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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

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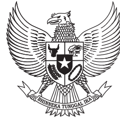

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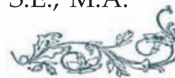

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THE CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

Constitutional Review (ConsRev) is pleased to present its second issue of 2022. ConsRev is a peer-reviewed journal published twice a year by the Center for Research and Case Analysis and Library Management of the Constitutional Court of the Republic of Indonesia. Each issue focuses on a range of topics on constitutions, constitutional courts and their decisions, and related issues on constitutional law from around the world. Our aim is to provide analysis and insight into legal issues by disseminating scientific articles by academics, researchers, observers, practitioners, law professors, legal scholars, and judges from Indonesia and abroad.

This issue contains six articles by eight authors from various backgrounds. The first article, **Freedom of Expression and Hate Speech: When Values Collide in Divided Societies**, is by Prof. Bertus de Villiers, a Visiting Professor of the Law School of the University of Johannesburg (South Africa), Member of the State Administrative Tribunal of Western Australia (Australia), and Fellow of the Alexander von Humboldt Stiftung (Germany). In this article, he gives a brief overview of international jurisprudential developments on speech that may fall within the category of hate speech, before discussing two prominent South African judgments by the Equality Court. He argues that inconsistency in comparative jurisprudence reaffirms that the labelling of speech as hate speech should be reserved for the most extreme forms of speech; it should be proportionate to the speech, including who expressed it, where and when; and any verdict should only be directed at the specific incident and not restrict speech in general.

The second article, **Creating Rights, Terminating Rights, Overcoming Legal Conflicts**, is authored by Prof. Roy Andrew Partain, a Chair in International and Comparative Law and in Mathematical Structures in Law at the University of

Aberdeen (Scotland). He examines how rights can actually enable conflicts and how judges can therefore steward and govern those rights to prevent and eliminate such conflicts. This paper also delivers original theoretical legal findings and provides functional approaches for best enabling the resolution of conflicts before courts and the maintenance of rights and privileges for all parties. Such approaches can clarify which rights to protect and preserve to enable the greater social benefits. Prof. Partain concludes that while rights are the kernel of justice, judges must balance the assignment and protection of rights for the maximum good of society.

The third article, **Influencing or Intervention? Impact of Constitutional Court Decisions on the Supreme Court in Indonesia**, is by Dian Agung Wicaksono, an Assistant Professor of Constitutional Law at the Department of Constitutional Law, Faculty of Law, Universitas Gadjah Mada, Yogyakarta (Indonesia) and Faiz Rahman, a lecturer at the Department of Constitutional Law at Universitas Gadjah Mada. They consider the important question of whether Indonesia's Constitutional Court could influence or intervene in the Supreme Court through judicial review. The authors argue the duality of judicial review authority unintentionally causes an imbalance in the functional relationship between the two apexes of the Indonesian judiciary. They conclude that the way to achieve a balanced relationship between the Supreme Court and the Constitutional Court depends on the extent to which the Constitutional Court could restrain itself when handling cases related to the Supreme Court.

The fourth article, **Conflict Resolution in Human Rights Cases: The Role of the Supreme Court of Canada**, is authored by Prof. Miriam Cohen, Canada Research Chair in Human Rights and International Reparative Justice, Associate Professor of Law at Université de Montréal (Canada), international lawyer, member of the Quebec Bar, and former Associate Legal Officer at the International Court of Justice (United Nations) and co-authored by Dr. Sarah-Michèle Vincent-Wright, PhD candidate, a lecturer in international law at the Faculty of Law of Université de Montréal, scientific coordinator of the Canada Research Chair in Human Rights and International Reparative Justice, and member of the Quebec Bar. They examine the role of the Supreme Court of Canada (SCC) in resolving human rights conflicts and balancing individual and collective rights. They also address how the Court's rulings may affect the protection of fundamental rights under the Canadian Charter. The article reasons that the SCC's role in providing a comprehensive final resolution in human rights cases may provide interesting lessons for other countries with a similar human rights protection framework.

The fifth article, **Conscientious Objection Before the Indonesian Constitutional Court**, is by Dr. Heribertus Jaka Triyana, a lecturer at the Department of International Law, Faculty of Law Universitas Gadjah Mada, Yogyakarta (Indonesia). He looks at the Indonesian Constitutional Court's adjudication on the issue of citizens being subject to conscription as reserve and backup components in situations of military threats, hybrid threats and/or non-military threats. He argues the Constitutional Court could resolve the polemic over conscription by recognizing conscientious objection as a democratic civil right. He maintains that precise details on the scope of conscientious objection would serve as a distinct feature of human rights, based on Indonesia's obligations under international human rights treaties, conventions, or general comments on such instruments.

The final article is **Exporting a Constitutional Court to Brunei? Benefits and Prospects**, by Dr. Ann Black, as Associate Professor at TC Beirne School of Law, the University of Queensland (Australia). She provides an insightful explanation of the absence of an effective checks and balances mechanism in Brunei such as a democratically elected Legislative Council, a free and open media, a judiciary with powers of constitutional review, an accountable executive government, and an engaged civil society. She makes a compelling case as to why a Constitutional Court could be a circuit breaker for a return to democratic participation, rule of law, and fundamental human rights in the Sultanate, although she concedes this unlikely within the lifetime of the current Sultan.

The editorial team hopes this edition of ConsRev will be a valuable resource for legal practitioners, readers, and researchers and will stimulate additional discussion and examination of constitutional law from around the world. We also expect this edition could encourage further research to contribute to the development of future national law and related literature.

Freedom of Expression and Hate Speech: When Values Collide in Divided Societies

Bertus de Villiers

Constitutional Review, Vol. 8, No. 2, December 2022, pp. 184-214

One of the thorniest issues in law, especially concerning the boundaries of what is reasonable and proportionate, is the distinction between freedom of expression and hate speech. Striking a balance between freedom of expression and hate speech is, however, not a mere exercise in theory; it goes to the core of respect of individual rights and freedoms. To one person, uttering speech pursuant to the right to free expression is essential for a free and open democratic society; whereas another person, offended by what they perceive as hatred, can experience such speech as an attack on their identity and self-worth, causing harm, fear and anxiety that deny their individual rights to equality, identity and dignity. This paper gives a brief overview of jurisprudential developments in international law concerning speech that may fall within the category of hate speech, whereafter two prominent South African judgments by the Equality Court are discussed. Those two judgments highlight the complexities in determining when speech can be regarded as hate speech; what test is applied to ascertain whether speech constitutes hate speech; what evidence is required for a finding to be made; and the effect of a declaratory order. The two judgments discussed, the Nelson Mandela Trust and Ors v. AfriForum and Ors (Old Flag case 2019) and the AfriForum and Economic Freedom Fighters and Ors (Kill the Boer Case 2022), attempted to determine the line that separates freedom of expression from hate speech. The judgments, perhaps not unexpectedly, have given rise to more questions than answers. The inconsistency in comparative jurisprudence reaffirms that the labelling of speech as hate speech should be reserved for the most extreme forms of speech; it should be proportionate to the speech, including who expressed it, where and when; and any declaration should only be directed at the specific incident and not restrict speech in general.

Keywords: Freedom of Expression, Hate Speech, Kill-the-Farmer, Old Flag, Proportionality, Signage.

Creating Rights, Terminating Rights, Overcoming Legal Conflicts

Roy Andrew Partain

Constitutional Review, Vol. 8, No. 2, December 2022, pp. 215-259

At the heart of this paper are judges and their obligations to ensure that conflicts over fragmented rights are cured, that fundamental rights are stewarded, and that justice prevails. There are several respected legal theories that have never been examined together before, but when three of them are placed in a nexus of constitutional law, we find that these ideas support broad powers for courts to control the distribution and allocation of rights, enabling the resolution of conflicts at many social levels. First, a succession of scholars has identified the risks of 'fragmenting rights', of allocating overlapping rights to too many parties. The danger presented is that those rights-holders may lose the use of their legal rights or privileges; this outcome is known as the 'Tragedy of the Anticommons'. Too many rights held by too many parties, a 'fragmentation of rights', can lead to a lack of access to rights and a lack of access to justice. Second, the legal theories of Nobel Laureate Ronald Coase, who found that initial allocations of rights across a community might have been allocated in a manner that frustrates negotiations and other means to avoid conflicts; but judges have an opportunity and an obligation to reset those allocations of rights to better enable society to flourish. Third, Yale constitutional scholar Robert Cover wrote that judges can and should terminate claims of overlapping rights so that the litigious parties, and society at large, can return to a more harmonious co-existence. Cover wrote that this methodology of 'jurispathic' judges was both an ethical and a robust means of solving Dworkin's 'hard cases'. This paper investigates the nexus of these three jurisprudences and what the impact of their nexus is for constitutional scholars. This paper delivers original theoretical legal findings and provides functional approaches to best enable the resolution of conflicts before courts and the maintenance of rights and privileges for all parties. This paper documents an argument that courts, especially constitutional courts, have more power to solve social conflicts and other conflicts arising from legal rules and cultures than many constitutional law scholars may have previously assumed feasible.

Keywords: Anticommons, Jurispathic Judges, Rights, Legal Conflict, Robert Cover, Ronald Coase.

Influencing or Intervention? Impact of Constitutional Court Decisions on the Supreme Court in Indonesia

Dian Agung Wicaksono and Faiz Rahman

Constitutional Review, Vol. 8, No. 2, December 2022, pp. 260-294

The third amendment of Indonesia's 1945 Constitution, conducted in 2001, had significant implications for the nation's judiciary. It transformed the judiciary from a single to a dual structure. Consequently, there are two apexes of the judiciary: the Supreme Court and the Constitutional Court. Furthermore, the establishment of the Constitutional Court divided judicial review authority between the two apex courts. The Constitutional Court can review laws against the Constitution, while the Supreme Court has the power to review whether regulations, made under laws, contradict such laws. Although the Indonesian Constitution provides explicit delineations over the absolute competence of judicial review, the division of judicial review has often triggered tension between the two courts. The Constitution allows the Supreme Court to have additional authorities granted by laws. On the other hand, the Constitutional Court has the power to review any law against the Constitution, including laws related to the Supreme Court. This article seeks to answer the important question of whether the Constitutional Court could influence or intervene in the Supreme Court through judicial review. The authors argue that the duality of judicial review authority unintentionally causes an imbalance in the functional relationship between the two apexes of the judiciary. The main reason is that the Constitutional Court can influence or intervene in the Supreme Court through constitutional review authority. The authors examine two essential aspects of this: (1) the functional implications of duality of judicial review authority; and (2) the implementation of the Constitutional Court's authority in reviewing laws, especially those closely related to the Supreme Court's authorities. Various cases are examined to illustrate how the Constitutional Court could directly or indirectly influence the Supreme Courts' authorities. The Constitutional Court, however, often seems to 'play safe' to maintain the judiciary's imbalanced relationship caused by the dualism of judicial review authority.

Keywords: Constitutional Review, Constitutitonal Court Decision, Influencing, Intervening, Supreme Court.

Conflict Resolution in Human Rights Cases: The Role of the Supreme Court of Canada

Miriam Cohen and Sarah-Michèle Vincent-Wright

Constitutional Review, Vol. 8, No. 2, December 2022, pp. 295-322

This paper examines the role of the Supreme Court of Canada (SCC) in resolving human rights conflicts and balancing individual and collective rights. With a multiple control mission, the Court must interpret the Constitution and resolve disputes over competing rights and interests, based on the principle of constitutional democracy. This paper specifically focuses on the SCC's role in conflict resolution in human rights cases, especially in the complex legal framework of protection existing in Canada. It also addresses how the Court's rulings may affect the protection of fundamental rights under the Canadian Charter, illustrated by some key examples from the Court's caselaw. To this end, the first part provides a descriptive overview of the complex fabric of human rights protection in the Canadian constitutional framework. The second part discusses the SCC's role in protecting human rights within the Canadian legal system. Ultimately, this paper underscores the fundamental role of a Supreme Court in protecting human rights in situations of multiple rights conflicts.

Keywords: Apex Courts, Balancing Rights, Canadian Charter of Rights and Freedoms, Constitutional Courts, Conflicting Rights, Supreme Court of Canada.

Conscientious Objection Before the Indonesian Constitutional Court

Heribertus Jaka Triyana

Constitutional Review, Vol. 8, No. 2, December 2022, pp. 323-360

The issuance of Indonesia's Law No. 23 of 2019 on the Management of National Resources for State Defense (PSDN Law) sparked a national debate on conscription and conscientious objection. Consequently, a coalition of civic society organizations submitted the PSDN Law before the Constitutional Court for judicial review. They argued that the PSDN Law violates the Indonesian Constitution's Article 28 on human rights protection. One of the legal submissions is based on the argument that the PSDN Law deliberately ignores human rights in order to provide reserve and backup components to the military. This argument is supported by Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and the ICCPR's General Comment No. 22 of 1993 paragraph 11, justifying conscientious objection as an inherent human right. The analysis in this paper is mainly uses the legal positivism paradigm and the human rights-based approach. This paradigm provides a framework for analyzing how the PSDN Law generates a distinctive legal feature for Indonesia's legal system. In line with Article 28 of the Indonesian Constitution, the Constitutional Court should explicitly assess the preservation of civil rights. It may be claimed that conceivable legal gaps (norm versus reality) and legal loopholes add to the Constitutional Court's obligation to consider the omission of conscientious objection recognition. This article argues the Constitutional Court should adjudicate on the issue of citizens being conscripted as reserve and backup components in situations of military threats, hybrid threats and/or non-military threats. This research further maintains that the Constitutional Court should recognize the existence of conscientious objection as an inherent human right, as a form of judicial activism. In accordance with the doctrine of judicial activism, the Court could resolve and offer solutions to the existence of conscientious objection as a democratic civil right. The Court should also determine the area, scope, application and orientation of conscientious objection as a distinct feature of human rights based on Indonesia's context and perspective on defense required by international human rights treaties, conventions, or general comments on such instruments.

Keywords: Conscientious Objection, Conscription, Human Rights Abuses, Military Service.

Exporting a Constitutional Court to Brunei? Benefits and Prospects

Ann Black

Constitutional Review, Vol. 8, No. 2, December 2022, pp. 361-391

Negara Brunei Darussalam (Brunei) is Asia's only, and one of the world's few remaining, absolute monarchies. Brunei's much-venerated Sultan and Yang Di Pertuan Agong is accountable to only Allah as his "shadow on earth". Within the Sultanate he is head of religion, Prime Minister, and as Sultan he appoints all members to the nation's six advisory Councils. He is above the law and is the country's legislator. He can amend the constitution and bypass the Legislative Council without court oversight. Judicial review was formally abolished in 2004. The accrual of power – judicial, religious, legislative, and executive – in the hands of one man is only possible by the continued renewal of a state of emergency. Since 1962, the state of emergency has been renewed every two years and once Brunei is in a state of emergency, all powers devolve to its Sultan. There is an absence of any effective checks and balances mechanism such as a democratically elected Legislative Council, a free and open media, a judiciary with powers of constitutional review, an accountable executive government, or an engaged civil society. Because the constitutionality of sixty years of emergency rule in Brunei has never been judicially determined, this paper argues it would be the first task for an independent Constitutional Court. The need for such determination on the legitimacy of Brunei's biennial emergency proclamations is set out and a case made as to why a Constitutional Court could be the circuit breaker for a return democratic participation, rule of law, and fundamental human rights in the Sultanate. There is reflection on the obstacles to any reform which make the prospects for this unlikely in the lifetime of the current Sultan.

Keywords: Brunei, Constitutional Court, State of Emergency, Sultan, Judicial Review.

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Freedom of Expression and Hate Speech: When Values Collide in Divided Societies

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Abstract

One of the thorniest issues in law, especially concerning the boundaries of what is reasonable and proportionate, is the distinction between freedom of expression and hate speech. Striking a balance between freedom of expression and hate speech is, however, not a mere exercise in theory; it goes to the core of respect of individual rights and freedoms. To one person, uttering speech pursuant to the right to free expression is essential for a free and open democratic society; whereas another person, offended by what they perceive as hatred, can experience such speech as an attack on their identity and self-worth, causing harm, fear and anxiety that deny their individual rights to equality, identity and dignity. This paper gives a brief overview of jurisprudential developments in international law concerning speech that may fall within the category of hate speech, whereafter two prominent South African judgments by the Equality Court are discussed. Those two judgments highlight the complexities in determining when speech can be regarded as hate speech; what test is applied to ascertain whether speech constitutes hate speech; what evidence is required for a finding to be made; and the effect of a declaratory order. The two judgments discussed, the Nelson Mandela Trust and Ors v. AfriForum and Ors (*Old Flag* case 2019)

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and the AfriForum and Economic Freedom Fighters and Ors (Kill the Boer Case 2022), attempted to determine the line that separates freedom of expression from hate speech. The judgments, perhaps not unexpectedly, have given rise to more questions than answers. The inconsistency in comparative jurisprudence reaffirms that the labelling of speech as hate speech should be reserved for the most extreme forms of speech; it should be proportionate to the speech, including who expressed it, where and when; and any declaration should only be directed at the specific incident and not restrict speech in general.

Keywords: Freedom of Expression, Hate Speech, Kill-the-Farmer, Old Flag, Proportionality, Signage.

I. INTRODUCTION

In few areas of law are the boundaries of what is reasonable and proportionate so difficult to determine as in the clash between freedom of expression and hate speech. If ever there was a case that reasonableness (as in beauty) is in the eye of the beholder, it applies to the undefinable line that tells us where freedom of expression ends and hate speech begins. The reality is that hate speech is circumstantial. There is no universal definition for it. And to the extent that there are attempts to settle on a universal statutory definition of hate speech, such efforts at a normative level differ in their practical application. The Supreme Court of India has aptly observed the difficulty of "confining the prohibition [against hate speech] to some manageable standard."[1]

Hate speech is determined by factors such as place, time, history, perception, population composition and circumstance. It is particularly in deeply divided societies with high ethno-cultural plurality and a poorly developed common identity, that one person's freedom of expression may be perceived by another as hate speech. Hate speech is, however, not limited to inter-ethnic utterances. Hate speech can also be directed to persons in their social circumstances, for example, regarding their gender.[22] The increased use of social media is giving rise

[1] Amish Devgan v. Union of India, SCC OnLine SC 994 (2020).
[2] Qwelane v. South African Human Rights Commission and Another, ZACC 22 (2021).

to an exponential growth in hate speech toward individuals and communities.[3] The Supreme Court of Canada has described the effect of hate speech in the following way:

> "Using expression that exposes the group to hatred, hate speech seeks to delegitimize group members in the eyes of the majority, reducing their social standing and acceptance within society. Hate speech, therefore, rises beyond causing distress to individual group members. It can have a societal impact. Hate speech lays the groundwork for later, broad attacks on vulnerable groups that can range from discrimination, to ostracism, segregation, deportation, violence and, in the most extreme cases, to genocide. Hate speech also impacts on a protected group's ability to respond to the substantive ideas under debate, thereby placing a serious barrier to their full participation in our democracy."[4]

Striking a balance between freedom of expression and hate speech is not a mere exercise in theory, it goes to the core of respect of individual rights and freedoms. To the one person, uttering speech pursuant to the right to free expression is essential for a free and open democratic society; whereas a person offended by what they perceive as hatred can feel such speech tearing into their identity and self-worth, causing harm, fear and anxiety that deny their individual rights to equality, identity and dignity. Sanjeev Khanna of the Supreme Court of India has described the denial of dignity as follows: "Loss of dignity and self-worth of the targeted group members contributes to disharmony amongst groups, erodes tolerance and open-mindedness which are a must for multi-cultural society committed to the idea of equality. It affects an individual as a member of a group."[5] Critics caution, however, that relying on the feelings of injury to the dignity of a person may open the door to restrictions on free speech and that "it will not be long before this definition will be used against

3 A. Tontodimamma et al., "Thirty Years of Research into Hate Speech: Topics of Interest and Their Evolution," *Scientometrics* 126 (2021): 157–79. In Norway (HR-2018-871-A), it has been held that a statement made via social media, even in the context of a closed group, met the requirements of the statement being 'public' pursuant to the relevant legislation I.N. Duy, "The Limits to Free Speech on Social Media: On Two Recent Decisions of the Supreme Court of Norway," *Nordic Journal of Human Rights* 38 (2020): 240. The court did, however, note that a distinction must be drawn between speech directed at a specific person or community, and speech that contributes to the public debate and discourse (HR-2020-2133-A, § 58 ff).

4 Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 (CanLII), 1 SCR 467 (2013).

5 Amish Devgan v. Union of India, SCC OnLine SC 994 (2020).

individuals speaking against the government".[6] The Constitutional Court of South Africa has also declared that the use of the word 'hurt' as a requirement for hate speech is too vague and lacks the clarity required for a finding of hate speech.[7]

Hate speech is not necessarily limited to actual words. It can also find expression via a sign, a symbol, a song, an insignia, a publication or something in writing. 'Speech' is given a wide meaning that relates to observable senses rather than just the spoken word. This is consistent with the 'purposive interpretation' of legislation.[8] But this wide approach also presents challenges since caution must be shown before the mere display of a symbol is classified as hate speech. As is discussed below, in South Africa the waving of the previous, pre-democracy, national flag without any words being uttered, has been regarded as factual evidence of hate speech without any other evidence being required, even though the flag had not been banned or criminalized by Parliament.[9] On the other hand, in the United States of America (US), the burning of the Christian cross, which is typically associated with the racism of the Ku Klux Klan, has been treated as falling within freedom of expression.[10]

Since there is no requirement in law for words to be uttered to meet the threshold of hate speech, the challenge that courts face is to ascertain what constitutes hate speech in the absence of an agreed definition, either in international law or domestic constitutional law. The term hate speech is easily used by those who are offended, while those who speak are equally hasty to deny that their speech is hate speech. One principle that is clear, is that hate speech is the most extreme and objectionable form of speech that dehumanizes a person or a community. The Canadian Supreme Court has said three principles should be applied in interpreting prohibitions on hate speech: first, the prohibition must be applied objectively; second, hatred must be interpreted as being restricted to

[6] P.V. Rao, "After Supreme Court Judgment, We Must Combat Hate Speech at Social and Political Levels," The Leaflet, published December 8, 2020.
[7] Qwelane v. South African Human Rights Commission and Another, ZACC 22 (2021), para. 155.
[8] Qwelane v. South African Human Rights Commission and Another, para. 115.
[9] Nelson Mandela Trust and Ors v. AfriForum and Ors, EQ 02/18 (2019).
[10] Virginia v. Black, 538 U.S. 343 (2003).

extreme manifestations of harmful speech; and third, courts must focus on the effect of the expression at issue, rather than the nature of the ideas expressed.[11]

This paper provides a brief overview of jurisprudential developments in international law about speech that may fall within the category of hate speech, whereafter two prominent South African judgments by the Equality Court are discussed. The methodology employed is based on comparative literature and jurisprudential analysis, whereby applicable judgments from various parts of the world are used to highlight the complexity and inconsistency between jurisdictions to identify and curb hate speech. The two South African judgments are used as points of reference to highlight the complexity in determining when speech can be regarded as hate speech; what test is applied to ascertain whether speech constitutes hate speech; and what evidence is required for a finding to be made. The two judgments under discussion, Nelson Mandela Trust and Ors v AfriForum and Ors,[12] and AfriForum and Economic Freedom Fighters and Ors[13] attempted to determine the line that separates freedom of expression from hate speech. The judgments, perhaps not unexpectedly, have given rise to more questions than answers.

II. HATE SPEECH IN INTERNATIONAL LAW

The menace that hate speech poses to stability, human rights and democratic peace and order has recently been described by the Secretary General of the United Nations, Antonio Guterres, as follows:

> “Public discourse is being weaponized for political gain with incendiary rhetoric that stigmatizes and dehumanizes minorities, migrants, refugees, women and any so called “other’...Hate speech is a menace to democratic values, social stability and peace. As a matter of principles, the United Nations must confront hate speech at every turn. Silence can signal indifference to bigotry and intolerance, even as a situation escalates and the vulnerable become victims... Addressing hate speech does not mean limiting or prohibiting freedom of speech... By enhancing global resilience against

[11] Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 (CanLII), 1 SCR 467 (2013).

[12] Nelson Mandela Trust and Ors v. AfriForum and Ors, EQ 02/18 (2019).

[13] AfriForum v. Economic Freedom Fighters and Others (EQ 04/2020), ZAGPJHC 599 (2022). ‘Boer’ in the Afrikaans language has principally two meanings: a farmer or a white, Afrikaans-speaking person.

this global phenomenon [of hate speech], we can strengthen the bonds of society and build a better world for all."[14]

There is no agreed universal definition of hate speech. Since hate speech is not a term of art, the meanings attached to it can range from the over-sensitive to the highly offensive. Hate speech is not to be equated to speech that we hate. As observed by the US Supreme Court: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate."[15] Whilst it is acknowledged in jurisprudence that hate speech is the most extreme form of speech and should not be confused with other forms of objectional speech, the dilemma is that what constitutes hate speech is often dependent upon the circumstances, context and history of the speech in question and those who are exposed to it.

In short, what constitutes hate speech is influenced by various factors, for example: the history of a country or a community; the timing when the speech is uttered since a speech may lose or gain its hate-status with the passing of time; the circumstances when and where the speech is uttered, for example, at a political event, on social media, in the privacy of home, or at a scientific or educational forum; and the perception of those to whom the speech is directed, because not all persons from the same community may display the same sensitivity when they observe the speech. Added to the definitional complexity, hate speech is often directed at ethno-cultural minorities, but it is not necessarily solely directed at minorities. Hate speech can also be directed at a majority, a dominant community, or an individual. Minorities may, however, be more vulnerable because they do not have the institutional or political means to combat hate speech or to declare it a criminal act through legislation. The majority, on the other hand, can criminalize hate speech directed at them, or they may ban certain symbols or insignia that offend them, while the principal recourse of minorities is to rely on courts to make a finding under common law or statutory law that speech

[14] UN Strategy Hate Speech, "UN Strategy and Plan of Action on Hate Speech" (Report, Geneva, 2019), 2.

[15] United States v. Schwimmer, 279 U. S. 644, 655 (US Supreme Court, 1929).

constitutes hate speech. The reality is, however, that the justices are appointed by the majority. This often leaves the minority not only exposed to hate speech, but potentially without effective remedy to challenge it.

There is a risk that the categorization of speech as hate speech can also become a mechanism for censorship. A dominant political party or an approach adopted by the courts may unduly limit freedom of expression and in effect use curbs against hate speech to suppress criticism or controversial views. Free and open debate can then become stifled or even criminalized behind the veil of combatting hate speech. In considering the complexity of hate speech in countries with deep-seated historical conflicts, it is salient to note the US Supreme Court's observation that in deciding whether freedom of expression should be limited, the court must not adopt a position of favoritism, whereby the sensitivities of one group are given preference over those of another group.[16] If the court were to adopt a favoritism approach, where the history or sensitivities of one community are treated more favorably than the history or sensitivities of another community, judgments would merely become an extension of the dominant view in society, rather than protecting the plurality of opinions.[17]

In order to give greater guidance to what is meant by hate speech, the United Nations through the office of the Secretary General, has suggested the following working definition of hate speech:

> "The term hate speech is understood as any kind of communication in speech, writing or behavior, that attacks or uses pejorative or discriminatory language with reference to a person or a group on the basis of who they are, in other words, based on their religion, ethnicity, nationality, race, color, descent, gender or other identify factor."[18]

This proposal clearly leaves a lot of room for courts to maneuver. Striking a balance between the limits of freedom of expression and the utterance of hate speech, is challenging. Freedom of expression is at the core of any free

[16] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

[17] B. De Villiers, "Flying a Flag for Freedom of Expression: When Does a Historic Symbol of a Minority Turn into Hate Speech? The Case of the Old Flag of South Africa," in *Navigating the Unknown – Essays on Selected Case Studies about the Rights of Minorities* (Leiden: Brill, 2022), 246.

[18] UN Strategy Hate Speech, "UN Strategy and Plan of Action on Hate Speech" (Report, Geneva, 2019), 2.

and democratic society. This is because, in the words of the Canadian Supreme Court, the connection between freedom of expression and the political process is "perhaps the linchpin" of a free and democratic society.[19] The freedom of expression includes the right to say and publish things that may cause offense, that are objectionable, that may hurt, that may lack sensitivity, or that may be derogatory.[20] In this regard, the caution expressed by the European Court of Human Rights must be noted, namely that a hurtful. At the same time, however, if a hateful comment is made and the person making the statement fails to remove it from a social media site, the imposition of a penalty is justified in a free and democratic society.[21] At the same time, however, if a hateful comment is made and the person making the statement fails to remove it from a social media site, the imposition of a penalty is justified in a free and democratic society.[22]

Freedom of expression is an ambit right of which the boundaries are wide and should not readily be restricted. As has been acknowledged by the United Nations Special Rapporteur on Minorities, Fernand de Varennes, "the freedoms of opinion and expression should be viewed as a default starting point with only very strictly constructed restrictions".[23] In an earlier publication, I have described the balance between free expression and hate speech as "a mirage that remains elusive in international and constitutional law", but "one aspect that is however shared by the respective case studies is that of all the different types of unacceptable speech, hate speech is the highest threshold to meet" and "if freedom of expression is to be curtailed, it should be narrow rather than wide".[24]

Several instruments of international law – both hard and soft law – refer to the primacy of freedom of expression in a free and democratic society, for example: Article 19 of the Universal Declaration of Human Rights; Article 19 of the International Covenant on Civil and Political Rights; Article 5 of the

[19] R. v. Keegstra, 3 SCR 697 (1990).
[20] M. Herz and P. Molnar, *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge: Cambridge University Press, 2012).
[21] Refah Partisi (the Welfare Party) and Others v. Turkey App, No. 41340/98 ECTHR 13 (2003), para. 57.
[22] Sanchez v. France, 45581/15 (2021).
[23] F. De Varennes, "Minority Issues: Report of the Special Rapporteur on Minority Issues, Fernand de Varennes" (Report, United Nations, 2021), 5.
[24] Villiers, "Flying a Flag," 248-49.

International Convention on the Elimination of all Forms of Racial Discrimination; Article 11 of the European Charter of Fundamental Rights; Article 13 of the American Convention on Human Rights; Article 9 of the African Charter of Human and Peoples' Rights; Article 32 of the Arab Charter on Human Rights; and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Added to these international instruments, an explicit or implied protection of the right to freedom of expression is associated with modern constitutions and constitutionalism. The high regard in which freedom of expression is held, means that whenever an allegation is made of hate speech, the starting point is protection of freedom of expression, with the burden resting on the aggrieved person to prove that the objectionable speech was disproportionate to freedom of expression; that it constituted hate speech; and that a proportionate restriction or remedy should be granted. This is because it is universally accepted that the exercise of the right to free speech "without fear or unlawful interference – is central to living in an open and fair society; one in which people can access justice and enjoy their human rights".[25]

Although hate speech often has a suggestion of violence, or that it may seek to normalize or encourage violence, evidence of actual violence or a threat of violence is not a requirement for hate speech to be proven.[26] Speech itself is adequate to constitute hate speech without any actions or threats arising from it. Experiences show, however, that hate speech often has the effect, if not the intent, to dehumanize persons or a community, to encourage or justify violence against them, to rationalize discrimination against them.[27] States are therefore encouraged by international instruments to enact legislation to combat hate speech. There are two main categories of permissible limitations on the scope of freedom of expression to protect persons against hate speech, namely: criminalization of speech that constitutes incitement to genocide; and prohibition

[25] Amnesty International, "Freedom of Expression," Amnesty International.

[26] Qwelane v. South African Human Rights Commission and Another, ZACC 22, para. 181.

[27] F. De Varennes, "Minority Issues: Report of the Special Rapporteur on Minority Issues, Fernand de Varennes" (Report, United Nations, 2021), 8.

of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility, or violence.[28]

In summary: the principles arising from international law to protect individuals against hate speech are as follows: first, the right to freedom of expression is a fundamental right in a free and democratic society and any restriction placed on the right must be proportionate and limited to extreme forms of speech; second, speech refers not only to spoken words, but includes symbols, insignia and publications; third, there is no universal definition of hate speech; and fourth, while states are encouraged to enact legislation to prohibit hate speech, a finding of hate speech is based on an objective assessment of the speech in question and is dependent on the specific circumstances of the grievous speech.

III. JURISPRUDENTIAL STRUGGLE TO DEAL WITH ALLEGATIONS OF HATE SPEECH

International experiences in dealing with freedom of expression vis-à-vis hate speech make for fascinating, albeit confusing, analysis. An overview of judgments shows a lack of consistency not only between nations, but also within nations about determining when speech constitutes hate speech.[29] There is neither an agreed international law definition of hate speech, nor a closed list of words or symbols of what constitutes hate speech.[30] International law and statutes enacted by states deal with hate speech by way of generality, with courts having to ascertain if, in a particular context, freedom of expression should be curtailed. Although the meaning of the term hate speech is to be ascertained objectively in a factual situation, international jurisprudence suggests that the term 'hate' to categorize speech in a legal sense is only to be found in extreme circumstances.[31] One can agree with Brown when he observes as follows:

[28] Hogan Lovells, "The Global Regulation of Online Hate: A Survey of Applicable Laws" (Report, Hogan Lovells, 2020), 42.

[29] K. Topidi, "Words That Hurt (1): Normative and Institutional Considerations in the Regulation of Hate Speech in Europe" (Paper, SSRN, 2019), 6.

[30] Topidi, "Words That Hurt," 32.

[31] J. Schweppe and D. Walsh. *Combating Racism and Xenophobia Through the Criminal Law* (Limerick: Centre of Criminal Justice, 2008), 72.

> "Given that hate speech laws provoke such strong moral reactions, on the part of defenders and critics alike, and given that legal meanings will themselves draw on a range of deeper values and principles about which people reasonably disagree, it is no surprise that there remains such divergence over how to define the very term that stands at the epicenter of the disagreement."[32]

The difficulty to define hate speech and the relatively low number of successful prosecutions of hate speech have caused Brown to observe that "there are many instances of hate speech where this putative connection is not merely weak but non-existent".[33] An important principle identified in the *Faurisson judgment* of the European Committee on Human Rights is that any power to place restrictions on freedom of expression "must not be interpreted as license to prohibit unpopular speech, or speech which some sections of the population find offensive".[34] Sensitivity by a person or community to speech should therefore not be used as an excuse to censor speech. A democracy is built on the pillar of free and robust speech that may cause offense.

The following examples are used to highlight for the purposes of this paper how challenging it is to lay down general norms to determine when freedom of expression should be restricted because of its potential hate element:

3.1. Can a Symbol Constitute Hate Speech?

The display of a symbol or the way a symbol is dealt with, for example, the waving of a flag or the burning of a national flag, is treated as a form of speech. No words are required for hate speech to be established. The question is when, or if, the display of a symbol does in fact constitute hate speech. Gelber, for example, reflects on efforts in the US, Australia and New Zealand to restrict the burning of the national flag. He says those efforts to restrict freedom of expression or to criminalize the burning of a flag, expose the "fragility of freedom of speech" and that freedom of speech is "culturally at risk".[35] In the *Texas judgment*, the US Supreme Court acknowledged that the burning of the flag is, as a "political

[32] A. Brown, "What Is Hate Speech? Part 1: The Myth of Hate'," *Law and Philosophy* 36 (2017): 422.
[33] Brown, " What Is Hate Speech? Part 1," 466.
[34] Faurisson v. France Communication, No 550/93 (1996).
[35] K. Gelber, "Political Culture, Flag Use and Freedom of Speech," *Political Studies* 60 (2012): 176.

statement", a form of speech that is protected by the Constitution regardless of the hurt, fear, intimidation or hate that onlookers may experience.[36] On the other hand, the Equality Court of South Africa has declared that the waving of the pre-democracy national flag at a public rally against high levels of crime, was not only hate speech on the specific day, but that any display of the country's old flag other than for scientific purposes also constitutes hate speech into the future.[37] The Equality Court in effect banned the old flag – something that the Parliament of South Africa had not thought fit to do. The different standards adopted by countries to regulate hate speech are also reflected in the manner that legislation deals with the most controversial of symbols, namely Nazi symbols. The display of the swastika flag and other Nazi insignia in some European states is highly regulated and even prohibited, particularly so in Germany, whilst in other countries such as the US and Australia there is not a general prohibition against those symbols since their display is protected by the right to freedom of speech.

3.2. Must Hate Speech Include Violence or Threat of Violence?

Hate speech does not necessarily have to be accompanied by a form of violence or threat of violence. The International Criminal Tribunal for Rwanda declared that hate speech does not necessarily require an incitement to violence since the nature of the speech in itself can meet the threshold of 'hate'.[38] On the other hand, in the *Kill the Boer* case, as discussed below, the Equality Court of South Africa relied on the lack of adequate evidence between the song that encourages the killing of Boers (white farmers) and actual violence on farms to conclude that the song did not meet the threshold of hate speech. The Court found that there was inadequate evidence to show that the controversial song contributed to actual violence or murders against farmers.[39] If, however, one adopts the reasoning of the UN Special Rapporteur for Minorities, who describes hate

[36] Texas v. Johnson, 491 US 397 (1989).
[37] Nelson Mandela Trust and Ors v. AfriForum and Ors, EQ 02/18 (2019); Villiers, "Flying a Flag," 215-50.
[38] The Prosecutor v. Ferdinand Nahimana Jean-Bosco Barayagwiza Hassan Ngeze, ICTR 99-52-T (2003).
[39] AfriForum v. Economic Freedom Fighters and Others (EQ 04/2020), ZAGPJHC 599 (2022), para. 101.

speech as dehumanizing language that normalizes violence against a minority,[40] it seems as if a compelling case can be made that a song calling upon people to kill (white) farmers, meets the threshold of hate speech, even if that song may have been appropriate in the pre-democracy liberation struggle. In the *Qwelane* case, on the other hand, the Constitutional Court of South Africa took into account complaints lodged against a newspaper article that criticized homosexuality and evidence given in court on the effects of the speech.[41] The Constitutional Court accepted the presence of hate speech in the article even in the absence of evidence that violence or threats of violence arose from the article.[42]

Hate speech is impacted by time and circumstance, which implies that speech may lose its hate speech status as time effluxes, or speech may become hate speech considering new circumstances. In Australia, for example, it has been found that the word 'nigger' does not always constitute racism since in the context of the historic naming of a sports stadium, the word 'Nigger' was used as a nickname of a celebrated rugby player.[43] In another Australian judgment, in the *Catch the Fire* case, Justice Robert French explained that what constitutes offensive speech in one circumstance may not constitute offense speech in another, even if the same symbol is shown or the same words are uttered. It must also be borne in mind that as circumstances change, the offense that is experienced by the use of certain words or expressions may change.[44]

3.3. Is the Test for Hate Speech Subjective or Objective?

The test whether speech constitutes hate speech is an objective test by considering what a reasonable person observing the speech would experience, not the subjective intentions of the speaker or the sensitivity of a single onlooker. The perception of a fictional, reasonable onlooker who is adequately informed about the issue, is ascertained by the court. The application of this test may be more complex than it may seem at first glance since some members of a

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40 F. De Varennes, "Minority Issues: Report of the Special Rapporteur on Minority Issues, Fernand de Varennes" (Report, United Nations, 2021), 8.

