public authority" means all acts which are committed by a Federal or State authority which violates to the fundamental rights, such as the constitutional complaint against the law, administrative act, or court decision.

The time limit of constitutional complaints application regulated in Article 93 of the Act on the Federal Constitutional Court. The constitutional complaint against the court and administrative decisions must be lodged within one month to be admissible, and the complete reasoning of the complaint must also be

[47] The Act on the Federal Constitutional Court, Art. 92.
[48] The Basic Law of Germany, Art. 93(1) No. 4a.
[49] The Act on the Federal Constitutional Court, Art. 23.
[50] The Basic Law of Germany, Art. 93(1) No. 4a.

submitted within this period.[51] If applicants were unable to apply with this time limit through no mistake of their own, they shall, upon application, be granted reinstatement into their previous procedural position. The application shall be submitted within two weeks of the removal of the cause for their non-compliance. Reasons for the request shall be stated either in the application itself or during the proceedings and their factual basis substantiated *by prima facie* evidence. Fault on the part of the applicant's authorized representative shall be deemed equal to fault on the part of the complainant.[52] The constitutional complaint examines a law or another sovereign act against which legal recourse is not possible, the complaint may only be lodged within one year of the law entering into force or of the sovereign act being issued.[53]

2.2.3. Decisions

The Constitutional Court shall decide in secret deliberations at its discretion and based on the opinion resulting from the hearing and the evidence obtained. The decision shall be set in writing, shall provide reasons and shall be signed by the participating Justices.[54] However, the pronouncements of the decisions shall be public.[55] If a Justice expressed a different view on the decision or its argumentation during the deliberations, he or she might set forth this viewpoint in a separate opinion; the separate opinion shall be attached to the decision. The Senates may publish the distribution of votes in their decisions.[56] The nature of the decision is final and binding upon the constitutional organs of the Federation and the *Laender*, as well as on all courts and those with public authority.[57]

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[51] Art. 93(1) first sentence of the Act on the Federal Constitutional Court. See also German Federal Constitutional Court, "How to Lodge the Constitutional Complaint." Last Modified March 2018, 2. Accessed August 22, 2018, https://www.bundesverfassungsgericht.de/EN/Homepage/_zielgruppeneinstieg/Merkblatt/Merkblatt_node.html.

[52] The Act on the Federal Constitutional Court, Art. 93(2). See also German Federal Constitutional Court, "How to Lodge the Constitutional Complaint," 2.

[53] The Act on the Federal Constitutional Court, Art. 93(3).

[54] The Act on the Federal Constitutional Court, Art. 30 (1).

[55] The Act on the Federal Constitutional Court, Art. 17a.

[56] The Act on the Federal Constitutional Court, Art. 30(2).

[57] The Act on the Federal Constitutional Court, Art. 31(1).

2.3. Spain

The Spanish Constitutional Court was created in 1978 whose operational setting was done by the Organic Law No. 2/1979 on the Constitutional Court. Spain has been chosen because the Spanish Constitutional Court jurisdictions is comparatively broad and its covers the whole Spanish territory.

The organizational structure of the Spanish Constitutional Court shall consist of twelve members selected by the King. Of these, four members shall be nominated by the Congress (parliament) by a majority of three-fifths of its members, then four shall be nominated by the Senate with the same majority, two shall be appointed by the Spanish Government, and two by the General Council of the Judicial Power.[58] The term of office of Constitutional Court justice shall be nine years, one-third of the Constitutional Court being renewed every three years.[59]

The Spanish Constitutional Court has jurisdiction to rule on the implementation of the constitutional review of laws, acts, and regulations; constitutional complaint (*recurso de amparo*) against violation of the rights and freedoms; disputes of the jurisdiction between the State and the Self-governing Communities or between the Self-governing Communities themselves; disputes between the constitutional bodies of the State; conflicts in defence of local self-government; and declaration concerning the constitutionality of international treaties.[60]

2.3.1. Models of the Constitutional Complaint

One of the Spanish Constitutional Court main powers is a constitutional complaint or appeal is the so-called *recurso de amparo*, this jurisdiction has the function to guarantee of fundamental rights and freedoms derived from the constitution. As determined by Article 53(2) of the Spanish Constitution, any citizen may assert a claim to protect the liberties and fundamental rights recognised in the Articles 14 to 30 of the Spanish Constitution, have been

[58] The Spanish Constitution, Art. 159(1).
[59] The Spanish Constitution, Art. 159(3).
[60] The Spanish Constitution, Art. 161 and The Constitutional Court Law, Art. 2.

violated by a Spanish public authority,[61] by lodging an individual appeal for protection (*recurso de amparo*) to the Constitutional Court.

Individual appeals for protection (*recurso de amparo*) against violation of the rights and freedoms, more specifically, *recurso de amparo* can be exercised to challenge legal enactments, omissions unconstitutional actions (*vía de hecho*) by the public authorities, the Autonomous Communities and other territorial, corporate or public institutional, as well as by their officials.[62] Furthermore, the *amparo* appeal shall be available against violations of the judicial decisions.[63]

The Constitutional Court of Spain Act distinguishes three types of amparo depending on the origin of the act of public authority which allegedly constitutes a violation of fundamental rights, appeal against parliamentary decision,[64] appeal against governmental and administrative decisions,[65] and appeal against judicial decision.[66] Moreover, the Organic Law on the Electoral System provides two types of amparo against acts and decisions of the electoral administration, appeal against the agreements of the Electoral Boards on proclamation of candidates and candidates,[67] and appeal against the agreements of the Electoral Boards on proclamation of elected and election and proclamation of Presidents of Local Corporations.[68]

2.3.2. Admission Procedures

The application for *recurso de amparo* shall be submitted directly to the Spanish Constitutional Court, according to Article 162(1) (b) of the Spanish constitution states that, any person or body corporate with a legitimate interest, as well as the Defender of the People and the Public Prosecutor's Office are entitled to lodge an appeal. Before filing the appeal against governmental or

[61] The Spanish Constitution, Art. 14 to 30, regulate the protection of fundamental rights and freedom such as equality before the law and public liberties.
[62] The Act of the Constitutional Court of Spain, Art. 41(2).
[63] In cases in which a court decision is questioned, Art. 47(1) of the Act of the Constitutional Court of Spain states that *those profited by the decision, act or fact that affected to the appeal or individual with a legitimate interest therein may appear in the proceedings for protection as a defendant*.
[64] The Act of the Constitutional Court of Spain, Art. 42.
[65] The Act of the Constitutional Court of Spain, Art. 43.
[66] The Act of the Constitutional Court of Spain, Art. 44.
[67] The Act of the Electoral System of Spain, Art. 49(3).
[68] The Act of the Electoral System of Spain, Art. 114(2).

administrative decisions or against judicial decisions, the applicant must show to have exhausted any remedies available before ordinary courts.

The standing to lodge the *amparo* appeal, Article 46 of the Act of the Constitutional Court of Spain states that, in the case of appeal against parliamentary decision, the person directly concerned, the Ombudsperson and the Public Prosecutor Office. While, in the case of against governmental and administrative decisions, as well as appeal against judicial decision, the parties to the corresponding judicial proceedings, the Ombudsperson and the Public Prosecutor Office.

The deadlines for filing the complaint against governmental or administrative decisions shall be twenty days from the date of announcement of the ruling given in the previous legal proceedings.[69] Furthermore, the deadline for lodging an *amparo* appeal against judicial decisions shall be thirty days from the date of announcement of the ruling given in the judicial proceedings.[70]

2.3.3. Decisions

The Spanish Constitutional Court decision is final, or no appeal may be brought against them, when the court declares the unconstitutionality of an act or a statute with the force of an act and all those which are not limited to the acknowledgment of an individual right, shall be fully binding on all persons and it has effect *erga omnes*.[71]

The decision delivered of the appeal may grant or deny the requested *amparo*. According to Article 53 of the Spanish Constitutional Court Act, the Chamber, or where appropriate the Section, having examined the case on its merits, shall deliver one of the following judgments: a) granting of protection (*otorgamiento de amparo*); and b) denial of protection (*denegación de amparo*).[72]

[69] The Act of the Constitutional Court of Spain, Art. 43(2). See also "Amparo (Appeal for Constitutional Protection of Fundamental Rights)," The Constitutional Court of Spain, accessed August 22, 2018, https://www.tribunalconstitucional.es/en/tribunal/Composicion-Organizacion/competencias/Paginas/04-Recurso-de-amparo.aspx.

[70] The Act of the Constitutional Court of Spain, Art. 44(2). See also the Constitutional Court of Spain, "Amparo (Appeal for Constitutional Protection of Fundamental Rights)."

[71] The Spanish Constitution, Art. 164 (1).

[72] The Act of the Constitutional Court of Spain, Art. 53.

Furthermore, when the judgment will be granting of protection, it should contain any of the following, a) declaration of invalidity of the Court decision, act or questioned resolution; b) public perception of the right or freedom violated; c) restoration of the appellant in the integrity of his or her rights or freedom by adopting appropriate measures, and where appropriate, for its conservation.[73]

III. MODELS OF CONSTITUTIONAL COMPLAINT IN AACC MEMBERS

The primary purpose of this paper is to explain the model of constitutional complaint in the AACC members. The general description of AACC members will be discussed in the first sections. In the second section, the author will specifically discuss the constitutional complaint in AACC members to obtain a comprehensive picture regarding the models, procedures and decisions.

3.1. General Description of AACC Members

Before discussion about the jurisdictions, this paper will mention briefly about the idea of establishing the AACC. Discussion about the idea of establishing the AACC began in 2005 at the 3rd Conference of Asian Constitutional Court Judges in Mongolia. Several countries agreed with the establishment of the AACC, then followed up with signing the Memorandum of Understanding on the Preparatory Committee for the establishment of the AACC at the 5th Conference of Asian Constitutional Court Judges held in Seoul, Korea in October 2007.[74] Finally, in Jakarta, July 2010, the AACC was officially launched and it was agreed to convene the Inaugural Congress in Korea.[75] The purpose of establishing the AACC is to promote the development of democracy, rule of law and fundamental rights in Asia.

The AACC has sixteen members, which are institutions of constitutional justice respectively from Afghanistan, Azerbaijan, Indonesia, Kazakhstan, Korea, Kyrgyz Republic, Malaysia, Mongolia, Myanmar, Pakistan, The Philippines, Russia,

[73] The Act of the Constitutional Court of Spain, Art. 55.
[74] MoU Signatories: Indonesia, Korea, Mongolia and the Philippines.
[75] Adopted the Jakarta Declaration on the Establishment of the AACC.

Tajikistan, Thailand, Turkey, and Uzbekistan. In carrying out its functions, the AACC has three permanent secretariats which have different functions. First, the Constitutional Court of Indonesia hosts the Secretariat for Planning and Coordination; second, the Constitutional Court of Korea hosts the Secretariat for Research and Development; and third, the Constitutional Court of Turkey runs a Center for Training and Human Resources Development.

The sixteen AACC members have a variety of organizational structures, jurisdictions, and procedures, which are influenced by different legal systems, historical backgrounds, and the various conditions that exist in each member. It reflects the diversity of fundamental rights protection systems. It is generally accepted that the system of constitutional adjudication in today's world can be classified into two types, each reflecting different historical backgrounds. The decentralized type is the American model of judicial review in which the power to review the constitutionality of state action is distributed throughout the regular courts. The centralized type is the European model in which the power to decide constitutional issues is concentrated in a particular independent agency that is separate from the ordinary courts.[76]

The AACC members that implement the American model system in which the institution that has a role as the guardian of the constitution is the Supreme Court, consist of Malaysia, Pakistan, and Philippine. While the AACC members that apply the Austrian model, which has a separate judicial institution outside the Supreme Court, consist of Afghanistan, Azerbaijan, Indonesia, Kyrgyzstan, Kazakhstan, Korea, Mongolia, Myanmar, Russia, Tajikistan, Thailand, Turkey, and Uzbekistan.

However, when it comes to jurisdictions, out of sixteen AACC members, only four AACC members have the authority to handle the constitutional complaint mechanism in their jurisdictions, namely Azerbaijan, Korea, Turkey, and Thailand.

[76] The Constitutional Court of Korea, *Thirty Years of the Constitutional Court of Korea* (Seoul: The Constitutional Court, 2018), 66.

3.2. Constitutional Complaint in Four AACC Member

As discussed above that out of the sixteen AACC members there are four countries that have constitutional complaint jurisdiction, namely Azerbaijan, Korea, Turkey, and Thailand. In this part, The Author attempt to summarize the constitutional complaint at AACC Members that were the subject of a comparative study, and then provide some explanations of the differences among them.

3.2.1. Azerbaijan

The Constitutional Court of Azerbaijan was established on 14 July 1998, which functions to guarantee the supremacy of the Constitution of Azerbaijan and to protect fundamental rights and freedoms of each person. In carrying out these powers, the Constitutional Court shall be based on the principle of supremacy of the Constitution of the Azerbaijan Republic as well as principles of independence, collegiality, and publicity.[77]

According to Article 130 of the Constitution of Azerbaijan that regulates the jurisdictions of the Constitutional Court, the Constitutional Court adopts decisions on the correspondence of laws, decrees and other normative legal acts to the Constitution and laws. Furthermore, the Constitutional Court also gives an interpretation of the Constitution and laws.

One of the main powers of the Constitutional Court of Azerbaijan is constitutional complaint. Article 34(1) of the Law on the Constitutional Court of Azerbaijan states that any individual who alleges that his or her fundamental rights have been violated by the normative legal act of the Legislative and Executive, or an act of the municipality and courts, may submit a complaint to the Constitutional Court in order to restore his/her fundamental rights and freedoms.

The Constitutional Court can examine individual complaints against judicial decisions in the following cases: if the normative legal act which should have been applied was not applied by a court; if a normative legal act which should

[77] The Law on the Constitutional Court of Azerbaijan, Art. 4.

not have been applied was applied by a court; and if normative legal act was not properly interpreted by a court.[78]

3.2.1.1. Application Procedures

The application for constitutional complaint shall be submitted to the Constitutional Court of Azerbaijan in accordance with the procedure stipulated in the Law on the Constitutional Court of Azerbaijan. The reasons for the complaint must be proven within the complaint, where the rights and freedoms of the complainant had been violated by legislative acts in force, normative acts of executive power, the acts adopted by a municipality or a court. There are also some technical requirements, such as identity, deadlines, complaint form, stamp duty, the language, as well as the title and date of the disputed act and other necessary matters.[79]

The constitutional complaint can be submitted to the Constitutional Court after exhaustion of all remedies. The time limit for the complaint to be submitted to the Constitutional Court is within six months from the moment of the entrance into force of the decision of the court of the last instance,[80] or within three months from the date of violation of the complainant's right to apply to Constitutional Court.[81]

Regarding the legal standing, according to Article 34(1) of the Constitutional Court Law, "any person" who alleges that his/her rights and freedoms have been violated by the normative legal act of the Legislative and Executive, the acts adopted by a municipality or a court may submit a complaint to the Constitutional Court.

While, according to Article 32(2) of the Constitutional Court Law, the Ombudsman of the Azerbaijan Republic shall apply to the Constitutional Court in cases where the rights and freedoms of a person had been violated by legislative acts in force, normative acts of executive power, the acts adopted by a municipality or a court. It means, the procedure of constitutional complaint

[78] The Law on Constitutional Court of Azerbaijan, Art. 34.1.
[79] The Law on the Constitutional Court of Azerbaijan, Art. 34.6.
[80] The Law on the Constitutional Court of Azerbaijan, Art. 34.4.1.
[81] The Law on the Constitutional Court of Azerbaijan, Art. 34.4.2.

to the Constitutional Court is indirect, since the first step for the applicant is to complain to the Ombudsman.

Regarding the procedure of examination, constitutional complaint cases shall be delivered to the session of the Panel of the Constitutional Court within 30 days, and there shall be affirmed a ruling as to admissibility or rejection of complaint. If the complaint is inadmissible, the complaint shall be sent to the applicant within seven days after its adoption. Otherwise, if the complaint is declared admissible, the examination on the merits of a complaint by the Constitutional Court shall start within 60 days after admission for examination.[82]

3.2.1.2. Decisions

After all trial sessions have been completed, Justices will decide whether the complaint is granted or not. The Constitutional Court decisions are final and binding. There are three types of final judgment on the request for adjudication. First, the complaint will be rejected if the complaint is irrational and unfounded. Second, the complaint will be dismissed if the complaint was made unlawfully. Third, the complaint will be granted if five or more Justices deem the request to have the reason(s) and is justified.[83]

3.2.2. South Korea

The Korean Constitutional Court has just celebrated its thirtieth anniversary, since its establishment thirty years ago in 1988, the Constitutional Court of Korea has been playing a significant role in protecting of fundamental rights and constitutional values through an impartial interpretation of the constitution, and the Court decisions also have strengthened the constitutional system in Korea.

In terms of the organizational structure, the Constitutional Court of Korea shall be composed of nine Justices qualified to be court judge, and they shall be appointed by the President.[84] Among the Justices, three shall be appointed from persons selected by the National Assembly, and three shall be elected from

[82] The Law on the Constitutional Court of Azerbaijan, Art. 52 (1), (2), and (3).
[83] The Constitutional Court of Azerbaijan, "AACC Member Fact File: Constitutional Court of Azerbaijan," in *The Jurisdictions and Organization of AACC members*, ed. AACC SRD (Seoul: AACC SRD, 2018), 40.
[84] The Korean Constitution, Art. 111(2).

person nominated by the Chief Justice of the Supreme Court.[85] The president of the Court shall be appointed by the President of the Republic of Korea from among the Justices with the approval of the National Assembly.[86]

The jurisdiction of the Court are stipulated in Article 111(1) of the Korean Constitution, and the Constitutional Court shall have the jurisdictions of constitutional review,[87] impeachment, dissolution of a political party, resolving competence disputes, and adjudicating constitutional complaint. Because of all these powers, the Constitutional Court occupies a very strategic and influential position, and the Court is said to be the guardian of the constitution.

Constitutional complaint at the Constitutional Court of Korea is an essential jurisdiction in the efforts to guarantee the protection of fundamental rights of the citizen as guaranteed by the Korean Constitution. There are two types of constitutional complaints available in Korea. First, based on Article 68(1) of the Constitutional Court Act, any person who claims that his or her fundamental rights have been violated by an exercise or omission of state power, excluding the judgments of the ordinary courts, can file a constitutional complaint.[88] Second, another type of constitutional complaint is mentioned in Article 68(2) of the Constitutional Court Act, if a motion made under Article 41(1) of the Constitutional Court Act for request of adjudication on constitutionality of laws is denied by the ordinary court, the party may file a constitutional complaint to the Constitutional Court.