41 *Qwelane* v. South African Human Rights Commission and Another, ZACC 22 (2021), para 6.

42 Qwelane v. South African Human Rights Commission and Another, para. 187.

43 Hagan v. Trustees of the Toowoomba Sports Ground Trust, FCA 1615 (2000).

44 Catch the Fire Ministries Inc v. Islamic Council of Victoria Inc, VSCA 284; 15 VR 207; 235 ALR 750 (2006).

community may objectively view a speech differently from other members of society. For example, the opinion of a reasonable person who is heterosexual may differ to the opinion of a reasonable person who is homosexual when exposed to degrading speech. It is not a given that a judge can really feel or comprehend the hurt felt by a minority community in response to certain speech. Whilst some suggest the reasonable person test is akin to the test of reasonable person in tort or delict, this is not the case since in tort or delict the community standard of conduct is indeed appropriate, while with hate speech the hurt experienced by an individual or a minority community is at issue. This raises the question of whether the opinion of an objective person must arise from that reasonable person being part of the community at whom the speech is directed.

The Supreme Court of India has emphasized that the courts must apply the hate speech prohibition objectively. The question courts must ask is whether a reasonable person, aware of the context and circumstances, would view the expression as exposing the protected group to hatred.[45] In Norway, the Supreme Court has formulated the objective test as being the average reader or listener's "natural perception of the statement made from the context" (HR-2020-184-A) The average person's perception of the grievous speech is therefore essential.[46] But courts have also accepted that the context within which speech takes place is a relevant consideration.[47] The Constitutional Court of South Africa emphasized that the hate speech must be "reasonably construed" and cannot be based on an inference or assumption made by the targeted individual or group.[48] The US Supreme Court has noted the court must examine the "content, form, and context" of the speech and in doing so the court must evaluate all the circumstances of the speech, "including what was said, where it was said, and how it was said".[49] In Canada, the Supreme Court described the test to ascertain hate speech as follows:

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[45] Pravasi Bhalai Sangathan v. Union of India and Ors., No. 157 (Supreme Court, 2014).

[46] I.N. Duy, "The Limits to Free Speech on Social Media: On Two Recent Decisions of the Supreme Court of Norway," Nordic Journal of Human Rights 38 (2020): 242.

[47] Qwelane v. South African Human Rights Commission and Another, ZACC 22 (2021), para 20.

[48] Qwelane v. South African Human Rights Commission and Another, para. 96.

[49] Snyder v. Phelps, 131 S. Ct. 1207 (US Supreme Court 2011).

> "The repugnancy of the ideas being expressed is not sufficient to justify restricting the expression, and whether or not the author of the expression intended to incite hatred or discriminatory treatment is irrelevant. The key is to determine the likely effect of the expression on its audience."[50]

The Supreme Court of India in the *Amish Devgan* case observed that both context and content of a speech are important to determine whether it amounts to hate speech. 'Content' has more to do with the expression, language and message, which should be to vilify, demean and incite psychosocial hatred or physical violence against the targeted group, the judgment observed. The 'context' has a certain key variable, namely, 'who' and 'what' is involved and 'where' and the 'occasion, time and under what circumstances' the case arises.[51] The Court went on to say consideration must also be had for the position and status of the person making the statement. For example, the statement of an ordinary individual at a private event may not be met with the same scrutiny as that of a public figure at a public rally.[52] Rather than to clarify the legal position about hate speech, these judgments add new layers of complexity.

The test of objectivity therefore implies objectivity within the nation or circumstances where the speech is expressed, not objectivity from the perspective of universal norms. This is a reasonable proposition, since speech taken out of context is impossible to categorize as breaching the limits of freedom of expression. For example, it has been held in France by the European Human Rights Committee that in the context of the "conditions of present-day France, Holocaust denial may constitute a form of incitement to anti-semitism", albeit that in another circumstance or time or place the same denial may be judged otherwise.[53] In the *Faurisson judgment* concerning a person's denial of the Holocaust, the Committee found that the intention of the person who expresses the denial is a relevant consideration, but that in the particular case the denial did constitute hate speech.[54] The Committee considered the context in which

[50] Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 (CanLII), 1 SCR 467 (2013).
[51] Amish Devgan v. Union of India, SCC OnLine SC 994 (2020).
[52] Amish Devgan v. Union of India, SCC OnLine SC 994 (2020), para. 52.
[53] Faurisson v. France Communication, No 550/93 (1996).
[54] Faurisson v. France Communication, No 550/93.

the Holocaust denial occurred as well as the intention of the person making the statement, for example, whether the statement was made in the context of a scientific discourse. The Constitutional Court of Germany has also noted that the question whether speech ought to be prohibited must be assessed in light of the circumstances of each case.[55] This approach is also reflected in the *Perincek* case in Switzerland, in which the court took detailed account of the context in which potentially hateful speech occurred.[56]

The foregoing cases highlight that hate speech is not only be determined by the jurisdiction (country) where the speech is expressed, but also the context and the time in history when it is used. In India, for example, it has been stated that the right to free expression contributes to society being able to reflect on its past and present social reality. In the *FA Picture* case, the court found that although a section of society may perceive a film or image as hate speech,[57] the public debate caused by such a display may contribute to discourse about the wrongs committed under the symbol and those discussions could in turn deepen and strengthen democracy. This approach is consistent with that of Rosenfeld, who says that in the US, the display of Nazi or Ku Klux Klan symbols has become isolated due to popular irrelevancy and rejection of those symbols as a result of informed debate based on freedom of speech, rather than by legislative or judicial intervention.[58] Whilst the test for hate speech is objective, it remains fictional in nature because what is reasonable and what is proportionate are highly discretionary, and added thereto is that not all persons may display the same sensitivity to public speech.

3.4. What is the Threshold of Hate Speech?

As stated above, hate speech is distinguished from other forms of inappropriate, dislikeable, offensive, hurtful and objectionable speech. Hate speech is the most extreme form of speech. Any categorization of speech as hate

[55] The Federal Constitutional Court, Federal Constitutional Court (First Senate) 15 January 1958 BVerfGE 7, 198 (1958).
[56] Perincek v. Switzerland App, No. 27510/08 (ECHR, 2015).
[57] FA Picture International v. Central Board of Film Certification, AIR 2005 Bom 145 (2005), para. 13.
[58] M. Rosenfeld, "Hate Speech in Constitutional Jurisprudence: A Comparative Analysis'," *Cardozo Law Review* 24 (2003): 1538.

speech should be reserved to "cover only the most intense form of dislike".[59] As the Supreme Court of India recently stated, "when statements are made with the objective and intent to cause public disorder or to demean dignity of the targeted groups" it should be regarded as hate speech.[60] It is important, however, that the declaration of speech as hate speech must be directed at a specific incident rather than a general declaration of hate speech into the future. It is ultimately for parliaments to ban or regulate certain speech or symbols if it is to be done prospectively, whilst a court declaration is done retrospectively with reference to a specific factual situation where it is alleged that hate speech occurred. Many nations have opted to enact legislation to deal specifically with hate speech, as well as in some instances the banning or regulation of certain insignia and symbols. This may explain why in some nations the display of Nazi insignia is banned by criminal code rather than pursuant to a hate speech litigation. Critics in Germany of legislative intervention to ban the display of national-socialist symbols have, however, cautioned that such regulation "creates a useful template for autocratic countries to use to censor political opponents and other members of marginalized groups".[61]

3.5. Is Freedom of Expression a Defense against a Criminal Code?

Although a criminal code may prohibit or regulate the display of certain symbols, a constitutional defense of freedom of expression may still be raised to defend against any prosecution. For example, even if a certain form of speech is prohibited by a criminal code, as in Germany, a defense of freedom of expression may still be used by the person uttering the speech. The Constitutional Court of Germany has, for example, cautioned that although the glorification of Nazi ideology may be declared a criminal act, it does not justify a general ban on the dissemination of right-wing radical or indeed National Socialist ideas.[62] The Court emphasized that there must be proportionality between the fundamental

[59] R. v. Keegstra, 3 SCR 697 (1990), para. 122.
[60] Amish Devgan v. Union of India, SCC OnLine SC 994 (2020).
[61] J. Delcker, "Germany's Balancing Act: Fighting Online Hate While Protecting Free Speech," Politico, published October 01, 2020.
[62] The Federal Constitutional Court, Order of the First Senate of 4 November 2009, 1 BvR 2150/08 (2009).

right and the restriction that is being placed on it. The Court formulated the importance of proportionality as follows:

> "This setting of boundaries must also be followed by a review of proportionality. The more concretely and directly a legal interest is placed in danger by an expression of opinion, the less stringent are the requirements when it comes to an encroachment; the more indirect and distant the threatening violations of legal interests remain, the greater are the requirements to be made. Accordingly, encroachments on freedom of opinion are more to be accepted when they are restricted to the forms and circumstances of an expression of opinion in the outside world. The more, by contrast, they ultimately result in a content-related suppression of the opinion itself, the higher are the requirements as to the concrete threat of a danger to legal interests."[63]

In summary, the above overview of selected international jurisprudence highlights the complexity to find consistency or universality in the definition and application of hate speech. The term hate speech has a certain qualitative value, which represents an extreme form of expression, albeit situation-bound. Each country offers a unique set of experiences and even within some countries there is sometimes a lack of consistency when it comes to classifying words and acts into an appropriate category.

Several principles are, however, shared by the respective case studies, namely: (a) of all the different types of unacceptable speech, hate speech is the highest threshold to meet; (b) even if hate speech is defined by legislation, the practical circumstances of the speech will determine if hate speech did actually occur; (c) the test to be applied is objective from the perspective of the reasonably informed onlooker and not subjective from the mind of the speaker, albeit that the circumstance of the speech is a relevant factor; and (d) if freedom of expression is to be curtailed, it should be proportionate and narrow rather than wide.[64]

IV. OLD FLAG CASE AND KILL THE BOER CASE

In this part, consideration is given to two recent judgments of the Equality Court of South Africa to highlight the challenges that remain in ascertaining if speech meets the threshold of hate speech. The two judgments, those of the

[63] The Federal Constitutional Court, Order of the First Senate of 4 November 2009, 1 BvR 2150/08 (2009), para. 52.
[64] Villiers, "Flying a Flag," 249.

Old Flag case and the *Kill the Boer* case, raise questions on the following four issues: (a) when speech can be regarded as hate speech; (b) what test – be it objective or subjective – is applied to ascertain whether speech constitutes hate speech; (c) what evidence is required for a finding to be made; and (d) whether a finding of hate speech is retrospective or prospective.

The factual background to the two judgments can be summarized as follows:

4.1. Old Flag Case

In the *Old Flag-Mandela Trust* judgment, the Equality Court of South Africa declared that the "gratuitous"[65] display of the old flag of South Africa on 30 October 2017 by a person participating in a public demonstration against high levels of crime in the country, constituted hate speech against black people and is therefore not protected by the constitutional right to freedom of expression.[66] The so-called old flag refers to the official South African flag that was in place during the apartheid era from 1927 to 1993. With the dawn of democracy, South Africa in 1994 adopted a new flag to represent the new democratic constitution. The old flag has not been banned by Parliament nor had the display thereof been the subject of any restrictive regulation.[67] The Equality Court declared the display of the old flag to be hate speech, not only its display on the day of the protest but also in any future display unless for journalistic, educational or scientific purposes. The case stemmed from a public protest against high levels of crime in South Africa. It is not disputed that South Africa has been experiencing an increase in crime and lawlessness. For example, South Africa has been ranked 19th in the world for organized crime.[68] Against this backdrop, a series of public marches took place on 30 October 2017. Coordinated by an Afrikaans-speaking, non-governmental association called AfriForum, the marches were attended

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65 The Court did not define 'gratuitous' but according to Macquarie Concise Dictionary (2019), it means 'without good reason, cause or justification'.

66 Nelson Mandela Trust and Ors v. AfriForum and Ors, EQ 02/18 (2019).

67 B. De Villiers, "Flying a Flag for Freedom of Expression: When Does a Historic Symbol of a Minority Turn into Hate Speech? The Case of the Old Flag of South Africa'," in *Navigating the Unknown – Essays on Selected Case Studies about the Rights of Minorities* (Leiden: Brill, 2022).

68 D. Delport, "SA 19de Op Lys van Lande Met Ergste Georganiseerde Misdaad," Netwerk24, published September 24, 2022.

by persons from all racial groups. During one of the protests, the old flag was displayed by some of the participants.[69] There is no suggestion that the display of the old flag during the march was orchestrated by the event organizers; or that the protest took place under the banner of the old flag; or that the protestors, including those who displayed the old flag, rejected the existing constitutional order or the new flag. No other racially offensive slogans or banners of a racial hatred nature nor a rejection of the current constitutional order accompanied the display of the old flag. The march was, according to all evidence, a peaceful protest against crime.

The Chief Executive of the Nelson Mandela Trust, Sello Hatang, filed an affidavit with the Equality Court in which he explained how he, as a black person, experienced the march and the display of the Old Flag. He had not seen the display of the old flag. He said,

> "the Old Flag represents nothing other than the inhumane system of racial segregation and subjugation that governed South Africa before 27 April 1994.... To *hear* that the Old Flag has been displayed gratuitously in 2017, more than a generation after apartheid had been abolished, reminded me that some South Africans still see me and other blacks as 'other', and would deny us the opportunity to be human."[70] [italics added]

The Nelson Mandela Foundation sought a declaration from the Equality Court that any display of the old flag that does not serve a genuine journalistic, academic or artistic purpose in the public interest, *ipso facto* (without any further evidence about circumstance) constitutes hate speech against black people pursuant to Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.[71] The Court found in favor of the applicant and declared the gratuitous display of the old flag on the day of the march and into the future, as hate speech – thereby effectively banning the display of the old flag at any cultural, private, sporting or political event.

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[69] Tom Portner, "South Africans Hold Black Monday Protests Over Farm Murders," Newsweek, published October 30, 2017.

[70] Nelson Mandela Trust and Ors v. AfriForum and Ors, EQ 02/18 (2019).

[71] "Equality Act. Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000," opened for signature February 2, 2000.

4.2. Kill the Boer Case

The complainant, AfriForum, sought a declaration from the Equality Court declaring that a song sung by the respondent, the Economic Freedom Fighters (EFF), constitutes hate speech pursuant to Section 10 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.[72] The EFF did not deny that its members often sing the song *Kill/Kiss the Boer – Kill/Kiss the Farmer* in public, and that they sometimes display a gesture of a gun while singing it. AfriForum contended the song constituted hate speech since it "advocates hatred on the grounds of race and ethnicity, and constitute an incitement to cause harm".[73] AfriForum also relied on a previous judgment of the Equality Court that declared the song constituted hate speech.[74] The precedent value of that previous case was, however, diluted by an agreement the parties had entered into on appeal at the time that a mediated outcome would substitute the earlier orders of the Equality Court. The Court in this case therefore found that the earlier judgment did not bear any relevance nor did it constitute a precedent in the current proceeding.[75]

AfriForum contended that the song incites violence, that it is a form of hate speech, and that it can be linked to an increase in violence against farmers and their workers. According to AfriForum, in 2019 there were 552 farm attacks and 57 murders.[76] AfriForum said the song contributed to a political climate in which white persons are portrayed as the "source of evil", that farmers are portrayed as criminals who exploit workers, and that violence against farmers was "romanticized" by the song.[77] The EFF said in response that its movement was formed to promote the economic emancipation of black people and in doing so it supports, among others, the expropriation of land without compensation. The EFF said the song should not be taken literally but assessed in light of the

[72] Equality Act, sec. 10.
[73] AfriForum v. Economic Freedom Fighters and Others (EQ 04/2020), ZAGPJHC 599 (2022), para. 3.
[74] AfriForum and Another v. Malema and Another (Vereniging van Regslui vir Afrikaans as Amicus Curiae) 2011 (12), BCLR 1289 (EqC) (2011).
[75] AfriForum v. Economic Freedom Fighters and Others (EQ 04/2020), ZAGPJHC 599 (2022), para. 98.
[76] AfriForum Research Institute, "*Farm Attacks and Farm Murders in South Africa*" (Report, AfriForum Research Institute, 2020), 3.
[77] AfriForum v. Economic Freedom Fighters and Others (EQ 04/2020), ZAGPJHC 599 (2022), para. 37.

oppressive apartheid system of which the effects remain visible. The word 'Boers', argued the EFF, refers to the system of oppression under apartheid, rather than to a specific community.[78]

The Equality Court dismissed the complaint. Justice Molahleni explained his finding, in essence, as follows: the test to be applied is an objective one "that requires a reasonable person test";[79] the objective test includes taking into account a reasonable listener having regard to the historical context of the speech; offensive or controversial statements do not equate to hate speech;[80] the lyrics of the song cannot reasonably be construed to incite hatred; the song should not be taken in its literal meaning;[81] that there was inadequate evidence to link violence on farms to the song; and curtailing the singing of the song would place an undue restriction on freedom of expression since it falls within the scope of 'political contestations'.[82]

V. CRITICAL ASSESSMENT OF OLD FLAG AND KILL THE BOER JUDGMENTS

The two aforementioned judgments of the Equality Court of South Africa raise issues that are not only relevant to South Africa but also reflect the ambivalence within international comparative law about the demarcation between freedom of expression and hate speech. Earlier in this paper, the following questions were identified in relation to analysis of the two judgments: (a) when speech can be regarded as hate speech; (b) what test – be it objective or subjective – is applied to ascertain whether speech constitutes hate speech; (c) what evidence is required for a finding to be made; and (d) whether a finding of hate speech is retrospective or prospective.

5.1. When is Speech 'Hate' Speech?

There is no universal definition of hate speech, although there is agreement that hate speech is the most extreme form of speech and should not be confused

78 AfriForum v. Economic Freedom Fighters and Others, para. 69–71.
79 AfriForum v. Economic Freedom Fighters and Others, para. 92.
80 Nelson Mandela Trust and Ors v. AfriForum and Ors, EQ 02/18 (2019), para. 97.
81 Nelson Mandela Trust and Ors v. AfriForum and Ors, para. 107.
82 Nelson Mandela Trust and Ors v. AfriForum and Ors, para. 102.

with other forms of dislikeable speech. Various countries, including South Africa, have enacted legislation to define hate speech. The general theme that runs through definitions is that hate speech is not protected by freedom of expression; hate speech includes speech, publication and symbols; and hate speech is speech that is harmful to persons or may promote or propagate hatred, for example, the Equality Act 2000, Section 10(1). Generally, hate speech is understood as any kind of communication in speech, writing, symbol or behavior that attacks or uses pejorative or discriminatory language with reference to a person or a group based on who they are, in other words, based on their religion, ethnicity, nationality, race, color, descent, gender or other identity factors.

In both cases discussed above, the reasoning adopted by the Equality Court is open to criticism. In the *Old Flag* case, the Court concluded that the mere display of South Africa's old flag at a public march against crime was *ipso facto* hate speech. The court did not consider the context in which the old flag was displayed, particularly that the public protest march against crime could be regarded as a political event. The Court also did not take into account that the person who had waved the old flag had not been identified; the event organizers did not promote the old flag; there was no evidence that the display of the old flag was directed at black persons or as some form of rejection of the new democratic order; and the event organizers were not responsible for the display of the old flag. In the *Kill the Boer* case, on the other hand, the Court went to some length to investigate the context within which the song was sung; the absence of evidence to prove that the singing of the song had caused actual violence; and the history and current symbolism of the song. It would seem that the Court's approach in the two cases differed fundamentally. In the *Old Flag* case, the mere display of a symbol was regarded as hate speech; while in the *Kill the Boer* case, the context, history and symbolism of the song were considered and accepted in its defense.

5.2. What Test to Apply: Objective or Subjective?

Both judgments reflect the international consensus that for hate speech to be determined, an objective test is required. There is no need to ascertain

the subjective mindset of the person who expressed the speech, albeit that the circumstances within which the speech was expressed is a relevant factor. A statement made in private may be assessed to be different to a statement made at a political rally, compared to a statement made in a scientific forum.

While an objective test is proper, the application thereof in the two judgments raises an important question, namely, how is the objective test of reasonableness of speech applied in practice? In the *Old Flag* case only one aggrieved person gave evidence about the perceptions of the black community of the old flag. That evidence was accepted by the Equality Court as being objectively reasonable. The Court did not accept the evidence that the old flag has a different meaning to different communities; that the old flag represents part of the complex history of South Africa; that the old flag itself reflected the struggle against British imperialism; and that the meaning of the old flag had changed over time. While it cannot be denied that the old flag represents the system of apartheid, it also reflects many other dimensions of South African society. The Court accepted that the old flag, objectively, only has one predominant meaning and that represents hate speech. On the other hand, in the *Kill the Boer* case, the Court rejected evidence of persons who spoke about the harm, fear and anxiety they experience when the song is heard. The Court accepted that it was a pre-democracy liberation song of which the meaning should not be interpreted literally under the current democratic order. In the *Old Flag* case, however, the Court adopted a position that the old flag has a predominant meaning that overshadows any other secondary meaning.

The inconsistency between the two approaches about the application of an objective test raises the question of how, in an ethnically diverse, post-conflict society, does a court ascertain what a reasonable person would perceive and what are the risks, as have been cautioned by the US Supreme Court, of favoritism being shown to one community's sensitivities over those of another community?[83] Although one could accept that the 'Kill the Boer' chant was objectively justifiable during the apartheid struggle, the question can be raised if it is equally justifiable

[83] R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

in a democracy where it continues to be used as a political slogan in the context of a country that is plagued by interracial violence and crime? It is also notable that in the *Kill the Boer* case, the Court went to some length to explain the justification of the song in light of the history of its origin; whereas in the *Old Flag* case, the Court heard no evidence from persons who were at the march who may have been offended; the Court discounted that a public march against crime had taken place; and the Court attached no weight to the circumstances within which the old flag was displayed. The judgments highlight that although there is agreement that the test for hate speech is objective, the application of the test may be problematic, particularly in deeply divided ethno-cultural societies. The two judgments leave unanswered the question of how a judge ascertains (other than by his or her personal preference) the depth of hurt, pain or fear experienced by those exposed to hate speech.

5.3. What Evidence is Required for a Finding of Hate Speech to be Made?

Comparative jurisprudence suggests that a wide net is cast to consider whether speech should be restricted, for example the background to the speech (or symbol); the circumstances in which the speech is made; the content of the speech; the forum where the speech is made; the profile or status of the person making the speech; the audience of the speech; the perceptions of people exposed to the speech; and any other relevant factor. The reason for considering all this information is that courts should be slow to restrict freedom of expression. It is only when a court is satisfied that speech exceeds boundaries of reasonableness, that free expression should be restricted. Even if freedom of expression is restricted, the restriction should be proportionate and limited to the specific event and the subject of the complaint.

In the two judgments under discussion, the Equality Court adopted seemingly different approaches to the weighting of evidence. In the *Old Flag* case, the Court only heard evidence from one aggrieved person who had merely heard of the display of the Old Flag on television. The Court accepted the evidence of that witness and attached less weight to submissions and evidence by the organizers of the march about the other meanings of the old flag and the history thereof.

Notably, when the *Old Flag* judgment is compared to the *Kill the Boer* judgment, it appears that in the *Kill the Boer* judgment, the Court went to some length to explain and justify that the song should not be taken to its literal meaning and the history of the song should be considered, whilst in the *Old Flag* judgment the Court rejected those same propositions. Although in international law, a threat of violence or actual violence is not required to prove hate speech, in the *Kill the Boer* case, the Court went to some length to justify its findings on the basis that a causal link between the song and violence had not been established. Both cases highlight the complexity to ascertain hate speech within the context of political rallies and events, and the risk that the opinions of the majority are weighted with greater sympathy than those of the minority.

5.4. Is a Declaration of Hate Speech Retrospective or Prospective?

Comparative jurisprudence suggests that a declaration of hate speech (or not) applies to a certain incident, in other words, the effect of the finding is retrospective and it does not regulate any future speech of the same nature. The reason being that parliaments may ban or restrict certain forms of speech prospectively, whilst courts are limited in their jurisdiction to a specific event and a particular circumstance.

Whilst in both judgments there is recognition that freedom of expression is an important pillar of a free and democratic society, and that speech should only be restricted to the extent that it is necessary to prevent hate speech, the question that arose in the *Old Flag* case is what the scope of a declaratory order should be. International theory and jurisprudence suggest that unless parliament bans certain speech or insignia, a declaration of hate speech should be directed only at the specific incident. In the *Old Flag* case, however, the Court not only declared that the display of the old flag on 30 October 2017 was hate speech, but the Court also went on to effectively ban the old flag, including the private display of the old flag. The scope of this declaration arguably exceeds the reasonable and proportional restriction that should be placed on freedom of expression. It was arguably disproportionate for the Court to make a declaration about the general display of the old flag, be it in private or in public, as being hate speech.

VI. CONCLUSION

This paper has shown how difficult it is to develop and apply universal norms to determine when freedom of expression should be restricted due to hate speech. Whether speech can be classified as hate speech is largely circumstantial, based on an objective assessment of the speech. It has also been highlighted that to ascertain what a reasonable person's perception is may be unrealistic and possibly highly unreliable, particularly in deeply divided societies. All relevant evidence should be considered by a court in the light of the fundamental importance of freedom of expression to a free and open democratic society. The two judgments discussed highlight the complexity to apply an objective assessment of reasonableness of speech since, particularly in a deeply divided society, the history of the respective communities and their perceptions of history are multidimensional, nuanced and complex. While in India the Supreme Court has upheld the right to certain forms of speech since the Court said it may assist the public to reflect on their past, the two judgments from South Africa seem to place higher value on the experiences and perceptions of one community vis-à-vis another community. In one case, the Equality Court declared that the display of a flag was hate speech; yet in another judgment, the Court declared that a song about killing farmers was not hate speech. The irony is that the South African Parliament had not thought it desirable to ban the display of the old flag specifically due to the sensitivity and complexity of it, yet the Court not only declared the display of the old flag on a specific day as hate speech, the Court also declared the old flag hate speech into the future. Ultimately, both judgments highlight the complexity to determine hate speech; the challenge to weigh up different histories of peoples and communities; the difficulty to separate a literal interpretation of speech from a figurative interpretation; and the intricacy arising from the so-called objective test since a reasonable person test in a deeply divided society may not be as simple to ascertain as theory may suggest. The lack of consistency in comparative jurisprudence reaffirms that the declaration of speech as hate speech should be reserved for the most

extreme forms of speech; it should be proportionate to the speech, including who expressed it, where and when; and any declaration should only be directed at the specific incident and not restrict speech in general.

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Creating Rights, Terminating Rights, Overcoming Legal Conflicts

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Abstract

At the heart of this paper are judges and their obligations to ensure that conflicts over fragmented rights are cured, that fundamental rights are stewarded, and that justice prevails. There are several respected legal theories that have never been examined together before, but when three of them are placed in a nexus of constitutional law, we find that these ideas support broad powers for courts to control the distribution and allocation of rights, enabling the resolution of conflicts at many social levels. First, a succession of scholars has identified the risks of 'fragmenting rights', of allocating overlapping rights to too many parties. The danger presented is that those rights-holders may lose the use of their legal rights or privileges; this outcome is known as the 'Tragedy of the Anticommons'. Too many rights held by too many parties, a 'fragmentation of rights', can lead to a lack of access to rights and a lack of access to justice. Second, the legal theories of Nobel Laureate Ronald Coase, who found that initial allocations of rights across a community might have been allocated in a manner that frustrates negotiations and other means to avoid conflicts; but judges have an opportunity and an obligation to reset those allocations of rights to better enable society to flourish. Third, Yale constitutional scholar Robert Cover wrote that judges can and should terminate claims of overlapping rights so that the litigious parties, and society at large, can return to a more harmonious co-existence. Cover wrote that this methodology of 'jurispathic' judges was both an ethical and a robust means of solving Dworkin's 'hard cases'. This paper investigates the nexus of these three jurisprudences and what the impact of their nexus is for constitutional

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scholars. This paper delivers original theoretical legal findings and provides functional approaches to best enable the resolution of conflicts before courts and the maintenance of rights and privileges for all parties. This paper documents an argument that courts, especially constitutional courts, have more power to solve social conflicts and other conflicts arising from legal rules and cultures than many constitutional law scholars may have previously assumed feasible.

Keywords: Anticommons, Jurispathic Judges, Rights, Legal Conflict, Robert Cover, Ronald Coase.

I. INTRODUCTION: CREATIVE ALLOCATION OF RIGHTS AND ITS RISKS

There are several well-known legal theories that have never been examined together before, but when three of them are placed in a common nexus of constitutional law, we find that these ideas support broad powers for courts and especially constitutional courts, to play leading roles in controlling the distribution of rights and enabling the resolution of conflicts at many social levels.

First, a succession of scholars, from Cournot to Buchanan to Heller, have identified the risks of 'fragmenting rights', of allocating potentially overlapping rights to too many parties. When too many parties hold such rights, especially rights of an exclusive nature, then there arises what is known as an 'anticommons' in the legal literature. The danger presented, known as the 'Tragedy of the Anticommons', is that all parties become blocked from access to the use of their legal rights or privileges, thereby denying all parties from access to rights, privileges, or justice. Too many rights held by too many parties, a 'fragmentation of rights', can lead to a lack of access to rights and a lack of access to justice.

Second, the legal theories of Nobel Economics Laureate Ronald Coase, who found that initial allocations of rights often prevented or frustrated the ability of parties to resolve their conflicts and that a political power, such as a court, could reallocate the disputed rights to better enable cooperative bargaining and negotiations that might lead to conflict resolution. Often, rights have been allocated in a manner that frustrates negotiations and means to avoid conflicts; so, judges have an opportunity and an obligation to reset those allocations of rights to better enable society to flourish.

Third, Yale constitutional scholar Robert Cover wrote that judges and courts must sometimes work to eliminate conflicting rights to better enable social cohesion and access to social justice. Cover noted that this methodology of 'jurispathic' judges was a more robust means to solving 'hard cases', the question originally debated by Ronald Dworkin and H.L.A. Hart. Judges are at their core assigned to terminate claims of overlapping rights so that the litigious parties, and society at large, can return to a more harmonious welfare.

This paper investigates the nexus of these three classical intellectual concepts and what the impact of their nexus is for constitutional scholars. The author delivers original theoretical legal findings and provides functional approaches to best enable the resolution of conflicts before courts and the maintenance of rights and privileges for all parties. Moreover, this paper documents an argument that courts, especially constitutional courts, have fundamental powers to solve social conflicts and other conflicts arising from legal rules and cultures than many constitutional law scholars may have previously assumed feasible.

The first three sections of this paper explore the intellectual and jurisprudential ideas of the three camps of anticommons: theorists, Coase, and Cover. Each of these sections will provide both an introduction and focal discussion on how that camp's ideas apply to the thesis of this paper.

After those three sections, the next section will dovetail the ideas together to present a harmonized analytical discussion, revealing how these three sets of ideas support creative reallocations of rights to achieve justice while also requiring caution on those reallocations to prevent further injustice. In short, the finding of this paper is that courts do have a liberty and perhaps an obligation to creatively reallocate rights to achieve justice in the cases before them, but the act of creative reallocation of rights must be tempered and limited to avoid the injustices that might result from the tragedy of the anticommons, where very little justice might result at all.

Finally, the last section will reflect on the earlier sections and suggest future lines of research.

II. ANTI-COMMONS: TRAGEDY FROM EXCESSIVE RIGHTS?

What happens when the rights of multiple parties interlock in such a manner so that no one is able to operate or rely on their rights? This is the question addressed by scholars who study the concept known as the 'anticommons'.

2.1. Introduction to Theory of Anticommons

An anticommons is present when multiple parties hold exclusionary rights over a resource.[1] As the number of parties holding such exclusionary rights increases, then the likelihood that the resource will remain unused or non-accessed increases. Once the resource is blocked from use, then scholars call that a 'tragedy of the anticommons', as the community will gain no social welfare, nor private gain, from the resource. As several decades of scholarship have revealed, anticommons are ubiquitous in legal cultures and legal institutions, and are a prime source of legal disputes or legal frustrations.

An anticommons is the functional inverse of a commons.[2] Whereas a commons presents a resource with few or no exclusionary rights to control its use, an anticommons presents a resource with many or a 'total' set of exclusionary rights to control its use.

In the case of a commons, since no or few exclusionary rights exist, any party can use the resource and thus the resource will become depleted from overuse and thereafter provide no value to the community at large. This loss of social welfare from a lack of exclusionary rights is called the '*tragedy of the commons*'.[3]

In the case of an *anticommons*, many parties can operate their exclusionary rights to prevent anyone's access to the resource, thus very few parties will ever be able to use the resource. This lack of permissions leads to the resource not being used or exploited at all and thus it will provide no value to the community

[1] A naïve example of an exclusionary right is the right to sit in a chair. If a person is sitting on a particular chair, then other people cannot sit on that chair, at least not in the normal, simple way. Another way to express this concept, is that the person sitting in the chair has a right to refuse to yield their chair, they can veto the idea that they will arise to yield their right to remain seated in the chair.

[2] In mathematical terms, the relationship between the mathematical models of commons and anticommons are known as a 'dual' or 'duality'; the problem spaces and solutions sets of the two ideas are fundamentally connected.

[3] Garret Hardin, "The Tragedy of the Commons." *Science* 162, no. 3859 (1968): 1243-1248.

at large. This loss of social welfare from an excess of exclusionary rights is called the '*tragedy of the anticommons*'.[4]

The simple concept of exclusionary rights is the core concept of anticommons, that some rights function in a way that the use of the right by one party means that another party cannot have access to that right.[5] The ability to exercise such a right, to be able to decide to exclude someone from a resource, is tantamount to having a veto over their ability to access the resource. So stated, it is clear than an exclusionary right is the functional equivalent of a right to a veto vote. And if an actor has the ability to decide over a necessary ingredient or service, what economists call complementary goods or services, then the actor can similarly approve or veto the use of a complementary input. In the anticommons literature, the concepts of exclusive rights, of veto votes, and of complementary goods and services are considered equivalent concepts.

Whenever an exclusionary right is present, or a veto right is present, or a combination of complementary goods or services are present, then the environment surrounding that resource is rich in anticommons and will have a propensity for that resource to not be usable or exploitable. And if the resources in discussion are legal rights or constitutional rights, then the community will be at risk of being deprived of the value or use of those rights that had been granted to them. And that denial of access to rights is in most cases evidence of injustice caused from an abundance of rights to the point that the collective set of rights frustrates the exercise and enjoyment of some of those same rights.

2.2. Models of Anticommons

The literature for anticommons was thought to have begun with Heller's paper in the late 1990s, but as part of a joint research project by the Japan Society for Promotion of Science (JSPS) and UK Research and Innovation (UKRI), it was discovered that a wide range of scholars had previously encountered this concept of anticommons in various forms and had reported it to the scientific

[4] Michael A. Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets," *Harvard Law Review* 111, no. 3 (1998): 624.

[5] For this purpose, the phrases 'rights of exclusion' and 'exclusionary rights' are identical in meaning.

community under various names. Scholarship on the subject existed in a wide range of disciplines, including economics, political science, law, and even in mathematics and computing science.

2.2.1. Economic Literature

The earliest variations of the models were found in the separate economic research projects of Ellet and Cournot,[6] who were researching oligopolistic markets. They both independently discovered that when several monopolies each produce a complementary input into a second manufacturing process, like copper and zinc for bronze, then the functional problems of anticommons arise. As any of the monopoly producers can choose to exclude their good or service from the secondary production, they are able to prevent the secondary production process from occurring.

In both Cournot and Ellet's models, that power is used to extract abusive rents from the secondary producer, rents that exceed the value to the producer from producing the secondary product, so none is produced; a tragedy of the anticommons, but one that relies on a threat of exclusion set by a high price that exceeds affordability. Ellet's research has the bonus of empirical analysis to support his findings.

Cournot and Ellet's work on oligopolies continues to influence anticommons models and economic policy. Economic models of anticommons have produced substantial advances in our understanding of the operational modalities of anticommons and of the risks presented by tragedies of anticommons.

Major, King, and Marian provided what is perhaps the most explicit 'economic' definition of an anticommons, focusing on the strategic thoughts of the actor:

> "The core prerequisites are merely that each actor knows that there are several necessary complementary inputs, that she controls at least one of them, and that successful bundling of all inputs will generate positive benefits available for allocation, giving rise to a non-cooperative strategic game."[7]

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[6] Michael A. Heller, "The Tragedy of the Anticommons: A Concise Introduction and Lexicon," *Modern Law Review* 76, no. 1 (2013): 20, with reference to Antonin Auguste Cournot, *Recherches sur les Principes Mathematiques de la Theorie des Richesses* [Researches into the Mathematical Principles of the Theory of Wealth] and to Ellet Jr, Charles, *An Essay on the Laws of Trade in Reference to the Works of Internal Improvement in the United States*.

[7] Ivan Major, Ronald F. King, and Cosmin Gabriel Marian, "Anticommons, the Coase Theorem and the Problem of Bundling Inefficiency," *International Journal of the Commons* 10, no. 1 (2016): 151.

Buchanan and Tullock may have presented an economic model of anticommons as early as 1962, claims Hsiung, who identified that their model of constitutional law reflected voters with veto-like powers.[8] Buchannan and Yoon are the standard citation for the first economic model of an anticommons in 2000, but their model was fairly naïve; they primarily evidenced the duality of the commons and anticommons problem sets.[9]

Thereafter, there were many discoveries and proofs; key findings include; The mathematical models of Buchanan and Yoon,[10] of Parisi, Schulz, and Depoorter, and of Major, King, and Marian have all rigorously proven that the risk of a tragedy of the anticommons increases as the number of actors with veto powers or exclusionary rights increases. These mathematical proofs have been buttressed by empirical studies by Stewart and Bjornstad, to boot, they found that the risk of tragedy increased more quickly in reality than most formal models had predicted (likely due to additional behaviors not included in the formal models).[11]

Parisi, Schulz, and Depoorter demonstrated that anticommons can arise in two fundamental ways,[12] first, 'horizontal' when all of the decisions are made simultaneously; second, 'vertical' when decisions are made sequentially. Of course, both characteristics of horizontal and vertical can be present in the same anticommons environment, adding complexity and chaos to the risk of tragedy.

Parisi, Schulz, and Depoorter found that anticommons that arise from complementary goods and services do not need to be predicated on 'perfectly complementary' goods or services, but rather that anticommons might arise from

[8] Bingyuan Hsiung, "Commons, Anticommons, and in-Betweens," *European Journal of Law and Economics* 43 (2017): 378-380, with reference to James Buchanan and Gordon Tullock. *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Michigan: University of Michigan Press¸1962).

[9] James Buchanan and Yong J. Yoon, "Symmetric tragedies: Commons and Anticommons," *The Journal of Law and Economics* 43, no. 1 (2000): 1-14. *See* Yoon's later commentary on their 2000 model and his comments on his later modelling of anticommons which were more sophisticated, Yong J. Yoon, "Buchanan on Increasing Returns and Anti-commons," *Constitutional Political Economy* 28 (2017): 270–285.

[10] Buchanan and Yoon, "Symmetric Tragedies: Commons and Anti-commons."; Francesco Parisi, Norbert Schulz, and Ben Depoorter, "Simultaneous and Sequential Anti-commons," *European Journal of Law and Economics* 17 (2004): 183; *See also* Major, King, and Marian, "Anticommons, the Coase Theorem," 247-248.

[11] Steven Stewart and David J. Bjornstad, "An Experimental Investigation of Predictions and Symmetries in the Tragedies of the Commons and Anticommons" (Research Report No. JIEE 7, Joint Institute for Energy & Environment, 2002), 3.

[12] Parisi, Schulz, and Depoorter, "Simultaneous and Sequential Anti-commons,"176-177.

"[c]ases of partial exclusion rights".[13] This finding greatly widens the risks of when a tragedy might arise. Empirically, Depoorter and Vanneste similarly found that "Anticommons deadweight losses *increase with the degree of complementarity* between individual parts, and *with the degree of fragmentation*."[14] (Italics added)

Oligopolistic competition can occur by either pricing or by quantity decisions; Dari-Mattiacci and Parisi found that both modes of competition could result in anticommons but that quantity competition is far more likely to result in tragedy outcomes than pricing competition.[15]

Vanneste, Van Hiel, Parisi, and Depoorter performed multiple empirical studies to examine how humans responded to tragedies from commons and those from anticommons. They found that "Anticommons dilemmas are more prone to underuse than Commons dilemmas are to overuse (Study 2). *If Commons lead to "tragedy"*[16]*, Anticommons may well lead to "disaster."* (Italics added)

Perhaps most importantly, King, Major, and Marian delivered a mathematical proof that the origins of the anticommons and of the potential tragedy resultant, are purely mechanical and logical outcomes once the initial requirements of multiple actors with exclusionary rights or veto-like powers are enabled:

> "Yet, importantly, inefficient underutilization is likely even when *all the separated actors unanimously grant permission* and *sale is a success*, as a consequence of them autonomously selecting the best available strategic position while recognizing that the others are calculating similarly. *Behaviour that is individually rational and maximizing thus results in outcomes that are collectively perverse and systematically suboptimal.* It is a logical consequence when the owners of a scarce resource play against each other as well as against the player who wishes to purchase some share of that resource.

[13] Ibid., 180.

[14] Ben Depoorter and Sven Vanneste, "Putting Humpty Dumpty Back Together: Experimental Evidence of Anticommons Tragedies," *Journal Law, Economics & Policy* 3 (2006): 21.

[15] Giuseppe Dari-Mattiacci and Francesco Parisi, "Substituting Complements," *Journal of Competition Law and Economics* 2, no. 3 (September 2006): 338-340. The implications of this for anti-trust or competition law are profound; their findings suggest that ministries should generally regulate mergers to protect consumer welfare but that ministries should encourage mergers when the corporations produce complementary goods or services to avoid tragedy of the anticommons in those market sectors.

[16] *See Hardin,* 1968.

> The implication is that the Anticommons Tragedy is deeply inherent and widely pervasive whenever *separated owners* possess *rights of exclusion* over a *product or activity* requiring *complementary approvals.*"[17] (Italics added.)

Thus, the economic theorists have provided rigorous models that anticommons can arise from a variety of non-perfect conditions, but that once those initial requirements are met, the tragedy of anticommons is guaranteed like clockwork.

2.2.2. Political Science Literature

Political scientists have studied the role of veto voting in political affairs, inclusive of legislature, empaneled multi-judge courts, and other political committees. It turns out one does not need an absolute veto; one can exercise something less than a full-powered veto to obtain results consistent with anticommons theory. Thus, anytime a vote is strategically used in a way that presents that a voter might withhold an important vote, or that the voter will not support a whole set of policy issues on a plank, then anticommons can emerge.

Anticommons models from political science literature include:

- 'Critical Player Models', which include classical power analyses from scholars such as Penrose, Shapley, Shubik, and Banzhaf.[18]
- 'Sequential Voting by Veto' models, from scholars such as Mueller, Winter, Felsenthal and Machover, and Yuval.[19]
- Tsebelis developed a complex geometrical and topological model of veto powers and how they impact policy and legislative formation, enabling a new methodology for comparative political analysis. Yet again, a veto model reveals the existence of a tragedy of the anticommons, seen as policy stability

[17] Ronald F. King, Ivan Major, and Cosmin Gabriel Marian, "Confusions in the Anti-commons," *Journal of Politics and Law* 9, no. 7 (2016): 67.

[18] L. S. Penrose, "The Elementary Statistics of Majority Voting," *Journal of the Royal Statistical Society* 109, no. 1. (1946): 53-57; Lloyd S. Shapley, "A Value for n-Person Games," in *Contributions to the Theory of Games, vol. II*, ed. H. W. Kuhn and A. W. Tucker (Princeton, New Jersey: 1953), 307-17; Lloyd S. Shapley and Martin Shubik, "A Method for Evaluating the Distribution of Power in a Committee System," *American Political Science Review* 48, no. 3 (1954): 787-792; John F. Banzhaf II, "Weighted Voting Doesn't Work: A Mathematical Analysis," *Rutgers Law Review* 19, no. 2 (1965): 317-344.

[19] Dennis C. Mueller, "Voting by Veto," *Journal of Public Economics* 10 (1978): 57-75; Eyal Winter, "Voting and Vetoing," *The American Political Science Review* 90, no. 4 (1996): 813-823; Dan S. Felsenthal and Moshé Machover, "The Majority Judgement Voting Procedure: A Critical Evaluation," *Homo Oeconomicus* 25, no. 3 (2008): 319-334; Fany Yuval, "Sophisticated Voting Under the Sequential Voting by Veto.," *Theory and Decision* 53 (2002): 343-369.

by Tsebelis.[20] Francis Fukuyama presented a similar anticommons 'vetocracy' concept in his book *Political Order and Political Decay*.[21]

2.2.3. Legal Literature

Legal scholars first came across anticommons in Michelman's theory of property law,[22] wherein he contrasts the rules of traditional private property with four other alternative property law designs, one of which presents anticommons as follows:

> "2. Regulatory regime (REG). The converse of SON [State of nature] is a regulatory regime (REG), in which everyone always has rights respecting the objects in the regime, and *no one, consequently, is ever privileged to use any of them except as particularly authorized by the others.* (Rules for determining when such authorization exists may vary along several axes. *At one extreme, authorization would require near-simultaneous unanimous consent* ...)"[23] (Italics added)

Heller was the first property law scholar to abstract this concept to administrative law and regulatory activities of the state.[24] He observed how multiple city officials could hold veto-type powers over various licensing and approval requirements necessary for opening a business. This distributed set of veto powers would then have a foreseeable effect of too few businesses being approved and opened for business, resulting in a tragedy of the anticommons.

Heller and Eisenberg explored how intellectual property rights could also lead to a tragedy of the anticommons,[25] by the necessity of approvals for a subsequent researcher to use the results of an earlier researcher, if that earlier researcher's ideas were protected by intellectual property (IP) rights; for use of

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[20] George Tsebelis, "Decision Making in Political Systems: Veto Players in Presidentialism, Parliamentarism, Multicameralism and Multipartyism," *British Journal of Political Science* 25, no. 3 (1995), 289-325.

[21] Francis Fukuyama, *Political Order and Political Decay: From the Industrial Revolution to the Globalization of Democracy* (New York: Farrar, Straus and Giroux, 2014).

[22] Frank Michelman, "Ethics, Economics, and the Law of Property," *Tulsa Law Review* 663, no. 39 (2004): 663-690.

[23] Ibid., 665.

[24] Heller, "The Tragedy of the Anticommons: Property in the Transition from Marx to Markets." *See* Heller, "The Tragedy of the Anticommons: A Concise Introduction and Lexicon" for a more recent update on the research program.

[25] Michael Heller and Rebecca S. Eisenberg, "Can Patents Deter Innovation? The Anticommons in Biomedical Research," *Science* 280, no. 5364 (1998): 698-701.

an IP right requires assent and consent from the owner and that implies that the owner holds a veto power over the use of those rights. Further in the IP context, careless granting of permissions or licenses to use IP rights can risk the owner losing their rights of ownership and control, so the law enables a choice but places a risk on permitting usage while it does not place such a risk on not permitting usage.

Finally, Dagan and Heller investigated how different traditions of inheritance planning could doom a family to poverty when mixed with the normal rules of immovable property law (real property laws).[26] They document that families that left all or most of their land to a single heir were able to retain effective control over their land for generations and enable the farm to remain in productive use for the family. But they also demonstrated how families that divided the land across a larger number of heirs rapidly lost control over the land and lost the ability to farm at economies of sufficient scale, dooming the former independent farmers to share-cropping or other forms of economic collapse. And this was due, again, to the splitting of control across many individuals, each of whom were able to exercise veto votes on the use of their lands or the contribution of their complementary lands to the greater farming project. Tragedy of the anticommons strikes again.

Anticommons has been found in wide range of substantive legal areas; e.g., in copyright law,[27] in patent law, [28] in many areas of administrative law,[29] in

[26] Hanoch Dagan and Michael A. Heller, "The Liberal Commons," *Yale Law Journal* 110 (2000): 549-623.

[27] Taylor Bussey, "You Got Too Much Dip on Your Chip! How Stagnant Copyright Law Is Stifling Creativity," *Journal of Intellectual Property Law* 27 (2020): 277-301; Clark D. Asay, "Software's Copyright Anti-commons," *Emory Law Journal* 66, no. 2 (2017): 265-332.

[28] Jeffrey R. Armstrong, "Bayh-Dole under Siege: The Challenge to Federal Patent Policy as a Result of Madey v. Duke University," *Journal of College and University Law* 30, no. 3 (2004): 619-640; *see* Giuseppe Colangelo, "Avoiding the Tragedy of The Anticommons: Collective Rights Organizations, Patent Pools and the Role of Antitrust" (*LUISS Law and Economics Lab Working Paper* No. IP-01-2004, 2004). *See* Lee A. Greer and David J. Bjornsta, "Licensing Complementary Patents, the Anticommons and Public Policy" (Joint Institute for Energy and Environment, Technical Report 2004), 3-11.

[29] Matt J. Van Essen, "Regulating the Anticommons: Insights from Public-Expenditure Theory," *Southern Economic Journal* 80, no. 2 (2013): 523-539. José António Filipe, "Tourism Destinations and Local Rental: A Discussion around Bureaucracy and Anti-Commons: Algarve Case (Portugal)," *International Journal of Latest Trends in Finance and Economic Sciences* 4 (2014): 821-830; Marian Cosmin Gabriel, "Education in the Anticommons: Evidence from Romania," *Central European Journal of Public Policy* 12, no. 1 (2018): 32–40; *See* Matthew Mitchell and Thomas Stratmann, "A Tragedy of the Anticommons: Local Option Taxation and Cell Phone Tax Bills," *Public Choice* 165 (2015): 171-191. *See also* Mitchell and Stratmann, "A Tragedy of the Anticommons: Local Option".

environmental and climate change laws,[30] in public international law,[31] and in corporate and commercial law.[32] There are many more examples, but essentially everywhere that legal scholars have searched for anticommons and tragedies of the anticommons, they have found anticommons and its tragedies present in legal rules and legal institutions.

The legal paradigm of anticommons has been found in many diverse contexts, but it was always found that whenever a fragmenting of rights occurs, resulting in an excess of rights, that action leads to multiple voices having exclusionary rights or veto-like powers over an underlaying resource, which might include a wide range of legal and constitutional rights. This means that the concept of anticommons, of too many rights being held by too many parties, can lead to a lack of justice for a community, and that such risks have been found throughout many areas of legal discourse.

2.3. Summary and Conclusion on Anticommons and Rights

The fragmentation of rights or the over-creation and over-granting of exclusionary rights, or the creation of legal institutions and processes of law that enable too many actors to operate veto-like powers, or legal processes that require too many coordinated, 'complementary', processes to achieve a legal outcome, then the fundamental rights and privileges of citizens will be at risk of a tragedy of the anticommons, wherein everyone becomes deprived of their legal rights or constitutional expectations of justice.

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[30] Giuseppe Bellantuono, "The Regulatory Anticommons of Green Infrastructures," *European Journal of Law and Economics* 37, no. 2 (2014): 325-354; Bing Shui, "China: Fragmented Rights and Tragedy of Anticommons: Evidence from China's Coastal Waters," *Journal of Civil Law Studies* 9, no. 2 (2016): 501-533; Lea-Rachel Kosnik, "River Basin Water Management in the US: A Regulatory Anti-commons," *Environmental & Energy Law & Policy Journal* 5 (2010): 365- 395.

[31] Roy Andrew Partain, "Anticommons in Public International Law: Consideration of a New Approach for Legal Research," *Gachon Law Review* 13, no. 1 (2020): 211-264; Benjamin David Landry, "A Tragedy of the Anticommons: The Economic Inefficiencies of Space Law," *Brooklyn Journal of International Law* 38 (2013): 523 – 578; Peng Wang, "Tragedy of Commons in Outer Space: The Case of Space Debris" (DRAFT FOR IAC 2013, School of Law, Xi'an Jiaotong University, China, 2013).

[32] Matthew W. McCarter, Shirli Kopelman, Thomas A. Turk, and Candace E. Ybarra. "Too many cooks spoil the broth: Toward a theory for how the tragedy of the anticommons emerges in organizations." *Negotiation and Conflict Management Research* 14, no. 2 (2021). 60-74; Timothy Simcoe, "Governing the Anticommons: Institutional Design for Standard-Setting Organizations," *Innovation Policy and the Economy* 14 (2014): 99-128; Alfredo Canavese, "Commons, Anti-commons, Corruption and 'Maffia' Behavior," *Economics Working Paper Archive EconWPA*, Law and Economics Series (2004).

Judges and justices should take care to be aware and to prevent or mitigate the harm that can arise from the fragmentation of rights or the over-creation and over-granting of exclusionary rights, to best protect the public and to ensure the preservation and stewardship of the constitutional intent of the rights allocated under constitutional law.

III. COASE: CREATIVE REALLOCATIONS OF RIGHTS

Ronald Coase is well known as one of the early founders of the economic analysis of law approach to jurisprudence. His seminal work on the institutional drivers of why companies and corporations exist opened up the new field of institutional economics. His research on the conflicts of rights, especially those allocated by processes of administrative law, led to a broader rethinking of Pigou's externalities and into tort law in general, opening up new pathways and options for judges in determining 'hard cases'. Hereunder, the deeper connection between these two accomplishments will be explored with an attention to how these breakthroughs occurred.

3.1. Pre-Coordination of Rights Enables Firms

Coase in 1937 wrote 'The Nature of the Firm',[33] a seminal paper that explored why people would organize into firms, such as companies and corporations, if the markets worked in the manner described by most micro-economists in the early 1900s. If an open and free market existed, then the theories of that era suggested that the socially optimal mode of production was to rely on the open and free market.

Except, the world really did not rely on the open market; it relied on firms with many non-market features built into them, primarily the long-term contracts and the centralization of decision-making powers around an inner core of entrepreneurs. Coase asked, why would such firms exist at all if the market is so effective? His answer to that question was as stunning as it was functionally simple: firms exist because operations on the market bear costs, and firms are

[33] Ronald Harry Coase. "The Nature of the Firm." *Economica* 4, no. 16 (1937): 386-405.

designed to bear fewer 'transaction costs' than would otherwise be required for an entrepreneur operating on the open and free market.

> "The main reason why it is profitable to establish a firm would seem to be that there is a cost of using the price mechanism.[34]

> "We may sum up this section of the argument by saying that the operation of a market costs something and by forming an organisation and allowing some authority (an "entrepreneur") to direct the resources, certain marketing costs are saved."[35]

This simple understanding, that the 'free and open market' was itself an economic creature and like all economic creatures had its own costs of operations, unlocked (albeit not immediately) a huge wave of scholarship into the origins of social institutions, especially those engaged in economic activities. The scholarly benefits from these insights cannot be understated, but as a means of evidencing the point, Coase earned a Nobel Prize for his economic insights into these social institutions and so did others who followed his interest in social institutions.[36]

At the very core of Coase's insight is the idea that while the market has its efficiencies, an entrepreneur bears costs to find items on the market, to appraise their value and functionality to his or her line of business, and to construct a dataset of prices and values of sufficiently many goods as to be able to know when a price is a good one or not, vis-à-vis other offers on the market. And there is a massive cost to bear from opportunity costs, for the longer the entrepreneur takes to establish this collective set of information, the greater the likelihood that he or she misses an opportunity to be productive on a given venture. So the entrepreneur faces costs from multiple vectors in his or her efforts to work with the market and the goods and services it renders.

And the solution is for the entrepreneur to legally pre-coordinate the rights to many factors of production, so that more effort can be placed on producing

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[34] Ibid., 390.

[35] Ibid., 392.

[36] Ronald Coase won the Nobel Prize for Economics in 1991, *see* "Ronald H. Coase-Facts, " The Nobel Prize, accessed on 8 August 2022, https://www.nobelprize.org/prizes/economic-sciences/1991/coase/facts; Oliver Williamson won the Nobel Prize for Economics in 2009, alongside Elinor Ostrom; *see* "The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2009," The Nobel Prize, accessed on 8 August 2022, https://www.nobelprize.org/prizes/economic-sciences/2009/summary. Technically the 'Nobel Prize in Economics' is not a Nobel Prize but the 'Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel'.

goods and services efficiently rather than constantly bearing transaction costs on the market.

> "It may be desired to make a long-term contract for the supply of some article or service. This may be due to the fact that if one contract is made for a longer period, instead of several shorter ones, then certain costs of making each contract will be avoided.[37]
>
> "A firm is likely therefore to emerge in those cases where a very short term contract would be unsatisfactory." [38]

This gathering of legal rights is the very beginning of the economic analysis of law. The careful reallocation of rights can enable more efficient social institutions to emerge from a free and open market.

3.2. Overlapping Rights and the Origins of Injuries

Almost 20 years later, Coase had a second inspiration that led to two more papers. What if transaction costs also reduced the ability of parties to negotiate to prevent frustration from overlapping claims to otherwise exclusive rights? Or more succinctly, what if transaction costs underlay the emergence of tortious events and litigation?

First, in 1959, Coase laid out the core of the new idea in 'The Federal Communications Commission'. The problem under inspection was how to allocate radio spectrum zones so that radio broadcasters could transmit effectively and efficiently without clashing with other broadcasters.

Coase made four major discoveries. First, he observed for the first time the 'reciprocity of harms', that a conflict of rights hurt both sides;[39] this is in contrast to the earlier tort assumptions of an injurer and a victim.

> "The traditional approach has tended to obscure the nature of the choice that has to be made. The question is commonly thought of as one in which A inflicts harm on B and what has to be decided is: how should we restrain A? But this is wrong. We are dealing with a problem of a reciprocal nature. To avoid the harm to B would inflict harm on A. The real question that has

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[37] Coase, "The Nature of the Firm," 391.
[38] Ibid., 392.
[39] Ronald Harry Coase, "The Federal Communications Commission," *The Journal of Law and Economics* 2. (1959): 1- 40.

> to be decided is: should A be allowed to harm B or should B be allowed to harm A? The problem is to avoid the more serious harm."[40]

Second, he went on to show that a reallocation of rights can enable negotiations to reach settlements.[41] Third, he demonstrated that the performance of the reallocation of rights and the final negotiated use of the resources is actually independent of each other; that is to say, that no matter how the rights are allocated or reallocated, the most productive use will be the final outcome of a negotiated discussion.[42]

Fourth, Coase put forward a revolutionary observation, that the most beneficial outcome for productivity is not a state of zero conflicts over legal claims, but rather to find the optimizing level of disputes. That is to say, it is not socially productive to 'perfectly' delineate ownership over rights, that it may well be more beneficial to society to leave some rights in dispute or conflict.

> "*What this example shows is that there is no analytical difference* between the right to use a resource without direct harm to others and the right to conduct operations in such a way as to produce direct harm to others. In each case something is denied to others: in one case, use of a resource in the other, use of a mode of operation. *This example also brings out the reciprocal nature of the relationship* which tends to be ignored by economists who, following Pigou, approach the problem in terms of a difference between private and social products but fail to make clear that *the suppression of the harm which A inflicts on B inevitably inflicts harm on A. The problem (ie the Goal) is to avoid the more serious harm.*"[43] (Italics added)

And,

> "It is sometimes implied that the aim of regulation in the radio industry should be to minimize interference. But this would be wrong. The aim should be to maximize output. All property rights interfere with the ability of people to use resources. What has to be insured is that the gain from interference more than offsets the harm it produces. There is no reason to suppose that the optimum situation is one in which there is no interference."

[40] The quote here is from "The Federal Communications Commissions", but it accurately reflects the discovery made earlier; *see* ibid., 2.

[41] Ibid., 26-27.

[42] Ibid. It is also possible that Coase was not the first to make this fundamental discovery of independence, that economist Rottenberg did in his article on contract laws and sport labor. *See* Simon Rottenberg, "The Baseball Players' Labor Market." *Journal of Political Economy* 64, no. 3 (1956): 242-258.

[43] Coase, "The Federal Communications Commissions," 26.

By 'output' in this second quote, Coase meant social welfare from the permitted activity. And we can see that Coase is recognizing that to grant a right to one party necessarily requires a loss of potential rights to another. And thus, Coase reminds us, "[w]hat has to be insured is that the gain from interference more than offsets the harm it produces," that the value of the reallocation of rights needs to ensure a net gain for society and that the goal is not *per se* to prevent all harms.

As a reminder to the reader, in the 'The Federal Communications Commission', Coase's primary focus was on rights to radio wave allocations and secondarily on commercial rights more generally. The broader application of these thoughts to society and law at large is to be found in his 'The Problem of Social Cost', which was published in 1960.

In 'The Problem of Social Cost', Coase explores the ideas he published in 'The Federal Communications Commission' with a broader legal analysis from case law into the subject matter of torts (or delicts) as a general matter. He creates a model of two parties with overlapping claims over an activity or a property, wherein the mutual simultaneous use of those rights would prevent either from using their rights in full. If one party takes initiative to use their rights, then then the other party is prevented from using their claimed rights. Thus, damage is caused by both parties claiming overlapping rights, but wholly preventable if the parties would (or *could*) simply negotiate before using their rights as to who has usufruct and when;[44] and like explored in 'Federal Communications Commissions', the negotiations would usually lead to the most productive use of the underlaying activities or assets.[45]

Yet, we don't observe this negotiated harm-free world in real life. So Coase reintroduces the concept that each party is facing transaction costs on determining how to use their resources, and like in the market search functions explored in 'The Nature of the Firm', each party bears costs in considering negotiations over unclearly assigned rights; it's equally costly to learn if your assumed rights are

[44] Ronald Harry Coase, "The Problem of Social Cost," *Journal of Law and Economics* 3 (1960): 1-44.

[45] Noting the caveats Coase provides that underwrite the argument for why sometimes the super-firm of the government should reallocate inalienable rights. *See* ibid., 850-851.

unclearly assigned. Thus, given non-infinite budgets of resources, especially for time, negotiations may be well out of reach in most situations. Coase returns to the idea of reallocating rights to better facilitate and enable negotiations so that the parties can solve their conflicting rights claims via discussions and negotiations.

> "In these conditions the initial delimitation of legal rights does have an effect on the efficiency with which the economic system operates. One arrangement of rights may bring about a greater value of production than any other.
>
> "But unless this is the arrangement of rights established by the legal system, the costs of reaching the same result by altering and combining rights through the market may be so great that this optimal arrangement of rights, and the greater value of production which it would bring, may never be achieved."[46]

And indeed, once again, the idea of independence of outcomes from the allocation of rights is presented again, but now it reveals that no matter how society initially allocates, or how courts reallocate rights, that if negotiations are viable then the most productive use of the rights will result.

Ultimately, Coase unifies all of these ideas, recognizing that the state itself can be more efficient and effective than firms in some conditions, that the state is a 'super-firm' that can enable even better 'coordinated' legal outcomes:

> "An alternative solution is direct Government regulation. Instead of instituting a legal system of rights which can be modified by transactions on the market, the government may impose regulations which state what people must or must not do and which have to be obeyed.
>
> "Thus, the government (by statute or perhaps more likely through an administrative agency) may, to deal with the problem of smoke nuisance, decree that certain methods of production should or should not be used (e.g. that smoke preventing devices should be installed or that coal or oil should not be burned) or may confine certain types of business to certain districts (zoning regulations).
>
> "The government is, in a sense, a super-firm (but of a very special kind) since it is able to influence the use of factors of production by administrative decision."

[46] Ibid., 850-851.

In essence, Coase is recognizing that the state's ability to reallocate rights can achieve results better than privately negotiated use of rights allocated to private parties. But this is in itself a recursive argument, in that these 'regulations' are once again nothing less than a reallocation of rights albeit a type of rights that the individual citizen cannot negotiate away at a price; is this not the quintessence of constitutionally granted rights and of fundamental human rights?

With this argument, Coase is recognizing that the state, particularly via its courts, can allocate and reallocate rights, and that the state can choose which (re)allocations of rights are alienable and which rights are not alienable. This is a very strong argument for the fundamental power and obligation of courts to understand their powers over the allocation of rights and to what privileges travel with those rights, inclusive of whether the rights are alienable or not via juristic acts of private law.

But Coase also warns that a government must carefully balance those efforts made to enhance the rights of some parties against the loss of rights to other parties:

> "It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost. *But in choosing between social arrangements* within the context of which individual decisions are made, *we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others*. Furthermore we have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. *In devising and choosing between social arrangements we should have regard for the total effect*. This, above all, is the change in approach which I am advocating."[47] (Italics added)

It is important to state that merely establishing the optimal productive use of rights does not also result in the most beneficial distribution of the fruits of that usage; the matter of ideal distribution of those fruits is a wholly distinct question.

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[47] Ibid., 877.

3.3. Summary and Conclusion on Coase

In brief review, Coase provided a theoretical foundation to the idea that coordination of legal rights exists in an environment of transaction costs. Without external support, many parties will find the transaction costs of solving their legal conflicts to be beyond their budgetary capacities, especially if timeliness is a major factor in avoiding a conflict of rights.

Coase recommends that governments, inclusive of courts, could and should take action to reallocate rights to better enable negotiated outcomes to achieve more productive use of the resources for all involved parties. This is distinctly different from asking courts to completely solve problems; rather, it is an observation that many disputes could be more efficiently addressed by courts and by the societal players involved if the rights were to be reallocated, that the court can 'nudge' the actors to better solve their own disputes to the greater benefit of all involved.

IV. COVER: SACRED LEGAL CULTURES AND JURISPATHIC JUDGES

Robert Cover,[48] within a brief period in the mid 1980s, produced a new theory of jurisprudence that is simultaneously one of the most cited and yet least fully understood approaches to law and justice.[49]

In a nutshell, he described law as a universe of sacred narratives and rules to ensure the attainment of justice based on the values found in those narratives, a *nomos*-laden universe. He also described law as something that bubbles up from daily life yet requires a mode of formal constraint to ensure that it remains

[48] Robert Cover was a professor of law at Yale University's School of Law from 1971 until his early death in 1986.

[49] With regard to being well cited, Shapiro and Pearse in 2012 ranked Cover's 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' the 16th most cited law review article of all time. *See* Fred Shapiro and Michelle Pearse, "The Most-Cited Law Review Articles of All Time," *Michigan Law Review* 110 (2012): 1483-1520. As to the next aspect, that his jurisprudence theory is more popular than it is understood, a comparative Google Scholar search for the terms [Cover law "narrative"] results in over 2.35 million hits whereas the terms [Cover law "paideic"] results in approximately 500 hits. (Searches performed on 27 July 2022.) While this simple example is not empirically rigorous, the results are sufficiently clear that Cover's concept of cultural materials being part of a continuum of legal interpretation are disproportionately more frequently cited than his actual legal theory of how that continuum is created. As to the lack of general uptake of the broader research agenda posed by Cover, *see* Gal Hertz, "Narratives of Justice: Robert Cover's Moral Creativity," *Law and Humanities* 14, no. 1 (2020): 5.

functionally useful. He called these two aspects of law Paideic Law and Imperial Law, respectively.

His research is well cited as the birth of the Law and Literature movement, as a profound resource in civil rights law, and in trailblazing the new literatures that would emerge on legal norms and their role in jurisprudence.

In rapid order, he published four seminal articles that lay out his new legal philosophy: 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative' (1983),[50] 'The Folktales of Justice: Tales of Jurisdiction' (1985), 'Violence and the Word' (1986), and 'Obligation: A Jewish Jurisprudence of the Social Order' (1987). But this burst of intellectual productivity was cut short and the last two articles were published posthumously.[51] Many have held that Cover was the leading constitutional scholar of his era, but the incomplete project he left behind means that we lack the volumes of literature that other greats, such as Hart and Dworkin, have left behind, so we must parse his few key articles carefully.

Cover was fascinated by how laws might not be binding, or how moral and other cultural narratives might bind us to justice where law might not. He was a scholar of Jewish legal traditions, and he was engaged with social justice and the struggle for civil rights in the United States. He comparatively examined two approaches to legal systems, those of religious and obligations based legal cultures and those based on social contracts and rights based approaches.[52] He was particularly interested in how to ensure that constitutional law and the rights constitutional law offers are socially recognized as 'true law' and thus as binding law, even when formal legal institutions failed to either offer why positive enactments were binding or when formal legal institutions failed to enforce a constitutional court's decision.[53] How can law be binding when formal

[50] This article was written in response to a constitutional law issue addressed by the US Supreme Court, in the case of *Bob Jones University v. the United States*, 461 U.S. 574 (1983). Thus, the very origins of Cover's development of his new jurisprudence was predicated on constitutional interpretation of rights. Hertz, "Narratives of Justice," 3.

[51] Cover died of a heart attack in 1986 at the age of 42.

[52] Stephen Wizner, "Repairing the World Through Law: A Reflection on Robert Cover's Social Activism," *Law & Literature* 8, no. 1 (1996): 6-7.

[53] *See* Franklin G. Snyder, "Nomos, Narrative, and Adjudication: Toward a Jurisgenetic Theory of Law," *William & Mary Law Review* 40 (1999): 1722.

legal institutions fail to advance justice? That is the question that Cover sought to address with his new jurisprudence.[54]

To enable his research agenda, he provided a novel set of definitions for 'law', what it is and how it functions. He provided three definitions:[55]

- Law is the set of normative rules that enable ordinary people the capacity to make socially interactive decisions and take socially interactive actions without crumpling under the eschatology of philosophies applied within a material world.[56]
- Law is a cultural force that authorizes the propriety of societal transactions and the extent to which violence is allowed or encouraged to effect justice within those transactions.[57]
- Law affects us as actors within a legal space, it is a force field not unlike the force field effects of gravity on our physical bodies, in that law pulls our community together from its individual human components, through a 'normative space, influencing and controlling behavior'.[58]

Looking at these definitions of law; normative rules balancing social interactions in a material world, cultural force authorizing violence, and as a defining force that defines a community, it is readily apparent that Cover contrasted with more traditional legal scholars,[59] such as Kelsen or Hart, who saw positive law descending from a state down to the people.[60]

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[54] Hertz, "Narratives of Justice," 4.

[55] The three definitions below are edited or other updated versions of the same three definitions I published in Roy Andrew Partain, "Ecologies of Paideic Law: Environmental Law and Robert M. Covers Jurisprudence of 'Nomos and Narratives'," *Hanyang Law Review* 24, no. 3 (2013): 434.

[56] Underlying all three definitions is the recognition that the narratives establish the Kelsen's *Grundnormen* and that the prescriptions are effectively rules of actions pre-approved as compliant with those *Grundnormen*. Robert M Cover, "The Supreme Court, 1982 Term – Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983).

[57] Cover, "The Supreme Court," 9.

[58] Ibid., 10.

[59] To emphasize the cognitive distance in Cover's jurisprudence versus those scholars more focused on social contract-based jurisprudence, Wizner quotes Cover, "it seems to me that the rhetoric of obligation speaks more sharply to me than that of rights. Of course, I believe that every child has a right to decent education and shelter, food and medical care; of course, I believe that refugees from political oppression have a right to a haven in a free land; of course, I believe that every person has a right to work in dignity and for a decent wage. I do believe and affirm the social contract that grounds those rights. But more to the point I also believe that I am commanded - that we are obligated - to realize those rights." *See* Wizner, "Repairing the World," 7, citing Robert M. Cover, "Obligation: A Jewish Jurisprudence of the Social Order," *Journal of Law and Religion* 5, no. 1 (1987): 73-74.

[60] Critical of liberal theories of justice and social contract theories of thinkers like Rawls or Dworkin, Cover believes that morality is never culturally neutral. *See* Hertz, "Narratives of Justice," 7.

Cover saw law organically emerging from the cultural matrix that held communities together. Indeed, for Cover, one of law's greatest gifts is to keep a community bound together by ensuring a common sense of justice.

4.1. Nomos and Sacred Narratives of Law

At the core of Cover's scholarship is the idea that it is jurisprudentially invalid to separate our cultural and sacred values, as expressed in our cultural narratives,[61] from the function and role of law to ensure justice. Law inhabits a universe filled with our moral sacraments.

Cover observed that some legal systems did not need to administer violence to ensure compliance. He noted this from the Jewish legal system; a system that had functioned for its community without claim to an official state or state apparatus of enforcement. The lack of a state apparatus for enforcement made more clear the need for community support of its laws, that they saw the connection between the rule and the justice the rules afforded.

Notably, Cover disputed that the mechanics of a parliamentary procedure to create positive law actually imbued those resulting enactments with any legitimacy, with any sense of justice.[62] At the core of his research program is the question, what makes one cluster of words spirited with the force of justice while other clusters of words are just words, descriptive and perhaps bound with enforcement yet hallow of any sense of justice?

Cover wrote that community-held cultural narratives enabled the legal rules of a community to become binding due to the justice that the members of the community believed would accrue from following such rules. And these cultural narratives were often religious in context. Cover notes that while scholars since the 1700s had tried to hide those religious and cultural origins of law and justice,

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[61] To be clear, narrative and law are not independent terms for Cover, but rather, narrative is intertwined with law, providing it with definition and context. Cover, however, goes further, viewing nomos and narrative not as two distinct discursive fields but as interdependent. Narrative is not the other of law, particularly of state law, but rather the place where legality, and more broadly, normativity itself is created, suspended, broadened and debated. *See* Hertz, "Narratives of Justice," 6.

[62] Cover saw the struggle to answer Hart's query of "what is law?" as a veneer to hide the real questions, which Cover saw as what gave law its legitimacy. Robert M. Cover, "The Folktales of Justice: Tales of Jurisdiction," *Capital University Law Review* 14 (1985): 181.

the truth remained that the validity of law truly lay in whether the members of the community, informed by their narratives, perceived the laws as achieving justice or not.

Cover holds that sacred narratives are needed as foundations for any law that hopes to achieve justice:

> "Legal positivism may be seen, in one sense, as a massive effort that has gone on in a self-conscious way for over two centuries to strip the word "law" of these resonances. But the *sacred narratives of our world doom the positivist enterprise to failure*, or, at best, to only imperfect success."[63] (Italics added.)