The two kinds of the complaint are distinct, Article 68(1) can be used in situations where existing laws do not afford remedies through ordinary court processes for unconstitutional state action. It should be noticed that the decisions of ordinary courts are not eligible for the petition.[89] Article 68(2) prescribes

[85] The Korean Constitution, Art. 111(3).

[86] The Korean Constitution, Art. 111(4).

[87] The Korean Constitutional Court does not have the competence of abstract review.

[88] Art. 68(1) The Constitutional Court Act: "Any person whose basic rights guaranteed by the Constitution is infringed due to exercise or non-exercise of the governmental power, excluding judgment of the ordinary courts, may file a constitutional complaint with the Constitutional Court: Provided, That if any remedy is provided by other laws, no one may file the constitutional complaint without having exhausted all such processes".

[89] Dae-Kyu Yoon, "The Constitutional Court System of Korea: The New Road for Constitutional Adjudication," *Journal of Korean Law* 1, no. 2, (2001): 11.

a special form of constitutional complaint, which is tied to the procedure of "norm-control" in the process of constitutional review of legislation. This is one of the institutional factors that enabled early stabilization of the constitutional adjudication system in Korea and which facilitated public recognition of constitutional review as the last resort in protecting individuals' fundamental rights.[90]

3.2.2.1. Application Procedures

The application for constitutional complaint under Article 68(1) requires that the applicant shall include the information of the complainant and his or her counsel, infringed rights, exercise or omission of state power by which the infringement of the right is caused, bases for the request and other necessary matters.[91] While the issues to be stated on the application for complaint under Article 68(2) is actually the same with adjudication on the constitutionality of statutes as regulated in Article 43, when an ordinary court requests a complaint to the Constitutional Court, the court's written request shall include the information of the requesting ordinary court, information of the case and the parties, the statute or any provision which is interpreted as unconstitutional, based on which a statute is interpreted as unconstitutional, and other necessary matters.[92]

The time limit for filing a constitutional complaint under Article 68(1) shall be filed within 90 days after the occurrence of the cause is known, and within one year after the cause happens. If a constitutional complaint is filed after exhausting remedial processes provided by other laws, it shall be filed within 30 days after the final decision in these processes has been made.[93] While a complaint under Article 68(2) shall be filed within 30 days after a denial of a motion to request for review on the constitutionality of the statute is notified.[94]

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[90] Kang-Kook Lee, "*The Past, and Future of Constitutional Adjudication in Korea,* in *Current Issues in Korean Law,"* ed. Laurent Mayali and John Yoo (California: Robbins Collection Publication School of Law University of California at Berkeley, 2014), 3.

[91] The Korean Constitutional Court Act, Art. 71(1).

[92] The Korean Constitutional Court Act, Art. 43.

[93] The Korean Constitutional Court Act, Art. 69(1).

[94] The Korean Constitutional Court Act, Art. 69(2).

Furthermore, the procedure of examination, according to Article 72 of the Constitutional Court Act that regulates about prior review states that the President of the Court may set the Panels each of which consists of three Justices and have the Panels take a prior review of a constitutional complaint.[95] The Panel shall dismiss a constitutional complaint unanimously as a result of the non-satisfaction of formal requirements for constitutional complaint.[96]

3.2.2.2. Decisions

The decision of the constitutional complaint cases shall bind all the state agencies and the local governments.[97] In upholding a constitutional complaint under Article 68(1), the violated fundamental rights and the exercise or non-exercise of governmental power by which the infringement has been caused shall be specified in the holding of the decision of upholding.[98] In the case related to in paragraph (2), the Constitutional Court may revoke the exercise of governmental power which infringes fundamental rights or confirms that the non-exercise thereof is unconstitutional.[99]

There are three types of final judgment on the request for adjudication. First, rejection means the request is irrational and unfounded. Second, dismissal means that the request was made unlawfully. Third, upholding means six or more Justices deem the request to have reason(s) and is justified.[100]

3.2.3. Turkey

The Turkish Constitutional Court was created by the constitution drafted after the military coup on May 27, 1960. The 1961 Constitution created the Turkish Constitutional Court to establish a constitutional review of legal action by the legislature.[101] In that period, only a few countries in Europe (Austria, Germany, and Italy) had a constitutional adjudication system. Therefore, the Turkish

[95] The Korean Constitutional Court Act, Art. 72(1).
[96] The Korean Constitutional Court Act, Art. 72(2).
[97] The Korean Constitutional Court Act, Art. 75(1).
[98] The Korean Constitutional Court Act, Art. 75(2).
[99] The Korean Constitutional Court Act, Art. 75(3).
[100] Constitutional Court of Korea, "AACC Member Fact File: Constitutional Court of Korea," in *The Jurisdictions and Organization of AACC members,* ed. AACC SRD (Seoul: AACC SRD, 2018), 117.
[101] Cenap Cakmak and Cengiz Dinc, "Constitutional Court: Its Limits to Shape Turkish Politics," *Insight Turkey* 12, no. 4, (2010): 7.

Constitutional Court is one of the oldest Constitutional Court established in Europe.[102] Turkey is a member of the Council of Europe, as well as a member of the AACC.

The composition, powers, and organizational structure of the Constitutional Court were changed considerably by the constitutional amendments in 2010, and a new law was enacted in 2011. The composition of the Constitutional Court is based on the representation model. The Constitutional Court of Turkey shall be composed of fifteen members.[103] The Constitutional Court members shall be chosen for a term of twelve years and non-renewable, and they shall retire when they are over the age of sixty-five.[104]

The jurisdiction of the Turkish Constitutional Court is regulated in Article 69 and 148 of the Turkish Constitution, the Constitutional Court maintained its powers to exercise abstract and concrete norm review,[105] individual application (constitutional complaint), adjudicate on the dissolution of political parties, carry out the financial audit of political parties, and trial of statesmen before the Supreme Criminal Court.[106]

The individual application was introduced into the Turkish legal system by the 2010 constitutional amendments,[107] and 23 September 2012 was determined as the first day of receiving applications.[108] According to Article 148 paragraph 3 of the Turkish Constitution "everyone may apply to the Constitutional Court because one of the fundamental rights within the scope of the ECHR which are guaranteed by the constitution has been infringed by state power. To make an application ordinary legal remedies must be exhausted."

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[102] "Introductory Booklet of the Constitutional Court of Turkey," Constitutional Court of Turkey, 9, accessed August 22, 2018, https://www.anayasa.gov.tr/en/publications/introductory-booklet/.

[103] The Turkish Constitution (As amended on January 21, 2017, ; Act No. 6771), Art. 146.

[104] The Turkish Constitution, Art. 147.

[105] The Constitutional Court shall examine the constitutionality, in respect of both form and substance of laws, presidential decrees and the Rules of Procedure of the Grand National Assembly of Turkey

[106] The explanation of the last jurisdiction is the Constitutional Court, acting as the Supreme Criminal Court, tries for offences relating to their official functions the President, Vice President or Ministers, and other high-level state officials.

[107] The Individual application was introduced in Turkish Constitutional Court with the provisions in provisional article 18 and Articles 148 and 149 of 1982 Constitution amended with Law no. 5982 adopted the constitutional referendum on 12/9/2010.

[108] Constitutional Court of Turkey, "Introductory Booklet of the Constitutional Court of Turkey," 23.

The individual application can be lodged by those who claim to suffer, as a result of action of public authorities, a violation of any of their fundamental rights and freedoms as guaranteed in the Turkish Constitution, which simultaneously are secured under the European Convention on Human Rights (ECHR) and its additional Protocols ratified by Turkey.[109] As a member of the Council of Europe, Turkey is bound to the ECHR.

3.2.3.1. Application Procedures

The individual application must be lodged with an application form by those, whose fundamental rights which are guaranteed by the Turkish Constitution and are simultaneously within the scope of the ECHR and the additional protocols thereto, are directly alleged to have been violated due to the act or action that is challenged.[110]

According to Article 45(1) of the Turkish Constitutional Court Act, "everyone" can lodge an individual application to the Constitutional Court. However, foreigners are not eligible to file an individual application concerning the rights that are only granted to Turkish citizens. The public legal person cannot make an individual application, but legal persons of private law (associations, foundations, commercial partnerships, etc.) can do so, making an individual application with the justification that only the rights of the legal person as they are have been violated.[111]

An individual application should be filed within thirty days starting from the exhaustion of legal remedies. An applicant who fails to apply within the due duration upon just excuse can apply in fifteen days starting from the ending date of such excuse and with evidence bearing proof of their reasons. The Constitutional Court shall accept or reject such request first by way of examination of the admissibility of the applicant's excuse.[112]

[109] Huseyin Ekinci and Musa Saglam, *Individual Application to the Turkish Constitutional Court* (Ankara: The Constitutional Court of Turkey, 2015), 5.
[110] Before lodging an individual application, all legal and administrative remedies must be exhausted.
[111] The Turkish Constitutional Court Act, Art. 46(2).
[112] The Turkish Constitutional Court Act, Art. 47(5).

In the process of examination of the admissibility of individual application, the admissibility review shall be made by Commissions. Concerning claims that have been concluded unanimously to fail to fulfill the criteria for admissibility, a decision of inadmissibility shall be taken, and decisions of inadmissibility are final.[113] Then, for the examination on merits, the merits of the application shall be reviewed by Sections. During the investigation, commissions and sections can carry out all sorts of research and examination regarding whether or not a fundamental right has been violated.[114]

3.2.3.2. Decisions

After all steps examinations have been carried out, the Turkish Constitutional Court will decide whether the right of the applicant has been violated or not. In individual application cases, applications may be found inadmissible at any stage for failure to satisfy formal requirements. Applications that fail to meet the admissibility requirements (non-exhaustion of remedies, rules about competence etc) are concluded with inadmissibility decision without any further examination. If admissible, it means that an application meets requirements so that the applications will be examined on the merits.

Examination on whether or not there is a violation of the fundamental right in the subject incident of the application is made during the investigation on the merits by Sections. This decision establishes whether or not there is a violation of fundamental right and what should be done to redress it if a violation is established.[115] The effect of the judgment is limited to the concerned individual(s). The Court cannot strike down legislation or other secondary norms through individual application mechanism.[116]

3.2.4. Thailand

The Constitutional Court of Thailand was introduced by the 2007 Constitution after a military *coup d´ état* in 2006 against then Prime Minister Thaksin.[117] The

[113] The Turkish Constitutional Court Act, Art. 48.
[114] The Turkish Constitutional Court Act, Art. 49.
[115] Huseyin Ekinci and Musa Saglam, *Individual Application to the Turkish Constitutional Court*, 104.
[116] Constitutional Court of Turkey, "AACC Member Fact File: Constitutional Court of Turkey," in *The Jurisdictions and Organization of AACC members,* ed. AACC SRD (Seoul: AACC SRD, 2018), 288-289.
[117] Glaser, Henning, "Thai Constitutional Courts and the Political Order," *Seoul Law Journal* 53, no. 2, (June 2012): 65.

2007 Constitution redesigned the Constitutional Court to be more politically isolated and powerful.[118]

Regarding the organizational structure, the Constitutional Court of Thailand has nine judges, which consist of three career judges from the Supreme Court, two judges from the Supreme Administrative Court, one qualified person in law, one qualified person in political science or public administration, and two qualified persons obtained by selection from persons holding or having held a position not lower than Director-General or a position equivalent to a head of government agency, or a position not lower than Deputy Attorney-General.[119]

Furthermore, according to Section 210 of the Constitution of Thailand stipulates,

> the Constitutional Court has duties and powers as follows: (1) to adjudicate on the constitutional review of law or bill; (2) to consider and adjudicate on a question regarding duties and powers of the House of Representative, the Senate, the National Assembly, the Council of Ministers or Independent Organs; (3) other duties and powers prescribed in the Constitution.

Other duties and powers of the Constitutional Court of Thailand is to protect people's rights and liberties or can be categorized as a constitutional complaint. First, adjudication on an application of the people or community against a state agency under Chapter V of the Constitution of Thailand (Duties of the State). In this jurisdiction, the Court must ensure that the state does not violate the people or community right.[120]

Second, the Constitutional Court of Thailand can adjudicate on an application of the people whose rights or liberties according to the Constitution are violated as stipulated in Section 213 of the Constitution of Thailand:

> an individual whose rights guaranteed by the constitution are violated, has the right to submit a complaint to the Constitutional Court for a decision on whether such an act is contrary to or inconsistent with the Constitution,

[118] Kemthong Tonsakulrungruang, "Development in Thai Constitutional Court," In *2016 Global Review of Constitutional Law*, ed. Richard Albert, David Landau, Pietro Faraguna, and Simon Drugda (I.CONnect and the Clough Center for the Study of Constitutional Democracy at Boston College, 2017), 211, http://www.iconnectblog.com/2017/08/now-available-the-i%C2%B7connect-clough-center-2016-global-review-of-constitutional-law/.

[119] The Constitution of Thailand, sec. 200.

[120] The provisions of the duties of the state stipulated in Section 54-60 of the Constitution of Thailand.

according to the rules, procedures, and conditions prescribed by the Organic Act on Procedures of the Constitutional Court.

2.2.4.1. Application Procedures

There are two differences of constitutional complaint procedures under Chapter V and Section 213 of the Constitution of Thailand. First, the procedure of adjudication on an application of the people or community against a state agency under Chapter V is as follows: if the people or community suffers any damage from an omission of act, malfunction, or delay of act of a government official, they have the right to file an application to the Constitutional Court according to Section 45 of the Organic Act on the Procedure of the Constitutional Court B.E. 2561 (2018). To be more specific, they follow up and urge a state agency to perform such act, but the agency refuses or keeps silent for 90 days, and also they lodge their complaint to the Ombudsman. In this case, if the Ombudsman is of the opinion that the state agency performs its functions relevant to the duties of the state, the Ombudsman shall notify the complainant. However, if the Ombudsman is not of that opinion, he shall notify the Council of Ministers. Then, after considering the Ombudsman's views, the Council of Ministers shall make an order and notify the people and community. Nonetheless, unless the people or community agrees with such order regarding the duties of the state according to Chapter V, they shall have the right to apply to the Constitutional Court.[121]

Second, the other procedure of adjudication on an application of the people whose rights or liberties according to the Constitution are violated is stipulated in Section 213 of the Constitution of Thailand. The issue here concerns a situation where people's rights or freedom according to the Constitution are directly infringed by the act of government agencies, government officials, or other agencies which exercise state powers, and such violation causes any damage or is troublesome to the said people. Individuals have the right to complain to the Ombudsman within 90 days. After receiving such complaint,

[121] Sumaporn Srimoung and Pitaksin Sivaroot, "The Organisation and Jurisdiction of the Constitutional Court of the Kingdom of Thailand," (Paper Presented at the AACC Research Conference, Mei 2018), 13-14.

the Ombudsman shall consider and file an application to the Constitutional Court within 60 days and notify the complainant within ten days. In the case where the Ombudsman is of opinion to cease his consideration and investigation, or he does not inform the complainant within 60 days since the date of the recipient, such people have the right to file his or her application or complaint (individual complaint) to the Court for a decision on whether such an act is contrary with the Constitution.[122]

3.2.4.2. Decisions

Section 211 of the Constitution of Thailand prescribed the following essential rules on the constitutional court decision and effect, which states

> a decision of the Constitutional Court shall be made by a majority of votes unless otherwise prescribed by the Constitution." Furthermore, "The decision of the Constitutional Court shall be final and binding on the National Assembly, the Council of Ministers, Courts, Independent Organs, and State agencies."[123]

IV. A COMPARISON ON CONSTITUTIONAL COMPLAINT AND A NECESSITY FOR INDONESIA

Comparative study on constitutional complaint from several countries in Europe such as Austria, Germany, and Spain as well as from four AACC member countries, showing similarities and differences that can be seen from their forms and procedures, including objects, standing, and time limits.

However, this variety of systems for constitutional complaint, particularly in Austria, Germany, and Spain shows on the effectiveness of the protection of fundamental rights. The details of the differences of constitutional complaints will be explained in the following table:

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[122] Sumaporn Srimoung and Pitaksin Sivaroot, "The Organisation and Jurisdiction of the Constitutional Court of the Kingdom of Thailand," 14.

[123] The Constitution of Thailand, sec. 211.

Table 1

Constitutional Complaint in Europe

Country	Constitutional Complaint		
	Object	**Standing**	**Time Limits**
Austria	A complaint against laws, regulations, international treaties, and against administrative actions	Any person who claims to be harmed directly in regard to one of their rights	Six weeks
Germany	A complaint against an act of public authority: • constitutionality of the law; • administrative act; and • court decision	Any individual alleging that one of his fundamental rights has been infringed by public authority	One month
Spain	A complaint against parliamentary decisions, governmental and administrative decisions, and judicial decisions	Any individual or body corporate, as well as the Defender of the People and the Public Prosecutor's Office	30 days (amparo against judicial decisions). 20 days (appeal against governmental or administrative decisions)

According to the models of constitutional complaint in Europe as mentioned in the table above, Germany and Spain permit constitutional complaints against any act of public authority, including statutes and court decisions, while Austria provides this remedy only against acts of Parliament, regulations, international treaties, and administrative actions.

Standing provisions for constitutional complaint are the same in three jurisdictions under consideration Austria, Germany and Spain, claiming suffering a personal and direct violation of constitutional rights by the public authority as a requirement for resorting to the Constitutional Court. Taking into account the substantive scope of constitutional rights, a complainant may be individual

or body corporate, as well as citizen foreigner.[124] These three countries also provide direct access to the Constitutional Court.

Whereas the AACC members as mentioned in the previous chapter, explained that out of sixteen AACC members there are four members have the constitutional complaint mechanism in their jurisdiction, the four countries are Azerbaijan, Korea, Turkey, and Thailand. The comparative analysis of the constitutional complaint among four AACC members will be explained in the following table:

Table 2
Constitutional Complaint in Four AACC Members

4 AACC Members	Constitutional Complaint		
	Object	**Standing**	**Time Limits**
Azerbaijan	The complaint against the normative legal act of the Legislative and Executive, act of municipality and courts	Any person who alleges that his/her rights have been infringed	Six months
South Korea	• The complaint against an exercise or omission of state power (Art. 68(1)) • The complaint against a court's denial of a request for constitutional review of a statute in any judicial proceeding (Art. 68(2)).	• Any person who claims that his/her rights have been violated (68(1)) • The party whose its request on constitutionality of statutes is rejected (68(2))	• 90 days (Art. 68(1)) • 30 days (Art. 68(2))
Turkey	Individual application concerning fundamental rights under the joint protection of the Constitution and ECHR.	Everyone can file an individual application, but foreigners are not eligible to do so for rights that are only granted to Turkish citizens.	30 days

[124] Nino Tsereteli, "Mechanism of Individual Complaints – Germany, Spanish and Hungarian Constitutional Court – Comparative Analysis" (LL.M Thesis, Central European University, Hungary, 2 April 2007), 11.