In writing that "this normative world, law and narrative are inseparably related,"[64] Cover expressed that law functions as a force field between the community's behavioral *grundnormen* (basic standards)and the community's narratives that lay out the justifications for those same *grundnormen*.

> "[L]aw becomes not merely a system of rules to be observed, but a world in which we live."[65] Considering this interconnected flow of cultural meaning and rules to ensure cultural values, Cover called this combined matrix of law *nomos*, law with its sacred narratives.[66]

> "A legal tradition is hence part and parcel of a complex normative world. The tradition includes not only a corpus juris, *but also a language and a mythos – narratives in which the corpus juris is located by those whose will acts upon it*. These myths establish the paradigms for behavior."[67] (Italics added)

Each nation and state will have its own *corpus juris*, a body of meaning that includes a way of speaking of legal matters and of infusing meaning into those legal affairs via the myths and truths of that society. These 'paradigms

[63] Ibid., 180.

[64] Cover, "The Supreme Court, 1982 Term", 4.

[65] Ibid.

[66] Ibid. *Nomos* is an Attic Greek term meaning law, ordinance, custom, or even a form of structured lyrics. *Nomos* is derived from *nemo*, meaning 'to distribute'. *See* Dmitriĭ Vladimirovich Nikulin, *On Dialogue*, (Lanham: Lexington Books, 2005): 225.

[67] Cover, "The Supreme Court, 1982 Term," 9. The quote continues: "They build relations between the normative and the material universe, between the constraints of reality and the demands of an ethic. These myths establish a repertoire of moves – a lexicon of normative action – that may be combined into meaningful patterns culled from the meaningful patterns of the past. The normative meaning that has inhered in the patterns of the past will be found in the history of ordinary legal doctrines at work in mundane affairs, in utopian and messianic yearnings, imaginary shapes given to less resistant reality; in apologies for power and privilege and in the critiques that may be leveled at the justificatory enterprises of law."

for behavior' are the very core of law, the kind of law that attains justice, in Cover's vision.

Therefore, no legislature can simply create meaningful law by simple decree or fiat; no, the law has to resonate with the pre-existing *nomos* of the community that the legislature seeks to govern. Nor can the *nomos* from an external community be employed in trying to justify these positive enactments, no matter how noble their *nomos* might be, because laws within a community can only be justified with its own sacred narratives and its own 'paradigms for behavior'.

Similarly, no court can pronounce a new law or a meaningfully different reading of previous cases, statutes, or regulations, unless the new holding aligns with the existing *nomos* of its community. Courts are not immune from Cover's analytical arguments; indeed, his seminal article was addressed to the concerns of the United States Supreme Court.[68]

4.2. Legal Culture Includes Paideic Law and Imperial Law

The mechanics of Cover's legal world are easy to understand if perhaps a bit unconventional. He posits two basic functional aspects of law: paideic law and imperial law. One can observe that Cover chose these two words in clear opposition, one meaning 'to teach' and the other 'to command or to order', and that is indeed their comparative roles, to teach law to its own community and to maintain order over the laws held by that same community.

Paideic law is organic, arising whenever a small group realizes that it needs to coordinate, whereafter repeated encounters at coordination lead to the emergence of rules to provide a ready coordination strategy. Within the group, they may enforce the rule to ensure that it brings the hoped-for coordination. Rules, enforcement, social goals, these are the beginnings of paideic law.

In defining his paideic legal system,[69] Cover states that a paideic legal system will hold in common a cultural body, which can include a wide range of cultural and narrative materials, he calls this a *corpus*.[70] Quite central to the point of the

[68] *See* the title itself: 'The Supreme Court, 1982 Term – Foreword: Nomos and Narrative'.
[69] Cover, "The Supreme Court, 1982 Term," 12-13.
[70] Ibid., 13.

paideic legal system, is that it contains materials that teach and train members of the community on its rules and values, a common pedagogic method. [71] To validate the paideic system, the community must hold a commonly shared view as to how its *nomos* and *corpus* develop for its people;[72] the community must acknowledge a shared and sustained legal culture. In essence, a paideic legal culture is an educational matrix that supports both the creation of legal rules and shared education as to the function and values of those rules.

Cover claims that paideic law is 'world creating'.[73] Paideic law is organic in that it arises from a community-shared collection of narratives, narratives shared during each member's initiation or education into the community's identity at large and to the community's norms and legal rules in particular,[74] especially in the way that the paideic legal culture emerges to balance the spiritual and material goals of the community.[75] As such, paideic legal culture informs each member of obedience to the law with understanding of the law.[76] Cover describes the evolution of the paideic legal materials as initiatory, 'celebratory', 'expressive' and 'performative'.[77] Paideic law is what draws and binds a community together, both aspirationally and politico-legally.[78] And there is no assumed consistency, no deep legal principles in play; each group that encounters a scenario needing a rule will create the rule that fits their needs; if two groups come across similar situations they may well create two different yet fully fit rules.

On the other hand, Cover's imperial legal culture is focused on 'world maintaining'.[79] It leverages institutional devices to maintain continuity and prevent excessive change.[80] Within an imperial legal system there is a universal set of norms, enforced and reinforced by the institutions of the imperial institutions.[81]

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[71] Ibid.
[72] Ibid.
[73] Ibid., 12.
[74] By this, Cover refers to trainings such as a young Jewish male learning to read Hebrew for his coming-of-age celebration, the Bar Mitzvah, or more generally, for rites of passage and initiation.
[75] Cover, "The Supreme Court, 1982 Term," 12 -13.
[76] Ibid., 13.
[77] Ibid.
[78] Ibid.
[79] Ibid.
[80] Ibid.
[81] Ibid.

This is in contrast to the organic, diverse rules that emerge from the paideic processes.

While paideic legal methods are organic, imperial legal methods are 'critical' and 'analytical'.[82] The value of an imperial legal system lays within its ability enforce the universality of norms across all of the communities or paideic systems within their scope.[83] As a side effect, the rules supported by the imperial system do not *per se* need to be taught to be effective,[84] as the enforcement methods of coercion and related rules of authorized violence might displace the need for paideic legal systems in the short run.[85] And while contrary to the organic character and justice-maintaining narratives of the paideic legal systems, an imperial system of law can be measured by its ability to maintain legal stability without reference to an internal, values-preserving, *nomos-matic* dialog.[86] "The imperial motive aims to limit the pluripotency of the paideic norms into a singular construct to hold the community and its *nomos* to a core of beliefs."[87]

In conclusion, Cover claims that all legal systems contain various admixtures of these two systems of paideic and imperial aspects. He wrote that Jewish legal culture and, by implication, other non-sovereign religious legal systems are high in paideic content while the analytical civil codes of Northern Europe reflect a highly imperial legal approach.[88]

4.3. Jurispathic Judges who Terminate Rights

In Cover's jurisprudence there is a constant oppositional dynamic of rules emerging from the paideic side, responsive to new and emerging issues, while the imperial side attempts to maintain legal stability and reliability to better enable social cohesion across the whole community. The central problem is not a scarcity of rights or legal rules, but rather a surplus.

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[82] Ibid.
[83] Ibid.
[84] Ibid.
[85] In addition, the law deals not only with rights but rather concerns lives, pain and violence. It deals with bodies and not only with ideas. Hertz, "Narratives of Justice," 7. *See also* Cover, "The Supreme Court, 1982 Term," 13.
[86] Ibid., 13.
[87] Partain, "Ecologies of Paideic Law," 438.
[88] Cover, "The Supreme Court, 1982 Term," 12-13.

> "It is the multiplicity of laws, the fecundity of jurisgenerative principle, that creates the problem to which the court and the state are the solution."[89]

It is the multiplicity of laws that enables different parties to claim that they have rights, rights that sit in conflict with other parties' claims to rights. It is this conflict of claimed rights that enables standing of the parties to be in court.

Following Dworkin on using legal principles to add new legal rules or to enable new lines of case-based logic would only add to the chaos[90] if we follow Cover's line of logic, yet Cover has an innovative solution beyond the creative policy innovators and the enforcing imperial institutions. His solution is to place judges and justices squarely at the center of balancing these two sides.

> "But the jurisgenerative principle by which legal meaning proliferates in all communities never exists in isolation from violence. Interpretation always takes place in the shadow of coercion. And from this fact we may come to recognize a special role for the courts. Courts, at least the courts of the state, are characteristically 'jurispathic.'
>
> "It is remarkable that in myth and history that the origin of and justification for a court is rarely understood to be the need for law. Rather, *it is understood to be the need to suppress law, to choose between two or more laws, to impose upon laws a hierarchy*." [91] (Italics and bold added)

This is the genius of Cover, to recognize that judges do not exist to create new laws, but rather, to reduce claims of existing rights to fewer and less conflicting sets of claims, to trim the rule sets so that the community is left with a harmonious set of rules to enable function and unity.[92] By labelling judges as 'jurispathic', Cover recognizes that judges can 'kill off' rights that cause conflicts that prevent justice for the community at large.

The role of a judge or a panel of justices is unique and necessary, as the community at large functions in a paideic manner, seeking new rules and new

[89] Ibid.

[90] Cover's thought does not conform to the positivist legal tradition of thinkers such as Kelsen or Hart, who see law as a closed system. He also rejects the notion of law as expressing moral ideals practiced through hermeneutical principles, as naturalists like Dworkin claim. Hertz, "Narratives of Justice," 24.

[91] Cover, "The Supreme Court, 1982 Term," 40.

[92] The jurisgenetic model suggests that this is because the judge is never truly legislating from scratch, but rather is selecting a pre-existing legal meaning. Judges generally are trying to determine what the legal norm is, and not what the best social policy is for the state. Snyder, "Nomos, Narrative, and," 1723-1724.

rights, which leads to overlapping rules, rights, and claims, which in turn leads to legal conflicts. The imperial function of the administration part of the state is focused on preservation and conservation of the law, ensuring stability and continuity. Neither process is well-tuned to resolving the surplus of rights created.

Judges are decision-makers on quandaries, their decisions are binding and effective acts of law, and their operational status is somewhat beyond the routine events of political democracy. Judges and justices stand beside, above, and with the law in a manner quite distinct and unique from other actors in our modes of public governance,[93] yet the role of judges and justices is one of the most persistent and ubiquitous roles found across most legal cultures. Their role in Cover's jurisprudence will be equally unique and central to ensuring justice despite the opposing functions of paideic and imperial law.

The history of judges is extremely ancient and predates Athenian democracy by at least a millennium. As far as we can tell, Hammurabi used judges in lieu of his direct presence; we have rediscovered his letters and exchanges with his judges and we know he retained an active interest in their decisions on legal conflicts. We know a variety of ancient cultures had judges, from China to Egypt, where the roles are surprisingly similar: a decision-maker, a decision-maker tasked with finding outcomes that will bring peace to their communities, a decision-maker with authority to employ violence or other measures to ensure that a decision is effected among the parties of the dispute. And this idea often overlaps with a notion of leadership, as seen in the Jewish tradition of judges.

Most centrally, is the role of the judge to decide cases brought before them. Usually that decision is reliably final and binding, even where appeals are possible, they are usually at high cost and on a limited range of issues. Few court systems today enable more than two levels of appeal, from first court to appellate court to supreme court and judges are cautious to render decisions that are readily or foreseeably reversible on appeal.

93 Legislators conduct public hearings, take polls, consult independent experts, and meet with lobbyists. Judges generally do not. Snyder, "Nomos, Narrative, and Adjudication," 1722.

This all bares the reality that decisions made by judges are usually binding on the parties before them. And these decisions can be made on the most important matters of human life, from marriage and divorce to decisions on human rights or capital punishments. Or even to deciding how law itself should operate, in making constitutional decisions and interpretations; which is where Cover was focused with 'Nomos and Narrative', on the upcoming cases of the US Supreme Court.

And Cover was very aware that the real power of judges lies in the complexity of healing communities via the authorized use of force and violence; judges often hold the power to cancel rights, to remove properties, to terminate marriages, to confine a person to prison, and even in some states, to order executions of criminals.

> "In this [judges] are different from poets, from critics, from artists. It will not do to insist on the violence of strong poetry, and strong poets. Even the violence of weak judges is utterly real – a naive but immediate reality, in need of no interpretation, no critic to reveal it."[94]

And similarly,

> "Whether or not the violence of judges is justified is not now the point – only that it exists in fact and differs from the violence that exists in literature or in the metaphoric characterizations of literary critics and philosophers."[95]

Cover recognizes that judges and justices hold this unique power, so rarely distributed in ministerial or legislative branches, the power to authorize violence. For Cover, this becomes the core issue of how to decide hard cases,[96] i.e., on what basis can a judge authorize force or violence while seeking to balance and harmonize rights in a community? For that solution, he will return to paideic legal culture to ensure that imperial legal culture is functioning properly.

Another aspect that defines a judge or a justice is that their role in law, in most legal systems, is barely democratic. Rarely are judges elected by popular

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[94] Robert M. Cover, "Violence and the Word," *The Yale Law Journal* 95, no. 8 (1986): 1609.
[95] Ibid.
[96] *See* a discussion on his earlier works on hard cases, where he researched the efforts of antebellum American judges to grapple with liberty and slavery under the US Constitution. Hertz, "Narratives of Justice," 9-11.

vote, although it does occur in certain jurisdictions.[97] Usually, judges and justices are appointed by an executive branch or a ministerial process, perhaps subject to parliamentary or sub-committee review – but this hardly enables their position of authority to be labelled as democratic.

And that sense of autocracy is not by error but by design, for judges and justices need to render decisions, difficult decisions, that are not well suited to public polling or other democratic processes that engage large numbers of politicians or from the public populace. Judges and justices need to consider the rights of weaker parties, of minority standing, of discriminated parties, and sometimes on parties that might have committed tremendously shocking acts, yet the judges and justices need to ensure that each and every party receives the full benefits of their rights and that the full balance of law is employed in making their difficult decisions on 'hard cases'. [98]

Cover provides this analysis of how judges should decide on 'hard cases' by looking to the narratives of justice that sustain the community:

> "The range of meaning that may be given to every norm – the norm's interpretability – is defined, therefore, both by a legal text, which objectifies the demand, and by the multiplicity of implicit and explicit commitments that go with it. Some interpretations are writ in blood and run with a warranty of blood as part of their validating force. Other interpretations carry more conventional limits to what will be hazarded on their behalf. *The narratives that any particular group associates with the law bespeak the range of the group's commitments. Those narratives also provide resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law.*"[99] (Italics added)

Judges and justices need to look beyond the positive law to the cultural and legal narratives that sustains the public faith that the laws of their communities will render justice to all in those communities. Cover provides several examples that communities' 'positive' laws are not the actual laws in function; this, he

[97] For example, some districts in Texas popularly elect judges, which results in quite unusual campaign finance requests from judges to members of the general public, including attorneys who work in their courts.

[98] The traditional reference is to the legal theory discussions on how judges should decide 'hard cases' as initiated by Dworkin in his 1975 article of the same name. *See* Ronald Dworkin, "Hard Cases," *Harvard Law Review* 88, no. 6 (1975): 1057-1109.

[99] Cover, "The Supreme Court, 1982 Term," 46.

tells us, is an example that the legal narratives provide broader understandings of how law is supposed to work in contrast to a more limited vision provided by the positive laws.[100] This goal of Cover is to enable our legal systems to evolve to higher accomplishments of justice.

In Cover's jurisprudence, the function of law depends on society being aware of both the legal rules that need interpretation by the court and of the narrative legal cultures that explain how interpretation should be performed when multiple interpretations are presented by opposing parties.[101]

> "To know the law – and certainly to live the law – is to know not only the objectified dimension of validation, but also the commitments that warrant interpretations."[102]

Cover sees the role of judges as not only central to killing off conflicting rights to enable a functional legal system,[103] but he also sees the role of judges as central to understanding where the paideic legal culture of a community has implicitly called for interpretation of the law to ensure that the imperial aspects are functioning to achieve justice as called for in the paideic legal culture.[104]

In *The Folktales of Justice*, Cover discusses the challenges of interpretation facing judges:

> "... each community builds its bridges with the materials of sacred narrative that take as their subject much more than what is commonly conceived as the "legal." The only way to segregate the legally relevant narrative from the general domain of sacred texts would be to trivialize the "legal" into a specialized subset of business or bureaucratic transactions.

> "The commitments that are the material of our bridges to the future are learned and expressed through sacred stories. Paradigmatic gestures are rehearsed in them. Thus, the claim to a "law" is a claim as well as to an

[100] It is not the rules but the narratives that hold the semantic key for coming to terms with this contradicting normativity. These narratives bind together the normative reasoning about the rules and their pragmatic application. Hertz, "Narratives of Justice," 17.

[101] Cover, "The Supreme Court, 1982 Term," 46.

[102] Ibid.

[103] She [the judge] really does not perceive what she is doing as creating new rules in the absence of law. Faced with competing preexisting legal meanings, her role is to choose the one that seems most correct, the one that is closest to what the norm *really* means. Snyder, "Nomos, Narrative, and Adjudication," 1724-1725.

[104] The goal for Cover, which is also performed in the text, is to overcome what he considers as the great threat to law that is posed when it becomes merely *nomos*: a detached form of morality emptied of meaning, thereby becoming merely authoritative state violence. Hertz, "Narratives of Justice," 4.

> understanding of a literature and a tradition. It doesn't matter how large the literature or how old the tradition."[105]

In Cover's jurisprudence, there is no simple, mechanical method to separate our cultures from our laws, to separate out 'legal rules' from our broader cultural universe of our communities.[106]

Furthermore, he argues that hard cases are decided with recourse to force and violence, and that the justifications for that force and violence flow from our paideic legal cultures and associated sacred texts, aiding us all in understanding the task of justice set before judges and justices.

> "As long as death and pain are part of our political world, *it is essential that they be at the center of the law. The alternative is truly unacceptable* – that they be within our polity but outside the discipline of the collective decision rules and the individual efforts to achieve outcomes through those rules. The fact that we require many voices is not, then, an accident or peculiarity of our jurisdictional rules. It is intrinsic to whatever achievement is possible in the domesticating of violence"[107] (Italics added)

Cover seeks to hear the many voices from our sacred texts that guide our paideic legal cultures, that provide the authorization for both our legal rules and their enforcement. He also seeks to ensure that rights are considered with the necessary gravitas, for the role of judges in his jurisprudence is to primarily terminate rights to bring an end to the chaos enabled by overlapping and conflicting claims to rights held by the litigants.

Judicial decisions are made by clarifying for whom the rights exist and for whom rights do not exist, for whom the court will support with the force of law and who will not receive that benefit. And that force of law speaks to the full range of judicial powers inclusive of powers to authorize the use of force and violence to ensure that the judgements are upheld in the community beyond the courtroom.

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[105] Cover, "The Folktales of Justice," 182.

[106] Nomos and Narrative is the formula by which Cover connects phronesis and poiesis. His is a dialectic normativity, in which the two forces of *nomos* and narrative constantly disrupt and limit each other. Hertz, "Narratives of Justice," 22.

[107] Cover, "Violence and the Word," 1628.

That moment is when a judge must be most careful to ensure that the 'sacred texts' that make up the paideic narratives of their community are fully reflected and integrated in their judicial decisions, lest court-endorsed use of force or violence might be incorrectly or injuriously delivered to the community that the judge seeks to heal.

4.4. Summary and Conclusion on Cover

Cover creates a revolutionary jurisprudence that is also one of the most cited bodies of legal literature. In so doing, he places judges and justices at the very center of his legal universe, providing them with the singular role to resolve legal conflicts by terminating rights in conflict, to eliminate claims of rights that give rise to social conflicts and that prevent justice.

V. SUMMARY AND CONCLUSIONS

In this paper, three schools of jurisprudence have been reviewed: the legal theory of anticommons and the tragedy of anticommons, the scholarship of R.H. Coase, and the jurisprudential vision of Robert Cover. Each approach has focused on legal rights and how rights aid or frustrate the delivery of justice to the broader community.

5.1. Theory of Anticommons

The theory of anticommons, established with mathematical models and proof as well as with empirical studies, states that the fragmenting of rights among multiple actors will cause the underlying utility of those rights to vanish. In other words, when multiple legal actors possess exclusionary rights over a resource or activity, be it tangible, intangible, or legal in nature, then that resource or activity will likely not be used or enjoyed by anyone in the community. Similarly, when legal actors possess decision-making powers similar to a veto over legal processes or administrative procedures, then rights to those procedures are likely to be frustrated and not accessible to those citizens dependent on their rights.

When rights have some aspect of an exclusionary nature, or when the reliance on a public right depends on the approvals (or lack of vetoes) of multiple actors,

then those rights are at fundamental risk of not being operable. Fragmenting of claims over rights frustrates the utility of those rights. And the mechanical function of anticommons means that human nature is not the core reason why these rights will become dysfunctional for the community; it is the design or allocation of the rights that enables the tragedy of the anticommons in each case.

Thus, per the theory of anticommons, judges and justices should carefully consider the impact of all decisions on the granting and eliminating of rights, private and public, to best ensure that the bulk of rights expected by the public citizenry under their constitution and under their national law remain functionally available to them.

5.2. Coase

The legal theory of R. H. Coase sets a different argument before us, that rights are often allocated in ways that will lead to social frustration and that judges and justices, as active officers of the state, have the capability to reallocate those rights so that society can achieve a higher level of social welfare.

Coase develops a theoretical argument that all social institutions bear costs, real economic costs, to operate them and that social institutions are responsive to the rights that have been allocated to them. Social institutions may have certain rights from historical sources, perhaps from state allocations, and other rights may have accrued from negotiations under private law, effects transfers of rights from one party to another party. But Coase argues that those allocations are not always the socially optimal allocation of resources, that due to the transaction costs of social institutions, some allocations of rights are more productive and more bargain enabling than other distributions.

Coase argues that courts, as part of the state, can creatively reallocate those rights already allocated so that the set of actors in the community can reach higher levels of social welfare. But Coase also warns that not all rights should remain in the marketplace for private law negotiations, that some rights should be assigned in an unalienable manner, so that the rights of certain parties cannot be bargained away. In this manner, Coase sets judges and courts as a part of the

super-firm called the state, and in this manner, a judge acts as an entrepreneur to make decisions on how rights can be structured to enable higher levels of social welfare.

Additionally, Coase argues that judges need to be mindful of two core caveats. First, that the allocation of rights to one party necessarily means the denial of rights to another party. Second, that the optimal goal in reallocating rights is not to achieve no harm but rather to ensure the maximum good for the public at large. This is tantamount to recognizing that judges that effectively reallocate rights for the greater good will necessarily cause some harm to some parties. Or in the inverse, when judges attempt to eliminate all harms by reallocating rights across the community, then they will certainly reduce the overall social welfare of that community.[108]

Thus, per Coase, judges and justices bear a tremendous weight on their shoulders. They are empowered to allocate and reallocate rights as they weigh the merits of cases before them. But they are also creators of opportunity and improvement in welfare for some while also being destroyers of opportunity and reducers of in welfare for others. Coase advises judges and justices to consider the greater good across the whole of the community and to not to seek the minimal set of injuries possible.

5.3. Cover

Robert Cover brings attention to the role of rights in litigation, particularly to the reality that legal disputes occur because multiple parties claim to possess similar or identical rights yet the enjoyment of those rights precludes either side from enjoying those rights simultaneously. Judges are routinely faced with the decision of whose rights will survive the trial and whose rights will not survive. And because the rights are claimed before the litigants arrive at the courthouse, judges are primarily tasked with determining whose rights will be terminated and extinguished, what he calls the primary task of 'jurispathic judges'.

[108] There is an opportunity here to engage in a discussion on Pareto Optimality and Kaldor Hicks Optimality, and on Calabresi's critique of both, but that is deferred to a later paper. *See* Guido Calabresi, "The pointlessness of Pareto: carrying Coase further," *Yale Law Journal* (1991): 1211-1237.

Cover reminds us that we need to return to our paideic narratives, those sacred texts that enable justice to function within our laws. Judges should be sure include those narrative *nomos*-laden texts alongside the positive laws that enable parties to make their claims to rights. How can we know what will improve social welfare for a given community, especially if we treasure those values that are difficult to evaluate in terms of money or other metrics? How can we evaluate which bundle of allocated rights will ensure optimal welfare, which overlaps of rights are the most harmful, and which tragedies of anticommons are more deleterious than other tragedies, unless we seek our deeper values?

Cover does not provide an escape clause from our positive laws, nor does he argue that our narrative texts override our positive laws, rather, that when judges need to make decisions on 'hard cases,' where the positive law provides support on both sides, then judges should dig into those narratives of *nomos* to consider which outcome best matches the hopes and values of the community.

5.4. Final Conclusions

This paper has examined the role of rights to enable conflicts and the power of judges to steward and govern those rights to prevent and eliminate those conflicts. Importantly, it has also addressed the role of courts to clarify which rights to protect and preserve to enable the greater social benefits from rights.

One school of thought warns that the fragmenting of rights, the creation of too many overlapping rights, can enable tragedies of greatly reduced access to those rights. And that encompasses all kinds of rights, from privately negotiated rights to publicly established rights under constitutions. Thus, judges must carefully consider when to trim rights, how to consolidate rights, and how to prevent the fragmentation of rights from preventing the very goals of those allocated rights. Yet too, a certain utility can be found in fragmented rights, particularly if the goal is to preserve a resource or to ensure that a resource has stability. Indeed, a question for all constitution design is flexibly to allow for change or amendments into a constitution. By properly distributing the powers of approvals

of such changes, who controls the vetoes over such changes, a government can design and engineer how reliable or flexible they want their constitution and the rights it affords will be for their national community.

A second school of thought warns that allocations of rights are often poorly designed or manifested, resulting in reduced social welfare for the community. This school advocates for judges to identify the central rights of any dispute and to consider if any reallocations of those rights might enable superior private outcomes for the community. Also, it advocates that sometimes a judge should declare some reallocations of rights to contain inalienable rights, that private individuals cannot negotiate away those certain rights. Central to this school of thought is that the allocation of rights that we find at the start of a case should not be considered anything more than one of many potential ways that rights could be allocated. If another reallocation of rights could better enable the community to avoid or resolve conflicts, then a judge should take that reallocation into consideration.

And a third school recognizes that law, legal rules, and the identification of rights often emerge organically and are embedded in sacred legal texts, which might include texts far beyond enactments of positive legislation. As such, too many rules and too many rights are likely to exist among the community and even efforts to enforce the law and compliance with the law will not suffice to ensure the integrity of the law. In such cases, judges will be asked to terminate rights, to reduce the number of rights circulating and present in the community, so that greater legal harmony can prevail.

What is common and shared across these three legal schools is the recognition of the centrality and gravity of adjudicating who should have which rights and whose rights might need to be reallocated and whose rights might need terminating, all to afford the community a greater hope for justice under law, a justice that the community believes in and will support.

While a judge might hope for a simpler recommendation, to always choose Cover or to always choose Coase, or perhaps a rule that in 'Case A', a judge should choose Cover but in 'Case B', choose Coase, that is not the way that these understandings of jurisprudence operate. Instead, they are a harmony of complementary ideas; that judges and justices must always remain uncomfortably aware of the powers they delegate by the creation of rights, by the denial of rights, and by the understanding of how different allocations of rights interact with each other's existence and functionalities.

Judges and justices need to be uncomfortable, for as Coase wrote, "A system in which the rights of individuals were unlimited would be one in which there were no rights to acquire;"[109] reminding us that to grant rights to one party is tantamount to denying them to another party. And thus is laid bare the centrality of the modern understanding of rights, that the goal is not the nirvana state of rights for everyone on all things, but rather to realize that all rights bear a cost to other rights and that judges and justices must find a way to balance the assignment and protection of rights so that the maximum benefit is attained for society at large. Judges and justices must remain uncomfortable for they hold the power and responsibility for attaining that vision of justice, not unlimited justice for all, but that allocation of incomplete justice for which the greatest welfare for the whole of society can be achieved – and that means that judges and justices bear the gravitas of the rights denied, of the justice not availed, so that society can best flourish under our reality of rights, a reality reflected in our social and religious narratives of justice holding our societies together.

Together these three schools of thought share a vision that rights are verily the kernel of justice, but that careful consideration must be taken so that judicial efforts to render justice are not frustrated by the very acts and decisions meant to deliver justice. Rights are powerful indeed, able to help and frustrate with equal power. Judges have an obligation to ensure that the correct balance of rights is obtained for one and all.

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[109] Coase, "The Problem of Social Cost," 876-877.

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Influencing or Intervention? Impact of Constitutional Court Decisions on the Supreme Court in Indonesia

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Abstract

The third amendment of Indonesia's 1945 Constitution, conducted in 2001, had significant implications for the nation's judiciary. It transformed the judiciary from a single to a dual structure. Consequently, there are two apexes of the judiciary: the Supreme Court and the Constitutional Court. Furthermore, the establishment of the Constitutional Court divided judicial review authority between the two apex courts. The Constitutional Court can review laws against the Constitution, while the Supreme Court has the power to review whether regulations, made under laws, contradict such laws. Although the Indonesian Constitution provides explicit delineations over the absolute competence of judicial review, the division of judicial review has often triggered tension between the two courts. The Constitution allows the Supreme Court to have additional authorities granted by laws. On the other hand, the Constitutional Court has the power to review any law against the Constitution, including laws related to the Supreme Court. This article seeks to answer the important question of whether the Constitutional Court could influence or intervene in the Supreme Court through judicial review. The authors argue that the duality of judicial review authority

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unintentionally causes an imbalance in the functional relationship between the two apexes of the judiciary. The main reason is that the Constitutional Court can influence or intervene in the Supreme Court through constitutional review authority. The authors examine two essential aspects of this: (1) the functional implications of duality of judicial review authority; and (2) the implementation of the Constitutional Court's authority in reviewing laws, especially those closely related to the Supreme Court's authorities. Various cases are examined to illustrate how the Constitutional Court could directly or indirectly influence the Supreme Courts' authorities. The Constitutional Court, however, often seems to 'play safe' to maintain the judiciary's imbalanced relationship caused by the dualism of judicial review authority.

Keywords: Constitutional Review, Constitutitonal Court Decision, Influencing, Intervening, Supreme Court.

I. INTRODUCTION

The existence of an independent judiciary is an essential element of a state based on the rule of law. Article 24 paragraph (1) of the 1945 Constitution of the Republic of Indonesia (the Indonesian Constitution) explicitly states that the judiciary is an independent authority in organizing the judicature for the sake of law enforcement and justice. The Indonesian judiciary consists of two branches, the Supreme Court and its subordinate judicial bodies, and the Constitutional Court. The Supreme Court and the Constitutional Court are the highest courts in the judiciary; both are independent, have respective authorities and equal positions. The Supreme Court has existed since the foundation of Indonesia in 1945, while the Constitutional Court was established based on the third amendment of the 1945 Constitution in 2001 although it did not begin to carry out its duties until 2003. The establishment of the Constitutional Court was intended to resolve problematic issues of administrative practice that had lacked a mechanism for resolution.[1]

Furthermore, the amendment of the 1945 Constitution not only established the Constitutional Court but also gave judicial review authority to both the

[1] Constitutional Court of the Republic of Indonesia, *Blueprint: Establishing a Constitutional Court as a Modern and Trusted Constitutional Court Institution* (Jakarta: Secretary General and Registrar of the Indonesian Constitutional Court, 2004), 4.

Supreme Court and the Constitutional Court. First, the Constitutional Court has the authority to review laws against the Constitution. Second, the Supreme Court can review regulations below law against the law. The judicial review of laws against the Constitution is deemed essential to protect citizens from any violation of their constitutional rights through the enactment of unconstitutional laws.[2] Thus, the task of nullifying unconstitutional laws must be entrusted to a separate organ that is independent of any state authority.[3]

In practice, the Constitutional Court's authority to review laws against the Constitution has accounted for most of its cases, compared to cases related to its other authorities.[4] Therefore, various legal developments have occurred in the last 18 years as a result of the Constitutional Court's decisions. This can be seen from the Court's decisions that have contained the formulation of new norms,[5] the absence of an external supervisory mechanism for constitutional justice, and multiple decisions annulling the provisions in laws deemed to weaken the Constitutional Court's authorities.[6] This development has prompted praise of the Court's independence but also triggered accusations the Court is 'untouchable'.

The Constitutional Court has not only maintained its authority through the implementation of judicial review, but has influenced other state institutions, such as in the *Judicial Commission* case in 2006,[7] the *Regional Representative Council* case in 2012,[8] and the *Supreme Court* case in 2013.[9] Although this seems

[2] The existence of a constitutional review mechanism toward laws is also one of the essential means to ensure the effectiveness of human rights provisions in constitution. *See* Adam S. Chilton and Mila Versteeg, "Do Constitutional Rights Make a Difference?" *American Journal of Political Science* 60, no. 3 (2016): 575-76.

[3] Sara Lagi, "Hans Kelsen and the Austrian Constitutional Court (1918-1929)," *Revista Co-Herencia* 9, no. 16 (2012): 286.

[4] Constitutional Court of the Republic of Indonesia, "*Rekapitulasi Perkara Pengujian Undang-Undang* [Recapitulation of Constitutional Review Cases]," Indonesian Constitutional Court, 2022, https://www.mkri.id/index.php?page=web.RekapPUU.

[5] The 'new norms' are formulated in a 'conditional decision', mostly in 'conditionally unconstitutional' decisions, where the Constitutional Court formulates a 'constitutional version' of an unconstitutional norm in the reviewed laws.

[6] For instance, Constitutional Court Decision No. 48/PUU-IX/2011 on the Review of Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court. Through this decision, the Court, for instance, allows itself to formulate new norms in its decisions and decide beyond what is requested in a petition.

[7] Constitutional Court Decision No. 005/PUU-IV/2006 on the Review of Law No. 22 of 2004 on the Judicial Commission and Law No. 4 of 2004 on Judicial Power against the 1945 Constitution of the Republic of Indonesia.

[8] Constitutional Court Decision No. 92/PUU-X/2012 on the Review of Law No. 27 of 2009 on the People's Consultative Assembly, the House of Representatives, and the Regional Representative Council, and Law No. 12 of 2011 on the Formulation of Laws and Regulations against the 1945 Constitution of the Republic of Indonesia.

[9] Constitutional Court Decision No. 34/PUU-XI/2013 on the Review of Law No. 8 of 1981 on the Criminal Procedure Code.

predictable and not particularly surprising as the Constitutional Court 'only' interprets the Constitution, the way it decides cases related to state institutions is inconsistent.[10] In some instances, the Constitutional Court seems to 'play safe' by stating that it lacks the authority to formulate regulations and order the legislature to revise laws. On the other hand, there are cases when the Constitutional Court explicitly develops new norms through its decisions. Such cases have occurred when the Constitutional Court deals with laws regulating the Supreme Court's authorities.

For instance, in Constitutional Court Decision No. 34/PUU-XI/2013, the Constitutional Court revoked Article 263(1) of Law No. 8 of 1981 on the Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana*). The Constitutional Court held that a reconsideration of a final and binding court decision (Reconsideration) could be done more than once.[11] The Supreme Court responded to the decision by issuing a Circular Letter stating that a Reconsideration could only be done once.[12] The Supreme Court added that a petition for Reconsideration could be made more than once only in a case involving two or more contradictory court decisions in civil or criminal cases.[13]

The Supreme Court also affirmed that if a Reconsideration does not follow the Circular Letter, then the chief of the lower-level court is instructed to reject the submission and not deliver it to the Supreme Court. Therefore, it seems the Supreme Court considers that its Circular Letter has more binding power than the Constitutional Court's decision. The Supreme Court also instructed the lower-level courts to "disregard" the Constitutional Court's decision on Reconsideration. Consequently, there was a conflict between the Constitutional Court's decision and the Supreme Court's response. The review of laws related to the Supreme Court by the Constitutional Court often results in disagreements between the two apex courts of the Indonesian judiciary.

[10] The inconsistency is apparent, even when dealing with provisions concerning authorities of the same institution, including the Supreme Court's authorities. The authors will elaborate on this issue on the next part of this article.
[11] Constitutional Court Decision No. 34/PUU-XI/2013 on the Review of Law No. 8 of 1981 on the Criminal Procedure Code (2013), 88.
[12] Supreme Court of the Republic of Indonesia, *Circular Letter of the Supreme Court of the Republic of Indonesia No. 7 of 2014 on Submission for Reconsideration*, 2014.
[13] Supreme Court of the Republic of Indonesia, *Circular Letter of the Supreme Court*, 2.

However, there are also several instances where the Constitutional Court seems to 'play safe' by 'not intervening' in the Supreme Court's authorities, such as in Constitutional Court Decision No. 30/PUU-XIII/2015. In that decision, even though the Constitutional Court stated the examination of a judicial review case and the reading of the verdict should be conducted in an open trial, the Court held that the arrangements of the mechanism of a judicial review examination trial are an open legal policy and not a problem of constitutionality of the norm.[14] A similar stance was seen in some decisions related to the restriction on cassation under certain circumstances stipulated in the Supreme Court Law, which will be discussed later in this article.

Several means to successfully implement judicial review have been put into practice. For example, a review by the Supreme Court of regulations under a law (regulatory review) shall be suspended if the law used as the legal basis in the regulatory review is under judicial review by the Constitutional Court.[15] This illustrates the implication of the hierarchy of legislation, which requires that lower-level norms should not contradict higher-level norms. Although there is an arrangement concerning the suspension of a regulatory review process, no provision requires the Supreme Court to follow the Constitutional Court's decision. In some instances, the Supreme Court may have different interpretations from the Constitutional Court concerning the law that becomes the legal basis in a regulatory review.

The above explanation shows how the Constitutional Court on the one hand can influence the Supreme Court, whereas the Supreme Court cannot similarly influence the Constitutional Court. Although the Constitutional Court seems only to conduct its authority to perform a constitutional review, there may be functional implications for the implementation of the Supreme Court's authorities. Moreover, as mentioned earlier, the Supreme Court may be given other authorities by law. Therefore, it is essential to examine the implication

[14] Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court (2016), 42-43.
[15] Law No. 24 of 2003 on the Constitutional Court, Article 55, 2003.

of constitutional review performed by the Constitutional Court on the laws regulating the Supreme Court's authorities.

This article is structured into two parts. The first briefly explains the division of judicial review authority and how it affects the Supreme Court and the Constitutional Court in exercising their respective authorities. The second examines various constitutional review decisions on laws regulating the Supreme Court's authorities. It is essential to understand the Constitutional Court's standing when it must indirectly face the Supreme Court, which has an equal position in the Indonesian judiciary. This article illustrates that the duality of judicial review in Indonesia unwittingly allows the Constitutional Court to intervene in the Supreme Court through its constitutional review authority, which may affect the independence of the Supreme Court granted by the Constitution. The situation is exacerbated by the absence of provisions on the institutional relationship between the Constitutional Court and the Supreme Court.[16]

II. DISCUSSION

2.1. Judicial Review in the Dual Structure of the Indonesian Judiciary

Implementation of the rule of law concept requires that all constitutional norms must be followed without exception. Consistency in applying constitutional provisions is known as the principle of constitutionalism. Tom Ginsburg depicts constitutionalism as an attempt to limit government under law, with an emphasis on limiting certain government bodies.[17] This principle is essentially a logical consequence of the implementation of the theory of the rule of law.[18] Gerhard Casper explains two implications of a comprehensive implementation of constitutionalism: (a) political restrictions and moral obligations are sacred as constitutional law; and (b) every social problem becomes a constitutional

[16] Ibnu Sina Chandranegara, "Defining Judicial Independence and Accountability Post Political Transition," *Constitutional Review* 5, no. 2 (2019): 295.

[17] Tom Ginsburg, "Constitutionalism: East Asian Antecedents," *Chicago-Kent Law Review* 88, no. 1 (2012): 12; *See* Rogers M. Smith, "Constitutionalism and the Rule of Law: Considering the Case for Antecedents," *Chicago-Kent Law Review* 88, no. 1 (2012): 37-40.

[18] T.R.S. Allan, "The Rule of Law as the Rule of Reason: Consent and Constitutionalism," *Law Quarterly Review* 115 (1999): 232; Furthermore, McIlwain explains the essential element of constitutionalism is a legal limitation on government. *See* Charles Howard McIlwain, *Constitutionalism: Ancient and Modern* (New York: Cornell University Press, 1947), 21.

problem (in the judicial review regime particularly), and thus, the law becomes heavily burdened.[19] Casper's explanation indicates that judicial review becomes one of the indicators in implementing constitutionalism, considering the shifting of socio-political issues into the constitutional law realm. Edward McWhinney noted that constitutional review is one of the striking trends in the development of constitutionalism and constitution-making in the post-World War II era.[20]

The expansion of judicial review is seen as an essential step toward greater protection of citizens' rights, thereby encouraging the creation of democracy around the world. Moreover, according to Ginsburg, judicial review is a central and essential feature of the principle of constitutionalism. The consistency in applying constitutional provisions is known as the principle of constitutionalism.[21] The expansion of judicial review encouraged the birth of a new political order called juristocracy, in which the power of the parliament in protecting the fundamental rights of citizens shifted to the judiciary. Ran Hirschl calls this condition new constitutionalism.[22]

In Indonesia, the establishment of the Constitutional Court through the third amendment of the 1945 Constitution was inseparable from the discussion of judicial review. The idea of an institution with judicial review authority had been discussed in the weeks ahead of Indonesia's independence. Mohammad Yamin put forward the idea during a meeting of the Investigating Committee for Preparatory Work for Independence (BPUPK) on 11 July 1945 but it was not accepted.[23] The discussion of judicial review resurfaced during the amendments

[19] Gerhard Casper, "Changing Concepts of Constitutionalism: 18th to 20th Century," *The Supreme Court Review* 10 (1989): 311.

[20] *See* Edward McWhinney, *Supreme Courts and Judicial Law-Making: Constitutional Tribunals and Constitutional Review* (Dordecht: Martinus Nijhoff, 1986), 1; *See also* Geoffrey R. Watson, "Constitutionalism, Judicial Review, and the World Court," *Harvard International Law Journal* 34, no. I (1993): 6.

[21] Margit Cohn, "Non-Statutory Executive Powers: Assessing Global Constitutionalism in a Structural-Institutional Context," *The International and Comparative Law Quarterly* 64, no. 1 (2015): 102; *See* Lisa Hilbink, "Assessing the New Constitutionalism," *Comparative Politics* 40, no. 2 (2008): 227; Bruce Ackerman, "The Rise of World Constitutionalism," *Virginia Law Review* 83, no. 4 (1997): 775.

[22] Ran Hirschl, "The Political Origins of the New Constitutionalism," *Indiana Journal of Global Legal Studies* 11, no. 1 (2004): 71.

[23] Yamin put forward his idea of an institution that could review laws against *adat* law, sharia, and the Constitution. However, the idea was rejected by Soepomo. *See* State Secretariat of the Republic of Indonesia, *Compilation of Minutes of Sessions of the Investigating Committee for Preparatory Work for Independence (BPUPKI) and the Preparatory Committee for Indonesian Independence (PPKI) in Connection with the Preparation of the 1945 Constitution* (State Secretariat of the Republic of Indonesia, n.d.), 168.

of the 1945 Constitution following the end of President Soeharto's New Order administration because of a legal vacuum in reviewing laws against the Constitution. After long and heated debates, the drafters of the constitutional amendments agreed to establish a new judicial institution to perform the judicial review of laws against the Constitution. The Constitutional Court is also equipped with constitutional authorities, as outlined in Article 24C paragraph (1) and paragraph (2) of the Constitution.

However, as mentioned earlier, the implementation of judicial review in Indonesia is conducted by both the Supreme Court and the Constitutional Court. The Supreme Court has the authority to perform a judicial review of regulations and ordinances to ensure their consistency with higher-level laws (regulatory review), while the Constitutional Court conducts a judicial review of laws against the Constitution (constitutional review). The Supreme Court retains its authority to perform regulatory review, previously regulated in the 1970 Judiciary Law.[24] Although the Constitution makes an apparent distinction between the judicial review authorities of the Supreme Court and the Constitutional Court, there are no explicit provisions on the relationship between the two courts when performing their respective judicial review authority.

Only one article in the 2003 Constitutional Court Law regulates the relationship between the two courts concerning judicial review. Article 55 of the 2003 Constitutional Court Law stipulates that a regulatory review by the Supreme Court must be stopped (*dihentikan*) if the law that is the basis for the regulatory review is itself being reviewed by the Constitutional Court, until there is a decision concerning the constitutionality of the law.[25]

However, Article 55 can be broadly interpreted. For instance, in Case No. 93/PUU-XV/2017, the petitioner filed for a review of Article 55 of the Constitutional Court Law. The petitioner claimed the Supreme Court had rejected its regulatory review petitions because the law that was the legal basis for the review was

[24] Law No. 14 of 1970 on Basic Provisions of the Judiciary, Article 26, 1970. The provision on regulatory review is also regulated in several decrees of the People's Consultative Assembly (MPR), such as MPR Decree No. VI/MPR/1973 and No. III/MPR/1978.

[25] Law No. 24 of 2003 on the Constitutional Court, Article 55.

being reviewed by the Constitutional Court.[26] The Constitutional Court decided the norm was conditionally unconstitutional and interpreted that the word "*dihentikan*" in Article 55 does not mean 'stopped' but 'suspended'. Thus, the regulatory review should be resumed after the Constitutional Court decides the constitutional review case.[27] Considering that the Constitutional Court's decisions should be executed, good faith from the Supreme Court to comply with its decisions is highly expected.

There was also a situation when the Supreme Court and the Constitutional Court held different stances on the same issue. The discrepancy was between the Constitutional Court's Decision No. 30/PUU-XVI/2018[28] and the Supreme Court's Decision No. 65 P/HUM/2018.[29] Both decisions concerned whether members of political parties could stand for election for the Regional Representative Council (DPD). The Constitutional Court held that political party functionaries could not stand for the DPD. In contrast, the Supreme Court decided that political party members could run for the DPD. In this case, the petitioners followed the decision that was most favorable to their interests.

The aforementioned cases show how the absence of an institutional relationship between the Constitutional Court and the Supreme Court leads to different interpretations, both in the context of "suspension of the regulatory review" and the "constitutional interpretation of a reviewed law". Therefore, a constitutional review decision that by law should be adhered to by a regulatory review decision can be "ignored" if the Supreme Court has a different stance in interpreting the case.

This condition raises the question of whether differing stances between the Supreme Court and the Constitutional Court can be justified based on an

[26] Constitutional Court Decision No. 93/PUU-XV/2017 on the Review of Law No. 8 of 2011 on the Amendement of Law No. 24 of 2003 on the Constitutional Court (2018), 6-7.
[27] Constitutional Court Decision No. 93/PUU-XV/2017 on the Review of Law No. 8 of 2011 on the Amendement of Law No. 24 of 2003 on the Constitutional Court.
[28] Constitutional Court Decision No. 30/PUU-XVI/2018 on the Review of Law No. 7 of 2017 on General Elections (2018).
[29] Supreme Court Decision No. 65 P/HUM/2018 on the Review of General Elections Commission (KPU) Regulation No. 26 of 2018 on the Second Amendment of KPU Regulation No. 14 of 2018 on the Individual Nomination for Regional Representative Assembly Elections (2018).

independent approach. P.N. Bhagwati emphasized that in theory, the concept of independence of the judiciary is not limited to independence from the legislative or the executive but is a much broader concept that encompasses independence from many other pressures and prejudices.[30] A further question arises as to whether it also applies to the relationship between judicial institutions, considering the disconnected functional relationship between the Supreme Court and the Constitutional Court. The next part of this discussion will elaborate on these dynamics, primarily on how the Constitutional Court handles the constitutional review of laws regulating the Supreme Court's authorities.

2.2. Duality of Judicial Power and Imbalanced Relationship between the Constitutional Court and the Supreme Court

As explained above, the division of judicial review authority between the Constitutional Court and Supreme Court affects the independence, impartiality and uniformity of the Indonesian judiciary. Furthermore, examining the implementation of constitutional review authority, especially in cases related to the Supreme Court's authorities, can help to understand how the Constitutional Court responds in circumstances by 'intervening in' or 'influencing' the Supreme Court's authorities.

Saldi Isra notes the potential for overlapping authorities between the two institutions could result in conflict and ineffective implementation of their judicial authorities.[31] Ideally, the distribution of authority between the two institutions should be followed by a clear demarcation between their respective authorities.[32] The Constitution does not place the two functions of the judiciary into the two institutions separately, as the Supreme Court and the Constitutional Court could each act as both a court of law and a court of justice.[33]

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[30] Yash Vyas, "The Independence of the Judiciary: A Third World Perspective," *Third World Legal Studies* 11, no. 1 (1992): 134–35. *See also* Bhagwati J. in *S.P. Gupta v President of India*, A.I.R. 1982 S.C. 149.

[31] Saldi Isra, "Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi [Authority Connectivity of the Supreme Court and Constitutional Court]," *Jurnal Hukum Dan Peradilan* 4, no. 1 (2015): 18.

[32] Ibid.

[33] According to Isra, the Constitutional Court acts as a court of justice when adjudicating disputed general election results, while the Supreme Court acts as a court of law when it performs the authority of regulatory review.

The implementation of constitutional review may affect the exercise of the Supreme Court's authorities in two circumstances. The first circumstance concerns the Supreme Court's power to conduct regulatory review. As described earlier, Article 55 provides a minimum connection between the Supreme Court and the Constitutional Court in their respective judicial review authorities. Therefore, the Constitutional Court shall notify the Supreme Court if there is a constitutional review submission.[34] If a law reviewed by the Constitutional Court is also the basis of a regulatory review by the Supreme Court, then the Supreme Court's review process should be suspended until the Constitutional Court hands down a decision.[35] Thus, the outcome of the regulatory review process in the Supreme Court will depend highly on the Constitutional Court's decision.

Ideally, the Supreme Court will follow the Constitutional Court decisions. According to Isra, there are two reasons why this is the case. First, the division of judicial review follows the hierarchy of legislation approach. This means the Supreme Court should comply with the Constitutional Court's interpretation of the reviewed law that becomes the legal basis for a regulatory review. Second, according to the theory of the validation of norms, lower-level regulations should be consistent with higher-level regulations.[36] However, as has been explained, there are some cases in which the Supreme Court has its own interpretation of a case.

The second circumstance in which the implementation of constitutional review may affect the exercise of the Supreme Court's authorities is related to laws that regulate such authorities. As mentioned previously, the Supreme Court can have "other authorities given by law".[37] Furthermore, it is highly possible that the Constitutional Court's constitutional review authority could influence and even intervene in the Supreme Court. The Constitutional Court could, through

[34] Undang-Undang tentang Mahkamah Konstitusi [Law on the Constitutional Court], UU No. 24 Tahun 2003, LN. No. 98 Tahun 2003 [Law No. 24 of 2003, SG. No. 98 of 2003], Article 53.
[35] Undang-Undang tentang Mahkamah Konstitusi (Law on the Constitutional Court), UU No. 24 Tahun 2003, LN. No. 98 Tahun 2003 [Law No. 24 of 2003, SG. No. 98 of 2003], Article 55.
[36] Isra, "Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi [Authority Connectivity of Supreme Court and Constitutional Court]," 29.
[37] The Indonesian Constitution, Article 24A (1).

a constitutional review decision, invalidate provisions on the Supreme Court's authorities stipulated in the law on the Supreme Court's authorities.

As of 2019, the Constitutional Court had made at least 38 constitutional review decisions related to the Supreme Court's authorities. The following table lists those 38 decisions from 2003 to 2019.

Table 1. Constitutional Court's Judicial Review Decisions Related to Supreme Court (2003-2019)

No.	Decision Number	Case	Verdict	Judgment Date
1	95/PUU-XVI/2018	Review of Law No. 14 of 1985 on the Supreme Court	Rejected	30 January 2019
2	85/PUU-XVI/2018	Review of Law No. 3 of 2009 on Second Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	24 January 2019
3	62/PUU-XVI/2018	Review of Law No. 14 of 1985 on the Supreme Court and Law No. 48 of 2009 on Judicial Power	Dismissed	30 October 2018
4	66/PUU-XIV/2016	Review of Law No. 23 of 2014 *jo.* Law No. 9 of 2015 on Regional Government, Law No. 14 of 1985 *jo.* Law No. 3 of 2009 on the Supreme Court.	Rejected	14 December 2017
5	69/PUU-XV/2017	Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court	Dismissed	26 October 2017
6	23/PUU-XV/2017	Review of Law No. 48 of 2009 on Judicial Power and Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court	Dismissed	19 October 2017
7	108/PUU-XIV/2016	Review of Law No. 14 of 1985 on the Supreme Court and Review of Law No. 48 of 2009 on Judicial Power	Rejected	26 July 2017

No.	Decision Number	Case	Verdict	Judgment Date
8	53/PUU-XIV/2016	Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 8 of 2011 *jo.* Law No. 24 of 2003 on the Constitutional Court	Partially Granted (Conditionally Unconstitutional)	19 July 2017
9	133/PUU-XIII/2015	Review of Law No. 14 of 2002 on the Tax Court, Law No. 28 of 2007 *jo.* Law No. 6 of 1983 on General Provisions and Tax Procedures, Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 48 of 2009 on Judicial Power	Rejected	11 January 2017
10	125/PUU-XIII/2015	Review of Law No. 22 of 2004 *jo.* Law No. 18 of 2011 on Judicial Commission and Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court	Dismissed	09 November 2016
11	92/PUU-XIII/2015	Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court	Dismissed	28 July 2016
12	30/PUU-XIII/2015	Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court	Rejected	31 May 2016
13	39/PUU-XIII/2015	Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 48 of 2009 on Judicial Power	Dismissed	22 March 2016
14	45/PUU-XIII/2015	Review of Law No. 14 of 1985 *jo.* Law No. 5 of 2004 *jo.* Law No. 3 of 2009 on the Supreme Court and Law No. 48 of 2009 on Judicial Power	Dismissed	10 December 2015
15	66/PUU-XIII/2015	Review of Law No. 14 of 1985 *jo.* Law No. 5 of 2004 *jo.* Law No. 3 of 2009 on the Supreme Court and Law No. 5 of 1960 on Basic Regulations of Agrarian Principles	Dismissed	07 December 2015

No.	Decision Number	Case	Verdict	Judgment Date
16	94/PUU-XIII/2015	Review of Law No. 22 of 2004 on the Judicial Commission, Law No. 27 of 2004 on the Truth and Reconciliation Commission, Law No. 14 of 1985 *jo.* Law No. 5 of 2004 *jo.* Law No. 3 of 2009 on the Supreme Court, Law No. 48 of 2009 on Judicial Power, and Law No. 24 of 2003 *jo.* Law No. 8 of 2011 on the Constitutional Court	Dismissed	11 November 2015
17	91/PUU-XII/2014`	Review of Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court	Rejected	19 March 2015
18	81/PUU-XII/2014	Review of Law No. 14 of 1985 on the Supreme Court	Rejected	11 March 2015
19	45/PUU-XII/2014	Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court	Rejected	23 December 2014
20	36/PUU-XI/2013	Review of Law No. 8 of 1981 on the Criminal Procedure Code, Law No. 48 of 2009 on Judicial Power, and Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court	Dismissed	06 March 2014
21	25/PUU-XI/2013	Review of Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court	Partially Rejected and Dismissed	09 January 2014
22	27/PUU-XI/2013	Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2011 *jo.* Law No. 22 of 2004 on the Judicial Commission	Granted	09 January 2014

No.	Decision Number	Case	Verdict	Judgment Date
23	42/PUU-XI/2013	Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, Law No. 39 of 2008 on State Ministries, Law No. 16 of 2004 on the Attorney General's Office, and Law No. 2 of 2002 on the Police of the Republic of Indonesia	Dismissed	10 September 2013
24	34/PUU-XI/2013	Review of Law No. 8 of 1981 on the Criminal Procedure Code	Granted	22 July 2013
25	28/PUU-X/2012	Review of Law No. 5 of 2004 on the Supreme Court and Law No. 16 of 2004 on the Attorney General's Office of the Republic of Indonesia	Rejected	19 September 2012
26	44/PUU-X/2012	Review of Law No. 8 of 1981 on the Criminal Procedure Code, Law No. 48 of 2009 on Judicial Power, and Law No. 14 of 1985 on the Supreme Court	Dismissed	26 June 2012
27	56/PUU-VIII/2010	Review of Law No. 14 of 1985 on the Supreme Court	Rejected	15 April 2011
28	10/PUU-IX/2011	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Dismissed	15 April 2011
29	64/PUU-VIII/2010	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Dismissed	28 February 2011

No.	Decision Number	Case	Verdict	Judgment Date
30	10/PUU-VIII/2010	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Dismissed	15 December 2010
31	16/PUU-VIII/2010	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Partially Rejected and Dismissed	15 December 2010
32	27/PUU-VII/2009	Formal Review of Law No. 3 of 2009 on Second Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	16 June 2010
33	23/PUU-V/2007	Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	14 January 2008
34	14-17/PUU-V/2007	Review of Law No. 23 of 2003 on General Election of the President and Vice President, Law No. 24 of 2003 on the Constitutional Court, Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, Law No. 32 of 2004 on Regional Government, and Law No. 15 of 2006 on the Financial Audit Board	Rejected	11 December 2007
35	007/PUU-IV/2006	Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 22 of 2004 on the Judicial Commission	Dismissed	20 June 2006
36	017/PUU-III/2005	Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court	Dismissed	04 January 2006

No.	Decision Number	Case	Verdict	Judgment Date
37	67/PUU-II/2004	Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates	Granted	15 February 2005
38	04/PUU-I/2003	Review of Law No. 14 of 1985 on the Supreme Court	Dismissed	30 December 2003

Source: Processed by Author, 2019

The above table shows 4 petitions granted,[38] 6 rejected[39] and 18 dismissed.[40] However, there are only 13 decisions closely related to the exercise of the Supreme Court's authorities. Some other decisions, such as Decision No. 92/PUU-XIII/2015 and Decision No. 39/PUU-XIII/2015, are also related to the exercise of the Supreme Court's authorities. In the first of those two cases, the applicants submitted that regulatory review trials in the Supreme Court should be conducted publicly, while the second case concerned internal supervision conducted by the Supreme Court. Both cases were dismissed because the applicants did not have legal standing, and therefore the decisions did not affect the implementation of the related provisions.

The 13 decisions closely associated with the exercise of the Supreme Court's authorities are detailed in the table below:

Table 2. Constitutional Court's Decisions Related to the Supreme Court's Authorities Stipulated in the Supreme Court Law (2003-2017)

No.	Decision Number	Case	Verdict	Explanation
1	85/PUU-XVI/2018	Review of Law No. 3 of 2009 on the Second Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	Asserting Constitutional Court Decision No. 30/PUU-XIII/2015.

[38] The Court declared the reviewed norms to be unconstitutional and revoked them.
[39] The Court held that the norm is constitutional.
[40] The Court held that the applicant does not have a legal standing, or the case submitted is not the Court's competence.

No.	Decision Number	Case	Verdict	Explanation
2	66/PUU-XIV/2016	Review of Law No. 23 of 2014 *jo.* Law No. 9 of 2015 on Regional Government, Law No. 14 of 1985 *jo.* Law No. 3 of 2009 on the Supreme Court.	Rejected	Confirming the authority of the Supreme Court to conduct regulatory review (to review lower-level regulations against higher laws and regulations under the laws in the Indonesian hierarchy of laws and regulations) is constitutional.
3	108/PUU-XIV/2016	Review of Law No. 14 of 1985 on the Supreme Court and Review of Law No. 48 of 2009 on Judicial Power	Rejected	Asserting that Reconsideration of a judgment that has become final and binding in a case, other than a criminal case, can only be done once.
4	133/PUU-XIII/2015	Review of Law No. 14 of 2002 on the Tax Court, Law No. 28 of 2007 *jo.* Law No. 6 of 1983 on General Provisions and Tax Procedures, Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 48 of 2009 on Judicial Power	Rejected	Asserting that Reconsideration of a judgment that has become final and binding in a case, other than a criminal case, can only be done once.
5	30/PUU-XIII/2015	Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court	Rejected	Confirming that the Supreme Court does not need to conduct a public hearing in regulatory review cases. However, the reading of the decision should be open to the public.
6	91/PUU-XII/2014	Review of Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court	Rejected	Confirming that restriction of cassation remedies in certain circumstances is constitutional.

No.	Decision Number	Case	Verdict	Explanation
7	45/PUU-XII/2014	Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court	Rejected	Confirming that restriction of cassation remedies in certain circumstances is constitutional.
8	34/PUU-XI/2013	Review of Law No. 8 of 1981 on the Criminal Procedure Code	Granted	Held that Reconsideration of a judgment that has become final and binding in a criminal case can be done more than once.
9	28/ PUU-X/2012	Review of Law No. 5 of 2004 on the Supreme Court and Law No. 16 of 2004 on the Attorney General's Office of the Republic of Indonesia	Rejected	Confirming that restriction of cassation remedies in certain circumstances is constitutional.
10	56/PUU-VIII/2010	Review of Law No. 14 of 1985 on the Supreme Court	Rejected	Held that the time limitation for the submission for Reconsideration of a judgment that has become final and binding is constitutional.
11	16/PUU-VIII/2010	Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code	Partially Rejected and Dismissed	Held that limitation for the submission for Reconsideration of a judgment that has become final and binding is constitutional.
12	23/ PUU-V/2007	Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court	Rejected	Confirming that restriction of cassation remedies in certain circumstances is constitutional.
13	67/PUU-II/2004	Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates	Granted	Held that the Supreme Court cannot supervise Advocates and Notaries.

Source: Processed by Authors, 2019

Table II above, shows that 11 decisions rejected the petitions, and 2 granted the petitions. Mostly, the disputed provisions are related to the judicial function of the Supreme Court. One of those is related to the supervision function. Also, there are five decisions concerning the authority to conduct a reconsideration, four decisions concerning cassation remedies, three decisions on regulatory review, and one decision on the supervision function of the Supreme Court.

2.2.1. The Case related to the Supervision Function of the Supreme Court

Constitutional Court Decision No. 67/PUU-II/2004 is the first decision affecting the Supreme Court's authority, especially regarding supervision. The Applicant stated in the submission that Article 36 of the Supreme Court Law, which regulates that the Supreme Court and the Government conduct oversight for Advocates and Notaries, is inconsistent with Article 24(1) and (3) of the Indonesian Constitution. Article 24(1) regulates the independence of the judiciary, while Article 24(3) states that other bodies whose functions are related to judicial power are regulated by law. Furthermore, the elucidation of Article 36 of the Supreme Court Law mentions that in carrying out their duties concerning the judiciary, Advocates and Notaries are under the supervision of the Supreme Court, which can impose sanctions in the form of temporary suspension and permanent suspension.

The Applicant argued that if Article 36 remained in force because it was not amended in Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court, it might result in legal uncertainty because of the dualism of supervision, primarily for Advocates, as according to Law No. 18 of 2003 on Advocates (Advocates Law), the supervision of the Advocate profession is conducted by an Advocates Organization.[41] The Applicant added that Article 36 also limits the rights and independence of Advocates to perform their duties because their appointment and dismissal – which under the Advocates Law is conducted by an Advocates Organization – is still conducted by the Supreme

[41] Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates (2003), 3-4.

Court and the Government, which sometimes have undertaken the supervision function arbitrarily.[42]

The Constitutional Court stated in its legal consideration that the independence of a profession cannot be interpreted as being free from supervision. However, supervision cannot be construed in such a way that it makes it difficult to distinguish between 'supervision' and 'intervention', which might hamper Advocates in conducting their duties independently.[43] Moreover, the Constitutional Court stated that lawmakers were not sufficiently careful in amending the Supreme Court Law, as Article 36 was one of the substances of discussion in the amendment of the 1985 Supreme Court Law process in the Legislative branch.[44]

Although the Constitutional Court disagreed with the constitutional basis of the petition (as the Applicant said, Advocates have constitutional rights based on Article 24(1) and (3) of the Constitution), the Court held that Article 36 of the Supreme Court Law is unconstitutional. The reason is that its implementation creates legal uncertainty, which is inconsistent with Article 28D(1) of the Constitution, which states that every person has the right of fair legal certainty. Therefore, the petition was granted, and the Court stated that relevant professional organizations should exercise the authority to supervise Advocates and Notaries.[45] However, even though the Court stated that Article 36 is unconstitutional, it does not mean that Advocates are free from the supervision of external parties. The Court added that the government and the judiciary still have inherent power to supervise Advocates outside their professional duties regulated in the Advocates Law. This was the first Constitutional Court decision that annulled the Supreme Court's authority.

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[42] Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates, 4.

[43] Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates, 26-27.

[44] Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates, 27.

[45] Constitutional Court Decision No. 67/PUU-II/2004 on the Review of Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court and Law No. 18 of 2003 on Advocates, 32-33.

2.2.2. Cases related to the Judicial Function of the Supreme Court

As mentioned above, 12 of the Constitutional Court's 13 constitutional review decisions directly related to the Supreme Court's authority concern the Supreme Court's judicial function. Three of the matters reviewed concern the judicial function of the Supreme Court, namely: (1) the authority to examine and decide upon cassation request; (2) the authority to conduct regulatory review; and (3) reconsideration of a decision that has become final and binding.

First, the authority to examine and decide upon a cassation request regulated in Chapter IV Part 2 of the Supreme Court Law. Article 45(2) of the Supreme Court Law restricts the cassation request in three circumstances: a pretrial decision; a criminal case that is punishable by a maximum imprisonment of one year and/or a fine; and state administrative cases in which the object of the lawsuit is a decision of a regional official whose coverage applies to the concerned region.[46] Therefore, the Applicant cannot submit a cassation request for these three matters.

As mentioned, the Constitutional Court has made four decisions regarding this authority. On those decisions, the Court held that the restriction in the cassation request is constitutional. The Court argued that for administrative cases, the limitation is not violating citizens' rights to justice as there are other avenues, such as appeal and Reconsideration.[47] Furthermore, for pre-trial decisions and criminal cases punishable by a maximum imprisonment of one year, the Court held that the restriction is reasonable as it is in line with the simple, fast, and low-cost principles, as well as the limitation of rights mentioned in Article 28J(2) of the Constitution.[48]

[46] Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court (2011), Article 45(2).

[47] Constitutional Court Decision No. 23/PUU-V/2007 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court (2008), 53. Constitutional Court Decision No. 28/PUU-X/2012 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court and Law No. 16 of 2004 on the Attorney General's Office (2012), 25.

[48] Constitutional Court Decision No. 45/PUU-XII/2014 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court (2014), 38. Constitutional Court Decision No. 91/PUU-XII/2014 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court Amended by Law No. 3 of 2009 (2015), 29-30.

Second, the decision on regulatory review authority. The Applicant's petition stated that the trial for regulatory review in the Supreme Court should be open to the public.[49] Law No. 3 of 2009 (Supreme Court Law) does not regulate the specific procedural measures for regulatory review in the Supreme Court. It only states that the examination of the regulatory review petition is conducted by the Supreme Court no later than 14 working days after the receipt of the petition.[50] In practice, there is no public trial in a regulatory review process. It also can be seen from the Applicant's expert opinion, which provided a table showing the time differences between regulatory review processes, one of which took up to two years.[51] Moreover, the verdict reading is not conducted in a public trial. The regulatory review decisions are delivered to the parties by sending a copy of the decision with a letter.[52]

The Applicant added that principally, the Supreme Court's examination should be open to the public to ensure the objectivity of the Supreme Court by being accountable for a fair hearing and giving a reasonable opportunity to the parties to deliver their arguments or objections, as well as presenting experts or witnesses (*audi et alteram partem*).[53] Furthermore, as the object of regulatory review is regulations below law that apply to the public (either regionally or nationally), the Applicant argued that regulatory review also has a public interest, and thus, a public trial in a regulatory review will encourage accountability and objectivity of the Supreme Court in its examination.

In its legal consideration, the Constitutional Court stated that based on Article 13(1) and (2) of Law No. 48 of 2009 on Judicial Power (Judicial Power Law) and Article 40 of the Supreme Court Law, all examination and reading of the verdict should be conducted in a public trial unless the law specifies otherwise. The Constitutional Court said the Supreme Court's decisions are legally binding

[49] Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 12.
[50] Law No. 3 of 2009 on the Second Amendment of Law No. 14 of 1985 on the Supreme Court (2009), Article 31(4).
[51] Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 25-26.
[52] Law No. 8 of 2011 on the Amendment of Law No. 24 of 2003 on the Constitutional Court, Article 6.
[53] Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 10.

only if read in a public trial. Therefore, the regulatory review process should follow these provisions.[54]

As the Constitutional Court affirmed that Article 31A(4) of the Supreme Court Law does not implicitly and explicitly regulate that regulatory review should be conducted in a public trial, the principles adopted in Article 13(1) and (2) of the Judicial Power Law and Article 40(2) of the Supreme Court Law should become the basis for examination and reading a regulatory review verdict in the Supreme Court.[55] Therefore, the Constitutional Court held that Article 31A(4) of the Supreme Court Law would be unconstitutional if not interpreted to mean that the examination and the reading of the verdict of regulatory review are conducted in a public trial.

However, even though the Constitutional Court seemed to agree with the Applicant, the Court held there is no constitutionality contradiction between Article 31A(4) of the Supreme Court Law and the Indonesian Constitution. Furthermore, the Constitutional Court added that the time limit regulated in the Supreme Court Law becomes an obstacle for the Supreme Court to conduct the examination and the reading of the verdict for the regulatory review in a public trial. The Constitutional Court also mentioned that the time limit, the mechanism for the examination, and the reading of the verdict for the regulatory review is the authority of legislators (open legal policy) and is not a norm of constitutionality.[56]

The argument above is corroborated in Constitutional Court Decision No. 85/PUU-XVI/2018, which stated that the legal consideration in Decision No. 30/PUU-XIII/2015 *mutatis mutandis* (having changed what needs to be changed) applies to legal consideration in the Decision under consideration.[57] Moreover, one of the Constitutional Court justices, Saldi Isra, presented a dissenting opinion that the

[54] Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 39-40.
[55] Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 41.
[56] Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 42-43.
[57] Constitutional Court Decision No. 85/PUU-XVI/2018 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court (2019), 41-42.

petition should be granted, considering the principle of trials being open to the public, and therefore, the Legislative branch should adjust the law in accordance with that principle.[58] The Constitutional Court's argument concerning the time limit seems to contradict the data presented by the Applicant's expert, which showed that the process can take from two months up to two years – which is more than the 14 days stipulated in the Supreme Court Law.[59]

Based on the above considerations, the Constitutional Court seems to 'play safe' by trying to avoid intervening in the authority of other institutions, specifically the Legislative branch and the Supreme Court. Regarding the Legislative branch, it is related to the stipulation of the time limit and the regulatory review mechanism. Even though the Constitutional Court can make a 'conditional decision', it did not exercise it in the above case. Through the 'conditional decision', the Court can present a condition for an article or law's enforceability or invalidity. As the case related to the Supreme Court, if the Constitutional Court had granted the petition, potentially, it might cause tension in the relationship between the Supreme Court and Constitutional Court – which has happened before because of Constitutional Court Decision No. 34/PUU-XI/2013, as it gives the Supreme Court 'more work'. After all, the examination and the reading of the verdict for regulatory review in the Supreme Court should be conducted in a public trial. It is also the same in the constitutional review decisions related to the restriction of the cassation for certain circumstances stipulated in the Supreme Court Law, which also shows how the Constitutional Court seems to 'play safe'.

Third, constitutional review on the Supreme Court's authority to conduct Reconsideration. The conflict between the two apex branches of the Indonesian judiciary can be seen from the implementation of Constitutional Court Decision No. 34/PUU-XI/2013 mentioned above. Through this decision, the Constitutional Court invalidated Article 263(3) of Law No. 8 of 1981 on the Criminal Procedure Code (Criminal Procedure Code Law), which regulates that Reconsideration

[58] Constitutional Court Decision No. 85/PUU-XVI/2018 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 45-46.
[59] Constitutional Court Decision No. 30/PUU-XIII/2015 on the Review of Law No. 3 of 2009 *jo.* Law No. 14 of 1985 on the Supreme Court, 25-56.

of a decision that has become final and binding can only be done once. This provision is not only regulated in the Criminal Procedure Code Law but also in the Supreme Court Law and Judicial Power Law – which previously had been tested in the Constitutional Court, although the Court rejected the petition.[60]

The Constitutional Court stated there is a difference between Reconsideration in criminal cases and other legal spheres, such as civil or administrative ones. In the criminal case, what matters is material truth. This is different from civil cases, which emphasize formal truth. Furthermore, as Reconsideration is an extraordinary legal remedy – which is historically and philosophically intended to protect the convicted person's interests, it is required to obtain justice and material truth.[61]

Furthermore, the Constitutional Court argued that justice cannot be limited by a time limit stipulated in related laws. It is possible that, after the Supreme Court hands down a decision for a Reconsideration submission, the convicted person might have found another essential new fact (*novum*) that will change the final and binding criminal decision. However, it cannot be used because a submission for Reconsideration can only be made once, and therefore, justice for the convicted person cannot be achieved. Based on the argument above, the Constitutional Court held that the limitation for a Reconsideration submission in criminal cases is contrary to the principle of justice upheld by the judicial power in Indonesia to enforce law, justice and the state of law principle.[62] Therefore, the Constitutional Court held that Article 268(3) of the Criminal Procedure Code Law is unconstitutional.

After the Constitutional Court handed down that decision in July 2013, the Supreme Court in December 2014 issued Supreme Court Circular Letter No. 7 of

[60] Constitutional Court Decision No. 56/PUU-VIII/2010 on the Review of Law No. 14 of 1985 on the Supreme Court (2011); Constitutional Court Decision No. 16/PUU-VIII/2010 on the Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code (2010).

[61] Constitutional Court Decision No. 16/PUU-VIII/2010 on the Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 jo. Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code, 85-86.

[62] Constitutional Court Decision No. 16/PUU-VIII/2010 on the Review of Law No. 48 of 2009 on Judicial Power, Law No. 3 of 2009 *jo.* Law No. 5 of 2004 *jo.* Law No. 14 of 1985 on the Supreme Court, and Law No. 8 of 1981 on the Criminal Procedure Code, 88.

2014 on Submission for Reconsideration of a Judgment which has Become Final and Binding in a Criminal Case (SEMA No. 7 of 2014). Paragraph 3 of SEMA No. 7 of 2014 states that submission for Reconsideration of criminal justice, which has become final and binding, is limited to one time only.[63] This SEMA is inconsistent with the Constitutional Court's above decision, which said that Reconsideration of a final and binding criminal justice decision could be done more than once.

The Supreme Court argued that other provisions also regulate the submission for Reconsideration of a judgment (in a more general sense), such as Article 66 of the Supreme Court Law and Article 24(2) of the Judicial Power Law, which the Constitutional Court did not invalidate.[64] These provisions have similar wording to Article 263 (3) of the Criminal Procedure Code Law, limiting the submission for Reconsideration of a judgment that has become final and binding. Thus, like the other provisions that restrict the request for Reconsideration still in force, the Supreme Court chooses to follow the provisions in these two laws and order the heads of District Courts to dismiss any submission for Reconsideration of a criminal judgment that was submitted more than once.[65]

After Constitutional Court handed down Decision No. 34/PUU-XI/2013, there were two more decisions on Reconsideration for a final and binding judgment, namely Constitutional Court Decision No. 66/PUU-XIII/2015[66] and Constitutional Court Decision No. 45/PUU-XIII/2015[67]. In these two decisions, the Court dismissed the petition because the petition's substance was the same as Case No. 34/PUU-XI/2013, even though the reviewed Article(s) were different. Furthermore, through Constitutional Court Decision No. 108/PUU-XIV/2016,[68]

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63 Supreme Court of the Republic of Indonesia, *Circular Letter of the Supreme Court of the Republic of Indonesia No. 7 of 2014 on Submission for the Reconsideration*. Para 3.