Thailand	• The complaint against a state agency (duties of the state) • The complaint against people's rights or liberties violations.	• People or community • A person whose rights or liberties are violated	90 days

The four AACC member countries mentioned above show that the constitutional complaint jurisdiction represents an essential mechanism for individuals who suffered from violations of fundamental rights guaranteed by the constitution. Therefore, the substantial part of the constitutional court workload in these countries is taken up by constitutional complaint. There are similarities and differences in the models and characteristics of constitutional complaint. In Azerbaijan, the Constitutional Court can handle constitutional complaint against the normative legal act of the legislative and executive, an act of a municipality and courts. Compared to Azerbaijan, constitutional complaint in South Korea and Thailand slightly more restricted, since even though constitutional complaints against an exercise and non-exercise of state powers are allowed, and constitutional complaints against court decisions are prohibited. In Turkey, one finds a very specific type of constitutional complaint, which is directly connected to a regional human rights protection system. The Turkish Constitutional Court handles complaints from individuals concerning violations of human rights and freedoms falling under the joint protection of the Constitution and the ECHR.

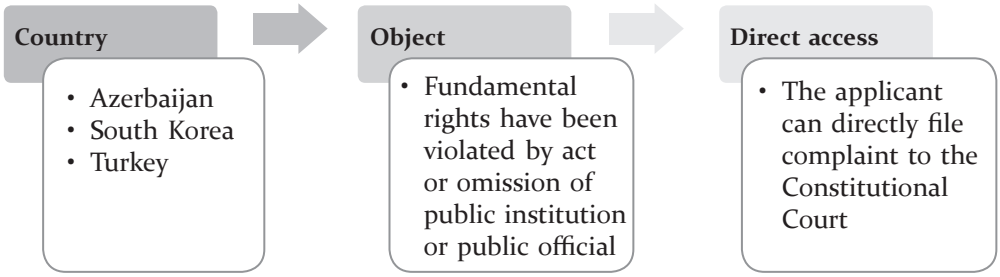
In terms of standing, constitutional complaint functions in the same way in three countries (Azerbaijan, South Korea, and Thailand), where everyone can file a constitutional complaint (excluding foreigners). Especially in Thailand, not only can individuals but also groups (the people or community) can also have legal standing to file constitutional complaint in the context of the non-performance of duties by a state agency. In Turkey, everyone can file an individual application to the Constitutional Court, but foreigners are explicitly not allowed to file an individual application concerning the rights that are

only granted to Turkish citizens. It means that in Turkey a foreigner also has legal standing to file constitutional complaints, but is strictly limitated to the context of specific rights.

Concerning the access to the constitutional complaint mechanism, the four countries have differences, the following figures will explain which country applies direct and indirect access to the Constitutional Court.

Figure 1

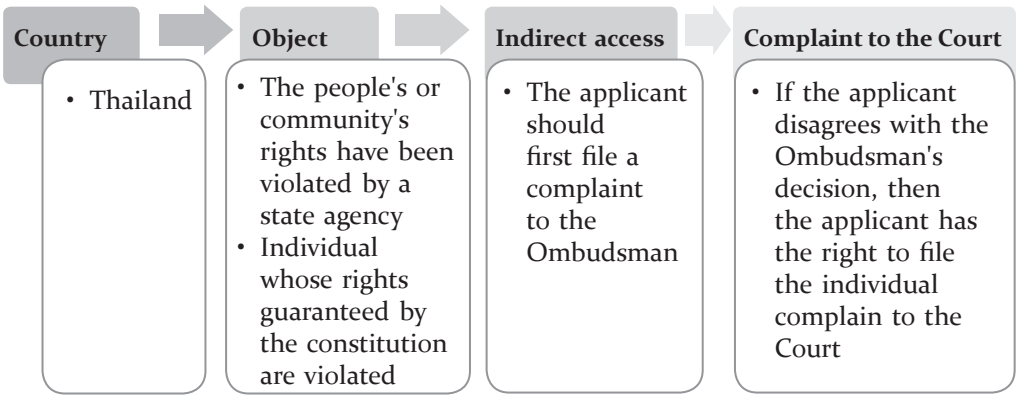
Direct Access to the Constitutional Court



According to the figure above, there are three countries, Azerbaijan, South Korea, and Turkey, which provide the citizen with direct access to file a constitutional complaint to the Constitutional Court. This direct mechanism is an effort to increase the effectiveness of protecting fundamental rights, enabling individuals to quickly obtain legal certainty over the problems they face.

Figure 2

Indirect Access to the Constitutional Court



While in Thailand, the procedure of constitutional complaint to the Constitutional Court of Thailand is indirect, since the first step for the applicant is to complain to the Ombudsman within 90 days. Then, the Ombudsman shall consider and file an application to the Constitutional Court within 60 days. If the Ombudsman is of the opinion to cease his consideration and investigation, or he does not inform the complainant within 60 days since the date of receiving the application, then the applicant has the right to file the individual complaint to the Constitutional Court.

A comparative perspective on the relevant AACC members as mentioned above can yield lessons for other AACC members which do not have a constitutional complaint mechanism. This is particularly so for AACC members who are or have been considering the introduction of constitutional complaint, such as Indonesia.

In Indonesia, each of the alternative methods to adopt constitutional complaint certainly has its own deficiencies and advantages. The first alternative is amending again the constitution which is requires a complicated process, besides requiring a long time. Second, via legislative action, the legislative amends the existing law or even establishes a new law concerning the Constitutional Court. However, such legislative interpretation could be challenged again by the people, so this approach may not provide an easily settled course of action. Third, the introduction of constitutional complaint via constitutional interpretation by the Constitutional Court may also be possible, but such an approach can only be used as long as there is a concrete case that involves the connection with some norm of law.

Each alternative has its imperfections, but the possible way to adopt constitutional complaint in Indonesia is while waiting for the People's Consultative Assembly (MPR) to amend the Constitution, the Constitutional Court can make a constitutional interpretation that constitutional complaint becomes part of the constitutional review system. Therefore, in the future, if the Indonesian Constitutional Court introduces constitutional complaint, it is

estimated that this will lead to a very large number of cases. In this context, the Constitutional Court must increase the supporting system of the Justices, which includes researchers and substitute registrars. In addition, the Indonesian Constitutional Court also must make an effective and efficient procedural law as well as provide a suitable information technology (IT) system.

V. CONCLUSION

The constitutional complaint is one of the legal mechanisms designed to reinforce the guarantee of the protection of citizens' rights against any state action, in all branches of power that violates the rights of citizens. The constitutional court in many countries have adopted a constitutional complaint system in a variety of models. However, the first application of the constitutional complaint came from Europe. In Austria, the constitutional complaint is allowed against the administrative actions but not against the court decisions. While Germany and Spain have a similar model that is a complaint against an act of the public authority including court decisions.

In Asia, it is imperative that the court in Asia actively participate in the AACC, an Asian regional forum for constitutional justice which provides the opportunity for AACC members to regularly exchange ideas and share their experiences of constitutional adjudication to promote the development of democracy, rule of law and fundamental rights in Asia. When it comes to the AACC members jurisdiction, out of sixteen members, there are four members which have the authority to handle the constitutional complaint cases in their jurisdiction, namely Azerbaijan, Korea, Turkey, and Thailand. These also take a variety of different forms and models.

In Azerbaijan, constitutional complaint is comparatively broad. Azerbaijan's Constitutional Court can handle constitutional complaint against the normative legal act of the legislative and executive, an act of a municipality and the decisions of courts. In contrast, even though constitutional complaint in South Korea and Thailand can be against the exercise and non-exercise of state power, constitutional complaint cannot be filed against court decisions. In Turkey the

constitutional complaint mechanism is coupled with the regional system of human rights protection. The Turkish Constitutional Court handles complaints from individuals concerning violations of human rights and freedoms falling under the joint protection of the Turkish Constitution and the ECHR.

A comparative perspective on the relevant AACC members can yield lessons for other AACC members which do not have a constitutional complaint mechanism. This is particularly so for AACC members who are or have been considering the introduction of constitutional complaint, such as Indonesia.

In Indonesia, each of the alternative methods to adopt constitutional complaint certainly has its own deficiencies and advantages. However, the possible way to adopt constitutional complaint in Indonesia is while waiting for the People's Consultative Assembly (MPR) to amend the Constitution, the Indonesian Constitutional Court can make a constitutional interpretation that constitutional complaint becomes part of the constitutional review system.

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The Malaysian Federal Constitution: An Islamic or a Secular Constitution?

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Abstract

Constitutionalism dictates that the government must only act within the four walls of the constitution. While adherence to this fundamental doctrine is proven to be difficult, it becomes more complicated when the walls are unclear. For decades, Malaysians struggle to ascertain the actual legal value of religion, particularly Islam, in its Federal Constitution and the impact of religion to the Malaysian legal system. Some opined that secularism is a basic structure of the Malaysian Federal Constitution and in the name of constitutionalism, religious laws cannot be the basis for administration of public law and must be confined to personal law matters. On the other hand, some opined that Islam constitutes a salient feature of the Constitution and the position of Islam as the religion of the Federation implies Malaysia as an Islamic state. This paper analyses the conflicting views, via qualitative studies of constitutional provisions which have religious element in the light of their history, together with relevant case laws which interpreted them. The analysis is done with a view to determine whether the Malaysian Federal Constitution is a secular instrument creating a secular state or a religious document establishing a theocratic state. From such analysis, the author presents that the Malaysian Federal Constitution, albeit giving special preference to Islam, is a religion-neutral document which is receptive to both religious and secular laws. This is based on the fact that the Constitution upholds the validity of both secular and religious laws for as long as they are enacted according to procedural laws required by the Constitution.

Keywords: Malaysian Federal Constitution, secularism, doctrine of basic structure, secular state, theocratic state.

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I. INTRODUCTION

Constitutionalism is the most potent arsenal of modern democratic states against abuse of power by the government. The mere existence of a constitution is pointless if people do not strive towards adherence. Before we start discussing about adherence to constitution, there must be some degree of clarity as to what are the constitutional boundaries which the government cannot surpass.

In Malaysia, constitutional walls that define the legal status and impact of religion in the Malaysian Federal Constitution (MFC) continue to be a subject matter of speculation. This uncertainty has adverse effect to the stability of multi-religious and culturally-diverse society in Malaysia especially when it is exploited as political tools to instil fear and cause tension within certain segment of the society. Further, the same uncertainty has hindered the development of the Malaysian legal system especially the adoption of religious laws into the Malaysian public law sphere.

Such problem is mainly due to the absence of a decisive constitutional provision and case law on this issue. Although Article 3 of the MFC unequivocally declared Islam as the religion of the Federation, its actual meaning and effect remain highly disputed. Even the court has given mixed decisions on this matter. The difference of opinions is closely related to the *hudud* and Islamic state debates as well as the proposed amendments to the Syariah Courts (Criminal Jurisdiction) Act 1965 [Act 355] to expand Syariah Court's jurisdiction in punishing offences against the precepts of Islam. Pro-secular group in Malaysia argued, among others, that secularism is a basic structure of the MFC and adoption of religious law into the public law sphere offends its secular nature and unconstitutional. On the contrary, pro-Syariah group argued that nothing in the MFC prohibits the implementation of Islamic criminal law in Malaysia.

It is critical, in the author's view, for this issue to be carefully studied and addressed because the pro-secular group's contention presents huge impacts to the Malaysian legal system and the position of Islam in the MFC. If secularism is taken as a basic structure of the MFC:

(a) the MFC must be interpreted based on secular approach and Islamic principles which are not in line with secular values will be ignored;
(b) Islamic criminal law can never be implemented in Malaysia even via amendment to the MFC because the parliament does not have the power to amend a basic structure of the MFC;
(c) notwithstanding Islam as the religion of the Federation, Islam shall remain for ritual and ceremonial purposes only and does not have special status but rank equally with other religions in Malaysia; and
(d) laws relating to Islam enacted by state legislative assemblies (SLA) particularly relating to offences against the precepts of Islam are very likely to be declared unconstitutional.

Premised on the above, the objective of this article is to determine whether the MFC is a secular instrument creating a secular state or a religious document establishing a theocratic state. The methodology adopted is qualitative studies of the text of the MFC, particularly provisions which have religious element in the light of historical documents on which they were inserted and cases decided by the Malaysian superior courts which interpreted those provisions. In addition, the author also analysed relevant case laws decided by foreign courts as well as views on secularism and the doctrine of basic structure of constitution.

II. THE ISLAMIC STATE AND *HUDUD* DEBATES

The debate on whether Malaysia is an Islamic or a secular state could be said to have been intensified by the declaration made by the Fourth Prime Minister, Dr. Mahathir Mohamad on 29 September 2001, during his opening address at the Gerakan Party's 30th National Delegates Conference where he announced:

> UMNO wishes to state loudly that Malaysia is an Islamic country. This is based on the opinion of *ulamaks* who had clarified what constituted as Islamic country. If Malaysia is not an Islamic country because it does not implement the *hudud*, then there are no Islamic countries in the world. If UMNO says that Malaysia is an Islamic country, it is because in an Islamic country non-Muslims have specific rights. This is in line with the teachings of Islam. There is no compulsion in Islam. And Islam does not like chaos that may come about if Islamic laws are enforced on non-Muslims.[1]

[1] Tommy Thomas, "Is Malaysia an Islamic state?" *Malayan Law Journal*, no. 4 (2006): xv.

The controversial declaration was followed by another stronger statement in the parliament on 17 June 2002 that Malaysia is not a moderate Islamic State but a fundamentalist Islamic State.[2]

Since then, the issue became a national debate. Some agreed with Mahathir's declaration while some others heavily criticized him, among others, for contradicting the words of his predecessors, the First Prime Minister and the Father of Independence, Tunku Abdul Rahman[3] and the Third Prime Minister, Tun Hussein Onn who rejected the idea of Malaysia being an Islamic state.[4] Even Parti Islam Se-Malaysia (PAS), the political party that promotes the implementation of *hudud* (which the author believes is more accurately referred to as Islamic criminal law because *hudud* is only one component of Islamic criminal law) in Malaysia, also refused to accept the declaration but not on the basis that the MFC is secular but because Malaysia does not implement Islamic criminal law.[5]

Although this article is neither about whether Malaysia is an Islamic state nor whether Islamic criminal law can be implemented in Malaysia, these debates are relevant because the primary contention of the opponents of Mahathir's declaration and PAS's proposal to implement Islamic criminal law in Malaysia is that they are inconsistent with the MFC which is purportedly secular in nature making Malaysia a secular state despite Article 3 that explicitly provides Islam as the religion of the Federation.

The most often quoted authority to justify secular nature of the MFC is the decision of the Supreme Court in 1988 delivered by the Lord President, Salleh Abas in Che Omar Bin Che Soh v Public Prosecutor.[6] His lordship rejected the defendant's argument that the death penalty for drug trafficking

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2 "Mahathir: Malaysia is 'Fundamentalist State," CNN.com/World, June 18, 2002, http://edition.cnn.com/2002/WORLD/asiapcf/southeast/06/18/malaysia.mahathir/.

3 Tunku Abdul Rahman, is reported to have said in the Dewan Rakyat (Hansard, 1 May 1958) that "I would like to make it clear that this country is not an Islamic State as it is generally understood, we merely provided that Islam shall be the official religion of the State."

4 "MCCBCHST's Press Statement: Malaysia is Not an Islamic State," The Malaysian Bar, accessed April 21, 2019, http://www.malaysianbar.org.my/letters_others/mccbchsts_press_statement_malaysia_is_not_an_islamic_state.html.

5 Thomas, "Is Malaysia an Islamic state?" xv.

6 Che Omar bin Che Soh v. Public Prosecutor (2) (1988), The Malayan Law Journal 55.

and firearm offences was unconstitutional for being contrary to Islam. While upholding the validity of death penalty for the said offences, the Supreme Court remarked that there is no provision in the MFC which nullifies any law contrary to the injunction of Islam and instead, Article 162 of the MFC preserves the continuity of secular law prior to the MFC. Relying on the said judgement, the pro-secular group maintains that Article 3 of the MFC is only meant for rituals and ceremonies only and was not intended to derogate the secular nature of the MFC.[7]

Additionally, the pro-secular group argued that preparatory works of the MFC stated, with regards to the issue of the state's religion, that insertion of provision on state's religion did not in any way imply that Malaysia is not a secular state. Among the advocates of this idea are the former President of the Democratic Action Party (DAP), the late Karpal Singh,[8] DAP leader, Lim Kit Siang,[9] former presidents of the Malaysian Bar, Ragunath Kesavan,[10] Mah Weng Kwai[11] and Steven Thiru,[12] and the current Attorney General of Malaysia, Tommy Thomas.[13]

On the other hand, the current President of the Malaysian Muslim Lawyers Association, Zainul Rijal Abu Bakar disagreed with Steven Thiru's statement and stated that the statement itself is unconstitutional because "nowhere also does the Constitution envisage [Malaysia as] a complete secular State" and the stance was based on a wrongful reading of the decision in Che Omar's

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7 Thomas, "Is Malaysia an Islamic state?" xv.

8 "*Hudud* Law Incompatible with Secular State, Says Karpal," The Rocket, accessed April 21, 2019, https://www.therocket.com.my/en/implementation-of-hudud-in-kelantan-is-ill-advised-says-karpal/.

9 "DAP CEC will Consider Proposal to Take Mahathir to Court for His "929 Declaration" and His "617 Announcement" that Malaysia is an Islamic Fundamentalist State," limkitsiang.com, accessed April 21, 2019,http://www.limkitsiang.com/archive/2002/jun02/lks1658.htm.

10 Hariati Azizan,, "Secular in Spirit," The Star Online, April 2, 2017, https://www.thestar.com.my/news/nation/2017/04/02/secular-in-spirit-we-need-to-look-at-our-shared-past-namely-the-founding-principle-of-the-country-an/.