64 Supreme Court of the Republic of Indonesia, Circular Letter of the Supreme Court of the Republic of Indonesia. Paras 1-2.

65 Supreme Court of the Republic of Indonesia, Circular Letter of the Supreme Court of the Republic of Indonesia. Para 5.

66 Review of Law No. 14 of 1985 *jo.* Law No. 5 of 2004 *jo.* Law No. 3 of 2009 on the Supreme Court and Law No. 5 of 1960 on the Basic Regulations of Agrarian Principles, 7 Dec. 2015.

67 Review of Law No. 14 of 1985 *jo.* Law No. 5 of 2004 *jo.* Law No. 3 of 2009 on the Supreme Court and Law No. 48 of 2009 on the Judicial Power, 10 Dec. 2015.

68 Review of Law No. 14 of 1985 on the Supreme Court and Review of Law No. 48 of 2009 on Judicial Power, 18 July 2017.

which reviewed Article 66(1) of the Supreme Court Law and Article 24(2) of the Judicial Power Law, the Constitutional Court, in its legal consideration, affirms that because Article 268(3) of Criminal Procedure Code Law is unconstitutional and does not have legally binding power, Constitutional Court Decision No. 34/PUU-XI/2013 should also apply to the reviewed Articles above, especially in criminal cases.[69] Therefore, these provisions do not apply in criminal cases because their substance is the same as Article 263(3) of the Criminal Procedure Code Law, which the Constitutional Court invalidated.

However, even though the Constitutional Court affirmed that the limit for Reconsideration of a criminal judgment is unconstitutional, in this decision, the Court held that Article 66(1) of the Supreme Court Law and Article 24(2) of the Judicial Power Law is constitutional, except for Reconsideration in criminal cases. The reason is the difference between criminal cases and other cases, such as civil cases. In a criminal case, the goal is to find material truth and protect human rights from the arbitrariness of the state, especially regarding the right to life and other fundamental rights.[70] Therefore, there should be different treatment between criminal and other cases for Reconsideration.

Nevertheless, as the verdict in the decision above "rejected the petition", the concerned parties in the constitutional review sometimes did not follow up the Constitutional Court's decision that rejected the petition because they thought that constitutional obligations arise from a decision that grants a petition, that is, stating that an article(s) or a law(s) is unconstitutional.[71] Thus, there might be a tendency that the Constitutional Court's decision above might not be followed up, and the Supreme Court will still enforce SEMA No. 7 of 2014.

Through this decision, it seems that the Constitutional Court tried to respond to the action taken by the Supreme Court. Nevertheless, this condition also

[69] Constitutional Court Decision No. 45/PUU-XII/2014 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court, 56.

[70] Constitutional Court Decision No. 45/PUU-XII/2014 on the Review of Law No. 5 of 2004 on the Amendment of Law No. 14 of 1985 on the Supreme Court, 58.

[71] Syukri Asy'ari, Meyrinda Rahmawaty Hilipito, and Mohammad Mahrus Ali, "Model Dan Implementasi Putusan Mahkamah Konstitusi Dalam Pengujian Undang-Undang (Studi Putusan Tahun 2003–2012) [Model and Implementation of Constitutional Court's Decisions in Reviews of Law (Case Study of Constitutional Court Decisions of 2003–2012)]," *Jurnal Konstitusi* 10, no. 4 (2013): 685.

raises the question of whether the Supreme Court Circular Letter (SEMA) can 'invalidate' the Constitutional Court's decision and whether the Constitutional Court's arguments in the legal consideration of the decision above can 'invalidate' SEMA No. 7 of 2014, as the legally binding force of the legal consideration in the Constitutional Court's decision is still debatable. It is interesting to see how the Supreme Court would react to the Constitutional Court's decision above, as the Constitutional Court has countered the Supreme Court's argument that said the limitation for Reconsideration of a criminal judgment which has become final and binding, still applies based on Article 66(1) of the Supreme Court Law and Article 24(2) of Judicial Power Law.

Some case laws above show that Constitutional Court decisions can directly and significantly affect the Supreme Court. The Constitutional Court's decisions can contribute to the addition or reduction of the Supreme Court's authorities, stipulated in some laws. However, the condition above demonstrates one of the weaknesses of the Constitutional Court's decisions.

As explained above, according to the Constitution, the Constitutional Court Law, and the Judicial Power Law, the Constitutional Court's decisions are final and binding. However, its decisions do not have executorial power like a criminal decision, which the Prosecutor executes after it has become final and binding. Therefore, the implementation of Constitutional Court decisions, especially constitutional review decisions, highly depends on the obedience of other state institutions such as the House of Representatives, the Government, and the Supreme Court. Therefore, there are no consequences for other state institutions if they do not follow up on Constitutional Court decision, except for decisions that state an article(s) is unconstitutional because it no longer has a legally binding force.

The discussion above illustrates that the duality of judicial power in the Indonesian judiciary unconsciously raises the potential for the Constitutional Court's intervention in the Supreme Court. The constitutional design of the duality of judicial review authority unintentionally triggered tension between

the Constitutional Court and the Supreme Court, especially regarding the constitutional review of the Supreme Court's authorities regulated in law. Furthermore, as the Indonesian Constitution states that the Supreme Court may have other authorities given by law, in addition to those mentioned in Article 24A paragraph (1) of the Constitution, the Constitutional Court also has the potential to invalidate the Supreme Court's authorities regulated in a law if it is submitted for a constitutional review. This has been shown, for instance, in the case on the authority of Reconsideration by the Supreme Court, as explained above. This condition conceptually affects the rule of law enforced by an independent judiciary.[72]

III. CONCLUSION

To conclude, Article 24 paragraph (1) of the Indonesian Constitution guarantees the independence of the judiciary. However, the division of judicial review authority based on a hierarchical approach indirectly created an 'imbalanced relationship', resulting from the imbalanced functional arrangement between the Constitutional Court and the Supreme Court. On the one hand, the Constitutional Court could directly affect the implementation of the Supreme Court's authorities, especially those regulated in laws. However, it does not apply the other way around. It is unlikely that the Supreme Court's regulatory review decisions can affect the implementation of the Constitutional Court's authorities. The reason is that the object of regulatory review by the Supreme Court is regulations under the law, which does not have a significant consequence on the exercise of the Constitutional Court's authorities.

Moreover, the case laws above show that, although some decisions seem to 'intervene' in the Supreme Court and trigger tension between these two courts, other decisions illustrate how the Constitutional Court seems to 'play safe' by not intervening in the Supreme Court. This demonstrates how the Constitutional Court tries to maintain the 'imbalanced relationship' in the judiciary caused by

[72] David Boies, "Judicial Independence and the Rule of Law," *Washington University Journal of Law & Policy* 22 (2006): 57; Gretchen Helmke and Frances Rosenbluth, "Regimes and the Rule of Law: Judicial Independence in Comparative Perspective," *Annual Review of Political Science* 12 (2009): 347.

the division of judicial review authority through the third amendment to the Constitution.

Further questions arise on whether the Indonesian Constitution allows a judicial institution to 'influence' or 'intervene in' another judicial institution with the same position and independence at the apex of the Indonesian judiciary, even though Article 24 paragraph (1) guarantees its independence. Additionally, is the Supreme Court's non-compliance toward the Constitutional Court's decisions constitutionally allowed in order to balance the imbalanced relationship?

The authors argue that the 'imbalanced relationship' between the two apex courts of the Indonesian judiciary can be resolved through a clear and connected functional differentiation, especially in judicial review authority. Ideally, as mentioned by Isra, the authority to perform a judicial review should be given only to the Constitutional Court.[73] However, this change can only be accommodated through the amendment of the Constitution.

Another radical change that can be adopted is the mechanism of constitutional question, in which a judge from an ordinary court adjudicating a case can ask the Constitutional Court about the constitutionality of the law on which the case is based.[74] Ideally, the constitutional question should be adopted through the amendment of the Constitution, although there can be a soft adoption through the revision of Article 55 of the Constitutional Court Law. The Legislative branch could make a more apparent connection between the Constitutional Court and the Supreme Court in performing judicial review authority, primarily when law reviewed by the Constitutional Court is being used as a legal basis for a regulatory review.

In a more practical sense, the way to achieve a balanced relationship between the Supreme Court and the Constitutional Court relies on to what extent the Constitutional Court could restrain itself when handling cases related to the

[73] *See* Isra, "Titik Singgung Wewenang Mahkamah Agung Dengan Mahkamah Konstitusi [Authority Connectivity of Supreme Court and Constitutional Court]," *Jurnal Hukum dan Peradilan* 4, no. 1 (2015): 18–19.

[74] I Dewa Gede Palguna, "Constitutional Question: Latar Belakang Dan Praktik Di Negara Lain Serta Kemungkinan Penerapannya Di Indonesia (Constitutional Question: Background and Its Practices in Other Countries and the Opportunity to Adopt in Indonesia)," *Jurnal Hukum Ius Quia Iustum* 17, no. 1 (2010): 2.

Supreme Court. The Constitutional Court has used this approach in many instances explained above. In a country that uses a dual structure of the judiciary, the concept of judicial restraint should be adjusted not only in the interplay between the executive, legislative and judiciary but also between the judicial institutions. The awareness of the Constitutional Court to implement judicial restraint will lead to judicial deference to the Constitutional Court's decisions.

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Conflict Resolution in Human Rights Cases: The Role of the Supreme Court of Canada

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Abstract

This paper examines the role of the Supreme Court of Canada (SCC) in resolving human rights conflicts and balancing individual and collective rights. With a multiple control mission, the Court must interpret the Constitution and resolve disputes over competing rights and interests, based on the principle of constitutional democracy. This paper specifically focuses on the SCC's role in conflict resolution in human rights cases, especially in the complex legal framework of protection existing in Canada. It also addresses how the Court's rulings may affect the protection of fundamental rights under the Canadian Charter, illustrated by some key examples from the Court's caselaw. To this end, the first part provides a descriptive overview of the complex fabric of human rights protection in the Canadian constitutional framework. The second part discusses the SCC's role in protecting human rights within the Canadian legal system. Ultimately, this paper underscores the fundamental role of a Supreme Court in protecting human rights in situations of multiple rights conflicts.

Keywords: Apex Courts, Balancing Rights, Canadian Charter of Rights and Freedoms, Constitutional Courts, Conflicting Rights, Supreme Court of Canada.

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I. INTRODUCTION

From 4-7 October 2022, the 5th Congress of the World Conference on Constitutional Justice (WCCJ) took place in Bali, Indonesia, bringing together constitutional law experts from around the globe to exchange opinions and experiences on matters of peace and constitutional justice. Within the WCCJ, the 5th Indonesian Constitutional Court International Symposium had the theme "Constitutional Court and Conflict Resolution" to promote constitutional justice, "understood as constitutional review including human rights caselaw – as a key element for democracy, the protection of human rights and the rule of law".[1] In Canada, these fundamental principles are overseen by the Supreme Court of Canada (SCC). As an apex court,[2] the SCC has a multiple control mission: judicial review, and the settlement of disputes between the State and individuals, as well as a court of final appeal. In this context, this paper aims to discuss the role of the SCC in resolving conflicts in human rights cases.

The legal framework for the protection of human rights in Canada is a complex one, where human rights are guaranteed by the Canadian Constitution as well as federal, provincial and territorial laws. Within the Canadian legal system, rights are not absolute, and often a balancing act between conflicting rights, or opposing interests (i.e., individual and societal) is necessary. Limiting human rights is a delicate task that needs to follow a clear legal framework. When human rights disputes arise, the crucial role of the SCC is evident to establish the rule of law and restore societal balance.

When interpreting the Canadian Constitution, the SCC can either promote or hinder the rule of law and public confidence in the Canadian legal system. Where the Court's jurisprudence is consistent in resolving a constitutional dispute, any potentially conflicting party can know its rights[3] based on established caselaw.

In this context, this paper examines the following research questions: the role of the SCC in resolving conflicts between competing rights as well as in

[1] Venice Commission, "Concept Paper and Questionnaire" (Paper (published) presented for the 5th Congress of the World Conference on Constitutional Justice at Bali, 2021).

[2] Concerning apex courts, see Jean-François Gaudreault-Desbiens, "The Role of Apex Courts in Federal Systems: Beyond the Law or Politics Dichotomy," *Jus Politicum* 17, no. 1 (2017): 171.

[3] In this paper, the terms "human rights" and "fundamental rights" are used interchangeably.

maintaining the balance between individual and collective rights. The SCC, as a relatively new court, with a dual mandate, has interpreted the Constitution and established a solid caselaw on human rights protection, based on the principle of a constitutional democracy. The Court has thus had to guarantee the protection of human rights as well as resolve dispute in matters of conflicting rights and interests. This paper also discusses how the Court's rulings may affect the protection of fundamental rights under the Canadian Constitution based on analyzing two key illustrative examples from the Court's caselaw in criminal law matters.

To analyze the role of the SCC in resolving human rights conflicts, this paper focuses on two interconnected aspects that address the research question. In Part I, this paper provides a descriptive overview of the complex fabric of human rights protection within the Canadian legal framework. Relying on this foundational background, Part II examines the crucial role of the SCC in protecting human rights within the Canadian legal system. Together, they aim to explain how the SCC has exercised its role as an apex court and the "guardian" of the Constitution over the past decade, and how its established jurisprudence has worked to protect human rights in some complex cases. Ultimately, this paper anticipates some lessons about the essential role of an apex court such as the SCC in protecting human rights in situations of conflict of multiple rights.

II. THE MULTIDIMENSIONAL FABRIC OF HUMAN RIGHTS PROTECTION IN THE CANADIAN CONTEXT

The SCC is the highest court in Canada. It is also the equivalent of a Constitutional Court in Canada. Within the Canadian federal system, the SCC is an apex court. As has been argued, apex courts are "the highest judicial decision-maker within a federation, which has jurisdiction to decisively decide federalism-related cases, and whose rulings are not subject to any form of further review".[4] As such, the SCC has a crucial role in protecting human rights and resolving disputes, especially in cases of multiple rights conflicts. In examining this matter, this paper provides a descriptive overview of how rights are protected

[4] Gaudreault-Desbiens, "The Role of Apex Courts," 172.

within the Canadian legal framework. This will pave the way for an appreciation of the SCC, an apex court, as opposed to a constitutional court, given that it can decide questions of a constitutional nature (e.g., conflict of constitutional rights) as well as conflicts stemming from provincial or federal human rights legislation. Thus, understanding the framework for human rights protection in the Canadian context requires an overview of Canadian constitutional history. By referring to Canadian federalism (1.1), one can understand the different levels of protection of human rights. In Canada, an individual's human rights are protected by the Constitution (1.2), as well as federal, provincial and territorial laws (1.3).[5]

2.1. The Canadian Constitutional Framework: An Overview

The starting point of the Canadian constitution is "[w]hereas" (in French "considérant"), a word from which Canada's confederation was formed. One might say that Canadian constitutional justice is a story of conflict and compromise. Initially occupied by indigenous peoples and communities, Canadian territory was colonized by Europeans during the 15th and 16th centuries. From the start, French and British colonization led to intercolonial conflicts until the British Conquest, which resulted in the creation of the Dominion of Canada by the Fathers of Confederation. Officially, the creation of Canada came from the British North America Act, passed by the British Parliament on 1 July 1867. Also known as the Constitution Act, 1867, this founding legislation established Canada as a constitutional monarchy, a state form inspired by the Franco-British monarchical heritage of the first settlers,[6] although "with a Constitution similar in Principle to that of the United Kingdom".[7]

The Constitution Act, 1867[8] thus established the functioning of the Canadian federal parliamentary system, in which the Crown remains the basis for separating

5 Canadian Heritage, "How Your Rights Are Protected," Canada.ca, accessed 2 August 2022.
6 Carolyn Harris, "Monarchie Constitutionnelle," The Canadian Encyclopedia.ca, accessed 2 August 2022.
7 Constitution Act, 1867, Articles 30 & 31 Victoria, c. 3 (U.K.) of 1867.
8 Constitution Act, 1867, Articles 91, 30 & 31 Victoria, c. 3 (U.K.) of 1867. Between 1871 and 1975, other British statutes amended the "Constitution Act, 1867," including the Statute of Westminster, 1931, which granted legislative sovereignty to the Canadian Parliament, and the British North America Act, 1949 (No. 2), which authorized the Parliament of Canada to amend constitutional provisions falling strictly within its federal jurisdiction "to make Laws for the Peace, Order, and Good Government of Canada, in relation to all matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."

the executive, legislative and judicial powers. This led to (1) the formation of the executive power of the federal government, (2) the division of legislative powers between Parliament and the provincial legislatures,[9] and (3) the division of the judicial system into federal and provincial responsibilities (independent of the first two).[10] As "the Supreme Law of Canada",[11] the Canadian Constitution (i.e., Constitution Act, 1867 and Constitution Act, 1982)[12] provides the "fundamental rules and principles" of a democratic government.[13] It also reaffirms Canada's dual legal system, that is, Canada is bijural, having both common law and civil law systems,[14] and bilingual, having English and French as official languages.[15] Today, the Canadian territory, composed of ten provinces and three territories, is headed by the Prime Minister (the Head of Government), appointed by the Governor General as the representative of the British monarch (the Head of State), who also appoints judges.

2.2. Human Rights Enshrined in the Canadian Constitution

The Canadian Charter of Rights and Freedoms, 1982[16] (Canadian Charter) is "the official name for Part I of the Constitution Act, 1982 (contained in s. 1 to 33)".[17] It guarantees different types of rights and freedoms, such as fundamental

[9] Constitution Act, 1867, Articles 91–95, 30 & 31 Victoria, c. 3 (U.K.) of 1867. (VI. Distribution of Legislative Powers). Powers of the Parliament – Legislative Authority of Parliament of Canada under sect. 91 and Exclusive Powers of Provincial Legislatures – Subjects of exclusive Provincial Legislation under sect. 92. In concrete terms, a federal system means that both the Parliament of Canada and the provincial and territorial legislatures have the jurisdiction to make laws. However, they have different powers: Parliament can legislate for all of Canada on matters assigned by the Constitution (including trade between provinces, national defense, criminal law and money); provincial or territorial legislatures can legislate on matters within their borders (including education, property, civil rights, hospitals, and municipalities).

[10] Constitution Act, 1867, Articles 96–101 (VII. Judicature), 30 & 31 Victoria, c. 3 (U.K.) of 1867.

[11] Constitution Act, 1982, Article 52, Schedule B to the Canada Act 1982 (UK), c. 11 of 1982.

[12] Justice Laws Website, "Constitution Acts, 1867 to 1982," Justice.gc.ca, accessed 2 August 2022. There are also some other constitutional principles, mostly coming from the United Kingdom constitution like juridical independence, which are not written in those two Constitution Acts.

[13] Justice Laws Website, "Constitution Acts."

[14] The Canadian legal system is a mixed one, whereby public law in the provinces and territories is based on the British common law tradition, with distinct Canadian characteristics, while private law is based on the common law tradition, except for the province of Quebec, which has a distinct civil law tradition.

[15] Supreme Court of Canada, "2021 Year in Review – Canada's Top Court," Scc-csc.ca, accessed 2 August 2022.

[16] Canadian Charter of Rights and Freedoms, Part I of the "Constitution Act," Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on 17 April 1982.

[17] Canadian Charter of Rights and Freedoms, Article 34, Part I of the "Constitution Act," Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on 17 April 1982. See also Canada.ca, "Guide to the Canadian Charter of Rights and Freedoms," Canada.ca, accessed 2 August 2022.

freedoms (s. 2);[18] democratic rights (s. 3 to 5); mobility rights (s. 6); legal rights (s. 7 to 14);[19] equality rights (s. 15);[20] Canada's official languages (s. 16 to 22); minority language education rights (s. 23); as well as other general provisions such as Indigenous peoples' rights (s. 25) and Canada's multicultural heritage (s. 27).

As part of the supreme law of Canada, the Canadian Charter applies to all Parliament and governments but not to private individuals, businesses, or other organizations.[21] Its scope is therefore limited to the actions of "the governments of Canada, the provinces or the territories", i.e., the public relations between an individual and one of the "legislative, executive and administrative branches of government."[22] So that governments can change their laws to comply with equality rights, s. 15 did not come into force until 1985.[23]

Concerning the limitation of rights, unless Parliament and the provincial or territorial legislatures use the "notwithstanding" clause (s. 33) to enact legislation that may limit (under certain conditions) the rights included in s. 2, or s. 7 to 15, any Canadian whose fundamental freedoms or legal and equality rights have

[18] Canadian Charter of Rights and Freedoms, Article 2, Part I of the "Constitution Act," Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on 17 April 1982. It protects "freedom of conscience and religion; freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; freedom of peaceful assembly; and freedom of association."

[19] The legal rights set out the protection of individual rights within the justice system to ensure fair treatment in criminal proceedings in accordance with the principles of fundamental justice. These protections are of various kinds, including the right to life, liberty and security of person and the protection to not be subjected cruel or unusual treatment or punishment.

[20] Regarding the protection of equality, the Canadian Charter guarantees that "every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law" regardless of "race, national or ethnic origin, colour, religion, sex, age or mental or physical disability." In addition to prohibiting discrimination on any of these grounds in Canadian law or programs, affirmative action programs that seek to improve the "conditions of disadvantaged individuals or groups" are permitted under Canada.ca, "Guide to the Canadian Charter of Rights and Freedoms," Canada.ca, accessed August 2, 2022, sect. 15(2).

[21] Canadian Charter of Rights and Freedoms, Articles 32–33, discuss the application of the Canadian Charter, while Article 31 indicate that "nothing in this Charter extends the legislative powers of any body or authority," meaning that sharing of responsibilities between the federal government and the provinces remains as set out under Constitution Act, 1867, Article 91, 30 & 31 Victoria, c. 3 (U.K.) of 1867.

[22] Supreme Court Judgments, R. v. Harrer, (1995) 3 S.C.R. 562 (Supreme Court of Canada 1995), 12; Supreme Court Judgments, RWDSU v. Dolphin Delivery Ltd., (1986) 2 S.C.R. 573, 598 (Supreme Court of Canada 1986), 603–604; Supreme Court Judgments, Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall, (2018) 1 S.C.R. 750 (Supreme Court of Canada 2018), 39. The Canadian Charter only applies to private actors when a violation of a fundamental right by a private party results from an act of a legislative nature or from an interaction with a public officer or a government agency, see Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022,* (Montréal (QC): Éditions Yvon Blais, 2021), 33, 35–36.

[23] Canadian Charter of Rights and Freedoms, Article 32(2), Part I of the "Constitution Act," Enacted as Schedule B to the Canada Act 1982, 1982, c. 11 (U.K.), which came into force on 17 April 1982. See also "Canada.ca, "Guide to the Canadian Charter of Rights and Freedoms," Canada.ca, accessed 2 August2022."

been infringed or denied by a person acting on behalf of the government "may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances" (s. 24(1)), as discussed in Part II. To do so, the individual must show which rights have been violated, whereby the government will have to show that the violation constitutes a reasonable limit under s. 1, which reads as follows:

> "The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In this regard, it is important to note that the rights and freedoms guaranteed by the Canadian Charter are not absolute, as they can be limited to protect other rights or national values, but only "to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society" (s. 1). Alternatively, if the infringement derives from a "rule of law", the SCC may strike down the part of the law that violates Charter rights and declare it invalid under s. 52 of the Constitution Act, 1982.[24]

Before the Canadian Charter came into force, many of the rights and freedoms[25] that it now includes were protected by other Canadian laws (federal and provincial), which are briefly discussed below. This overview of the complex federal and provincial legal framework highlights the probability of conflicting rights, and the necessity of a Supreme Court that can resolve human rights disputes and consolidate jurisprudence.

2.3. Human Rights at the Federal, Provincial and Territorial Levels

There are two federal laws protecting the fundamental rights of Canadians. One is the Canadian Bill of Rights, 1960,[26] which established the first fundamental rights of individuals in relation to federal government laws and policies (s. 2

[24] It should be noted that sect. 52 is not part of the Canadian Charter, but the Court may still have the power to strike down a law that violates a right or freedom guarantee under the Charter, "which itself is part of the Constitution." See Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022,* (Montréal (QC): Éditions Yvon Blais, 2021), 111.

[25] "Canada.ca, "Guide to the Canadian Charter of Rights and Freedoms," Canada.ca, accessed 2 August 2022."

[26] Canadian Bill of Rights, S.C. 1960, c. 44 of 1960.

and 5(2)). The other is the Canadian Human Rights Act, 1977,[27] which protects against harassment or discrimination[28] of employees and/or beneficiaries of services from the federal government, federally regulated private businesses and First Nations governments. These laws coexist with the Canadian Charter and provide another layer of human rights protection.

For equality rights protection, the Canadian Human Rights Commission[29] was created to receive and analyze complaints of discrimination (s. 40–41). When the allegations in the complaint require further investigation, the Canadian Human Rights Tribunal[30] Chairperson can appoint a member to hear the complaint (s. 49). That said, the Canadian Human Rights Act applies only to private law in areas of federal jurisdiction. It cannot be used to challenge the validity of other legislation based on inconsistency.[31]

There are also laws protecting human rights against discrimination in provincial and territorial jurisdiction areas, including most workplaces, housing, schools, and other services. All ten provinces and three territories have similar human rights laws to the Canadian Human Rights Act, as they apply similar principles and provide the same kind of agencies.[32] However, unlike the Canadian Charter, the provisions of these provincial and territorial laws can be abrogated and/or amended because they do not have the same constitutional primacy. Other differences exist between the Canadian Charter and provincial laws, including their scope of application. For example, in Quebec, the only civil law province in Canada (as far as private law is concerned), the Charter of Human Rights

[27] Canadian Human Rights Act, R.S.C., 1985, c. H-6 of 1981.

[28] Canadian Human Rights Act, R.S.C., 1985, c. H-6 of 1981. The prohibited grounds of discrimination are mentioned under sect. 2–3(1).

[29] Canadian Human Rights Commission, "Human Rights in Canada," Canadian Human Rights Commission, accessed 2 August 2022.

[30] Canadian Human Rights Tribunal, "Welcome to the Canadian Human Rights Tribunal," Canadian Human Rights Tribunal, accessed 2 August 2022.

[31] Supreme Court Judgments, Canada (Canadian Human Rights Commission) v. Canada (Attorney General), (2018), 2 S.C.R. 230 (Supreme Court of Canada 2018), 56; Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022*, (Montréal (QC): Éditions Yvon Blais, 2021), 23-24.

[32] The different provincial and territorial human rights agencies are listed at Canadian Human Rights Commission, "Provincial & Territorial Human Rights Agencies," Canadian Human Rights Commission, accessed 2 August 2022.

and Freedoms, 1975,[33] "applies in both the private and public law context".[34] Thus, unlike the Canadian Charter, "the scope of the Quebec Charter is not restricted to 'government action'."[35] but rather "extends to relationships between individuals and relationships between individuals and the state".[36] As such, for individuals living in Quebec, the means of enforcing their fundamental rights and freedoms will depend on the nature of the violation, i.e., by an individual conduct or by a rule of law (depending on the legislative jurisdiction in cause), since the Canadian and Quebec charters provide separate remedies for these two potential sources of infringement.[37]

To conclude this overview, it appears clearly that the Canadian human rights protection framework provides for a multilayered system whereas human rights are protected, and within which there can be conflict among different actors and/or competing rights. It is within this context that this paper addresses the question of how the SCC can play a crucial role in ensuring the protection of human rights in a democratic society and resolve conflicts in situations of competing rights.

III. THE ROLE OF THE SCC IN PROTECTING HUMAN RIGHTS

Having set the background framework of human rights protection in Canada, this part discusses the role of the SCC in resolving conflicts between competing rights and in maintaining the balance between individual and collective rights, illustrated by two key cases of the past decade. This paper focuses on the following four aspects in this part. First, it discusses the jurisdiction over human rights

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[33] Charter of Human Rights and Freedoms, R.S.Q., c. C-12 of 1975.

[34] Supreme Court Judgments, Syndicat Northcrest v. Amselem, (2004) 2 S.C.R. 551 (Supreme Court of Canada 2004), Article 38. However, in Supreme Court Judgments, Plourde v. Wal-Mart Canada Inc, (2009) 3 S.C.R. 465 (Supreme Court of Canada 2009), Article 56, this fundamental difference between the Canadian Charter and the Quebec Charter was overlooked by the Court, see Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022*, (Montréal (QC): Éditions Yvon Blais, 2021), 33.

[35] Supreme Court Judgments, Godbout v. Longueuil (City), (1997) 3 S.C.R. 844 (Supreme Court of Canada 1997), Article 93.

[36] Supreme Court Judgments, Chaoulli v. Quebec (Attorney General), (2005) 1 S.C.R. 791 (Supreme Court of Canada 2005), 33. See in paragraph 270: "It applies not only to state action but also to many forms of private relationships."

[37] Christian Brunelle and Mélanie Samson, "Les Domaines d'Application Des Chartes Des Droits," in *Droit Public et Administratif, Collection de Droit 2021-2022*, (Montréal (QC): Éditions Yvon Blais, 2021), 33–36, 111.

in the Canadian constitutional framework (2.1). It then theorizes the central role of the SCC in protecting human rights and resolving conflicts between conflicting rights (2.2). The paper moves on to discuss the SCC's recent Chief Justices, whereas the fourth section illustrates the SCC's role in settling conflicts involving fundamental rights in two recent cases (2.4).

3.1. Jurisdiction Over Human Rights in the Canadian Constitutional Framework

The SCC is often seen (and sees itself)[38] as the guardian of the Constitution for the protection of fundamental rights. However, according to the founding texts of Canadian constitutional law, the SCC is not the only court to have this role in the Canadian constitutional framework.

As previously discussed, the division of powers between Parliament and the provincial legislatures is guaranteed under the Canadian Constitution, which also divides the judicial system with respective powers for the federal and provincial governments.[39] However, in addition to their exclusive powers, all Canadian courts are considered arbiters of constitutional disputes, given the principle of constitutionalism enshrined in the Constitution Act, 1867.[40] Consequently, the courts of general jurisdiction (i.e., the courts of first instance) may be called upon to decide either constitutional disputes between Parliament and the provincial legislatures, or constitutional disputes between an individual and a government.

[38] Several scholars have written about the self-legitimizing discourse of the SCC in its own jurisprudence, which regularly asserts and delineates the boundaries of its constitutional role, see in Kate Glover Berger, "The Supreme Court in Canada's Constitutional Order," *Review of Constitutional Studies* 21, no. 1 (May, 2016): 143; Daniel Jutras, "Le Rôle Constitutionnel de la Cour Suprême du Canada: Autoportrait (A Self-Portrait of the Supreme Court of Canada)," *Les Cahiers Du Conseil Constitutionnel* 24 (2008): 65; Warren J. Newman, "The Constitutional Status of the Supreme Court of Canada," *Supreme Court Law Review* 47, no. 2 (2009): 429; Peter W. Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis," *Canadian Bar Review* 80, no. 1/2 (2001): 171; Paul Daly, "A Supreme Court's Place in the Constitutional Order: Contrasting Recent Experiences in Canada and the United Kingdom," *Queen's Law Journal* 41, no. 1 (2015): 1; Vanessa MacDonnell, "The Constitution as Framework for Governance," *University of Toronto Law Journal* 63, no. 4 (2013): 624.

[39] Constitution Act, 1867, Articles 91–95 (VI. Distribution of Legislative Powers), 30 & 31 Victoria, c. 3 (U.K.) of 1867. Mainly, exclusive provincial powers include: "the Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts" (paragraph 92(14)), while exclusive federal powers include: the criminal law procedure; the appointment and remuneration of provincial superior court judges; the "Constitution, Maintenance, and Organization of a General Court of Appeal for Canada" (paragraph 101), from which comes the creation of the SCC (as we will discuss further).

[40] Daniel Jutras, "Le Rôle Constitutionnel de la Cour Suprême du Canada: Autoportrait (A Self-Portrait of the Supreme Court of Canada)," *Les Cahiers Du Conseil Constitutionnel* 24 (2008)."

If an appeal is made from a first instance court's decision (i.e., provincial or federal courts), the provincial or federal court of appeal will be called upon to decide. If an appeal is made against the decision of a court of appeal, then the SCC will be the final arbiter. Thus, the SCC does not have exclusive jurisdiction to decide constitutional disputes.[41] A former SCC judge summarized the uniqueness of the SCC in the following terms:

> "Given the Supreme Court of Canada's distinctive tradition and role, it is arguably the most unique among the world's highest courts. First, it is a bilingual court, in that it hears appeals argued in both English and French, and also publishes its decisions and all official documents in both languages. Second, it deals with matters emerging from civil law and common law jurisdictions in the country, and its membership is composed of judges from both of these legal backgrounds. Third, unlike the courts of Europe, the Supreme Court of Canada serves as both a constitutional court and a supreme court for the country. Fourth, in contrast to the United States, the Supreme Court of Canada sits at the top of a unified judicial system, and may hear appeals from provincial and federal courts alike. These cases may involve issues of private law (e.g. torts, contracts and property) and public law (e.g. labour, administrative, taxation and patents). The Court thus has an extremely wide jurisdiction because it may potentially hear an appeal from any court or tribunal in the country."[42]

The SCC stands as Canada's final court of appeal for all Canadian courts.[43] In practical terms, this means that an individual must proceed up the judicial structure before submitting an appeal to the SCC. In this sense, the SCC is the final legal authority on constitutional interpretation and thus can "shape the development of constitutional law" regarding individual and collective rights.[44] But, as the highest court in Canada, the SCC has jurisdiction over disputes in every area of law, not just constitutional law. As an apex court, the SCC can settle

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[41] As said before, the Canadian Charter paragraph 24(1) does not specify an exclusive jurisdiction to the SCC since any "court of competent jurisdiction" could have jurisdiction to judge a violation of the rights guaranteed by the Charter.

[42] Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities," *Journal of Appellate Practice and Process* 4, no. 1 (2002): 27, 33–34.

[43] The judicial Canadian structure has four levels of court: Provincial and territorial (lower) courts; Provincial and territorial superior courts; Provincial and territorial courts of appeal and the Federal Court of Appeal; Supreme Court of Canada, which is the final court of appeal for Canada. Justice Laws Website, "The Judicial Structure – About Canada's System of Justice," Justice.gc.ca, accessed 2 August 2022.

[44] Johanne Poirier, "The Role of Constitutional Courts, A Comparative Perspective: The Supreme Court of Canada," *European Parliamentary Research Service* (July 2019).

conflicts in a broad range of human rights cases, and not just those regarding constitutional rights.

Regarding constitutional matters, there are two possible procedures: constitutional review by leave to appeal a lower court decision[45] or an appeal as of right, particularly in criminal cases;[46] advisory opinion on constitutional matters, which are named references, at the Governor in Council's request.[47]

The Court's recent docket illustrates the reach of this dual mandate in constitutional and other areas, as well as the SCC's crucial role in resolving disputes. This is seemingly a consequence of the SCC's function as an apex court, as opposed to two separate constitutional and final appeals courts. In the Court's workload over the last decade (2012–2021),[48] 5,251 applications for leave to appeal and 199 notices of appeal as of right were filed at the Court, from which 4,433 were dismissed and 461 were granted. Within appeals heard, 473 were by leave and 186 were as of right, from which 350 were dismissed, 290 were allowed and 17 are still on reserve. Regarding the outcomes of appeals decided, 371 were dismissed and 303 were allowed. Of the allowed appeals, 407 were unanimous decisions, against 269 majority decisions.

The high number of cases begs the question as to whether the apex court model creates too many potential (human rights) conflicts for a court to resolve. This question is particularly interesting if one looks to the high number of cases in which review was requested (5,215 applications and 199 cases as a matter of right) and those in which review was denied (4,333 cases). Similarly, would individuals feel that their rights were better protected by a separate Constitutional Court that had no conflicting responsibilities?

[45] Leave to appeal may be granted by the SCC where the matter is one of public importance or of law and/or fact. Supreme Court of Canada, "Role of the Court," Scc-csc.ca, accessed 2 August 2022.

[46] No leave is required for an appeal as of right in criminal matters.

[47] Special Jurisdiction of the SCC, see Supreme Court Act, R.S.C., 1985, c. S-26 of 1985. The Governor in Council can ask the SCC to interpret the constitution or the constitutionality of a legislation. Also, constitutional questions can be raised in an appeal involving individual litigants, governments or government agencies. For an example of an advisory opinion by the SCC issued on multiple provincial references about the constitutionality of a federal law aimed at combatting climate change, see Supreme Court Judgments, *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, (Supreme Court of Canada 2021).

[48] These figures were calculated based on the information available for each year on the SCC website. That said, due to pandemic court closures across the country in 2020 and 2021, some of the most recent data is inconsistent, see Supreme Court of Canada, "2021 Year in Review – Canada's Top Court," Scc-csc.ca, accessed 2 August 2022.

One relevant aspect of the apex court model used in Canada is precisely that the same court has jurisdiction over human rights disputes stemming from the Constitution as well as conflicts of rights guaranteed in provincial or federal legislation. It could be argued that, while the model of a separate Constitutional Court could provide a focused and more streamlined approach to constitutional litigation, there are some particular advantages in having an apex court, particularly in a legal context of human rights protection where constitutional rights coexist with provincial and federal laws of human rights protection. As Paul Daly puts it:

> "Apex courts, which sit at the apex of common law systems, fulfil these standard dispute-resolution and law-development functions, but they also have a unique institutional position. By virtue of their place at the top of the judicial hierarchy, their decisions and, in particular, the language used in those decisions, resonate through the legal system. Moreover, members of the legal community – judges, lawyers, legal academics, students, and laypeople – often look to apex courts for general guidance. Accordingly, the institutional position of apex courts may nudge them away from incremental development of the law based on the resolution of individual cases and towards the elaboration of general principles that can unify large areas of the law and provide meaningful guidance to the legal community and the general public."[49]

3.2. The Central Role of the SCC in the Protection of Human Rights in a Democratic Society: the Balancing of Competing Rights and Interests

The significance of the SCC's constitutional role is relatively recent. While it was constituted by Parliament in 1875, under s. 101 of the Constitution Act, 1867, the SCC only became the final court of appeal for criminal cases in 1933 and civil cases in 1949.[50] Before those dates, it was still possible to contest decisions before the Judicial Committee of the Privy Council in London.[51] Only after adopting the Canadian Charter (Constitution Act, 1982) did the role of the

[49] Paul Daly, *Apex Courts and the Common Law: Introduction* (University of Toronto Press: Toronto, 2019), 4–5.
[50] Supreme Court Act, Articles 3 and 35 R.S.C., 1985, c. S-26 of 1985. See also Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities," *Journal of Appellate Practice and Process* 4, no. 1 (2002): 27.
[51] Robin MacKay and Maxime Charron-Tousignant, "The Role of the Supreme Court of Canada – Membership and the Nomination Process," Hill Notes, accessed 2 August 2022.

SCC become more crucial,[52] having to interpret the rights and freedoms newly protected by the Constitution.[53]

Given that the Canadian Charter states that rights and freedoms are not absolute and thus can be limited by law reasonably and justifiably in a free and democratic society (s. 1), how can this acceptable limitation be assessed in practice? It was left to the SCC to establish a method of applying s. 1 to settle a conflict between individual rights and societal interests (public policy).[54] In fact, s. 1 of the Canadian Charter embodies the notion of a balancing act, by permitting limits to be placed on guaranteed rights and freedoms. This provision can be found in some international treaties, such as the International Covenant on Economic, Social and Cultural Rights. Since there is no hierarchy of rights within the Canadian Charter,[55] the SCC had to elaborate solutions to balance competing fundamental rights protected by the Canadian Charter.[56] As the SCC has indicated, "[m]ost modern constitutions recognize that rights are not absolute and can be limited if this is necessary to achieve an important objective and if the limit is appropriately tailored, or proportionate".[57]

[52] Since then, the constitutional role of the CCS is reinforced by paragraph 52(1) of the "Constitution Act, 1982," and its jurisprudence claiming responsibility "to interpret and apply the laws of Canada and of each of the provinces" as their duty "to ensure that the constitutional law prevails", see Supreme Court Judgments, *Reference re Manitoba Language Rights*, (1985) 1 S.C.R. 721 (Supreme Court of Canada 1985).

[53] Many papers have been written on the subject, see in particular Peter W. Hogg, "The Law-Making Role of the Supreme Court of Canada: Rapporteur's Synthesis," *Canadian Bar Review* 80, no. 1/2 (2001).

[54] The Oakes test is the SCC's analysis of the Limitation Clause in paragraph 1. Essentially, the government may limit rights and freedom to the extent that: "is set out in law; pursues an important goal which can be justified in a free and democratic society; pursues that goal in a reasonable and proportionate manner." Furthermore, see in the Justice Laws Website, "Learn about the Charter- Canada's System of Justice," Justice.gc.ca, accessed 2 August 2022. For SCC's full explanation of the Oakes test, see Supreme Court Judgments, R. v. Oakes, (1986) 1 S.C.R. 103 (Supreme Court of Canada 1986), 69–70.

[55] Supreme Court Judgments, *Reference re Same Sex Marriage,* [2004] 3 S.C.R. 698 (Supreme Court of Canada 2004), 50–53. The Canadian Charter also does not have a superior status within the Canadian constitution, see Supreme Court Judgments, *Adler v. Ontario* (1996) 3 S.C.R. 609 (Supreme Court of Canada 1996).

[56] Supreme Court Judgments, *Dagenais v. Canadian Broadcasting Corp., (1994) 3 S*.C.R. 835 (Supreme Court of Canada 1994), 877. However, not all potential conflicts imply unconstitutionality, only if the collision cannot be reconciled, in which case the fundamental values and principles of a free and democratic society should guide the SCC's analysis. Those values and principles include human dignity, the promotion of social justice and equality, and public faith in social and political institutions, all of which underlie the Canadian Charter and provide the fundamental standard for determining whether a limit on a right or freedom is reasonable despite its effects. See Henri Brun, Pierre Brun, and Fannie Lafontaine, "Chartes des droits de la personne: Législation, Jurisprudence et Doctrine," in *Collection Alter Ego, 34e Éd.* (Montréal: Wilson & Lafleur, 2021), 1/67.

[57] Supreme Court Judgments, Canada (Attorney General) v. JTI-Macdonald Corp., (2007) 2 S.C.R. 610 (Supreme Court of Canada 2007), 36.

Guided by the SCC jurisprudence, Canadian courts have interpreted the rights and freedoms protected by the Charter in a liberal manner, without reluctance to strike down laws that violate the Charter. Overall, a "generous" (rather than legalistic)[58] interpretation has been adopted by applying the metaphor of the "living tree", which allows the Canadian Charter to grow and develop over time "to meet new social, political, and historical realities often unimagined by its framers"[59] but "within its natural limits".[60]

However, to interpret the Canadian Charter, the SCC had to take a stand on some of the most controversial socio-political issues. It had to strike a balance between promoting collective interests and respecting rights guaranteed by the Canadian Charter, which were previously reserved for the legislative and/or executive branches, triggering several criticisms (such as "judicial activism", "government of judges", "institutional legitimacy" and "legitimacy of judicial review").[61] Nevertheless, it remains the judicial body best placed to oversee "the growth and development of Canadian jurisprudence",[62] including constitutional human rights litigation, given its multiple review role as both a constitutional court and a court of final appeals. In this sense, the protection of human rights depends essentially on striking the right balance between competing rights and setting the jurisprudence to guide lower courts on the interpretation of human rights.

In addition to constitutional rights cases, which are based on the interpretation and application of the Canadian Charter, the SCC has also been called upon

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[58] Supreme Court Judgments, R. v. Big M Drug Mart Ltd., (1985) 1 S.C.R. 295 (Supreme Court of Canada 1985), 344.

[59] Supreme Court Judgments, Hunter v. Southam, (1984) 2 S.C.R. 145 (Supreme Court of Canada 1984), 155. We can trace the creative nature of constitutional interpretation back to 1930, over 50 years before the adoption of the Canadian Charter, through a metaphor describing the constitution as a "living tree" in Supreme Court Judgments, Edwards v. Attorney General of Canada, (1930) A.C. 124 (Supreme Court of Canada 1930), while interpreting the "British North America Act, 1867," paragraph 24. See also Robert J. Sharpe, "The Supreme Court of Canada in Changing Times," (Paper presented for Ontario Justice Education Network Summer Law Institute for Secondary School Teachers, 2003).

[60] Sharpe, "The Supreme Court of Canada." Those "natural limits" are also Canada's fundamental legal values and principles contained within the Constitution, the statutes enacted by Parliament, the precedents set by the courts, the legal literature, and other international legal norms.

[61] Ibid. For example, see Sharpe, "The Supreme Court," on the SCC in changing times and judicial interpretation of the Canadian Charter, which provoked ongoing debate from both the political right and left as well as many academics.

[62] See Supreme Court of Canada, "Role of the Court," Scc-csc.ca, accessed 2 August2022.

to settle disputes relating to provincial human rights legislation, as a court of final appeal.[63] In such cases, while not interpreting the Constitution – i.e., the Canadian Charter – the SCC has played an important role in the resolution of conflict in human rights protection cases based on regular laws.

3.3. The SCC's Chief Justice and the Protection of Human Rights

This section looks into the changes in the Court's Chief Justices in the past decade in the context of the resolution of conflicts relating to human rights protection in Canada.

As the Supreme Court Act requires, the SCC comprises nine judges, including the Chief Justice of Canada.[64] The current Chief Justice of Canada is the Right Honorable Richard Wagner, appointed on 18 December 2017 after serving on the SCC for almost five years, succeeding the Right Honorable Beverley McLachlin, former Chief Justice of Canada from 7 January 2000 until her retirement on 14 December 2017.

As the longest-serving and first woman Chief Justice in the history of the SCC, McLachlin joined the Justice Lamer divided Court in 1989, which, as claimed by some authors, she transformed into a collegial court after being appointed Chief Justice in 2000.[65] She also arrived at a pivotal time in Canadian constitutional history: that of the newly adopted Canadian Charter, whose interpretation had yet to be formulated and implemented in cases involving the resolution of conflicts between competing individual rights and/or collective interests. Overall, the jurisprudence during her tenure was characterized by a theme of harmony, also referred to by scholars as "consensus", "accommodation", "reconciliation", "compromise" and/or "balance", an approach to deliver justice

[63] For example, see the recent decision Supreme Court Judgments, Ward v. Commission des droits de la personne et des droits de la jeunesse, 2021 SCC 43 (Supreme Court of Canada 2021).

[64] The current judges at the SCC are: The Hon. Michelle O'Bonsawin (since 1 September 2022), The Hon. Andromache Karakatsanis (since 21 October 2011), The Hon. Suzanne Côté (since 1 December 2014), The Hon. Russell Brown (since 31 August 2015), The Hon. Malcolm Rowe (since 28 October 2016), The Hon. Sheilah L. Martin (since 18 December 2017), The Hon. Nicholas Kasirer (since 16 September 2019), The Hon. Mahmud Jamal (since 1 July 2021), with The Rt. Hon. Richard Wagner, P.C., as the new Chief Justice of Canada since 18 December 2017. Supreme Court of Canada, "2021 Year in Review – Canada's Top Court," Scc-csc.ca, accessed 2 December 2022.

[65] Ian Greene and Peter McCormick, *Beverley McLachlin: The Legacy of a Supreme Court Chief Justice* (Toronto: James Lorimer & Company Ltd., Publishers, 2019), 7–9, 48.

in a judicial problem-solving way.[66] As for Charter jurisprudence, her approach has taken the form of a harmonious balance between "the individual interest asserted as protected by a right, the constitutional rights of other individuals and groups affected by that claim, and the needs of a society where these limit rights no more than is reasonable".[67] As such, many saw her as the "chief ambassador of the Charter", speaking to the public about the role of the judiciary (notably the SCC) as guardian of the values embodied in the Charter by giving voice to the deepest values of Canadian society, which have been reflected and guided by the courts since then.[68] Thus, her leadership within the Court and in public opinion has helped to demystify the judicial function, improve public understanding of it, and protect the judiciary from attacks claiming "judicial activism".[69] Simply put, she brought her own unique contribution to the way of interpreting the Canadian Charter. She left her mark with her interpretative approach of "conscious objectivity" and the harmonization of jurisprudential principles. Since Wagner was appointed Chief Justice, in his short tenure thus far, the percentage of unanimous decisions has decreased.[70]

Therefore, the analysis of recent changes in the Chief Justice of the SCC are of interest to shed light on their impact on the consistent (or otherwise) application and interpretation of the Canadian Charter (and interpretation of human rights protected by it). As the guardian of the Constitution and the final arbiter of constitutional disputes, the SCC has the power to strike down legislation that violates the Canadian Charter, which may directly impact the rights and freedoms of Canadians. Since the task of interpretation is ultimately

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66 Marcus Moore, "Introduction: Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership," *Supreme Court Law Review* 86, no. 2 (2018): lxiii, lxxiii–lxxxvi; Marcus Moore, "Justice as Harmony: The Distinct Resonance of Chief Justice Beverley McLachlin's Juridical Genius," in *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership*, ed. Marcus Moore and Daniel Jutras (Toronto: LexisNexis, 2018).

67 Moore, "Introduction: Canada's Chief Justice,"; Moore, "Justice as Harmony."

68 Moore, "Introduction: Canada's Chief Justice," lxxxiv; Richard Albert, "The Expositor and Guardian of Our Constitutional Values," in *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership*, ed. Marcus Moore and Daniel Jutras (Toronto: LexisNexis, 2018).

69 Albert, "The Expositor and Guardian," lxxxi; L'honorable Marie Deschamps, "Beverley McLachlin : Femme, Juge, Porte-Étendard," in *Canada's Chief Justice: Beverley McLachlin's Legacy of Law and Leadership*, ed. Marcus Moore and Daniel Jutras (Toronto: LexisNexis, 2018).

70 The ten-years trends in the percentage of unanimous decisions illustrate how often the SCC's judges agree or not in the result of a judgment: 72% in 2012, 68% in 2013, 79% in 2014, 70% in 2015, 61% in 2016, 54% in 2017, 48% in 2018, 42% in 2019, 49% in 2020 and 46% in 2021, see Supreme Court of Canada, "2021 Year in Review – Canada's Top Court," Scc-csc.ca, accessed 2 August 2022.

theirs, judges must decide in light of the values of a free and democratic society, following the principle of the "living tree" to keep pace with the evolution of society.

3.4. The SCC's Role in Settling Conflicts Involving Fundamental Rights: an Overview of Two Contrasting Illustrative Cases

To illustrate the SCC's role in settling constitutional conflicts, this paper discusses some cases which highlight the impact of the Court's judicial transitions over the past ten years to see what implications these may have on interpreting the Canadian Charter and, therefore, on protecting fundamental rights. Given their importance in illustrating the role of the SCC in resolving conflicts between individual rights and societal interests, this paper contrasts the R. v. Jordan judgment of 2016[71] (with former Chief Justice McLachlin) and the R. v. Bissonnette case of 2022[72] (with new Chief Justice Wagner). For many observers, resolving these two conflicts had a preventive function, allowing other potentially conflicting parties to know their rights based on these precedents, thus regulating and stabilizing the safeguarding of democratic principles.

Jordan, a case on appeal from the Court of Appeal of British Columbia, concerned an application under s. 11(b) of the Canadian Charter, which guarantees the right of accused persons "to be tried within a reasonable time". While all nine judges of the SCC agreed on the stay of proceedings, the analytical framework split the judges' decision 5 to 4. According to the majority (justices Abella, Moldaver, Karakatsanis, Côté and Brown), a new analytical framework was needed to apply s. 11(b) of the Canadian Charter with a presumptive ceiling of time limits for an accused to be tried within a reasonable time. For the dissenting judges (Chief Justice McLachlin and justices Cromwell, Wagner and Gascon), the jurisprudence of the last 30 years should have been maintained, with a clarification of the legal framework to balance further the many factors relevant to the application of s. 11 (b) without limiting it to numerical ceilings.

[71] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631(Supreme Court of Canada 2016).
[72] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022).

In the majority's view, since "[t]imely justice is one of the hallmarks of a free and democratic society",[73] the criminal justice system should have never let emerge "a culture of complacency towards delay"[74] which has grave effects on society. Beyond justice for the accused, this kind of culture also affects the victims, the victims' families, the justice system, and "the administration of justice".[75] Therefore, five judges ruled that the SCC precedent had to be set aside, i.e., the framework set out since *Morin* and *Askov*, to facilitate "a much-needed shift in culture" by creating incentives for the Crown counsel, the defense lawyers and the courts to foster "proactive and preventative problem solving".[76] For most judges, this approach allows "to further the interests of justice"[77] and "to maintain the public's confidence by delivering justice in a timely manner" since timely trials "are constitutionally required."[78] In contrast, in the minority's view (delivered by Cromwell), this new framework "diminishes Charter rights."[79] Instead, the "case-specific determinations of reasonableness" approach should be pursued, with some adjustments, so that the constitutional right of defendants to be tried within reasonable limits would remain "defined and applied in a way that appropriately balances the many relevant considerations".[80] Nevertheless, in the *Jordan* case, the SCC allowed the appeal and overturned the convictions by entering a stay of proceedings.

Another interesting and recent example of the role of the SCC in balancing fundamental rights and societal interests is the *Bissonnette* judgment. In this case, on appeal from the Court of Appeal of Quebec, the SCC was asked to determine whether sentencing an offender to consecutive periods of parole ineligibility (s. 745.51 (1) of the Criminal Code)[81] violated his protection against "cruel and unusual treatment or punishment" (s. 12, Canadian Charter). If so,

[73] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631 (Supreme Court of Canada 2016), 1.
[74] Ibid., 40–41.
[75] Ibid., 21–27.
[76] Ibid., 94, 112. To develop the new framework, a review of the SCC paragraph 11(b) cases over the past decade was undertaken to align the contextual approach with the new problem-solving approach, see page 107.
[77] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631 (Supreme Court of Canada 2016), 28.
[78] Ibid., 141.
[79] Ibid., 302.
[80] Ibid., 145.
[81] Criminal Code, R.S.C., 1985, c. C-46 of 1985.

whether this could be justified “in a free and democratic society” (s. 1, Canadian Charter), and if not, what remedy was appropriate.[82] Here, the role of the SCC was to resolve a conflict between, respectively, a law of Parliament (allowing judges to limit the possibility of parole of an offender for the protection of the public under s. 745.51 (1) Criminal Code, in force since 2011)[83] and access to parole consistent with human dignity (“a value that underlies the protection conferred by s. 12 of the Charter”[84] and which “requires that Parliament leave a door open for rehabilitation”).[85] In other words, it was a question of reconciling the power of Parliament (to determine the objectives of denunciation and deterrence of heinous crimes) with the constitutional limits within which that power can be exercised, i.e., in accordance with Canadian values.[86] Because social norms are not fixed in time, the SCC recalled that the nature of cruel and unusual punishment could evolve “in accordance with the principle that our Constitution is a living tree capable of growth and expansion within its natural limits so as to meet the new social, political and historical realities of the modern world”.[87] As such, a unanimous decision written by Chief Justice Richard Wagner declared that s. 745.51 Criminal Code is unconstitutional as it violates s. 12 of the Canadian Charter and it does not pass the test of s. 1. It was therefore declared invalid and inoperative retroactively, i.e., from the time of its adoption.[88]

These two cases illustrate the complex role of the SCC to guarantee the protection of human rights while resolving conflicts between individual rights and societal interests. In doing so, the SCC can change a precedent despite the

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[82] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 25. The SCC also had to assess whether it would violate his “right to life, liberty and security” (sect. 7 Canadian Charter), but ended up not having to do so.

[83] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 35; Protecting Canadians by Ending Sentence Discounts for Multiple Murders Act, Article 5, S.C. 2011, c. 5 of 2011.

[84] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 81. See also page 59, “Although dignity is not recognized as an independent constitutional right, it is a fundamental value that serves as a guide for the interpretation of all Charter rights.” It is referring to Supreme Court Judgments, Blencoe v. British Columbia (Human Rights Commission), (2000) 2 S.C.R. 307 (Supreme Court of Canada 2000), 77.

[85] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 9.

[86] R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 65, 86–87.

[87] Ibid., 65.

[88] Ibid., 26.

principle of *stare decisis*[89] (Jordan) and strike down a law (act of Parliament) retroactively despite the doctrine of *res judicata*[90] (Bissonnette), both of which are constitutional powers with concrete impacts on the fundamental rights of Canadians. Indeed, in the first case, the majority decided to overturn a precedent by shifting to a new analytical framework that complies with s. 11(b) of the Canadian Charter, so that under certain conditions, those already in the criminal justice system can assert the new analytical framework. This may have "the potential to effect positive change within the justice system, rather than succumb to the culture of complacency".[91] In the second case, the decision to invalidate s. 745.51 of the Criminal Code retroactively (despite the doctrine of *res judicata*, which normally tempers the application of the s. 52(1) Constitution Act, 1982)[92] may have consequences for those found in the justice system, "by allowing them to appeal on constitutional grounds"[93] and seek redress under s. 24(2) of the Canadian Charter.[94]

V. CONCLUSION

In a multicultural society, guided by democratic principles, the rule of law, and the protection of human rights, an apex court plays a crucial role in the settlement of disputes. In a system where fundamental rights, such as the right

[89] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631 (Supreme Court of Canada 2016), 45, 92–95. Also, it should be quickly pointed out that, despite the principle of stare decisis, the SCC may exceptionally question its own jurisprudence if it is not or no longer in conformity with the law, inapplicable or inequitable or unnecessarily complex and formalistic in practice, or if society has evolved such that a new interpretation is necessary, see Johanne Poirier, "The Role of Constitutional Courts, A Comparative Perspective: The Supreme Court of Canada," *European Parliamentary Research Service* (July 2019): 25, referring to: Supreme Court Judgments, R v. Henry, (2005) 3 S.C.R. 609 (Supreme Court of Canada 2005). See also Supreme Court Judgments, Ontario (Attorney General) v. Fraser, (2011) 2 S.C.R. 3 (Supreme Court of Canada 2011), 139. It states, "Fundamentally, the question in every case involves a balancing: do the reasons in favour of following a precedent – such as certainty, consistency, predictability and institutional legitimacy – outweigh the need to overturn a precedent that is sufficiently wrong that it should not be upheld or perpetuated?" See also Supreme Court Judgments, Carter v. Canada (Attorney General), (2015) 1 S.C.R. 331 (Supreme Court of Canada 2015), overturning: Supreme Court Judgments, Rodriguez v. British Columbia (Attorney General), (1993) 3 S.C.R. 519 (Supreme Court of Canada 1993).

[90] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 134–138.

[91] Supreme Court Judgments, R. v. Jordan, (2016) 1 S.C.R. 631 (Supreme Court of Canada 2016), 104.

[92] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 136.

[93] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 135. It is referring to Supreme Court Judgments, R. v. Boudreault, (2018) 3 S.C.R. 599 (Supreme Court of Canada 2018), 103; Supreme Court Judgments, R. v. Thomas, (1990) 1 S.C.R. 713 (Supreme Court of Canada 1990), 716.

[94] Supreme Court Judgments, R. v. Bissonnette, 2022 SCC 23 (Supreme Court of Canada 2022), 137.

to life, liberty and equality are guaranteed by the Constitution, the SCC occupies a position of guarantor of human rights similarly to both a constitutional court and the final court of appeal. As a former SCC justice has posited, the Court has "become a fundamental national institution charged with protecting and preserving the rights and freedoms of individual Canadians … it is beyond question that the role and function of the Supreme Court of Canada have dramatically transformed over time."[95] The aim of this paper was to take stock of how the SCC operates in a complex human rights framework and to evaluate its role as the court of final appeal for all areas of law, including in constitutional and fundamental rights matters.

This paper has thus discussed the complex framework of legal protection of human rights in Canada and highlighted the crucial role of the SCC in resolving conflicts as an apex court. Given the particularities of human rights protections in Canada, a model of apex court for conflict resolution allows for "the elaboration of general principles that can unify large areas of the law and provide meaningful guidance to the legal community and the general public".[96] The role of the SCC in providing a comprehensive final resolution in human rights cases may provide interesting lessons for other countries which have a similar human rights protection framework. This paper illustrated its research by analyzing two decisions of the SCC which contrast individual fundamental freedoms with societal interests. It has argued that in a country based on a system of constitutional monarchy and parliamentary democracy such as Canada, the SCC has a key role in guaranteeing human rights in situations of conflict between competing rights or interests. Ultimately, the paper provides an overview of the SCC's role in human rights conflict resolution and a basis for comparative analysis with other systems.

[95] Frank Iacobucci, "The Supreme Court of Canada: Its History, Powers and Responsibilities," *Journal of Appellate Practice and Process* 4, no. 1 (2002): 39–40.
[96] Paul Daly, *Apex Courts and the Common Law: Introduction* (University of Toronto Press: Toronto, 2019), 5.

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Conscientious Objection Before the Indonesian Constitutional Court

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Abstract

The issuance of Indonesia's Law No. 23 of 2019 on the Management of National Resources for State Defense (PSDN Law) sparked a national debate on conscription and conscientious objection. Consequently, a coalition of civic society organizations submitted the PSDN Law before the Constitutional Court for judicial review. They argued that the PSDN Law violates the Indonesian Constitution's Article 28 on human rights protection. One of the legal submissions is based on the argument that the PSDN Law deliberately ignores human rights in order to provide reserve and backup components to the military. This argument is supported by Article 18 of the International Covenant on Civil and Political Rights (ICCPR) and the ICCPR's General Comment No. 22 of 1993 paragraph 11, justifying conscientious objection as an inherent human right. The analysis in this paper is mainly uses the legal positivism paradigm and the human rights-based approach. This paradigm provides a framework for analyzing how the PSDN Law generates a distinctive legal feature for Indonesia's legal system. In line with Article 28 of the Indonesian Constitution, the Constitutional Court should explicitly assess the preservation of civil rights. It may be claimed that conceivable legal gaps (norm versus reality) and legal loopholes add to the Constitutional Court's obligation to consider the omission of conscientious objection recognition. This article argues the Constitutional Court should adjudicate on the issue of citizens being conscripted as reserve and backup components in situations of military threats, hybrid threats and/or non-military threats. This research further maintains that the Constitutional Court should recognize the existence of conscientious objection as an inherent human right, as a form of judicial activism. In accordance with the doctrine of judicial activism, the Court could resolve and offer solutions to

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the existence of conscientious objection as a democratic civil right. The Court should also determine the area, scope, application and orientation of conscientious objection as a distinct feature of human rights based on Indonesia's context and perspective on defense required by international human rights treaties, conventions, or general comments on such instruments.

Keywords: Conscientious Objection, Conscription, Human Rights Abuses, Military Service.

I. INTRODUCTION

The protection of all the people and land of Indonesia is one of the objectives of the Government of Indonesia, according to paragraph 4 of the Preamble to the Indonesian Constitution.[1] Accordingly, the House of Representatives issued Law No. 23 of 2019 on the Management of National Resources for State Defense (the PSDN Law). The PSDN Law stems from a positivistic point of view, fostering principles such as proportionality, rationality, non-discrimination, equity and justice, which are the basis for establishing a comprehensive national defense strategy that clarifies the right and obligation to participate in national defense.[2] The establishment of a national defense management is focused on enhancing national peace, security and stability in the event of future disruptions by involving civilians as defense reserves and backup forces.[3]

The PSDN Law has legitimate reasons and authority to enhance state defense strategy, based upon Indonesia's state philosophy, Pancasila.[4] The PSDN Law provides a transparent management system to ensure maximum available resources are rendered by Indonesian citizens as reserve and backup forces. This expectation for more active and meaningful participation is in line with Article 30

[1] The 1945 Constitution of Indonesia has been amended four times, namely on 19 October 1999, 18 August 2000, 10 November 2001 and 10 August 2002.

[2] Martin Krygier, "Critical Legal Studies and Social Theory," *Oxford Journal of Legal Studies* 7, no. 5 (1987); Eric Margolis and Stephen Laurence, "Concepts and Cognitive Science," in *Eric Margolis and Stephen Laurence*, (Stanford: Stanford University, 1996); Korner, "Deductive Unification and Idealisation," *The British Society for Philosophy of Science* 63, no. 20 (1964); Satjipto Raharjo, *Biarkan Hukum Mengalir, Catatan Kritis Tentang Pergulatan Manusia dan Hukum* [*Let the Law Flow, A Critical Note on the Struggle of Man and Law*] (Jakarta: Kompas, 2000).

[3] Law No. 23 of 2019 on the Management of National Resources for State Defense.

[4] BPIP and University of Bangka Belitung, "Kajian Evaluasi Undang-Undang Nomor 23 Tahun 2019 Tentang Pengelolaan Sumber Daya Nasional Untuk Pertahanan Negara [An Evaluation Study of Law No. 23 of 2019 on the Management of National Resources for State Defense]" (Final Report, BPIP and University of Bangka Belitung, 2019) 11-12.

(1) of the Indonesian Constitution, which stipulates, "Every citizen has the right and duty to participate in the defense and security of the state." This provision may be interpreted broadly to mean that citizens' participation in military service is both a right and an obligation. Moreover, Article 30 (5) of the Constitution includes the provision that, "... the requirements concerning the participation of citizens in the defense and security of the state, and other matters related to defense and security, are regulated by law." Supporting the implementation of the Constitution, the PSDN Law provides modes of accountabilities among actors such as the military and central and local governments for the mobilization, deployment and demobilization of reserve and backup components. Thus, the PSDN Law sees the coexistence of the state organs commonly recognized in the separation of powers, namely the legislative, executive and judicative organs, from central to local levels, applicable to the Indonesian state structure.[5]

Article 4 of the PSDN Law defines the scope of threats to national sovereignty, territorial integrity and security. Next, Article 5 details how the management of national resources for national defense is implemented. These articles reveal two distinct features. First, internal coordination and cordial support between the President, as the commander-in-chief, and the military creates a status of mission agreement to maintain national safety and security in facing military, hybrid and non-military threats. Second, at the operational and technical levels, the creation of a status of force agreement and rules of engagement based on the aforementioned types of threats determines the most acceptable options for the deployment of all available resources ranging from manpower, natural and/or man-made resources, especially civilians, as reserve and backup components. Furthermore, the PSDN Law also regulates national defense strategy in a more comprehensive, total, sustainable and well-organized manner required by the Indonesian Constitution. The PSDN Law is also seen as paving the way for a more active and adaptive plan of action in dealing with new phenomena of national threats, such as potential armed conflicts with their various characteristics,

[5] Article 3, Law No. 23 of 2019 on the Management of National Resources for State Defense, states, "The management of National Resources for State Defense aims to transform Human Resources, Natural Resources and Artificial Resources, as well as National Facilities and Infrastructure, into National Defense forces that are ready to be used for the interests of State Defense."

complex emergencies, and disasters deemed as military threats, hybrid threats and non-military threats.[6] These threats require the government to take extraordinary measures to sustain the national interest and national resilience by involving active and meaningful participation from all citizens.[7]

To this end, the hybrid threat category was introduced to cover grave national safety and security threats. Consequently, extraordinary measures are construed as substantial matters in the PSDN Law, triggering debate over the Law's implementation.[8] As a result of implementation issues, a lack of stipulations, and loose interpretation, there is an opportunity for improvement, particularly with regard to conscription of reserve and backup components for military service. If the obstacles are resolved, participation will be safer and more meaningful through the use of legitimate objections, such as conscientious objection, as an alternative form of participation.[9] It is hoped that the issuance of the PSDN Law will result in greater public awareness regarding civilian conscription for military service, as well as protection of private premises, better safety for civilian engagement in times of war, more precise recording of zones of national resources, and flexible forms of meaningful participation by highlighting different expertise, resources, risks and conditions during situations of state emergency, particularly based upon respect and protection of human rights.[10] However, the PSDN Law is also deemed to be centralistic and mandatory, paying less attention to legitimate objections legally possessed by individuals or group of individuals, such as conscientious objection, as inherent human rights.

This article will provide an analytical analysis of three different topics. First, judicial review before the Indonesian Constitutional Court will be proposed

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[6] Article 4, Law No. 23 of 2019 on the Management of National Resources for State Defense.

[7] Osgar S. Matompo, "Pembatasan Terhadap Hak Asasi Manusia dalam Prespektif Keadaan Darurat [The Restrictions on Human Rights in the Perspective of Emergencies]," *Jurnal Media Hukum* 21, no. 1 (2014): 67-68; Siti Marwiyah, "Kewenangan Konstitusional Presiden Terhadap Hal Ikhwal Kegentingan yang Memaksa [The President's Constitutional Authority on Emergency Matters]," *Jurnal Masalah-Masalah Hukum* 4, no. 3 (2015): 297.

[8] Nanda Perdana Putra, "Pro Kontra Rekruitmen Komponen Cadangan, UU PSDN Digugat ke MK [Pros and Cons of Reserve Component Recruitment, PSDN Law Challenged at the Constitutional Court]," Merdeka, published 31 May 2021; Andi Saputra, "Hikmahanto Juwana di MK: UU PSDN Adalah UU yang Disiapkan Bila Ada Perang [Hikmahanto Juwana at the Constitutional Court: The PSDN Law is a Law Prepared for the Event of War]," DetikNews, published 10 February 2022.

[9] United Nations Human Rights Office of the High Commissioner, *Conscientious Objection to Military Service* (Geneva and Switzerland: United Nations Publication, 2012), 20-21.

[10] Saputra, "Hikmahanto Juwana di MK [Hikmahanto Juwana at the Constitutional Court]."

to test the second and the third issues in accordance with Article 28 of the Indonesian Constitution and relevant international human rights standards on the recognition of conscientious objection to military service as an inherent human right. Second, civilian conscription to military service as reserve and backup components under the rubric of international human rights law, international humanitarian law and international criminal law will be outlined to determine the area, scope and application of Indonesia's international obligations under human rights standards to justify the relevance of conscientious objection. Such application will be utilized to determine whether or not the enactment of the PSDN Law in Indonesia complies with international standards on the recognition of conscientious objection. Meaningful involvement based on conscientious objection to military service will be evaluated according to the extent to which certain components of understanding have been met, possible risks have been taken, and civilian resources have been allocated. In addition to the issue of legitimacy and accountability, it must also be evaluated from the government's perspective to justify the nature of "absolute choice and mandatory manner" as the cause of possible human rights abuse and ignorance of the essence of conscientious objection in the PSDN Law.

II. JUDICIAL REVIEW BEFORE THE INDONESIAN CONSTITUTIONAL COURT

A coalition of civil society organizations, namely Imparsial (the Indonesian Human Rights Monitor), Elsam (*Lembaga Studi dan Advokasi Masyarakat*, the Institute for Community Studies and Advocacy), and KontraS (*Komisi untuk Orang Hilang dan Korban Tindak Kekerasan*, the Commission for Disappeared and Victims of Violence), deemed several articles of the PSDN Law as a threat to civilian rights and an abuse of constitutional power.[11] The organizations in 2021 submitted a petition to the Constitutional Court for judicial review of the

[11] They submitted the judicial review application to the Constitutional Court on 3 August 2021, questioning the legality of Articles 4, 5, 17, 18, 20, 28, 29, 46, 66, 75, 77, 78, 79, 81 and 82 of the PSDN Law toward the Indonesian Constitution, specifically Articles 28 and 30. On 31 October 2022, the Constitutional Court rejected the application, although it did order legislators to improve the definitions of threats in the PSDN Law and to ensure that its determination of resources is democratic and respects human rights.

constitutionality of the PSDN Law. This step was taken as an advocacy and adjudication mechanism, appealing that the participation of citizens in defending the State must be in accordance with national objectives, civil reformation and human rights standards. The applicants noted the PSDN Law allows for direct and rapid military plans implemented at the strategic, operational, and tactical levels, commanded by the military commander-in-chief, that is, the Indonesian President.[12] The organizations believe the PSDN Law systematically reduces the spirit of Indonesia's reformation agenda due to overwhelming military characteristics directed to civilians as reserve and backup components, military conscription with no room for objection or alternative modes of military service.[13] Moreover, they were concerned by the Law's centralization of policy deliberation, programs, actions and funds, citizens' mandatory participation and military reserves, appropriation of properties owned by citizens, and penalization of non-compliance with such measures as crimes.[14] The organizations submitted their judicial review request before the Constitutional Court on 31 May 2021, arguing that certain articles in the PSDN Law breach Article 28 of the Indonesian Constitution, especially concerning the duty to respect, protect and fulfil human rights and their legal limitation.[15]

One of the most crucial issues concerns the legitimacy of conscientious objection to mandatory military service under the PSDN Law.[16] Such objection is absent from the PSDN Law. However, Indonesia does have some laws and regulations on this matter. To some extent, the issue of mandatory military service may breach Indonesia's legal obligations as a member state to the International Covenant on Civil and Political Rights (ICCPR).[17] Article 18 of the ICCPR stipulates that "everyone shall have the right to freedom of thought, conscience and religion"

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[12] KontraS, Elsam and Imparsial, *Judicial Review Legal Argument*, 3 August 2021.
[13] The Indonesian Human Rights Monitor, *Menggugat Komponen Cadangan* [*Claiming Reserve Components*] (Jakarta: Imparsial, 2022), 1.
[14] The Indonesian Human Rights Monitor, 85-86.
[15] Massimo La Torre, *Law and Institutions* (London: Springer, 2009), 61; Robert S. Summers, *Form and Function in A Legal System A General Study* (Cambridge: Cambridge University Press, 2006), 15-19 and 3-7.
[16] The Indonesian Human Rights Monitor, 82.
[17] ICCPR entered into force on 23 March 1976, 993 UNTS 171, 1966 UNJYB 193; 1977 UKTS 6.

with its distinguished features on personal coverage relevant to law, policy, program and action issued by the government affecting their civil and political entitlements.[18] In addition, General Comment No. 22 (48) (Art. 18) of 1993 of the United Nations Human Rights Committee endorses conscientious objection as a reference for individual legal entitlement for military service that must be respected, protected and guaranteed by member states.[19] This raises the question of why the PSDN Law does not recognize conscientious objection – a question reviewed by the Indonesian Constitutional Court. The Constitutional Court's decision can been deemed a measure of Indonesia's willingness and compliance in fulfilling its obligations under the ICCPR and other international standards. Such compliance shall be measured based on several factors such as availability of regulation, transparency and non-discriminatory nature of procedures, and whether there are alternative choices to military service.[20]

Within the framework of human rights standards, Indonesia is obliged to fulfil its international obligations, i.e., duties to protect, to ensure and to respect from its membership to major human rights conventions.[21] In other words, these duties enshrine the principle of effectiveness, which requires that the provisions of peace treaties shall "be interpreted and applied so as to make their safeguards practical and effective" including use of force in time of emergencies

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[18] Commission on Human Rights, "Commission on Human Rights, Resolution 1998/77 on Conscientious Objection to Military Service" (Report, E/CN/4/RES/1998/77, 1998); D. Prasad and T. Smythe, *Conscription: A World Survey - Compulsory Military Service and Resistance to It* (London: War Resisters' International, 1968), 56; Anne M. Yoder, *Conscientious Objection in America: Primary Sources for Research* (Pennsylvania: Swarthmore College Peace Collection, 2003), 6-7.

[19] Markus Burgstaller, *Theories of Compliance with International Law* (Leiden: Martinus Nijhoff Publishers, 2005), 85; Andrew Guzman, *How International Law Works, A Rational Choice Theory* (Oxford: Oxford University Press, 2008), 22.