11 Lee Ban Chen, "The Islamic State Debacle," Malaysiakini, November 11, 2001, http://www.malaysiakini.com/columns/7017.

12 "*Hudud* is Unconstitutional, Discriminatory and Divisive," The Malaysian Bar, accessed April 21, 2019, http://www.malaysianbar.org.my/press_statements/press_release_%7C_hudud_is_unconstitutional_discriminatory_and_divisive.html. See also Tan Yi Liang, "Malaysian Bar: Kelantan Hudud is Unconstitutional and Discriminatory," The Star Online, March 20, 2015, http://www.thestar.com.my/News/Nation/2015/03/20/Malaysian-Bar-statement-on-Kelantan-hudud/.

13 Thomas, "Is Malaysia an Islamic state?" xv.

case.[14] He further mentioned that careful analysis of Che Omar's case would reveal that the Supreme Court did not support such proposition. In a more controversial statement, the former Chief Justice of Malaysia, Ahmad Fairuz opined that Syariah is the "second most supreme" law and that "Islamic law takes precedence over civil legislation in Malaysia". He further mentioned that "just like laws that contradicted the Federal Constitution would be void, those that went against Islamic law's main sources, the *Quran* and *Sunnah*, would also be void".[15]

While the author celebrates freedom of expression as a guaranteed fundamental liberty under the MFC, meticulous study of the MFC is required to resolve these conflicting views, which precisely what the author intends to achieve through this paper.

III. SECULARISM AND DOCTRINE OF BASIC STRUCTURE OF CONSTITUTION

In this part, the author discusses two principles which are salient to the pro-secular group's contention that the MFC is a secular instrument making Malaysia a secular state.

3.1. Secularism

Some dictionaries simply define the term "secular" as "worldly" and "without spiritual element". According to Syed Muhammad Naquib Al-Attas, the term "secularisation" means:

> The deliverance of man first from religious and then from metaphysical control over his reason and his language. It is the loosing of the world from religious and quasi-religious understanding of itself, the dispelling of all closed worldviews, the breaking of all supernatural myths and sacred symbols... the defatalisation of history, the discovery by man that he has been left with the world on his hands, and that he can no longer blame

[14] "Malaysian Bar's Stand on Hudud Unconstitutional: Muslim Lawyers," *Astro Awani*, March 21, 2015, http://english.astroawani.com/malaysia-news/malaysian-bars-stand-hudud-unconstitutional-muslim-lawyers-13591.

[15] Arfa Yunus, "Laws in Contradiction to Islamic Laws are void, says Former Chief Justice," *The New Straits Times*, March 25, 2017, https://www.nst.com.my/news/2017/03/224249/laws-contradiction-islamic-laws-are-void-says-former-chief-justice.

fortune or the furies for what he does with it...; man turning his attention away from worlds beyond and toward this world and this time.[16]

George Jacob Holyoake, a British writer who is said to be the person who coined the term "secularism" used it in about 1846 to describe "a form of opinion which concerns itself only with questions, the issues of which can be tested by the experience of this life."[17] The original usage of the term "secularism" by him did not expressly reveal the concept of resistance to religion but rather, it suggested the idea of focusing on this present life rather than speculating about any other life or afterlife. Holyoake clarified his idea of secularism by saying:

> Secularism is not an argument against Christianity, it is one independent of it. It does not question the pretensions of Christianity; it advances others. Secularism does not say there is no light or guidance elsewhere, but maintains that there is light and guidance in secular truth, whose conditions and sanctions exist independently, and act forever. Secular knowledge is manifestly that kind of knowledge which is founded in this life, which relates to the conduct of this life, conduces to the welfare of this life, and is capable of being tested by the experience of this life.[18]

From the above excerpt, secularism is not intended to challenge the truth or credibility of religion but rather it is independent from any discussion about religion. It promotes accentuation to the material and upon this world rather than the immaterial, spiritual or any other world. The concept was developed as a non-religious philosophy intended to stress upon the welfare and concerns of humanity in present life, not the potential needs and concerns related to any probable afterlife.

The pro-secular group in Malaysia, while arguing that the MFC is secular, did not properly and comprehensively define what they mean by the term "secular". While different scholars have offered different perspectives, based on the author's reading, the pro-secular group in Malaysia is referring to

[16] Syed Muhammad Naquib Al-Attas, Islam, Secularism and Philosophy of the Future (London: Mansell Publishing Limited, 1985), 14.
[17] "Secularism," New Advent, accessed April 21, 2019, http://www.newadvent.org/cathen/13676a.htm.
[18] *Ibid*.

total separation between state and religion, and neutrality in the matters of religion. This concept can be traced back to Thomas Jefferson's letter to Danbury Baptist Association in 1802 where he justified the reason as to why he would not proclaim national days of fasting and thanksgiving, as done by his predecessor, George Washington and John Adams. In the letter, the Third President of the United States stated:

> Believing with you that religion is a matter which lies solely between man and his god, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, and not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should make no law respecting an establishment of religion, or prohibiting the free exercise thereof, thus building a wall of separation between church and state. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore to man all his natural rights, convinced he has no natural right in opposition to his social duties.[19]

In essence, secularism in the context of a state refers the principle of separation between government institutions and religious institution, preventing religion precepts from influencing the way through which a state is run by the politicians and preventing politicians from intervening the manners through which religion is administered by religious institutions.

The expression of "a wall of separation between church and state" does not mean mere separation but strict and total separation. This is evidenced from the words of the First Amendment to the US Constitution which provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" leaving no room for religion in the governance of the state. In this respect, Justice Black in Everson v. Board of Education[20] mentioned:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a

[19] "Jefferson's Wall of Separation Letter," Constitution Society, accessed April 21, 2019, http://www.constitution.org/tj/sep_church_state.htm.

[20] Everson v. Board of Education 330 U.S. 1 (1947).

> church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion to another ... in the words of Jefferson, the [First Amendment] clause against establishment of religion by law was intended to erect 'a wall of separation between church and State' ... That wall must be kept high and impregnable. We could not approve the slightest breach.

Secularism is therefore, not merely independent from religious doctrine and influence but also prohibition of subsequent importation or incorporation of religious element in the name of maintaining the strict wall of separation.

This is the concept referred at least by Karpal Singh[21] and Steven Thiru,[22] based on the fact that they argued the adoption of religious laws offends the purported secular nature of Malaysia. *Civic group Bebas* member, Azrul Mohd Khalib explained the perspective of the pro-secular group through the following words:

> Secularism does not mean atheism. A secular state is a state that purports to be neutral in the matters of religion and it supports neither religion nor irreligion. When we look at the nature of a secular state and the relationship between the state and religion, what we are talking about is the separation of the state and religion...

3.2. Doctrine of Basic Structure of Constitution

It is a constitutional law doctrine founded by the Supreme Court of India which epitomises the idea that a constitution contains fundamental features which are so important and unamendable. The abrogation of any such features would result in complete obliteration of the existing constitution. The earliest discussion on the doctrine was in Sajjan Singh v State of Rajasthan[23] where Justice J.R. Mudholkar in his dissenting judgment suggested:

> The Constituent Assembly which was the repository of sovereignty could well have created a sovereign Parliament on the British model. But instead it enacted a written Constitution,... Above all, it formulated a solemn and dignified preamble which appears to be an epitome of

[21] "*Hudud* Law Incompatible with Secular State, says Karpal".
[22] "*Hudud* is Unconstitutional, Discriminatory and Divisive".
[23] Sajjan Singh v State of Rajasthan 1965 AIR 845, 1965 SCR (1) 933.

> the basic features of the Constitution. Can it not be said that these are indicate of the intention of the Constituent Assembly to give a permanency to the basic features of the Constitution? It is also a matter for consideration whether making a change in a basic feature of the Constitution can be regarded merely as an amendment or would it be, in effect, rewriting a part of the Constitution; and if the latter, would it be within the purview of Art. 368?
>
> ...The Constitution indicates three modes of amendments and assuming that the provisions of Art. 368 confer power on Parliament to amend the Constitution, it will still have to be considered whether as long as the preamble stands unmended, that power can be exercised with respect to any of the basic features of the Constitution.

In the above excerpt, the learned judge was proposing that there should be limit to the parliament's power to amend the constitution so as to prevent it from "rewriting" the constitution as a result of abolishing its basic features.

In 1973, the idea was revisited in the landmark case of Kesavananda Bharati Sripadagalvaru and Others v. State of Kerala and Anr.[24] where Justice J.R. Mudholkar's view was accepted through a narrow 7-6 verdict. The Indian apex court overruled its decision in Shankari Prasad v Union of India[25] (that parliament's power to amend constitution is unlimited) and held, as per the view of K.S. Hegde and A.K. Mukherjea, JJ.:

> ...the Parliament has no power to abrogate or emasculate the basic elements or fundamental features of the Constitution such as the sovereignty of India, the democratic character of our polity, the unity of the country, the essential features of the individual freedoms secured to the citizens.

In addition, H.R. Khanna J. proceeded to make the following remark:

> We may now deal with the question as to what is the scope of the power of amendment under Article 368. This would depend upon the connotation of the word "amendment". Question has been posed during arguments as to whether the power to amend under the above article includes the power to completely abrogate the Constitution and replace

[24] Kesavananda Bharati Sripadagalvaru and Others. v. State of Kerala and Anr (1973) 4 SCC 225.
[25] Shankari Prasad v. Union of India AIR 1951 SC 458..

> it by an entirely new Constitution. The answer to the above question, in my opinion, should be in the negative. I am further of the opinion that amendment of the Constitution necessarily contemplates that the Constitution has not to be abrogated but only changes have to be made in it. The word "amendment" postulates that the old Constitution survives without loss of its identity despite the change and continues even though it has been subjected to alterations. As a result of the amendment, the old Constitution cannot be destroyed and done away with; it is retained though in the amended form. What then is meant by the retention of the old Constitution? It means the retention of the basic structure or framework of the old Constitution. A mere retention of some provisions of the old Constitution even though the basic structure or framework of the Constitution has been destroyed would not amount to the retention of the old Constitution. Although it is permissible under the power of amendment to effect changes, "howsoever important, and to adapt the system to the requirements of changing conditions, it is not permissible to touch the foundation or to alter the basic institutional pattern. The words "amendment of the Constitution" with all their wide sweep and amplitude cannot have the effect of destroying or abrogating the basic structure or framework of the Constitution. It would not be competent under the garb of amendment, for instance, to change the democratic government into dictatorship or hereditary monarchy nor would it be permissible to abolish the Lok Sabha and the Rajya Sabha. The secular character of the state according to which the state shall not discriminate against any citizen on the ground of religion only cannot likewise be done away with. Provision regarding the amendment of the Constitution does not furnish a pretence for subverting the structure of the Constitution nor can Article 368 be so construed as to embody the death wish of the Constitution or provide sanction for what may perhaps be called its lawful harakiri. Such subversion or destruction cannot be described to be amendment of the Constitution as contemplated by Article 368.

In summary, the doctrine refers to the foundational features to the constitution which if amended, will have the effect of rewriting the constitution, altering the basic institutional pattern and "destroy" the existing constitution.

3.3. Doctrine of Basic Structure in Malaysia

The apex court has given two conflicting views on whether Malaysia subscribes to the Doctrine. First, the former Federal Court in Loh Kooi

Choon v Government of Malaysia[26] decided the Doctrine is not applicable.[27] Wan Suleiman FJ stated:

> The restriction upon the amending power of the Indian Parliament, according to this view arises from what is contained in the Preamble to the Indian Constitution...
>
> The power to amend would not, in this country, be restricted by anything set out in a Preamble for there is no Preamble to our Constitution. It seems to me to be clear that if there is to be any restriction to the right to amend any of the fundamental rights set out in Part II, such restriction would have been set out in one of the various clauses of Article 159 itself.

Secondly, the present apex court in Sivarasa Rasiah v Badan Peguam Malaysia & Another[28] stated:

> Further, it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional. Whether a particular feature is part of the basic structure must be worked out on a case by case basis. Suffice to say that the rights guaranteed by Part II which are enforceable in the courts form part of the basic structure of the Federal Constitution.

The two conflicting views however, has been put to rest by latest pronouncement by the Federal Court in two latest cases of Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat and another case[29] and Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Others and other appeals[30] which decided that the Doctrine is applicable in Malaysia.

However, the author wishes to highlight several noteworthy observations from the position taken by the apex court. Firstly, the notion of democratic state profoundly refers to a state governed by the majority will of the people. It is the majority will that first established the constitution and hence,

[26] Loh Kooi Choon v. Government of Malaysia [1977] 2 MLJ 187.
[27] Phang Chin Hock v Public Prosecutor [1980] 1 MLJ 70.
[28] Sivarasa Rasiah v. Badan Peguam Malaysia & Another [2010] 2 MLJ 333.
[29] [2017] 3 MLJ 561.
[30] [2018] 1 MLJ 545.

there should not be an impediment to the majority will to subsequently amend it. Otherwise, the impediment would undermine the fundamental of democracy. As majority will is reflected by majority vote in the parliament, to implement the doctrine which limits the parliament's power to amend the constitution is clearly inconsistent with the notion of democracy itself.

Secondly, while the Federal Court in Semenyih Jaya's case stated that the decision in Loh Kooi Choon was superseded in Sivarasa's case, no definite word used by the Federal Court in Sivarasa's case pointed that the Malaysian Parliament's power to amend the MFC is limited by the doctrine. The closest words are "Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional." In this regards, the words "unless sanctioned by the Constitution itself" creates ambiguity in the proposition that the doctrine applies because MFC in Article 159 clearly sanctions the parliament's power to amend the MFC.

Thirdly, the rationale given in Loh Kooi Choon's case that the doctrine is not applicable because it derives from the Preamble to the Indian Constitution whereas the MFC does not have preamble was not rebutted in Sivarasa's case. Fourthly, the argument posed by the Federal Court in Sivarasa's case that Vacher's case should not be followed by the Malaysian court because the UK embraces the Parliamentary Supremacy Doctrine is not a strong argument. This is because the MFC itself vests the parliament with the power to amend the constitution and hence, any amendment made by the parliament to the constitution is in no way prejudice the supremacy of the MFC or implies that Malaysia adopted the Parliamentary Supremacy Doctrine.

In any way, by virtue of stare decisis (judicial precedent) principle, we stand guided by the Federal Court's pronouncement in Semenyih Jaya's and Indira Gandhi's cases.

IV. THE POSITION OF RELIGION IN THE MALAYSIAN FEDERAL CONSTITUTION

It is an established principle of constitutional construction that no one provision of the MFC can be considered in isolation but instead, a particular provision in question must be brought into view together with all other provisions bearing upon that particular subject. This principle has been reiterated again and again by the Federal Court in many cases including in Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd & Another[31] and ZI Publications v Kerajaan Negeri Selangor.[32] Thus, in considering whether secularism is a basic structure of the MFC or otherwise, it is incumbent to consider the constitutional framework as a whole and not by reading a particular provision in isolation. With this principle in mind, the author will now analyse the position of Islam and secularism in the MFC and determine whether it is a secular instrument creating a secular state or a religious document establishing a theocratic state. For that, the author will provide five main arguments.

Firstly, argument on preparatory works of the MFC. There is no doubt that the preparatory works of the MFC contained clear records that Persekutuan Tanah Melayu (the predecessor of Malaysia) was intended to be a secular state as evidenced in the following excerpts on the issue of state religion:

(a) the Alliance Memorandum submitted by the Parti Perikatan (Alliance Party) to the Reid Commission stated:

> The religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religion, and shall not imply that the State is not a secular State.[33]

(b) the Reid Commission Report published in February 1957 stated:

> 169. We have considered the question whether there should be any statement in the Constitution to the effect that Islam should be the State religion.

[31] Danaharta Urus Sdn Bhd v. Kekatong Sdn Bhd & Another [2004] 2 MLJ 257.
[32] ZI Publications Sdn Bhd and Another v. Kerajaan Negeri Selangor [2016] 1 MLJ 153.
[33] Thomas, "Is Malaysia an Islamic state?" xv.

There was universal agreement that if any such provision were inserted it must be made clear that it would not in any way affect the civil rights of non-Muslims — 'the religion of Malaysia shall be Islam. The observance of this principle shall not impose any disability on non-Muslim nationals professing and practising their own religion and shall not imply that the State is not a secular State'. There is nothing in the draft Constitution to affect the continuance of the present position in the States with regard to recognition of Islam or to prevent the recognition of Islam in the Federation by legislation or otherwise in any respect which does not prejudice the civil rights of individual non-Muslims. The majority of us think that it is best to leave the matter on this basis, looking to the fact that Counsel for the Rulers said to us — 'It is Their Highnesses' considered view that it would not be desirable to insert some declaration such as has been suggested that the Muslim Faith or Islamic Faith be the established religion of the Federation. Their Highnesses are not in favour of such declaration being inserted and that is a matter of specific instruction in which I myself have played very little part.' Mr Justice Abdul Hamid is of opinion that a declaration should be inserted in the Constitution as suggested by the Alliance and his views are set out in his note appended to this Report. [34]

(c) the Alliance response to the issue raised in the Reid Commission Report with regard to the issue of state religion:

The UMNO leaders contended that provision for an official religion would have an important psychological impact on the Malays. But in deference to the objections of the Rulers and the concerns of non-Muslims, the Alliance agreed that the new article should include two provisos: first, that it would not affect the position of the Rulers as head of religion in their respective States; and second, that the practice and propagation of other religions in the Federation would be assured under the Constitution. The MCA and MIC representatives did not raise any objections to the new article, despite protests

[34] Abdul Aziz Bari and Farid Sufian Shuaib, Constitution of Malaysian: Text and Commentary, 2nd edition, (Selangor: Pearson, 2006), 6. See also Teoh Eng Huat v Kadhi, Pasir Mas & Another [1990] 2 MLJ 300.

by many non-Muslim organizations, as they were given to understand by their UMNO colleagues that it was intended to have symbolic significance rather than practical effect, and that the civil rights of the non-Muslims would not be affected. Mac Gillivray personally felt that such a provision would be advantageous because the Yang di-Pertuan Agong could at the same time become the head of the faith in the Settlements of Penang and Malacca. The Colonial Office, while apprehensive at first, did not object after being assured by the Alliance leaders during the London Conference in May 1957 that they 'had no intention of creating a Muslim theocracy and that Malaya would be a secular State'.[35]

(d) the Federation of Malaya Constitutional Proposals 1957, also known as the White Paper, stated:

57. There has been included in the proposed Federal Constitution a declaration that Islam is the religion of the Federation. This will in no way affect the present position of the Federation as a secular State, and every person will have the right to profess and practice his own religion and the right to propagate his religion, though this last right is subject to any restrictions imposed by State law relating to the propagation of any religious doctrine or belief among persons professing the Muslim religion.[36]

(e) Lennox Boyd, the Colonial Secretary's letter to Lord Reid on 31 May 1957 offering tribute and gratitude to the work done by the Reid Commission after the Constitutional Bill was debated in the British Parliament and in the Federal Legislative Council in Kuala Lumpur and subsequently passed without amendment stated:

The Rulers, as you know, changed their tune about Islam and they and the Government presented a united front in favour of making Islam a state religion even though Malaya is to be a secular state.[37]

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35 JM Fernando, The Making of the Malayan Constitution, (Malaysia: Malaysian Branch of the Royal Asiatic Society, 2002), 162-163.

36 Abdul Aziz and Farid, Constitution of Malaysian: Text and Commentary, 7.

37 Thomas, "Is Malaysia an Islamic state?" xv.

(f) Report of the Commission of Enquiry, North Borneo and Sarawak, 1962 (also known as the Cobbold Commission)

> We think that all Muslim communities would become a provision that Islam should be the national religion of the Federation. Amongst the non-Muslim who appeared before us there was a substantial number who would not object to the present practice in the Federation of Malaya, as they are satisfied with the provisions for fundamental liberties and freedom of religion in the Malayan Constitution. There were however, a number of non-Muslims who were most anxious that there should be no national religion for the Federation; a great many of them, however, would be prepared to consider that Islam might be made the national religion provided that it should not be the religion of their particular State.
>
> Taking these points fully into consideration, we are agreed that Islam should be the national religion for the Federation. We are satisfied that the proposal in no way jeopardizes freedom of religion in the Federation, which in effect would be secular.[38]

Based on the above records, pro-secular group argued that framers of the MFC intended it to be secular.

Despite the repeated emphasise in the preparatory works that the insertion of provision on state religion should not affect the secular nature of Persekutuan Tanah Melayu, nowhere in the MFC states that it is a secular document or it intends to establish a secular state. This is unlike France, Turkey and India which constitutions, in no uncertain term, declare the states as secular states. Instead, the total opposite happened whereby the Merdeka Constitution contains many provisions on matters relating to Islam namely:

(a) Article 3: Islam as religion of the Federation and the YDPA's function as the head of religion of Islam for the Federation, states without rulers and federal territories;

[38] "Malaysia Social Contract (Part 2): Excerpts from Historical Documents," Krisis & Praxis, accessed April 21, 2019, https://www.krisispraxis.com/archives/2007/05/social-contract-part-2-excerpts-from-historical-documents/.

(b) Article 11(4): Power of the parliament and state legislature to make law to control or restrict the propagation of any religious doctrine or belief among Muslims;
(c) Article 12(2): Federal law or state law may establish, maintain or assist Islamic institutions or provide or assist in providing instruction in Islam and incur necessary expenses for that purpose;
(d) Article 37(1) read together with the Fourth Schedule: The name of Allah as part of the oath of office of the YDPA as the head of state as well as the oath of the Timbalan YDPA.
(e) Article 38: Function of the Conference of Rulers on agreeing or disagreeing to the extension of any religious acts, observances or ceremonies to the Federation; and
(f) Article 74(2) read together with Second List of the Ninth Schedule (State List): Power of the state to legislate laws on Islamic matters including marriage, inheritance, guardianship, waqaf, zakat, fitrah, baitulmal and creation and punishment of offences by Muslims against precepts of Islam.

In the author's view, there cannot be a stronger proof than this to support that the MFC is not a secular document. This is so simply because if a provision establishing a secular state is inserted, no way would the Malays who were the majority citizens of Tanah Melayu would agree to such constitution and no way would the Malay Rulers assent to sign the agreement for the establishment of Persekutuan Tanah Melayu given that Islam was the backbone of the Malay community during that era. Had it not because of colognisation which introduced foreign law into Tanah Melayu, Islam would continue to be the law of the land because such was the position as acknowledged in Shaik Abdul Latif v Shaik Elias Bux[39] and Ramah v Laton[40] and it was never the intention of the Malays to adopt a different legal system.

The initial sentiment of the Malay Rulers as recorded in the Reid Commission Report was not because of their objection towards making Persekutuan Tanah Melayu an Islamic state or because of their support for the establishment of a

[39] Shaik Abdul Latif v. Shaik Elias Bux (1915) 1 F.M.S.L.R. 204.
[40] Ramah v. Laton (1927) 6 F.M.S.L.R. 128.

secular state. It was rather due to their intention to ensure power on matters relation to Islam remains with the Malay Rulers and also their concern that if a provision on state religion is inserted, their exclusive powers which were already limited would be further depleted. *The Tujuh Wasiat Raja-raja Melayu* which contains declaration by the Malay Rulers, when they signed the agreement for the establishment of Persekutuan Tanah Melayu on 5 August 1957, that Islam shall be the religion of the Federation[41] supports this argument.

However, the pertinent question now is how to reconcile between the preparatory works and the provisions in the MFC which appear contradictory? The Federal Court ruled that, "A constitution must be interpreted in light of its historical and philosophical context". In Indira Gandhi's case, the apex court quoted with approval, the words of the Supreme Court of Canada in Reference re Senate Reform: "The rules of constitutional interpretation require that constitutional documents be interpreted in a broad and purposive manner and placed in their proper linguistic, philosophic, and historical contexts..."[42]

In view of the above rules of interpretation, the MFC cannot be interpreted strictly and restrictively within the constraint of its preparatory works which in effect will render the MFC as an obsolete document incapable of adapting to historical, social, cultural and developing environment surrounding it. Further, religion especially Islam has always been an important component of the Malay society before Merdeka and even now. These facts cannot be neglected in understanding the MFC as the document that governs the Malaysian society.

Based on the contents of the Merdeka Constitution and the earlier explained concept of secularism, the essence of secularism i.e. strict wall of separation between the state and religion does not exist in the MFC. In this regard, the author argues that as far as rules of interpretation is concerned, if the literal construction of a provision is inconsistent with its preparatory works, then the

[41] "Tujuh wasiat Raja-Raja Melayu, [The Seven Testaments of King of Malay], " Malaysia kini, accessed April 21, 2019, https://www.malaysiakini.com/news/110050. See also Zuliza Mohd Kusrin, Zaini Nasohah, Mohd al-Adib Samuri and Mat Noor Mat Zain, "Legal Provisions and Restrictions on the Propagation of Non-Islamic Religions among Muslims in Malaysia," Kajian Malaysia 31, no.2 (2013): 1–18.

[42] [2014] 1 SCR 704; (2014) SCC 32 at paragraphs 25-26.

literal interpretation of the provision must be given precedence. This is because logic tells us that the obvious discrepancy between the literal wordings and the preparatory works must mean either the drafter intended to totally deviate from the preparatory works or the preparatory works should be read in the light of the actual provision and not vice versa because preparatory works are not binding like the actual provisions.

If the case is the former, the preparatory works should be ignored in totality because reliance on them would deviate from the real meaning of the actual provisions. However, since there is no proof that the former is the actual case, the author is of the view that the latter must be the right approach to be adopted i.e. to understand the preparatory works in the light of the actual provision so as to avoid the provision from losing its authoritative value to mere preparatory works. Looking to both the provision and preparatory works side by side, the author argues what is meant by "secular state" in the preparatory works is not equivalent to secularism that have been discussed earlier but a loose usage of the word to merely reflect that *Persekutuan Tanah Melayu* is not a pure theocratic state.[43] The constitution neither mandates total separation nor prohibits subsequent adoption of religious element into the state. This understanding is supported by the High Court's comments in Lina Joy v. Majlis Agama Islam Wilayah & Another[44] on the Supreme Court's decision in Che Omar's case where it states:

> The constitution of this hybrid model accord official or preferential status to Islam but does not create a theocratic state like Saudi Arabia or Iran. Contrary to the plaintiff's assertion, the subject and purpose of art 3(1) is not merely 'to fix' the official religion of a nation. The case of Che Omar bin Che Soh v Public Prosecutor [1988] 2 MLJ 55 did not decide on art 3(1), that is, the meaning of Islam as the Religion of the Federation (see Sheridan —The Religion of the Federation[1988] 2 MLJ xiii. Article 3(1) has a far wider and meaningful purpose than a mere fixation of the official religion.

[43] "Historian Explains Why Malaysia is Neither Secular Nor Islamic," FMT, accessed April 21, 2019, https://www.freemalaysiatoday.com/category/nation/2017/09/22/historian-explains-why-malaysia-is-neither-secular-nor-islamic/.

[44] Lina Joy v. Majlis Agama Islam Wilayah & Another [2004] 2 MLJ 119.

To hold an extreme opposite view that secularism is a basic structure of the MFC despite its obvious contents which give importance to Islam from the aspect of appointment of head of state to the extent of recognising Islam as a source of law is logically, factually and legally unacceptable.

Secondly, argument the Supreme Court's decision in Che Omar's case. Contrary to the pro-secular group's contention, careful reading of the Supreme Court's judgment revealed that it did not declare the MFC as a secular constitution but merely stating that the prevailing law in 1988 adopted by Malaysia was secular law (which is not accurate since drug trafficking and possession of firearm offences in Islam may fall within the scope of ta'zir crime which according to some muslim jurists, may be punishable with capital punishment) and such is allowed by the MFC.

The author argues that there is a significant difference between the MFC is secular and the law adopted by Malaysia is secular. In the latter case, it does not mean the MFC is secular but rather religion-neutral and receptive to any law be it religious or secular for as long as it undergoes proper procedural processes required by the MFC. The Supreme Court's argument that there is no provision which nullifies law that is contrary to Islam does not prove that the MFC is secular but rather proves that it is religion-neutral because it neither nullifies law related to religion nor prohibit the legislature from making law on religious matters.[45]

The Lord President in the same case further argued when British ascribed sovereignty to the rulers (i.e. to a human being), the divine source of legal validity (which were the original system prior to colonial period) was severed and thus the British turned the system into a secular institution. In this regard, the author regrets the Lord President failed to appreciate the importance to segregate between what the British intended *Persekutuan Tanah Melayu* to be and what the people of the Federation wanted it to be. The British intended the

[45] Mohamed Azam, "Is Malaysia a Secular State?" New Straits Times, December 28, 2019, https://www.nst.com.my/opinion/columnists/2018/12/444567/malaysia-secular-state. See also Kow Gah Chie, "Law Expert: Malaysia Neither Secular nor Islamic State," Malaysiakini, January 25, 2019. https://www.malaysiakini.com/news/461745.

Federation to be a secular state governed the Malayan Union which was rejected by the people. Instead, the Reid Commission was formed to collate collective views of the people on the contents of the constitution that would become the supreme law of the land. Hence, the MFC is the product of people's wills, neither the British's will not the Reid Commission's will. Thus the author argues this as a clear evidence that the MFC should not be interpreted according to what the British wanted the Federation to be. Instead, the MFC is a document that comprises, among others, the history, civilization and culture of the people which include Islam as a salient component. The independence of *Persekutuan Tanah Melayu* would be meaningless if the British will is still dominant in the interpretation of the MFC.

In Dato Menteri Othman Bin Baginda & Another v. Dato Ombi Syed Alwi Bin Syed Idrus,[46] the Federal Court stated:

> In interpreting a constitution two points must be borne in mind. First, judicial precedent plays a lesser part than is normal in matters of ordinary statutory interpretation. Secondly, a constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way — "with less rigidity and more generosity than other Acts" (see Minister of Home Affairs v Fisher [1979] 3 All ER 21. A constitution is *sui generis*, calling for its own principles of interpretation, suitable to its character, but without necessarily accepting the ordinary rules and presumptions of statutory interpretation. As stated in the judgment of Lord Wilberforce in that case: "A constitution is a legal instrument given rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to take as a point of departure for the process of interpretation a recognition of the character and origin of the instrument, and to be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms." The principle of interpreting constitutions "with less rigidity and more generosity" was again applied by the Privy Council in Attorney-General of St Christopher, Nevis and Anguilla v Reynolds [1979] 3 All ER 129, 136.

[46] Dato Menteri Othman Bin Baginda & Another v. Dato Ombi Syed Alwi Bin Syed Idrus [1981] 1 MLJ 29.

Having regards to the above stated principle of constitutional interpretation, the author submits that the Lord President's contention that the British turned the system into a secular institution cannot be sustained as an argument to conclude Malaysia as a secular state.

Thirdly, the pro-secular group asserts that the Supreme Court in Che Omar's case decided the scope of Islam in Article 3 is limited to rituals and ceremonies only. It is the author's view that meticulous appraisal of the Supreme Court's judgment reveals that although the Supreme Court asked the question, whether "the religion of Islam in the context means only such acts as relate to rituals and ceremonies", it did not give a conclusive answer to the question. As commented by the High Court in Lina Joy's case, the Supreme Court in Che Omar's case did not decide on Article 3(1) on the meaning of Islam as the Religion of the Federation but rather whether death penalty for drug trafficking and possession of firearm offences was unconstitutional. As such, the author further argues that it is misleading to claim the Supreme Court answered the question in the affirmative since the Supreme Court mentioned, "Islamic law was rendered isolated in a narrow confinement of the law of marriage, divorce, and inheritance only" whereas marriage, divorce and inheritance are not matters of mere rituals and ceremonials but involve legal rights and responsibilities. Besides, the author agrees with the High Court in:

(a) Meor Atiqulrahman's case which stated that Article 3 has the effect of uplifting the status of Islam above other religions; and
(b) Lina Joy's case which stated, "Article 3(1) has a far wider and meaningful purpose than a mere fixation of the official religion".

Fourthly, cases like Sulaiman bin Takrib v. Kerajaan Negeri Terengganu[47], Fathul Bari v. Majlis Agama Islam Negeri Sembilan[48], ZI Publication's case and Muhamad Juzaili v. State Government of Negeri Sembilan[49] show there were many attempts to strike down state's legislations on offences against the precepts of Islam on the ground of constitutionality. For instance, the Court

[47] Sulaiman bin Takrib v. Kerajaan Negeri Terengganu [2009] 2 CLJ 54.
[48] Muhamad Juzaili Bin Mohd Khamis & Others v. State Government of Negeri Sembilan & Others [2015] 3 MLJ 513.
[49] Muhamad Juzaili Bin Mohd Khamis & Others v. State Government of Negeri Sembilan & Others [2015] 3 MLJ 513.

of Appeal Juzaili's case had ignored the Four Walls Doctrine[50] and was very liberal in interpreting the MFC by adopting, among others, interpretation from states that clearly upholds secularism (India and USA) and by disregarding the position of Islam in the constitution and the SLA's constitutional right to enact laws on religious matters. Nevertheless, the Federal Court in all the above cases upheld the constitutionality of the state legislations.

In ZI Publications' case, the Federal Court remarked that there can be no doubt the MFC allows SLA to enact laws against the precepts of Islam. In Fathul Bari's case, the Federal court stated the SLA had acted within its legislative power in enacting law with the purpose to protect the integrity of the *aqidah* (belief), *syariah* (law) and *akhlak* (morality) of muslims which constituted the precepts of Islam. In Sulaiman bin Takrib's case, the Federal Court explained the SLA's power to enact law on the creation and punishment of offences under Item 1 of the State List subject to four conditions:

(a) it is confined to persons professing the religion of Islam;
(b) it is against the precepts of Islam;
(c) it is not with regard to matters included in the Federal List; and
(d) it is within the limit set by Section 2 of the Syariah Courts (Criminal Jurisdiction) Act 1965.

Accordingly, the author argues that it is irrational to insist that the MFC is secular when the Federal Court had in many occasions decided the MFC empowers the SLA to enact laws on the creation and punishment of offences against the precepts of Islam.

Fifthly, the author had earlier ventured into the doctrine of basic structure of constitution. In this context, the author argues that it is illogical to say in the first place that something which is so fundamental to the constitution is being neglected from expression especially when it has been repeated numerous times in the preparatory works. This fact can be implied to mean secularism was not

[50] The Court in The Government of The State of Kelantan v The Government of The Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj [1963] 1 MLJ 355 stated "The second consideration is that the Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia."

intended to be inserted in the MFC. In Titular Roman Catholic Archbishop's case, Apandi Ali JCA, while delivering the Court of Appeal's judgment, states:

> It is my observation that the words 'in peace and harmony' in art 3(1) has a historical background and dimension, to the effect that those words are not without significance. The article places the religion of Islam at par with the other basic structures of the Constitution, as it is the third in the order of precedence of the articles that were within the confines of Part I of the Constitution. It is pertinent to note that the fundamental liberties articles were grouped together subsequently under Part II of the Constitution.

From the above, the author further argues that secularism does not qualify as a basic structure of the MFC because it has been deliberately neglected from being mentioned in the MFC and instead, it is more apparent that Islam is intended to be a basic feature of the MFC due to its importance and frequent repetition in the MFC on various subjects.

Nonetheless, the understanding of Article 3(1) as suggested by Ahmad Fairuz that *Syariah* is the "second most supreme" law of Malaysia is also not tenable[51]. With respect, the author finds this proposition is neither supported by constitutional provision nor case law. In fact, Article 3(4) of the MFC states, "Nothing in this Article derogates from any other provision of this Constitution". This means that Article 3(1) must be read harmoniously with other provisions of the MFC including Article 162 which preserves *pre-Merdeka* laws notwithstanding it is secular as well as Articles 73 and 74 on the legislative power of the legislature regardless that the law passed by it is secular or religious.

V. CONCLUSION

There is no conclusive evidence to establish with certainty that secularism is a basic structure of the MFC. The pro-secular group heavily relied on the preparatory works of the MFC which no doubt mentioned that the insertion of Islam as a state's religion does not derogate from the secular nature of the Federation. They also referred to Che Omar's case which appears to support such

[51] Shad Saleem Faruqi, "Constitution – the litmus test of validity," *The Star Online*, March 30, 2017, https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2017/03/30/constitution-the-litmus-test-of-validity-the-assertion-that-islamic-law-takes-precedence-over-civil/.

proposition. However, it is important to note that Islam in the MFC does not only appear in Article 3 but in many other articles. In fact, Islam plays significant role in the Malaysian legal system be it from the aspect of appointment of head of state to the extent of serving as a source of law. With this important fact, the author argues that the term "secular" used in the preparatory works does not refer to "strict wall of separation between state and religion". Instead, the term has been loosely used to indicate that Malaysia, at the time of its establishment is not intended to be a pure theocratic state. This however, does not in any way preclude subsequent adoption of religious law by the legislature or even the subsequent shift into becoming a pure theocratic state.

Therefore, the author concludes that the MFC is not a secular document creating a secular state and despite giving special preference to Islam as the religion of the Federation, it is not a religious document establishing a pure theocratic state. The MFC is rather a religion-neutral document which is receptive to both religious, in particular Islamic and secular laws.

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The Return of Pancasila: Political and Legal Rhetoric Against Transnational Islamist Imposition*

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Abstract

The rise of transnational Islamist movements in Indonesia in the last two decades recurrences the old debate between Pancasila and Islamism. This kind of fundamental Islamic movements widespread with their conservative view and it has had detrimental effects on the Indonesian society's social cohesion. President Joko Widodo seeks to revive Pancasila to confront this threat. This is not for the first time Pancasila is used by the Indonesian government to resolve the tension between Islamic values and nation-state principles. Both President Sukarno and Suharto also used Pancasila as a vehicle to discipline their political opponents. Adopting a non-essentialist approach to Pancasila, I argue that the return of Pancasila in recent years would be more complicated because of the narrative of Pancasila revivalism as an adversarial ideology is bounded by traditionalism and lack of progressive interpretation. Instead of locating Pancasila as the counterpart to Islamism, what is needed is re-interpretation of Pancasila as a unifying ideology.

Keywords: Pancasila, Ideology, Transnational Islamism, Non-Essentialist Approach.

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I. INTRODUCTION

The debate on the relationship between Islam and Pancasila remains one of the most prominent conversations in social and political discourse in contemporary Indonesia.[1] The immediate cause for the contemporary resurfacing of this debate lay in 2017 when Islamic supporters used religious rhetoric to defeat Basuki Tjahaya Purnama, a Christian-Chinese incumbent governor of Jakarta then running for his second election. Radical Islamic organisations accused Basuki of committing blasphemy to Islam. Basuki's supporters teach *Bhineka Tunggal Ika* (unity in diversity), a concept central to the Pancasila movement and their stance for inclusivity and equality among citizens with different ethnic and religious backgrounds. President Joko Widodo answered the threat of transnational Islamic movements by releasing a Regulation in Lieu of Law to dissolve the Hizbut Tahrir Indonesia (HTI), an Islamic organisation that rejects democracy and supports the establishment of a Caliphate.[2] Moreover, the President created a novel Presidential Unit (*Unit Kerja Pemantapan Ideologi Pancasila*/UKPIP), dedicated to the implementation of Pancasila state ideology in public life, which later became the Board for the Implementation of Pancasila State Ideology (*Badan Pembinaan Ideologi Pancasila*/*BPIP*).

The debate between Pancasila and Islamism has existed since the founding of the Republic of Indonesia in 1945 and proceeds from the tension between Islamism and secularism in Indonesian society. On the one hand, as a country with a majority Muslim population, there exists a strong tendency to Islamize the state and society. Islamic religious principles play a significant role in Indonesia's legal system. Consider the many state regulations which promote Islam, like the Law on Religious Courts, Zakat, (alms), Waqf (religious endowment) and the Hajj (pilgrimage). There are no similar, special regulations to accommodate

[1] Nadirsyah Hosen, *Shariá and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007); Seung-Won Song, "Back to Basics in Indonesia? Reassessing the Pancasila and Pancasila State and Society, 1945-2007" (Dissertation, Department of History and the College of Arts and Sciences of Ohio University, 2008); Robert Cribb, 'The incredible shrinking Pancasila: Nationalist propaganda and the missing ideological legacy of Suharto' in *The return to constitutional democracy in Indonesia,* ed. Thomas Reuter (Caulfield: Monash Asia Institute, 2010).

[2] Giri Ahmad Taufik. "Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly," *Constitutional Review* 4, no. 1 (May 2018) 55-6.

religions other than Islam. On the other hand, Indonesia is not a self-proclaimed Islamic state, and the persistent popularity of the Pancasila movement highlights the popularity of secular ideals enjoy in Indonesia alongside Islam.[3]

Theoretically, the intertwinement between religion and the nation-state is inseparable because it has been rooted in the birth of the concept of the modern nation-state. In 1648, the Treaty of Westphalia established the core principles of the modern conception of statehood and was the final result of a religious war of Protestants against the Holy Roman Empire. The Holy Roman Empire's loss provided an opportunity to the Lutheran and the Calvinist followers to perform their worship freely. The Westphalia Treaty is the fundamental constitution of the secular state. This treaty not only separates state and religion, but it also establishes as a general principle that the state has to treat different religions similarly.[4] Therefore, the position of the state is above religious institutions.[5]

In addition to religious struggle, the notion of the modern nation-state has also been shaped by political ideology. In the 20th century, liberalism, communism and fascism, as the three dominant political ideologies, outlined the features of the modern nation-state and the global political constellation.[6] In Indonesia, founders of the Republic formulated Pancasila to serve as the state ideology for the newly formed nation. Pancasila consists of five principles, accommodating the most important aspirations the Republic's founders had for the new state in 1945: belief in one supreme God, justice and civility among peoples, the unity of Indonesia, democracy through deliberation and consensus among representatives and social justice for all the people of Indonesia.

In Indonesia, the contention between Pancasila and Islamism continuously shapes and reshapes the nation-state especially in moments of political transition. Admittedly, the conflict between Pancasila and Islamism did not play a

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3 Nadirsyah Hosen, "The Constitutional Court and 'Islamic' Judges in Indonesia," *Australian Journal of Asian Law* 16, no 2 (2016): 1-11 and Jan Michiel Otto, "Introduction: investigating the role of sharia in national law," *Sharia Incorporated* (2010): 29 and 41.

4 Abdullah Ahmed An-Na'im, *Islam and the Secular State: Negotiating the Future of Shari'a,* (Cambridge, Massachusetts, London, England: Harvard University Press, 2008). 267-8.

5 Benjamin Straumann, "The Peace of Westphalia (1648) as a Secular Constitution," *Constellations* 15, no. 2 (June 2008) (IILJ Working Paper No. 2007/07): 21.

6 Yuval Noah Harari, *Homo Deus: Masa depan umat manusia* (Jakarta: Pustaka Alvanbet, 2018), 285.

significant role in the political transition in 1998 and the attendant constitutional amendment debate.[7] However, the new democratic environment in Indonesia, characterised by a dramatic increase in freedom of association and expression, proved fertile ground for transnational Islamic movements. The government's decentralisation policy, adopted in 1999, also allowed radical Islamic movements to gain influence by actively encouraging district governments to accommodate Islamic norms into local regulations. This fundamentalist groups also regularly persecuted minority groups that they presumed contradict their interpretation of Islamic law such as the followers of Ahmadiyya in Cikeusik and the Shia in Sampang.[8] Since 1998, accusations of blasphemy are also on the rise due to the increasing popularity of hard-line Muslim groups, which are more likely to decide against defendants.[9]

At the same time, Muslim identity politics or, more specifically, the image of the good Muslim as the only bulwark against the destructive influence of globalisation, has succeeded in attracting many Indonesians. At the global level, transnational Islamist movements present Muslims as the primary victims of Westerners' greed, pointing to the recent invasions of Muslim countries such as Afghanistan and Iraq after the 911 tragedy.[10] Islamist movements further their agenda drawing on the public's dissatisfaction with globalisation and the modern nation-state. The Islamic State of Iraq and Syria (ISIS) promotes the Caliphate Islamiyah as a solution to these global problems resulting from westernization. Other transnational Islamist movements include Wahabi, the Muslim Brotherhood (*Ikhwanul Muslimin*) and Hizbut Tahrir.[11] Through the

7 Nadirsyah Hosen, *Shariá and Constitutional Reform in Indonesia*.

8 Melissa Crouch, "Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis," *Sydney Law Review* 34 (2012): 545.

9 Rafiqa Qurrata A'yun, "Di balik meningkatnya kasus penodaan agama di Indonesia [Behind the increasing blasphemy in Indonesia]," *The Conversation,* May 14, 2018, http://theconversation.com/di-balik-meningkatnya-kasus-penodaan-agama-di-indonesia-96354.

10 Jan Michiel Otto, "Introduction: investigating the role of sharia in national law," *Sharia Incorporated* (2010): 29 and 41.

11 Abdurrahman Wahid, *The illusion of an Islamic State: How an Alliance of Moderates Waged a Successful Campaign Against Radicalization and Terrorism in the World's Largest Muslim-Majority Country* (Jakarta: LibForAll Foundation, 2011), viii and Noorhaidi Hasan, "Transnational Islam in Indonesia," in *Transnational Islam in South and Southeast Asia: Movements, Networks, and Conflict Dynamics*, edited by Peter Mandaville et al. (NBR Project Report: April 2009).

support of big funding organisations from the Middle East, transnational Islamist movements inject the local and the national political situation in Indonesia with their radical agenda.[12] Their objective is to convert Muslims who cherish modern ideas, such as democracy, liberalism, pluralism, and traditional (non-Islamic) ways of life into exponents of 'pure Islamic societies' – i.e. societies free from either western or local, traditional (non-Islamic) influences.[13]

The nationalist and liberal scholars perceive the emergence of transnational Islamism as a threat to nationhood, solidarity and tolerance. As stated above, President Joko Widodo employed Pancasila as a weapon to limit the influence of radical Islam. However, the use of Pancasila to deal with this problem is not a new approach. As noted in many analyses, Sukarno and Suharto had used Pancasila to serve as the ideological basis for their authoritarian governments. Referring to the historical path and applying a non-essentialist approach to Pancasila, the central question of this article: To what extent can Pancasila rhetoric be used to undermine the transnational Islamist movements' influence in Indonesia? This question will be addressed by an investigation into the history of the movement and the contention between its exponents and Islamists in Indonesia.

II. HISTORICAL AND POLITICAL SETTING

2.1. The Historical Contention between Islam and ***Pancasila***

During the 19th century, Indonesia's rural population often drew on Islam in their rhetoric for popular resistance and rebellion against the colonial rulers.[14] Even though the acquisition of land and resources was arguably the primary motivation for most leaders of the resistance against colonial rule, they used Islamic language to persuade ordinary people to join their cause. Furthermore, in the early 20th century, many modern Muslim organisations were established with the support of intellectuals and traders, such as Sarekat Islam (1912),

[12] Abdurrahman Wahid, *The illusion of an Islamic State*, x.

[13] *Ibid*.

[14] For instance, the Paderi War (1821-1832), the Java War during Diponegoro (1825-1830), the Banjar War (1854-1864), and the Aceh War (1875-1903).

Muhammadiyah (1912) and Nahdlatul Ulama (1926).[15] Note that, at the same time, many other organisations were also established on the basis of nationalist, communist, and socialist principles.

During the Indonesian decolonisation war of 1945-1949, Nahdlatul Ulama (NU), the most prominent Indonesian Islamic organisation, released a 'Jihad Resolution', calling all Muslims to fight against the Dutch for Indonesian independence. After their regular involvement in wars against the colonial rulers, Islamic groups claimed that they contributed most to Indonesian independence. During the formation of the Republic, Islamic leaders, therefore, demanded the institution of Islamic law (*sharia*) throughout the country. This attempt had succeeded as evidenced by the first Jakarta Charter,[16] which stated that the first principle of the Republic of Indonesia is "believe in almighty God with the obligation to practice Islamic Sharia to its adherents". However, the Jakarta Charter was revised by the PPKI on August 18, 1945.[17] More specifically, the seven words concerning the obligation for Muslims to practice Sharia in the Jakarta Charter had been revoked in the preamble of the 1945 Constitution.[18] Deeply regretful of the removal of the obligation to observe Islamic law, Muslim leaders vowed to restore the seven words in the formulation of Indonesia's permanent constitution in the future. They found momentum in the Constitutional Assembly (*Konstituante*)[19] meetings held between 1955 and 1959. The primary task of the Constitutional Assembly was to formulate a new and robust constitution of Indonesia to replace the 1945 Constitution. In addition to restoring the seven

[15] Vedi R. Hadiz, *Islamic Populism in Indonesia and the Middle East* (Cambridge University Press, 2016),.53.

[16] Jakarta Charter is a negotiation document between Islamist and Nationalist group in the formulation of the Indonesian constitution. This charter formulated by nine members of the Indonesian Investigation Committee for Preparatory Work for Indonesia Independence on June 22, 1945. Later, on August 18, 1945, the Jakarta Charter was revised by eliminating the obligation for Muslim to abide by Sharia,

[17] Panitia Persiapan Kemerdekaan Indonesia (PPKI) or the Preparatory Committee for Indonesian Independence was a body established on 7 August 1945 to prepare for the transfer of authority from the occupying Japanese to Indonesia. On August 18, 1945 after the Proclamation, PPKI elected the first Indonesia President and Vice President as well as determining an interim constitution.

[18] The seven words is 'with the obligation to practice Islamic Sharia to its adherents' (In Indonesian: '*dengan kewajiban menjalankan syariat Islam bagi pemeluk-pemeluknya*').

[19] Konstituante (the Constitutional Assembly) was a parliamentary body that established as the result of the 1955 election. The Konstituante has an obligation to draw up a permanent constitution for the Republic of Indonesia. It sat between November 10, 1956 and July 2, 1959. Later, It was dissolved by then President Sukarno on July 5, 1959 which reimposed the 1945 Constitution.

words from the first Jakarta Charter, these Islamic leaders, including Mohammad Natsir (Masyumi), Kasman Singodimoedjo (Muhammadiyah/Masyumi), and Abdul Wahab Chasbullah (Nahdlatul Ulama), desired the formation of modern Islamic Democratic State (*Negara Demokrasi Islam*), with Islamic principles serving as the new state's foundation. Unlike contemporary Islamist movements, these leaders did not go so far as to call for the installation of a theocratic state or caliphate Islamiyah.[20]

In 1959, President Sukarno argued that the Constitutional Assembly had failed to fulfil its obligation to produce a new constitution. No proposal succeeded in obtaining the required 2/3 majority vote, due to the equal representation of Islamists and *Pancasila*'s supporters in the assembly. In July 1959, Sukarno released a presidential decree to dissolve the Constitutional Assembly and return to the 1945 Constitution. Subsequently, Sukarno imposed the Guided Democracy system to replace parliamentary democracy system that had functioned in Indonesia since it became independent. Sukarno used his power to exterminate the Islamic rebellion which was promoting the formation of an Islamic State by guerrilla-warfare in Pasundan, South Kalimantan, Sulawesi and Aceh during the 1950s to 1960s. In that period, Sukarno strategically used rhetoric inspired by *Pancasila* to maintain his political power against the onslaught of the promoters of an Islamic State.

Suharto similarly employed *Pancasila* to deal with Islamist groups during the 32 years he was in power (1967-1998). Suharto took the Presidency after the 1965 Tragedy when seven high military commanders were assassinated. He accused the Indonesia Communist Party (PKI) of masterminding the killings. At the beginning of his rule, Suharto received support from Islamic organisations to eliminate communism, including the support of Nahdlatul Ulama and Muhammadiyah. Furthermore, Suharto continued Sukarno's policy of displaying respect for Islam as a private religious practice, while attempting to limit Islam's influence in the political sphere.[21] In doing so, Suharto made

[20] Muhammad Natsir Opinion in *Risalah Sidang Konstituante* (Konstituante Republik Indonesia, 1958), 41; Kasman Singodimedjo, *ibid*., 259 ; and Abdul Wahab Chasbullah, *ibid*., 347.

[21] Nadirsyah Hosen, *Shariá and Constitutional Reform in Indonesia* (Singapore: ISEAS, 2007), 71.

Pancasila the sole ideology to receive state support and forced the Islam-based political parties to merge into the United Development Party (*Partai Persatuan Pembangunan/PPP*).[22] Muslim intellectual and political elites who rejected Suharto's plans stood accused of subversive conduct and jailed. Nahdlatul Ulama and Muhammadiyah responded to this policy by adopting *Pancasila* as the official basis of their organisation. Instead of seeing Islam and *Pancasila* as adversarial, Muslim scholars connected to these organisations argued that the two are compatible and largely depart from the same values. This strategy successfully changed Indonesian Muslims' perception of *Pancasila*. Nadirsyah Hosen described this period as the honeymoon of the *Islam-Pancasila* relationship resulted in increased cooperation between the Indonesian military and Islamic organisations.[23] To illustrate this rapprochement between Islamic groups and the *Pancasila* movement, he pointed to, among other things, the enactment of judiciary law in favour of the religious court to decide on matters of family law. In that period, Suharto became more religious and changed his name to Haji Muhammad Suharto after a visit to Mecca.[24] Towards the end of his rule, Suharto increasingly presented himself as the leader of Indonesian Muslims. Similarly to Hosen, Martin van Bruinessen also argued Islamic thought during the Suharto period reached a comparatively high level of intellectual sophistication, due to the emergence of Liberal Muslims, represented by two leading figures: Nurcholis Madjid and Abdurrahman Wahid.[25]

The new era of the debate between *Pancasila* and Islamism takes place in the Post-New Order period. The multi-party system introduced in 1999 allows for the existence of Islamic political parties not bound by *Pancasila* ideology. PPP, PBB[26] and PK[27] are the Islamic political parties that have declared Islam as

[22] Jan Michiel Otto, *Sharia* Incorporated, 446.
[23] Nadirsyah Hosen, *Shariá and Constitutional Reform in Indonesia,* 72-4.
[24] Jan Michiel Otto, *Sharia* Incorporated, 449.
[25] Martin van Bruinessen, "What happened to the smiling face of Indonesian Islam? Muslim intellectualism and the conservative turn in post-Suharto Indonesia" (RSIS Working Papers, Singapore, 2011), 1.
[26] Partai Bulan Bintang (PPB) is led by Yusriz Ihza Mahendra, and it has strong connection with the Masyumi Party. Yusril himself was the assistance of Muhammad Natsir, the former leader of Masyumi Party.
[27] Partai Keadilan (PK) is founded by university activists who have a connection to the Muslim Brotherhood (*Ikhwanul Muslimin*).

their organisational foundation. The PBB party, led by Yuzril Ihza Mahendra, presents itself as the heir to the Masyumi Party – its political platform revolves around the promotion of Sharia law and the formation of an Islamic State. The PBB did not perform well in the 1999 election, showing that the idea of incorporating Sharia in the national laws has little public support.[28] During the amendments to the 1945 Constitution (1999-2002), there were no serious attempts from the Islamic political parties to restore the Jakarta Charter, because the main political parties such as the PKB (the majority supported by NU voters) and PAN (the majority backed up by Muhammadiyah voters) had been supporting *Pancasila* since the New Order period. This time, the refusal to restore the first Jakarta Charter was not followed by state-coercion of Islamist groups, likely because it was arrived at by political consensus in parliament.[29] At the turn of the century, the leading promoters of the Islamic state in the past, such as Nahdlatul Ulama and Muhammadiyah, no longer argued for the incompatibility of Islamic values and *Pancasila*. Both leaders of these organisations, Abdurahman Wahid and Syafii Maarif, supported a substantive approach to the Islam-*Pancasila* relationship[30] and they stressed the similarities between Islam and the nation-state rather than sharpening the divide.[31]

However, several attempts to formalise Islamic norms into national law have been made at the district-level through locally introducing sharia-based regulations, so-called *Perda Syariah*.[32] According to Tim Lindsey, around 160 such regulations were enacted in at least 24 of Indonesia's 33 provinces.[33] Interestingly, the effort to create local regulation with Islamic features not only came from Islamic parties but was also supported by other non-Islamic parties such as Golkar, PDIP and the Democratic Party.[34] Even secular political elites favoure

[28] Nadirsyah Hosen, *Shariá and Constitutional Reform in Indonesia,* 82.
[29] *Ibid*., 85.
[30] *Ibid*., 93-4.
[31] Syafii Maarif, *Islam dan Pancasila sebagai Dasar Negara: Studi tentang perdebatan dalam konstituante* (Jakarta: LP3ES, 2006).
[32] Jan Michiel Otto, *Sharia* Incorporated, 452. See Also Melissa Crouch, "Judicial Review and Religious Freedom", 569.
[33] Timothy Lindsey (2008), "When words fail. Syariah law in Indonesia: Revival, reform or transplantation?," in *Examining practices, interrogating theory: Asian Comparative legal studies*, ed. P.Nicholson & S. Bidolph (Leiden: Brill, 2008), 107-8.
[34] Jan Michiel Otto, *Sharia* Incorporated, 482.

Islamic features to acquire votes and build a clean political image in the context of pervasive corruption at the local level. Radical Islamic organisations use this situation to obtain the support of local politicians for their illegal activities and persecution of minorities at the grassroots level.

After Suharto's administration, transnational Islamist movements and other radical Islamic organisations gained popularity and influence. In 2017, the situation worsened under Jokowi's presidency and reached its peak with the Basuki Tjahaya Purnama blasphemy case, which was followed by an upsurge of persecution and discrimination toward ethnic and religious minorities. What are transnational Islamist movements and how could it widespread in contemporary Indonesia? The next part of this article uncovers the imposition of the transnational Islamist movement into the Indonesian context.

2.2. Transnational Islamist movement and its imposition to Indonesia

After the 911 tragedy, we have witnessed a new notion of Islam as a transnational political identity gaining traction around the world. Since that tragedy, the West increasingly regards Islam as a source of terrorism and stigmatises Muslims as purists opposed to modernity. This negative stigma is particularly applied to the inhabitants of Islamic countries in the Middle East where Islam originated. The manner in which the 911 tragedy changed the world order is similar to the effects of the end of the Cold war described by Samuel P. Huntington in his seminal book *The Clash of Civilizations and the Remaking of World Order*.[35] Huntington argued that in the Post-Cold War era, contention among cultures and religions will be the most important source of global conflict.

The West sees Islam as a major cause of the disruption of global stability. Therefore, the West, led by the USA, conducted political and military interventions in a number of Islamic countries. Soon after the 911 tragedy, the USA invaded Afghanistan and Iraq. Following the Arab Spring, Syria became a theatre of war for Western countries to expand their control over oil resources.

[35] Samuel P. Huntington, *The Clash of Civilizations and the Remaking of World Order (*Simon and Schuster, 1996).

Meanwhile, the resulting waves of migration from the Middle East to Europe and Australia were considered a threat to the West. The presence of Islam in the West is not something new. On the contrary, Muslims have lived in Europe for centuries. However, after the 911 tragedy, Islam was increasingly perceived as a dangerous threat to western civilisation, leading to the emergence of anti-Muslim parties in western countries.

Western Islamophobia, coupled with the fact that Muslim countries largely failed to benefit from the advances of the West, resulted in the formulation of a new Islamic political identity. The failure of Muslims to adapt to modernity strengthens the appeal of fundamentalist groups seeking to insert an alternative form of society, based on Islamic values and free from western influence.[36] From this standpoint, the idea of the caliphate has been developed under the narrative of Islamic politics. The formation of Islam as a new political identity is in line with Michel Foucault's views on subject formation. Despite the fact that Foucault's work is commonly used to study female and LGBTs subjectivity, I found that his theory on subject formation could be applied to analyse the formation of Islam as a new global political identity. For Foucault, a subject is formed by the experience of discrimination, exploitation, and subjection.[37] The persecution of Islam by the West has led to the formation of a new Muslim identity centered around victimhood.

Contemporary discourse on transnational Islamism centers around the utopian concept of the Caliphate. Although the idea of the Caliphate is never stated explicitly in the Qur'an, radical Islamic transnational groups nevertheless propose this concept as a superior alternative to the western model of democracy and neoliberal economics. The establishment of ISIS presents a remarkable attempt to realise this ideal. Other transnational Islamic movements with different method and purposes are Wahabi and Ikhwanul Muslim. These movements are affiliated with a variety of organisations, including Partai Keadilan Sejahtera,

[36] Syafii Maarif, Prologue in Abdurrahman Wahid (edt). *The illusion of an Islamic State: How an Alliance of Moderates Waged a Successful Campaign Against Radicalization and Terrorism in the World's Largest Muslim-Majority Country*, Jakarta: LibForAll Foundation, 2011), 2.

[37] Michiel Foucault, "The Subject and Power" *Culturail Inquiry* 8 (Summer 1982).

Hizbut Tahrir Indonesia, the Islamic Defenders Front and Jamaah Islamiyah.[38] Wahabism is not new to Indonesia, in fact it was introduced to Sumatra in the colonial period, Wahabism has spread out in Sumatra, and it generated to Padri War led by Tuanku Imam Bonjol. These transnational Islamic movements use various strategies to further their common aim of incorporating Islam into national law and societal life.[39]

Wahabis and Salafis practice Islam in a rigid, monolithic fashion. The prevailing attitude in these groups is to accuse others of being gentile (*kafir*) persons. They denounce different teachings of Islam (particularly Shia Islam) and are even willing to violently persecute those with different religious beliefs.[40] Jan Michiel Otto uses the term Islamic Puritanism to describe this attitude,[41] while Martin van Bruinessen labels it conservative and fundamentalist.[42] These movements obtained significant support from Islamic countries and international organisations. According to Abdurrahman Wahid, former president of the Republic of Indonesia, the Kingdom of Saudi Arabia is the most significant supporter of Wahabism. The Saudi government channels this support through the International Islamic Relief Organisation (IIRS).[43] In Indonesia, the IIRS funded a number of organisations engaged in the spreading of Wahabism, including Dewan Dakwah Islamiyah Indonesia (DDII), Majelis Mujahidin Indonesia and Kompak.[44]

Transnational Islamic movements not only persecute the followers of religions other than Islam but also adherents of different teaching in Islam itself, such as the Ahmadiyya Muslims in Cikeusik and Shia in Madura. These

[38] Noorhaidi Hasan, "Transnational Islam in Indonesia," in *Transnational Islam South and Southeast Asia: Movements, Networks, and Conflict Dynamics*, ed. Peter Mandaville et al. (NBR Project Report: April 2009),122. See also Van Bruinessen, "What happened to the smiling face of Indonesian Islam?" 3 and Abdurrahman Wahid, *The illusion of an Islamic* State, 88.

[39] Van Bruinessen, "What happened to the smiling face of Indonesian Islam?" 9.

[40] Syafii Maarif, "Prologue," 2-3.

[41] Jan Michiel Otto, *Sharia Incorporated,* 39.

[42] Van Bruinessen uses the term "conservative" refers to the various currents that reject modernist, liberal or progressive re-interpretations of Islamic teachings and adhere to established doctrines and social order. By "fundamentalist", He means those currents that focus on the key scriptural sources of Islam—Qur'an and hadith—and adhere to a literal and strict reading thereof. Van Bruinessen, "What happened to the smiling face of Indonesian Islam?" 7.

[43] Jan Michiel Otto, *Sharia Incorporated*, 45.

[44] Abdurrahman Wahid, *The illusion of an Islamic* State, 75.

movements have been able to proliferate because of the extensive interpretation of the freedom of association in Indonesia and the absence of effective legal enforcement in response to the violation of minority rights. In some cases, the state apparatus even facilitates radical Islamic groups in doing persecution.[45]

The current objective of transnational Islamic groups is to replace the Unitary State of Indonesia and *Pancasila* with a Caliphate based on their interpretation of Islam.[46] Their rhetoric of defending Islam is primarily a political agenda to create Islam as weapons of their purposes. They not only intend to replace the formal structure of the nation-state but also want to replace the traditional culture of the archipelago with Middle Eastern culture, notably the *Wahabi-Ikhwanul Muslim*.[47]

Abdurrahman Wahid also notes that the transnational Islamist movements in Indonesia infiltrate moderate Islamic organisations, such as NU and Muhammadiyah. According to Wahid, they consider these organisations obstacle to achieving their goals.[48] Among the Muhammadiyah, this infiltration has become known as "the virus tarbiyah" and resulted in a severe response by Muhammadiyah leaders. Moreover, Wahid found that 75% of the hard-line Muslim organisation leaders have ties to Muhammadiyah.[49] The infiltration of the NU mainly proceeds by Wahabi organisations, affiliated to the PKS and/or HTI, acquiring poorly maintained mosques. These organisations subsequently exert control over what is preached and use the mosques in political campaigns for local and national elections.

The Indonesia Ulama Council (Majelis Ulama Indonesia/MUI) also became targets of these groups.[50] The MUI was established by the Suharto regime to exert control over Islamist, but today it has turned into a bunker for fundamentalist groups.[51] Since 1998, the MUI has shifted from a pro-government

[45] Melissa Crouch, "Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis," *Sydney Law Review* 34 (2012): 545.
[46] Abdurrahman Wahid, *The illusion of an Islamic* State, 75.
[47] *Ibid.*, 22.
[48] *Ibid.*, 22-5. See also Jan Michiel Otto, *Sharia Incorporated.* p.483.
[49] Abdurrahman Wahid, *The illusion of an Islamic State*, 28.
[50] Giri Ahmad Taufik, "Proportionality Test in the 1945 Constitution," 57.
[51] Abdurrahman Wahid, *The illusion of an Islamic State*, 35.

role to a somewhat oppositional, Islamist stance.[52] In 2005, the MUI released a *fatwa* stating that secularism, pluralism, and religious liberalism – or SiPiLis, in a suggestive acronym coined by their fundamentalist opponents – are all incompatible with Islam.[53] The quasi-state status of MUI made this organisation become an effective transmitter for radical Islamic groups to spread their exclusive interpretation of Islam.

National political elites perceived the rise of transnational Islamist movements as a serious threat, especially after witnessing its potential to gather millions of supporters and defeat Basuki Tjahaya Purnama in the Jakarta election for Governor in 2017. Beyond the political elites' anxiety, at the grassroots level, this situation also threatens the social harmony of a society characterised by highly diverse identities and backgrounds. To overcome this problem, President Joko Widodo reawakened *Pancasila* to counteract the negative influence of transnational Islamist movements. Before analyzing how *Pancasila* is currently employed, we will look at how it has been utilised for political purposes in the past. I employ a non-essentialist approach to *Pancasila*, understanding it as an ideological construction developing through time, instead of a fixed, unchanging doctrine.

III. ANALYSIS AND DISCUSSION

3.1. The Political Use of *Pancasila*

3.1.1. *Pancasila* as a Unifying Ideology

Pancasila emerges as an answer to a philosophical question by Radjiman Widiodiningrat, the chairman of BPUPKI.[54] During the BPUPKI's meetings in 1945, Radjiman asked the committee's members what could serve as the philosophical foundation for the new Indonesian state. In response to this question, Sukarno introduced *Pancasila* to the committee on 1 June 1945. His

[52] Jan Michiel Otto, *Sharia Incorporated,* 456.

[53] Van Bruinessen, "What happened to the smiling face of Indonesian Islam?" 3-4.

[54] Badan Penyelidikan Usaha Persiapan Kemerdekaan Indonesia (BPUPKI) is an investigating committee that was set up in March 1945 by the Japanese military authority during the Japanese Occupation of Indonesia. The BPUPK held two plenary meetings; the first was from 29 May to 1 June 1945, and the second was between 10 and 17 July 1945.

speech centred around *Pancasila*'s five principles: (1) Indonesian nationalism; (2) internationalism or humanism; (3) consensus or democracy; (4) social prosperity; and (5) and believe in God culturally.[55] Sukarno claimed to have derived these five principles from traditional Indonesian values that he discovered by studying Indonesian history.

Prior to Sukarno, Supomo and Muhammad Yamin – both legal scholars – answered Radjiman's question by proposing their own respective ideas about a proper ideological foundation for the new Indonesian state. Interestingly, both their proposals also contained five core principles.[56] In order to develop a robust state foundation to prepare for the proclamation of Indonesian independence, BPUPKI created a working committee also known as *Panitia 9*. As its name suggests, this committee consisted of nine members consisted of Islamist and Nationalist representative.

Panitia 9 held a meeting on 22 June 1945 and produced a consensual document – the aforementioned Jakarta Charter. Although the wording was slightly different from Sukarno's version, the charter essentially incorporated his five principles. The five principles in the Jakarta Charter were accommodated to the preamble of the Indonesian Constitution on 18 August 1945, with a small but important modification: a phrase affirming an obligation for Muslims to adhere to Sharia was removed. Islamist representatives accepted the elimination with an objection because of protest from the Indonesian representative from the eastern part of Indonesia. An important motivation for Islamic groups to compromise was the narrow window of time in which the Constitution had to be enacted in a narrow time of utilising moment where Japan was going to lose its power after Hiroshima and Nagasaki nuclear bombs.

[55] Current *Pancasila* has grammatical different from Sukarno's notion on June 1, 1945. The five principles as stated in the preamble of the 1945 Constitution contained: (1) Belief in the One and Almighty God; (2) A just and civilized humanity; (3) A unified Indonesia; (4) Democracy, led by the wisdom of the representatives of the People; (5) Social justice for all Indonesians.

[56] Supomo's five principles consist of unity, familiness, consensus and democracy, social prosperity, and believe in the only and one God. Meanwhile, Muhammad Yamin's five principles consist of the belief in the One and Almighty God, a united nation of Indonesia, a just and civilised sense of humanity, democracy led by wisdom in deliberation and representation, and social justice for all Indonesian peoples.

Who should be regarded as the original founder of Pancasila and which text should be considered its founding document are controversial matters. Whether it comes from Sukarno, Supomo, Muhammad Yamin, the Jakarta Charter or the preamble of the 1945 Constitution? Instead of searching for the origin of Pancasila in a single text and an exact moment in history, Yudi Latif understands Pancasila as a historical intellectual project. According to Latif, its earliest beginnings can be traced back to the work of Indonesian intellectual-activists involved with Sumpah Pemuda (Youth Pledge) in the 1920s, until the formulation and endorsement process of Pancasila in 1945.[57] From this point of view, Pancasila should not be understood as a static, unchanging doctrine but as a collective historical project.

The primary function of *Pancasila* at the beginning of the Republic of Indonesia was to provide a common platform for adherents to various ideologies, namely: Islamism, nationalism, socialism, communism and traditionalism. Beside this unifying function, *Pancasila* was also intended to serve as an ideological alternative to other global ideologies, i.e. fascism, communism, liberalism and pan-Islamism. Sukarno regarded *Pancasila* as Indonesian's world view (*Weltanschauung*) to enter the new world of the modern nation-state.

3.1.2. *Pancasila* and Guided Democracy

At the start of Indonesia's independence, *Pancasila* was successfully employed to unify diverse political groups in pursuit of national interest. *Pancasila* got its privileged position after the enactment of the preamble of the 1945 Constitution. However, the 1945 Constitution was intended to be an interim constitution. To establish a permanent constitution, a Constitutional Assembly was established after the first general election in 1955. As discussed in the previous chapter of this article, the Islamist and *Pancasila* supporters failed to reach a consensus and decide on an ideological foundation for the new constitution. After the Constitutional Assembly's failing, *Pancasila* lost its unifying appeal and became an ideology for those opposed to Islamism.

[57] Yudi Latif, *Negara Paripurna: Historisitas, rasionalitas, dan aktualitas Pancasila* (Jakarta: Gramedia Pustaka Utama, 1976), 17.

Moreover, Sukarno was impatient and unsatisfied with the liberal multi-party system. Supported by the military, Sukarno dissolved the Constitutional Assembly and returned to the 1945 Constitution.[58] Sukarno subsequently introduced Guided Democracy to replace liberal democracy, thereby substituting a politics based on consensus with a directive approach. After the Presidential Decree of 5 July 1959, Sukarno reinforced *Pancasila* with new rhetoric to integrate between nationalism, Islamism, and communism (*Nasionalisme, Agama [Islam], and Komunisme*/*NASAKOM*). This strategy failed due to the deep political divisions between Indonesia's political parties. In the era of Guided Democracy, Sukarno employed *Pancasila* as a means to overcome political and ideological differences with repression, rather than through discourse aimed at achieving consensus.

3.1.3. *Pancasila* as the Ideology of the Authoritarian Regime

Suharto took over the presidency with a position to defence and to implement *Pancasila* and the 1945 Constitution in 'pure and consequently'. During the Suharto presidency, there was no room for constitutional reform to accommodate public demands. The fact that the 1945 Constitution did not set a term limit for the presidency allowed Suharto to maintain his position for more than 30 years. Suharto, strongly influenced by traditional Javanese values, utilised Pancasila to further his own political agenda. In 1966, the Peoples' Consultative Assembly enacted resolution number XX/MPRS/1966, concerning Pancasila as a source of all Indonesian legislation. Moreover, Suharto mystified Pancasila by enacting the sacred day of Pancasila. For Suharto and his supporters, the most important to be celebrated is the sacred day of Pancasila on October 1, instead of the birth of Pancasila on June 1.[59] This effort simultaneously encouraged by the Suharto regime to eliminate Sukarno historical influence in the formulation of Pancasila.

Under Suharto's regime, communism was made illegal. This political view supported by the People's Consultative Assembly resolution number XXV/

[58] Daniel S. Lev, *The transition to guided democracy: Indonesian Politics 1957-1959* (Ithaca, NY: Cornell University. Southeast Asia Program, 1966).

[59] Nugroho Notosusanto, *Naskah Proklamasi yang Otentik dan Rumusan Pancasila yang Otentik* (Jakarta: Departemen Pertahanan dan Keamanan, 1976), 19-21. See also A.G. Pringgodigdo, *Sekitar Pantjasila* (Pandaan: SU.5, 1970), 9.

MPRS/1966 and it remains prohibited to propagate communism in public space. Suharto used Pancasila to justify his repression of communism. The hostility of the Pancasila movement against communists under the Suharto regime is quite puzzling. After all, the communist party PKI joined nationalist groups in pledging its support to Pancasila in the Constitutional Assembly Meeting in 1956-1959. D.N Aidit, the Chairman of the PKI even wrote a book to defend his support of the Pancasila movement.[60] This reversal of Pancasila's attitude towards communism illustrates how successful Suharto was in transforming Pancasila to support his authoritarian style of government. Under Suharto, critics of the government were regularly accused of being against Pancasila, against Indonesia's development and/or of being PKI members. Moreover, Suharto started the P4 project to indoctrinate Indonesia's using ideas and rhetoric from the Pancasila state-ideology.[61] P4 was a comprehensive training program aimed at teaching Indonesian citizens how to behave in their family, social and political lives. Thus, Pancasila became a perfect disciplinary tool in Suharto's hands, which he used to control Indonesian social and political life.[62] During the Suharto period, the notion of Pancasila stressed Indonesian exceptionalism, which is rooted in ancient Javanese wisdom.[63]

3.2. Relocating Pancasila

After Suharto's resignation in 1998, Pancasila lost its privileged political position and started being used as a scapegoat for many problems in Indonesia's past.[64] In the new political atmosphere, organisations are free to choose any

[60] D.N. Aidit, *Membela Pancasila* (Jakarta: Yayasan Pembaruan, 1964).

[61] Pedoman Penghayatan dan Pengamalan Pancasila (P4) is a mandatory program conducted by Suharto administration to indoctrinate Indonesian from primary school student to office workers. This is also a lustration program to filter other ideologies that can be condemned as opponents of Pancasila. See David Bourchier, "Indonesianising Indonesia: Conservative indigenism in an age of globalisation," *Social Semiotics* 8, no. 2 (1998): 207-8. DOI: 10.1080/10350339809360408. See also Robert Cribb, "The incredible shrinking Pancasila: Nationalist propaganda and the missing ideological legacy of Suharto," in *The return to constitutional democracy in Indonesia*, ed. Thomas Reuter (Caulfield: Monash Asia Institute, 2010), 67-69.

[62] David Bourchier, *Pancasila Versi Orde Baru dan Asal Muasal Negara Organis (Integralistik)* (Yogyakarta: Aditya Media Yogyakarta dan Pusat Studi Pancasila UGM, 2007). 348-66.

[63] David Bourchier, "Indonesianising Indonesia: Conservative indigenism in an age of globalisation," *Social Semiotics* 8, no. 2 (1998): 205. DOI: 10.1080/10350339809360408. See also Pranoto Iskandar, "The Pancasila Delusion," *Journal of Contemporary Asia* 45, no. 3 (2016); Michael Morfit, "The Indonesian State Ideology According to the New Order Government" *Asian Survey* 21, no. 8 (Aug, 1981), 839-40.

[64] Tedi Sudrajat, "Harmonization of Regulation Based on Pancasila Values Through the Constitutional Court of Indonesia," *Constitutional Review* 4, no. 2 (December 2018), 304.

ideological foundation apart from communism, which remains prohibited by law. This new situation proved fertile ground for radical Islamic groups. Even Hizbut Tahrir Indonesia, an organisation forbidden in many democratic countries, succeeded in attracting a significant following.

Although Pancasila has lost its status as the dominant ideology in Indonesia,[65] a large number of Indonesian – both members of the political elite and ordinary citizens – still passionately support the ideology. On 1 June 2011, Pancasila commemoration day, President Susilo Bambang Yudhoyono, along with former presidents BJ. Habibie and Megawati Sukarnoputri expressed the need to revitalise Pancasila. There exists considerable public support for such a revival in Indonesia. In a 2011 survey conducted by Statistics Indonesia (*Badan Pusat Statistik*), 79% of the respondents desired a revival of Pancasila in social and political life. However, the respondents had little trust in the political elite's ability to revitalise the movement by properly educating the public on Pancasila (3%). Out of all the groups inquired after, the respondents felt academic institutions is the best suited to revitalize the movement (43%), followed by community and religious leaders (28%) and specialised agencies to be formed by the government (20%). Despite considerable support among Indonesians, no significant steps to revitalize Pancasila were taken until the end of the Yudhoyono administration in 2014. In contrast, many acts of religious intolerance occurred during the Yudhoyono government, for instance, what happened to the Ahmadiyya and Shia.[66]

The subsequent President Joko Widodo inherited the rise in religious intolerance from the Yudhoyono government. A recent striking example of such intolerance is the massive demonstration by the GNPF-MUI[67] calling for Jakarta's Governor Basuki Tjahaya Purnama to be sentenced for blasphemy in 2017. The effort was successful and heightened the tensions between supporters of radical Islamists and pluralists in Indonesian society.

[65] Robert Cribb, "The incredible shrinking Pancasila," 71-72.
[66] Melissa Crouch, "Judicial Review and Religious Freedom".
[67] GNPF-MUI is the National Movement Supporter of the Indonesian Ulama Council's Stance (Gerakan Nasional Pengawal Fatwa Majelis Ulama Indonesia)

3.3. The Revival of *Pancasila*: Political and Legal Strategies

President Joko Widodo is searching for a suitable approach to deal with the rise of religious fundamentalism in Indonesia. The president announced new regulation in lieu of law on the Mass Organisation (*Perppu Ormas*) and added a provision regarding the dissolution of mass organisation. This regulation is not only prohibited mass organisation that promotes communism but also organization engaged in the spreading of an ideology that contradicts with Pancasila. It is generally understood in Indonesia that *Perppu Ormas* was created to allow law enforcement to subdue Islamic fundamentalism and transnational Islamism. A few days after *Perppu Ormas* was instituted, the Ministry of Law and Human Rights nullified the registration of Hizbut Tahrir Indonesia as a legal entity. HTI thereby became an illegal organisation under Indonesian law. HTI and other societal organisations have challenged the *Perppu Ormas* in the Constitutional Court, arguing that the regulation constitutes a violation of their human rights (i.e., their freedom of assembly and association). Human rights activists warn that this action can be used to limit freedom of assembly in a broader sense, and it is dangerous for democracy.[68]

In parallel with *Perppu Ormas*, Joko Widodo also created a Presidential Unit dedicated to reviving Pancasila as a state ideology (*Unit Kerja Pemantapan Ideologi Pancasila*/UKPIP) in June 2017. He appointed Yudi Latif, a prominent intellectual with a Muslim background who produced a seminal book on the history of Pancasila, as the chairman of the UKPIP.[69] Several senior with diverse social, religious and political background appointed as supervisory board members of UKPIP. [70]

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[68] Wahyu Djafar, "Perppu ormas tak sejalan dengan negara hukum [The Government Regulation in lieu of law is not in line with the state law]," accessed on May 16, 2019, https://tirto.id/perppu-ormas-tak-sejalan-dengan-negara-hukum-cs83.

[69] Yudi Latif. *Negara Paripurna: Historisitas, rasionalitas, dan aktualitas Pancasila* (Jakarta: Gramedia Pustaka Utama, 1976).

[70] Member of UKPIP supervisory board includes former President and daughter of Sukarno, Megawati Sukarnoputri; former Vice President of Suharto with military background, Try Sutrisno; chairman of Majelis Ulama Indonesia, that later become candidate for Jokowi's Vice President, Ma'ruf Amin; former chairman of Muhammadyah and prominent Muslim modern scholar, Ahmad Syafii Maarif; the chairman of Nahdlatul Ulama as the biggest Muslim organization in Indonesia, Said Agil Siradj; former chairman of the Indonesian Constitutional Court, Moh Mahfud MD; business person with Budha background, Sudhamek; a Catholic leader, AA Yewangoe; and a retired military elite, Wisnu Bawa Tenaya.

As a new government body, UKPIP suffers from bureaucratic problems. In the beginning, UKPIP is designed to supply recommendations to the President and to implement Pancasila values into the state apparatus. Due to its weak official status, UKPIP could largely fail to influence other government agencies. Therefore, one of the first aims of the unit is to improve its position to be able to further the president's interests in other government agencies. In this regard, UKPIP transforms to be the Board for Implementation Pancasila State Ideology (*Badan Pembinaan Ideologi Pancasila*/BPIP). In its new form, the agency obtained higher status, more budget and expanded its structure, but became even more caught up in bureaucratic technicalities such as planning, implementing, and monitoring projects. Its ability to implement the Pancasila state ideology remains limited, despite the fact that its mandate was enlarged to promote Pancasila in society at large, in addition to the state apparatus. In June 2018, Yudi Latif resigned as the Head of BPIP indicating that such institutional reform to implement Pancasila through government body was very challenging. Another challenge is promoting Pancasila to millennials that were not with a part of the 'indoctrination project' administered by Suharto's regime.

After two years of UKPIP and BPIP, nothing special has been produced by these bodies. Many intellectuals argue that this type of strategy by the government was destined to fail in its objectives. This also shows the limits of government narrative and technique to use political and legal intervention to reduce the adverse effect of transnational Islamism in the political and social sphere. According to Iskandar, the ultimate problem with Pancasila promotors is its capture by traditionalist forces, preventing the development of a liberal and progressive interpretation of its principles.[71] Moreover, in post-New Order Indonesia, none of the ideological visions formed into a political program,[72] including Pancasila. None political parties really effective in transforming political ideologies into political programs. So, whether this limitation would generate a positive impact on practical social life? What can be alternative rhetoric to

[71] Pranoto Iskandar, "The Pancasila Delusion," 727.
[72] Farabi Fakih, "Reading ideology in Indonesia today," *Bijdragen tot taal, land en volkenkunde 171* (2015), 348.

revitalise Pancasila? In the next part, I suggest a new interpretation of Pancasila not as an adversarial ideology, but an arena of contesting ideologies.

3.4. Toward a New Interpretation of Pancasila

Above I discussed how the government conducted a reactive rather than a systematic approach to address the threat posed by transnational Islamist movements. The Government needs a new narrative of Pancasila to restore its central position in social and political life. However, I argue that the old notion of Pancasila, as the sole state ideology and disciplinary device used by Presidents Sukarno and Suharto will be less relevant to Indonesia's contemporary democratic society. Therefore, redefinition and reposition of Pancasila are required.

In the past, Sukarno and Suharto had used Pancasila as a vehicle to discipline the population and maintain their political power. That approach can only be successful when the government is prepared to use coercive force on a large scale, which is deemed unacceptable in a democratic society. An alternative interpretation of Pancasila does not conceive of it as a coercive ideology, but rather a discursive arena for various social and political interests which need not having anything in common but respect for Pancasila's five core principles. By contrast, during the Suharto regime, scholars tended to understand Pancasila as a set of intrinsic values which should serve as the only and ultimate justification for the government's decisions and regulation; as the state's philosophical foundation and a basis for nation building;[73] or Indonesian values that have to be located at the centre of social and political dynamics.[74] I argue, rather than locating it at the centre, top, or basis of the social and political process, Pancasila should be constructed from the ground up, as a discursive arena for social and political contention, including political ideologies.

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[73] Notonagoro, *Beberapa Hal Mengenai Falsafah Pancasila: Pengertian inti-isi-mutlak daripada Pancasila dasar falsafah negara, pokok pangkal pelaksanaannya, secara murni dan konsekuen* (Jakarta: Pantjuran Tudjuh, 1970).

[74] J.W. Sulandra, "Hubungan antara Proklamasi 17 Agustus 1945 dengan Pembukaan dan Batang Tubuh UUD 1945" in *Santiadji Pancasila: Suatu tinjauan filosofis, historis dan yuridis konstitusional*, ed. Dardji Darmodihardjo et al. (Malang: Laboratorium Pancasila IKIP Malang, 1975). See also Kuntjoro Purbopranoto, 1975. 'Pancasila Ditinjau dari Segi Hukum Tata Negara, in Dardji Darmodihardjo et al., *Santiadji Pancasila: Suatu tinjauan filosofis, historis dan yuridis konstitusional,* Malang: Laboratorium Pancasila IKIP Malang.

By underpinning a non-essentialist approach to Pancasila, therefore, the revival of Pancasila shall be more focus on the use of Pancasila rather than its pure and genuine values. The historical investigation found that Pancasila has been used for different political purposes in the past. However, we have to consider the emerging Pancasila as a guide for Indonesian independence and constitution-making in 1945. Pancasila bound by the spirit of the time (*Zeitgeist*) and political agreement to build the Republic of Indonesia. Therefore, Pancasila blew up the spirit of Indonesian constitutionalism. I argue, there were three basic principles of the Indonesian constitution when it was constituted in 1945.

First, the idea of constitutional liberation. In many Western countries, the concept of constitutionalism appeared as a response to the despotic power of Kings, while in Indonesia and many post-colonial countries, the Constitution was created as a means for and symbol of liberation against colonialism. It implies an idea of empowering citizens to participate in developing civilisation as stated in the second principle of Pancasila. However, the challenges faced by our current society no longer arise from colonialism. Instead, the challenge is to liberate vulnerable groups from injustices caused by the unfair political and economic system of neoliberalism. When in the colonial context, to struggle meant to fight for colonial agrarian capitalism, in the modern context to struggle means to argue successfully against neoliberal economic policies. The spirit of the Indonesian constitution generates empowerment of the vulnerable groups. Therefore, protection and affirmation of minorities rights an active element in Indonesian constitutionalism.

Second, the idea of maintaining social plurality. Although it was not stated expressly in the Constitution, the concept of pluralism is inherent to Indonesian history. It is expressed in principle three of Pancasila to preserve Indonesian unity. It is also recorded at the symbol of the Republic of Indonesia, Garuda: *Bhineka Tunggal Ika*. The original meaning of *Bhineka Tunggal Ika* was not pluralism, but syncretism.[75] Later, this maxim turns the meaning of 'unity in

[75] I Gusti Bagus Sugriwa, *Ringkasan Tjerita Sutasoma* (Denpasar: Pustaka Balimas, 1956).

diversity'. However, during the New Order era, *Bhineka Tunggal Ika* has used to legitimise the state's superiority that any diversity should comply with the state interpretation of plurality. Therefore, *Bhinneka Tunggal Ika* should be reinterpreted as an umbrella of various diversities, including religious and ideological diversities.

Third, freedom of religion and spirituality. Pancasila contained the principle 'belief in God' as the state foundation. The constitutional framers believe that Indonesians have spirituality element in their daily life. It is a guarantee that the state recognises religious freedom. However, in practice, there are still many restrictions on religious freedom because the government only acknowledges six official religions. It excludes many traditional beliefs of indigenous groups that are not considered proper religions, although they do have spirituality elements. Therefore, to expand the scope of the Constitution, I argue that freedom of spirituality should be promoted to complete the concept of religious freedom.

In this part, I would like to stress that the new interpretation of Pancasila should be attached to the idea of constitutionalism rather than elite political interest. It is required a productive debate supported by freedom of the press, reduce hoaxes and strong law enforcement. At this point, the constitutional legal mechanism can be utilised as an arena for public discourse on ideological debates. During the constitution-making period in 1945, BPUPKI and PPKI were forums for ideological debate and so was the Constitutional Assembly from 1956 to 1959. During the period of constitutional amendments (1999-2002), such ideological debate received little attention, but the focus more on the prevention of authoritarianism by imposing the rule of law principles. The instalment of the Constitutional Court as a result of the constitutional amendments in 2003, provided a new arena for ideological debate trough adjudicating the statutes that are presumed violate the constitutional arrangement.[76]

[76] More detail about the role of the Constitutional Court in adjudicating constitutional cases related to religious freedom. See Dian AH. Shah, *Constitutions, Religion and Politics in Asia: Indonesia, Malaysia and Sri Lanka,* Cambridge University Press, 2017; Melissa Crouch, "Judicial Review and Religious Freedom: The Case of Indonesian Ahmadis," *Sydney Law Review* 34 (2012): 545; Nadirsyah Hosen, "The Constitutional Court and 'Islamic' Judges in Indonesia"; and Yance Arizona, Endra Wijaya, and Tanius Sebastian, *Pancasila dalam Putusan Mahkamah Konstitusi,* Jakarta: Epistema Institute, 2014.

IV. CONCLUSION

This article has examined how political elites has been employed Pancasila to overcome the transnational Islamist movements. Referring to historical inquiry, the revival of Pancasila as an adversarial ideology to Islamism likely will fail to reach its objectives. Creating a central agency to impose Pancasila state ideology would not be effective without the full support of coercive power and a strong state.[77] However, in a democratic society, coercive power by the government is often understood as a human rights violation and leading to more resistance to the government. Moreover, the interpretation of Pancasila as the product of 'Indonesian exceptionalism' by many Indonesian scholars is a romantic view that provides legitimacy to the government to use of Pancasila as a basis against their political opponents

This article, therefore, called for a reinterpretation of Pancasila from a closed-state-focused ideology to an open arena for contesting ideologies. Such a new interpretation of Pancasila preserves the main principles and the original use of Pancasila as a unifying ideology. Therefore, instead of using Pancasila as a standard to condemn other ideologies such as communism and Islamism,[78] Pancasila should be located as an arena for ideological debate. Through this approach, Pancasila is subject to perennial deliberation process of obtaining the objective of Indonesian independence. This narrative can effective with the support of strong legal enforcement. Therefore, persecution and human right violation by radical Islamic organisations should be prosecuted by legal apparatus, without limiting their aspiration to involve in ideological debates.

Legal institutions can be one of the legal fora for ideological debate to improve the resilience of Pancasila against the Islamic fundamentalist agenda. Even though this article is too much focus on legal instrumentalist approach for exploring the role of the legal institution for ideological debates, another approach can be used to complete the big picture on the return of Pancasila. For

[77] Zezen Zaenal Mutaqin, "The Strong State And Pancasila: Reflecting Human Rights in the Indonesian Democracy" *Constitutional Review* 2, no. 2 (December, 2016), 161 and 184.

[78] Tedi Sudrajat, "Harmonization of Regulation Based on Pancasila Values," 314.

instance, how to explain that the selection of Ma'ruf Amin, a prominent leader of Nahdlatul Ulama and the chairman of MUI, as the running mate of Joko Widodo for his second term as a political strategy to limit Islamic fundamentalist agenda. In this respect, how to understand the intertwined between the return of Pancasila with Islam Nusantara (Archipelago Islam), promoted by Nahdlatul Ulama. Moreover, out of political elites dynamics, Seung-Won Song, for instance, investigating the positive effect of the discourse on the revival of Pancasila for grassroots society. This is an invitation to go deeply to the local context to understand the use of Pancasila in societal practice.[79]

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[79] Seung-Won Song, 2008. *Back to Basics in Indonesia.*

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AUTHOR GUIDELINE

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