[20] UN Office of the High Commissioner for Human Rights, "Approaches and Challenges with Regard to Application Procedures for Obtaining the Status of Conscientious Objector to Military Service in Accordance with Human Rights Standards" (Report (published) presented for the United Nations High Commissioner for Human Rights, 2019); Human Rights Committee, "Compilation of General Comments and General Recommendations" (Report (published) presented for the United Nations High Commissioner for Human Rights, 1981).

[21] Hans-Joachim Heintze, *Convergence Between Human Rights Law and International Humanitarian Law and the Consequences for the Implementation* (London: Springer, 2011), 83-101; Heribertus Jaka Triyana, "Pengaruh Pasal 4 Undang-Undang Nomor 39 Tahun 1999 Tentang Hak Asasi Manusia Terhadap Upaya Penegakan Hukum Pelanggaran Berat Hukum Humaniter Internasional [The Effect of Article 4 of Law No. 39 of 1999 on Human Rights on Law Enforcement Efforts for Serious Violations of International Humanitarian Law]," *Jurnal Mimbar Hukum* 1, no. 3 (2004): 46-49.

and imminent threats.[22] Within the PSDN Law, imminent threats are defined as military, non-military and hybrid threats. Consequently, state organs bear the responsibility to protect and respect human rights law, especially in exercising legal entitlement between the duty-bearer (i.e., the state, state organs) vs. rights holders (i.e., the individual, groups).[23] Particularly, such provisions apply in terms of the conduct of state organs to achieve legitimate mandates in the PSDN Law. State organs also bear responsibility to be held accountable if they violate international human rights law in their duties in handling threats or emergencies once people are mobilized and deployed.[24] State defense policies, programs and actions as a manifestation of duty to respect of human rights law have been incorporated by the PSDN Law as a matter of law. However, the PSDN Law itself does not provide any references to effectively control activities and measures carried out by the reserve and backup components of military forces once they are deployed. Consequently, matters relating to training, active dissemination, education, and the interpretation of international human rights law must be put into simple language to ensure understanding and awareness of the reserve and backup components. It is also necessary to include legitimacy or reasons why the troops are deployed for missions. This step should be taken by the president when he/she mobilizes or demobilizes reserve and backup components in complex emergency situations based on the PSDN Law.

From a legal point of view, the issuance of the PSDN Law has also created a discourse on the status and applicability of International Human Rights Law (IHRL), International Humanitarian Law (IHL) and criminal law in the Indonesian legal system, especially on the issue of conscription and criminal

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[22] Human Rights Committee, "Compilation of General Comments and General Recommendations" (Report (published) presented for the United Nations High Commissioner for Human Rights, 2019); European Court of Human Rights, Case of *Loizidou vs. Turkey*, Preliminary Objections No. 15318/89 (European Court of Human Rights, 1995).

[23] Rick Lawson, "Out of Control, State Responsibility and Human Rights: Will the ILC's Definition of the 'Act of State' Meet the Challenges of the 21st Century?" in *The Role of the Nation-State in the 21st Century, Human Rights, International Organizations and Foreign Policies: Essays in Honor of Peter Baehr*, eds. Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith (Cambridge: Kluwer Law International, 1999), 91.

[24] Eva Rieter and Karin Zwaan, *Urgency and Human Rights, The Protective Potential and Legitimacy of Interim Measures* (The Hague: T.M.C. Asser Press, 2020), 28-29; Eva Rieter, *Preventing Irreparable Harm: Provisional Measures in International Human Rights Adjudication* (Antwerp: Intersentia, 2010), 5-8.

sanctions imposed for refusing to be reserve or backup components.[25] In simple terms, conscientious objection is legally assumed to be a crime punishable under the PSDN Law. This shows the PSDN Law ignores generally accepted human rights standards. As a result, it reduces the legitimacy of the PSDN Law and its implementation. Such concerns prompted several civil society organizations to review the validity of the PSDN Law at the Constitutional Court, as described above.

The petition for judicial review of the PSDN Law was submitted to test the legal position of Indonesia on the implementation of international human rights standards on the recognition and application of conscientious objection.[26] Military service and human rights standards on conscientious objection have relevance in four features tested in the Constitutional Court. First, they are the means of the legal basis for legitimate sources (just causes) to conduct actions in situations of military, non-military and hybrid threats, and who is obligated to act in conformity with them (duties to respect as preventive action for violations); the degree of military control over individuals (duties to protect and respect, which can hold them accountable for any potential breaches), where and when the operation is ultimately conducted among military forces (all the duties).[27] Thus, it was believed that submitting a judicial review to the Constitutional Court would clarify the area, scope and application of conscientious objection for military service as an inherent human right. Furthermore, it would also create a standard to prevent abuse of power by state authorities in future situations of military, non-military, and hybrid threats.

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[25] T.O. Elias, *New Horizons in International Law*, 2nd ed. (Leiden: Martinus Nijhoff Publishers, 1979), 15; Isabella Daoust, Robin Coupland and Rikke Ishoey, "New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare," International Review of the Red Cross 84, no. 846 (2002): 345-62; George H. Aldrich, "The Law of War on Land," *American Journal of International Law* 94, no. 42 (2000): 54; George H. Aldrich, "Compliance with International Humanitarian Law," *International Review of the Red Cross*, no. 282, (1991): 294; Timothy L.H. McCormack, "From Solferino to Sarajevo: A Continuing Role for International Humanitarian Law," *Melbourne University Law Review* 21 (1997): 642; Marco Sassòli and Antoine Bouvier, "How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law," ICRC, published 9 June 2020.

[26] Maruarar Siahaan, *Hukum Acara Mahkamah Konstitusi Republik Indonesia* [*Procedural Law of the Constitutional Court of the Republic of Indonesia*] (Jakarta: Sinar Grafika, 2015), 5-20.

[27] D. Fisher, "Domestic Regulation of International Humanitarian Relief in Disasters and Armed Conflict: A Comparative Analysis," *International Review of the Red Cross*, no. 866 (2007); Alan Page Fiske, "Complementarity Theory: Why Human Social Capacity Evolved to Require Cultural Complement," *Personality and Social Psychology Review* 4, no. 1 (2000).

III. MILITARY SERVICE, CONSCIENTIOUS OBJECTION AND HUMAN RIGHTS IN INDONESIA

In Indonesia, military service is primarily by those who applied voluntarily as regular military forces.[28] Military power served by regular forces aims to sustain national interests and protect sovereignty from external threats, so military force is last resort and a legitimate coercive tool of the state.[29] Every year, thousands of Indonesians enlist, based on their competence, in air, sea and land forces. Military personnel have their own functional imperative characters and uniqueness compared to civilians in their legal obligations as citizens.[30] Consequently, primary responsibility for national defense is carried out by military forces, while reserve and backup components serve as complementary organs.[31] This primary function of defense is mainly directed at military threats from other states or international armed conflicts, based on the concept of state security. However, the concept of threat has been developed into more fluid individual security issues, marked by human rights, democracy and good governance.[32] Comprehensive security for a state's existence under international law and international relations involves active participation from citizens to

[28] Article 7 (2), Law No. 3 of 2002 on National Defense states, "The national defense system in dealing with military threats places the Indonesian National Armed Forces as the primary component, supported by reserve components and backup components."

[29] Timothy L.H. McCormack, "From Solferino to Sarajevo: A Continuing Role for International Humanitarian Law," *Melbourne University Law Review* 21 (1997): 1059–60; Isabella Daoust, Robin Coupland, and Rikke Ishoey, "New Wars, New Weapons? The Obligation of States to Assess the Legality of Means and Methods of Warfare," *International Review of the Red Cross*, no. 84 (2002): 345-62.

[30] Katherine Doherty and Timothy L.H. McCormack, "'Complementarity' as a Catalyst for Comprehensive Domestic Penal Legislation," *University of California Davis Journal of International Law and Policy* 5, (1995): 171; John Tobin, "Seeking Clarity in Relation to the Principle of Complementarity: Reflection on The Recent Contributions of Some International Bodies," *Melbourne Journal of International Law* 8, (2017); Jann K. Kleffner, "The Impact of Complementarity on National Implementation of Substantive International Criminal Law," *Journal of International Criminal Justice* 1, no. 1 (2003): 88-89.

[31] Article 8 (1) of Law No. 3 of 2002 on National Defense states, "The reserve component consists of citizens, natural resources, artificial resources, and national facilities and infrastructure, which have been prepared to be deployed through mobilization to enlarge and strengthen the primary components." Article 8 (2) of Law No.3 of 2002 states, "The backup component consists of citizens, natural resources, artificial resources, as well as national facilities and infrastructure that can directly or indirectly increase the strength and capability of the primary component and the reserve component."

[32] Benjamin Miller, "The Concept of Security: Should it be Redefined?" *Journal of Strategic Studies* 24, no. 2 (2001): 19–22; The Preamble of the ASEAN Charter also recognizes the shifts in regional threats and challenges by mentioning the need "to effectively respond to current and future challenges and opportunities", while the AICHR Terms of Reference states that one of its purposes is "To enhance regional cooperation with a view to complementing national and international efforts on the promotion and protection of human rights".

counter global threats, such as climate change, pollution and poverty, affecting individual needs and concerns.[33] This concept of threat inspired the purposeful rationales for the enactment of the PSDN Law. Reserve and backup components should be controlled and prepared in line with regular military forces in order to bolster Indonesia's resilience against all foreign and internal threats.[34]

In addition to the aforementioned facts, Indonesia has taken steps since 1998 to sustain its reform program, including in its security sector. Such reform emphasizes good governance, democracy and human rights. Maintaining civilian supremacy in politics, professional and competent military welfare arrangements, and a clear and powerful assignment of foreign defense authority dictate the rationales.[35] In 2005, the Organization for Economic Cooperation and Development (OECD) issued guidelines for Security Sector Reform (SSR). In order to minimize abuse of power by the military or military leaders, resulting in egregious human rights abuses, unnecessary suffering, and impunity, one of the prominent goals of SSR is to ensure that heads of state or those in authority are held accountable.[36] To this end, Indonesia has made efforts to prevent gross violations of human rights or potential abuses committed by military

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[33] Daniel Yergin, *The New Map, Energy, Climate and the Clash of the Nations* (New York: Penguin, 2020), 423; Bill Gates, *How to Avoid Climate Disaster* (New York: Penguin, 2021), 227; Deiter Helm, *Net Zero: How We Stop Causing Climate Change* (United Kingdom: HarperCollins, 2022), 231; Gearoid Tuathail, Simon Dalby, and Paul Routledge, *The Geopolitics Reader* (New York: Routledge, 2007), 263.

[34] Constitutional Court of the Republic of Indonesia, "Pengujian Undang-Undang Nomor 23 Tahun 2019 Tentang Pengelolaan Sumber Daya Nasional Untuk Pertahanan Negara Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, No. 27/PUU-XIX/2021 [Judicial Review of Law No. 23 of 2019 on the Management of National Resources for State Defense Against the 1945 Constitution of the Republic of Indonesia, No. 27/PUU-XIX/2021]" (Report, Constitutional Court of the Republic of Indonesia, 2021).

[35] Dewi Fortuna Anwar, "Demokrasi, Keamanan dan Peranan Militer [Democracy, Security and the Role of the Military]" in *Ikrar Nusa Bakti, Dinamika Internal Tentang Peran dan Fungsi TNI* [*Nusa Bakti Pledge, Internal Dynamics of the Role and Functions of the TNI*], ed. Ikrar Nusa Bhakti (Jakarta: LIPI Political Research Center, 2001), 19-21; Faculty of Law, Universitas Gadjah Mada, "Reposisi TNI-POLRI dalam Sistem Hukum Indonesia [TNI-POLRI Reposition in the Indonesian Legal System]" (Research Paper funded by USAID, 2001), 19-26.

[36] Organization for Economic Cooperation and Development, *Security Sector Reforms and Governance* (Paris: OECD Publishing, 2005), 20; Steven Ratner and Jason Abrams, *Accountability for Human Rights Atrocities in International Law Beyond the Nuremberg Legacy*, 2nd ed. (Oxford: Oxford University Press, 2009), 21; Neil Kritz, "Coming to Terms with Atrocities: A Review of Accountability Mechanism for Mass Violations of Human Rights," *Law and Contemporary Problems* 59, (1996): 127; United Nations Development Programme, "Public Accountability of Democratic Institution" (Report (published), 2002), 65; Louis Joinet, "Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political)" (Report (published) presented for Sub-Commission Decision 1996/119, 1996), 13–14.

members or their superior officers.[37] This commitment has been manifested by enacting effective penal sanctions and creating national institutions to monitor the protection of human rights. Indonesia's National Commission on Human Rights, created in 1993, was strengthened by new legislation in 1999. Similarly, the National Press Council, established in 1968, was made independent in 1999. The National Commission for the Protection of Children was founded in 1998, as was the National Commission on Violence Against Women, and the Judicial Commission was founded in 2004. Since the onset of Indonesia's reform era in 1998, prosecution of persons suspected of committing or ordering human rights abuses is mainly conducted in accordance with international standards for a fair trial. Measures have also been taken to ensure the accountability of trials, and to enact appropriate laws for victims of abuse and those who have suffered a miscarriage of justice. All of these norms and institutions, including the establishment of the Ad Hoc Human Rights Tribunal for Timor-Leste, have also been launched with mutual state cooperation in handling criminal issues, whether in times of peace or war.[38]

In addition to these initiatives, other measures have been taken concurrently to ensure that Indonesia complies with international human rights law, including the creation of policies, programs and actions. Examples include the enactment or recognition of inquiry procedures, cooperation with the United Nations (UN) and the Association of Southeast Asian Nations (ASEAN), special reports on violence against women and children, and the enhancement of cooperation with the ASEAN Intergovernmental Commission on Human Rights (AICHR) and the

[37] For example, in the Ad Hoc Tribunal for Timor-Leste, Case register: 01/PID HAM/Ad Hoc/PN JKT PST; a former governor of East Timor was found guilty and sentenced to three years' imprisonment. He was convicted for his involvement in crimes against humanity. As governor, he intentionally ignored information of the atrocities and did not try to stop atrocities in which 22 people were killed and 21 wounded. He was charged pursuant to Article 42 (2) a, b, Article 7(b) and Article 37 of the 26 of 2000 Law. Also, in a judgment in January 2003, a former Police Chief of Dili was sentenced to three years in jail for failing to prevent violence in East Timor.

[38] Article 8, Law No. 39 of 1999 on Human Rights; Article 49, Compared with Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949; Article 50 of the Convention (II) for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea; Article 129, Convention (III) Relative to the Protection to the Prisoner of War of 1949; Article 146, Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949; The 1949 Geneva Conventions were ratified by Indonesia by Law No. 59 of 1958 on the Participation of Indonesia in all the 1949 Geneva Conventions; International Committee of the Red Cross, *The Geneva Conventions of August 12, 1949* (1949), 44-5, 70-1, 132-3, 212-3; Article 89, Additional Protocol I to the 1949 Geneva Conventions of 1977.

ASEAN Commission on Women and Children (ACWC).[39] In particular, national courts have been given authority to prevent abuse of power and gross human rights violations by military personnel or their superiors.[40] Law No. 26 of 2000 on Human Rights Courts furthered Indonesia's security sector reforms.[41] Thus, military forces have been regulated by mainstreaming respect to human rights standards as it is believed this will increase their professionalism and capabilities, in addition to enhancing their accountability and legitimacy in a democratic society, as required by Article 28J (2) of the Indonesian Constitution.[42] Hence, factors such as responsibility, professionalism, competence and welfare of the armed forces, mainstreamed by proper human knowledge and values, determines accountability as well as legitimacy for any deployment of military forces.

The most logical framework for revealing patterns, trends or orientations to critically assess the future application of the PSDN Law is an analysis of prior experience. It has been demonstrated that professional armed forces ensure accountable civil, political, economic, social, cultural and social exchanges between state authority and its citizens. In a democratic society, professional armed forces aid in the reduction of the state's coercive dominance.[43] In the past, state authority championed by military intervention led to abuses of powers as well as gross human rights violations due to military hegemony, especially in

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[39] Henry J. Steiner and Phillip Alston, *International Human Rights in Context: Law, Politics, Morals: Text and Materials*, 2nd ed. (Oxford: Oxford University Press, 2000), 28; Tommy Koh and Rosario G Manalo, *The Making of the ASEAN Charter* (Singapore: World Scientific Publishing, 2009), 117; ASEAN, *ASEAN Masterplan* (ASEAN, 2020), 26; Michelle Staggs Kelsall, *The New ASEAN Intergovernmental Commission on Human Rights: Toothless Tiger or Tentative First Step?* (United States: East-West Center, 2009), 2-3; Li-an Thio, "Implementing Human Rights in ASEAN Countries: Promises to Keep Miles to Go Before I Sleep," *Yale Human Rights and Development Journal* 2, no. 1 (2014): 7, 40, 41.

[40] Miriam Budiardjo, *Demokrasi di Indonesia: Demokrasi Parlementer dan Demokrasi Pancasila* [*Democracy in Indonesia: Parliamentary Democracy and Pancasila Democracy*] (Jakarta: Gramedia Pustaka Utama, 1994), 10-21.

[41] Saputra, "Hikmahanto Juwana di MK [Hikmahanto Juwana at the Constitutional Court]."; Nihal Jayawickrama, *The Judicial Application of Human Rights National, Regional and International Jurisprudence* (Cambridge: Cambridge University Press, 2002).

[42] Law No. 3 of 2002 on National Defense states, "That state defense efforts are carried out by building, maintaining, developing, and using national defense forces based on the principles of democracy, human rights, general welfare, the environment, provisions of national law, international law and international custom, as well as the principle of peaceful coexistence." Article 28J (2) of the Indonesian Constitution states, "In exercising their rights and freedoms, every person shall be subject to any restrictions established by law solely for the purpose of ensuring the recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, religious values, security, and public order in a democratic society."

[43] Andi Widjajanto, *Reformasi Sektor Keamanan Indonesia* [*Indonesia's Security Sector Reform*] (Jakarta: Pro Patria, 2004), 15-18; Shanty Sibarani, *Antara Kekeuasaan dan Profesionalisme Menuju Kemandirian Polri* [*Between Power and Professionalism Towards Police Independence*] (Jakarta: PT Dhramapena, 2001), 51-52.

the economic and security sectors.[44] Consequently, there is public scrutiny and negative perceptions over the possible deployment of reserve and backup military components by means of conscription, mandatory appropriation of private properties, and enactment of criminal sanctions, as such policies are deemed to have been made without any possible considerations of individual or group of individual risks, resources and knowledge assessments. There are concerns over assigning the military to non-military threats, while civilians are prepared and equipped with military status and capabilities with no clear link to internal or international armed conflict situations. In simpler terms, citizens become military personnel without understanding the legal and lethal implications. Extensive and systematic military engagement with civilians raises the question of whether the security sector in Indonesian reform will be strengthened or weakened when the majority of military characteristics and capabilities are attached to civilians as reserve and backup components.[45]

Indonesia's legal system has been augmented by the development of human rights standards in which human rights have been exercised, guaranteed and enforced as a prerequisite to a democratic society.[46] The Indonesian Constitution highlights the supremacy of law, equality before the law,[47] and human rights to balance the use of force in order to maintain public order, national interests, public morality and public health.[48] The concepts of supremacy of law and equality before the law are fundamental to Indonesian SSR by strengthening the Indonesian

[44] Moch. Nurhasim, *Praktek-Praktek Bisnis Militer: Pengalaman Indonesia, Burma, Filipina, dan Korea Selatan* [*Military Business Practices: Experiences of Indonesia, Burma, Philippines, and South Korea*] (Jakarta: The RIDEP Institute, 2003), 8-10; Muradi, *Metamorfosis Bisnis Militer: Sebaran Bisnis TNI Pasca UU TNI Diterbitkan* [*The Metamorphosis of Military Business: Distribution of TNI Business After Issuing the TNI Law*] (Jakarta: The RIDEP Institute, 2007), 15-20.

[45] Constitutional Court of the Republic of Indonesia, "Pengujian Undang-Undang Nomor 23 Tahun 2019 Tentang Pengelolaan Sumber Daya Nasional Untuk Pertahanan Negara Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, No. 27/PUU-XIX/2021 [Judicial Review of Law Number 23 of 2019 on the Management of National Resources for State Defense Against the 1945 Constitution of the Republic of Indonesia, No. 27/PUU-XIX/2021]" (Report, Constitutional Court of the Republic of Indonesia, 2021).

[46] The People's Consultative Assembly (*Majelis Permusyawaratan Rakyat*, MPR) promulgated its decision on human rights by MPR Decree Number XVII on Human Rights in 1998. This was followed by the enactment of Law No. 39 of 1999 on Human Rights, which entered into force on 23 September 1999, and then the direct enactment of the Law No. 26 of 2000 on Human Rights Courts, which entered into force on 23 November 2000. See Boer Mauna, *Hukum Internasional, Pengertian Peranan dan Fungsi dalam Era Dinamika Global* [*International Law, Understanding the Role and Function in the Era of Global Dynamics*] (Bandung: PT. Alumni, 2003), 623-24.

[47] Indonesian Constitution, Chapter IX.

[48] Indonesian Constitution, Chapter XA.

judiciary's composition of impartial, independent and competent bodies.[49] Human Rights, i.e., rights to life,[50] freedom,[51] and protection,[52] are guaranteed by the Constitution. Such rights are relevant to the issues of conscription and conscientious objection. In addition to the Constitution, numerous laws have been enacted for the respect, protection and fulfilment human rights enjoyed by civilians in their defense rights and duties. Examples of this progress include MPR Decree Number XVII/MPR/1998 on Human Rights,[53] Law No. 39 of 1999 on Human Rights, and Law No. 26 of 2000 on Human Rights Courts.[54] To enforce material elements, the Criminal Procedure Code (*Kitab Undang-Undang Hukum Acara Pidana*, KUHAP),[55] the Military Criminal Code (*Kitab Undang-Undang Hukum Pidana Militer*, KUHPM)[56] and Law No. 26 of 2000 have been promulgated to stop potential abuses of power and to prosecute perpetrators of gross human rights violations. In this regard, the Indonesian courts have a role in creating, guaranteeing and enforcing the enjoyment of human rights standards for individuals within Indonesian jurisdiction and territory. Besides this, they also exercise human rights legislation as a legal basis to hold perpetrators of human rights abuses accountable and to give remedies to victims of past gross human rights violations.[57]

There are certain 'pressures' in a military operation involving direct engagement of civilians as reserve and backup components. These can be examined and compared to international experiences gathered by the United

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[49] Indonesian Constitution, Chapter IX, Article 24 states, "The judicial power is exercised by a Supreme Court with its subordinated judicial bodies within the form of general courts, religious courts, military courts, administrative courts, and by a Constitutional Court."

[50] Indonesian Constitution, Article 28A.

[51] Indonesian Constitution, Article 28E.

[52] Indonesian Constitution, Article 28G.

[53] A Decree of the People's Consultative Assembly (*Ketetapan Majelis Permusyarwaratan Rakyat*, TAP MPR) is the second-highest hierarchical source of law in the Indonesian legal system.

[54] State Gazette No. 208 of 2000, which entered into force on 23 November 2000.

[55] Law No. 8 of 1981 on Criminal Procedure Law.

[56] Law No. 31 of 1997 on Military Courts.

[57] Benedetto Conforti, *Enforcing International Human Rights in Domestic Courts* (The Netherlands: Martinus Nijhoff Publishers, 1997), 3; Jo Stigen, *The Relationship Between the International Criminal Court and National Jurisdictions, The Principle of Complementarity* (Leiden: Martinus Nijhoff Publishers, 2008), 6-8; John T. Holmes, "The Principle of Complementarity" in *The International Criminal Court: The Making of the Rome Statute - Issues, Negotiations, Results* (Boston: Kluwer Law International, 1999), 41-78; Katherine Doherty and Timothy LH. McCormack, "'Complementarity' as a Catalyst for Comprehensive Domestic Penal Legislation," *University of California Davis Journal of International Law and Policy* 5, (1995): 667-68.

Nations during its deployment of peacekeeping operations around the globe.[58] Indicators of legitimate aims, proportionality, prompt situations and clarity of status of the military members construed in peacekeeping operations' status mission agreements, the status of force agreements, and rules of engagement can be used as a comparative study to test the legal relationships of military service and compliance to human rights standards in the PSDN Law. Deployment of civilians as reserve and backup components in operations involving military, hybrid and non-military threats is difficult to comply with the aforementioned indicators on the ground. Crimes could easily be committed, leading to an attitude of superiority once the reserves become well-trained and fully equipped combatants. Further, the distinction between military and civilian targets regulated in IHL becomes at risk of being eroded when subjects are a mix between regular military forces and civilians (reserve and backup components), and when a situation has no nexus with armed conflicts, such as riots, tensions or internal disturbances.

At the international level, for example, precedent from the Kosovo War of 1998-99 highlights this matter, although the UN forces applied the application of IHL.[59] In such circumstances, it will be more difficult to demonstrate the difficulties associated with combining humanitarian aims with efficient control and political administration of military forces. It may also happen in Indonesia when threats are construed as military, non-military and hybrid.[60] Undoubtedly, there is a need for a clear concept for deployment and procedures for military responses to crises to reduce the likelihood of individual crimes carried out by reserve and backup components. Applicable laws on the ground must be in line

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58 United Nations Security Council, "S/Res/758," S/Res/758 (1992); United Nations Security Council, "S/Res/761," S/Res/761 (1992); United Nations Security Council, "S/Res/770," S/Res/770 (1992); United Nations Security Council, "S/Res/1270," S/Res/1270 (1999); United Nations Security Council, "S/Res/918," S/Res/918 (1994); United Nations Security Council, "S/Res/975," S/Res/975 (1995); United Nations Security Council, "S/Res/814," S/Res/814 (1993); United Nations Security Council, "S/Res/1101," S/Res/1101 (1997); United Nations Security Council, "S/Res/1199," S/Res/1199 (1998); United Nations Security Council, "S/Res/1272," S/Res/1272 (1999).

59 United Nations Secretary General, "Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law" (Report, ST/SGB/1999/13, 1999).

60 Swedish National Defence College, *Challenges of Peace Operations: Into the 21st Century* (Sweden: Elanders Gotab, 2002); Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law* (Leiden: Martinus Nijhoff Publishers, 1996); Fernanon Teson, *Humanitarian Intervention: An Inquiry into Law and Morality* (Leiden: Martinus Nijhoff Publishers, 1996); The Asia Pacific Center, *The Responsibility to Protect in Southeast Asia* (California: The Asia Pacific Center, 2009).

with international human rights and humanitarian laws. Such measures are necessary for accountability for military forces' rules of engagement applicable for civilians as reserve and backup components.[61]

The degree of control over civilians in armed conflicts triggers the application of international human rights law treaties or customs. Once reserve and backup components are deployed, irrespective of the types of operations, the state authority shall bear responsibility to apply international human rights law.[62] If the reserve and backup components then violate provisions in human rights law, they will be held accountable for their actions irrespective of their status as civilian or quasi-military. This raises the question of whether they have awareness of such legal consequences. Article 1 of the UN Code of Conduct for Law Enforcement Officials states, "Law enforcement officials shall all times fulfil the duty imposed upon them by law, by serving the community and by protecting all persons against illegal acts, consistent with the high degree of responsibility required by their profession."[63] Article 2 then states, "In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons." The Commentary for Article 2 states that the human rights in question are identified and protected by national and international law.[64] Clarity of mission objectives, structures of force, and fixed interpretation of the use of force in rules of engagement are three fundamental elements that must be complied with to ensure the respect and protection of human rights for military deployment affecting civilians and to reduce possible abuses or human rights violations. Factually, the PSDN Law is silent on this reference determining the obligations of commanders, field officers and civilians

[61] Adam Roberts, "Humanitarian Issues and Agencies as Triggers for International Military Action," *International Review of the Red Cross* 82, no. 839 (2000): 679; Borhan Amrallah, "The International Responsibility of the United Nations for Activities Carried Out by UN Peace-Keeping Forces," *Revue Egyptienne de Droit Internationalle* 57 (1976): 57–59; Michael H. Hofmann, "Peace-Enforcement Actions and Humanitarian Law: Emerging Rules for Interventional Armed Conflict," *International Review of the Red Cross* 82, no. 837 (2000): 201.

[62] John Cerone, "Minding the Gap: Outlining KFOR Accountability in Post-Conflict in Kosovo," *European Journal of International Law* 12, no. 3 (2001): 472, 476.

[63] United Nations Human Rights Office of the High Commissioner, "Code of Conduct for Law Enforcement Officials" (Report, General Assembly Resolution 34/169, Article 1, 1979).

[64] United Nations Human Rights Office of the High Commissioner, "Code of Conduct for Law Enforcement Officials" (Report, General Assembly Resolution 34/169, Article 2, 1979).

serving as reserve and backup components when deployed in a situation deemed a state of emergency due to military, non-military and hybrid threats.

Overall, the PSDN Law has legitimate reasons to comply with human rights standards on controlling military personnel and civilians who serve as military members, yet there is no reference to the existence of conscientious objection possessed by civilians. This is not line with accountability and legitimacy of actions, which have been institutionalized with human rights mainstreaming. Many institutions have been created to manifest human rights standards carried out by military forces. Management of maximum available resources is intended to improve the military's capacity for defense of the state. However, conscription of civilians can reduce the level of control between military commanders and their subordinates. The absence of reference to this issue will lead to the potential abuse of power by a military commander toward reserve and backup component members. Furthermore, there is the risk that civilians may commit crimes or even human rights abuses when deployed in military, non-military and hybrid threats. The PSDN Law's lack of attention to the degree of control over civilians exercised by military superiors endangers compliance with human rights standards. This lack of accountability and lack of legitimacy for military service by civilians needs to be continuously criticized in order to maintain the spirit of the Indonesian security sector's reform.

IV. CONSCIENTIOUS OBJECTION TO MILITARY SERVICE IN INDONESIA

Conscientious objection is part of the inalienable right to freedom of thought, conscience and religion under Article 18 of the ICCPR, to which Indonesia is a member state upon ratification of the Convention by Law No. 12 of 2005. This means that Indonesia has to take action to comply with the ICCPR. However, the scope of the PSDN Law does not support the obligation to determine and regulate conscientious objection to military service by civilians as reserve and backup components.[65] Furthermore, the PSDN Law is also silent on any possible alternative modes of

[65] KontraS, Elsam, and Imparsial, *Judicial Review Legal Argument*, 3 August 2021, paras. 99, 23.

national service or legitimate forms of conscientious objection and the duration of claims before, during and after conscription.[66] Consequently, there may be unwillingness among civilians to participate in military service as reserve and backup components. Ignorance of international standards and a lack of compliance become challenges in managing and controlling mobilization and demobilization to be more accountable for engagement of civilians.[67]

Following the promulgation of the PSDN Law, the notion of conscientious objection has become a common topic in public discourse, especially among legal practitioners and academics. It opens different interpretations between reality and normativity, ambiguity of meanings, overlapping institutionalization, non-existence of norm, and possible conflicts of norms in the Indonesian legal system.[68] Even though conscientious objection is recognized as an inherent human right, it has not been familiarly used nor practiced in Indonesia. In the PSDN Law, the scope for clear rights and obligations between the state as duty-bearer and citizens, especially those who object to being conscripted, are under question. Conscription under the PSDN Law is tailored to a specific scenario involving potential military, non-military and hybrid threats. In this regard, a lack of public awareness and potential dangers have been raised as issues by people opposed to the possibility of being drafted into the military. Such arguments could indicate the PSDN Law involves low accountability as reduces meaningful participation from civilians, thereby hindering basic acceptance of the PSDN Law.[69]

Upon further examination, it is apparent that there is an absence of implementing legislation regulating protection of conscientious objectors and of specific references to recognize conscientious objection in the PSDN Law

[66] KontraS, Elsam, and Imparsial, *Judicial Review Legal Argument*, 3 August 2021, paras. 101-2, 123-24.
[67] National Commission on Human Rights, "Menyoal Undang-Undang Pengelolaan Sumber Daya Nasional Untuk Pertahanan Negara (PSDN) [Questioning the Law on the Management of National Resources for State Defense (PSDN)]," Komnas HAM Republik Indonesia, published 23 March 2020.
[68] SETARA Institute, "Pemerintah Bergerak Cepat Membuat Aturan Turunan UU PSDN, Tapi Lamban Merespon Sorotan [Government Moves Quickly to Create Derivative Regulations for the PSDN Law, but is Slow to Respond to Scrutiny]," SETARA Institute, published 22 January 2021.
[69] Edna C. Pattissina, "Amandemen Penundaan UU PSDN Diperkuat [Amendment to Postponement of PSDN Law Strengthened]," Kompas, published 5 August 2021.

in times of emergencies.[70] A specific reference is vital as reserve and backup components are among the persons most vulnerable during emergencies, being at risk of unavoidable harm, injuries and death. Another issue of the PSDN Law is why it does not provide alternative national service options for non-combatant roles that are more suitable for the expertise of civilians. The safety of civilians is the ultimate task to be guaranteed by the state at any time. The state has a special duty to take all appropriate measures to protect the dignity of its mission against any intrusions or damage and to prevent any disturbance of the peace or impairment of the dignity of its own nationals.[71] Without further regulations, there would not be a contingency plan against threats, which may strike at any moment and may cause fatalities among those who are conscripted and those who resist conscription due to conscientious objection.[72] This regulatory element is vital in cases of emergencies, for instance, in situations of armed conflict affecting national security, as the safety and security of reserve and backup components is paramount. There have been numerous instances where civilians were subjected to harm as a result of conflict with the military. For example, four farmers were shot dead and eight wounded in a land ownership dispute with the Indonesian Navy at Alas Tlogo village in Pasuruan district, East Java province on 30 May 2007.[73]

Technical arrangements for facilitating conscientious objection should be considered in the PSDN Law. The Constitutional Court could use the framework of judicial activism to recognize this right and its relevance. Arrangements should also be made for a database on reserve and backup components. Data on

[70] Dede Anggara Saputra, "Analisis Politik Hukum Undang-Undang Nomor 23 Tahun 2019 Tentang Pengelolaan Sumber Daya Nasional Untuk Pertahanan Negara [Political Analysis of Law No. 23 of 2019 on the Management of National Resources for State Defense]," *Lex Renaissance* 5, no. 4 (2020): 967; Media Indonesia, "Pengujian UU PSDN, TNI/POLRI Komponen Utama Pertahanan Keamanan [Judicial Review the PSDN Law, TNI/POLRI Main Components of Defense and Security]," Media Indonesia, published 21 October 2021.

[71] Constitutional Court of the Republic of Indonesia, "Pengujian Undang-Undang Nomor 23 Tahun 2019 Tentang Pengelolaan Sumber Daya Nasional Untuk Pertahanan Negara Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, No. 27/PUU-XIX/2021 [Judicial Review of Law Number 23 of 2019 on the Management of National Resources for State Defense Against the 1945 Constitution of the Republic of Indonesia, No. 27/PUU-XIX/2021]" (Report, Constitutional Court of the Republic of Indonesia, 2021).

[72] Joko Sadewo, "Ketua PBHI Sebut UU PSDN Banyak Masalah Substansial [PBHI Chairman Says PSDN Law Has Many Substantial Problems]," Republika, published 17 June 2022.

[73] Federasi KontraS, "Desakan Penyelesaian Kasus Alas Tlogo [Pressure to Settle the Alas Tlogo Case]," KontraS, published 2 August 2008.

potential reserves, the number of potential legitimate conscientious objectors, non-combatant roles and sustainable funding are essential for the recognition of conscientious objection. Factually, the PSDN Law is silent on these matters. Regrettably, the PSDN Law stipulates in strong terms the obligation for compulsory military service and penalties for those who refuse to participate. A penal sanction for conscientious objection, to some extent, breaches Indonesia's obligations under the 1949 Geneva Convention.[74] As a matter of law, this stipulation is indiscriminate in nature and neglects the state's proper protection system for its own nationals.[75] The proper system provides prompt services and protection for Indonesian citizens, as well as providing guiding principles to fulfil these obligations through, among others, an integrated, standardized, accurate and secure defense system.[76]

The aforementioned elements of the logical framework are derived from a human rights-based approach. This is "is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights".[77] In the context of conscientious objection to military service in Indonesia, this approach enables plans, policies and processes of development to be firmly secured in a system of rights and corresponding obligations established by

[74] Article 49, Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 1949; Article 50, Convention (II) for the Amelioration of the Condition of the Wounded and Sick and Shipwrecked Members of the Armed Forces at Sea; Article 129, Convention (III) Relative to the Protection to the Prisoner of War of 1949; Article 146, Convention (IV) Relative to the Protection of Civilian Persons in Time of War of 1949;

[75] Thomas Graditzky, "Individual Criminal Responsibility for Violations of International Humanitarian Law in Internal Armed Conflicts," *International Review of the Red Cross* 38, no. 322 (1998): 29-56; Fred Tanner, "Conflict Prevention and Conflict Resolution: The Limits to Multilateralism," *International Review of the Red Cross* 83, no. 541 (2000): 547–56.

[76] Constitutional Court of the Republic of Indonesia, "Pengujian Undang-Undang Nomor 23 Tahun 2019 Tentang Pengelolaan Sumber Daya Nasional Untuk Pertahanan Negara Terhadap Undang-Undang Dasar Negara Republik Indonesia Tahun 1945, No. 27/PUU-XIX/2021[Judicial Review of Law No. 23 of 2019 on the Management of National Resources for State Defense Against the 1945 Constitution of the Republic of Indonesia, No. 27/PUU-XIX/2021]", (Report, Constitutional Court of the Republic of Indonesia, 2021).

[77] Leena Avonius and Damien Kingsbury, *Human Rights in Asia: A Reassessment of the Asian Values Debate* (New York: Palgrave Macmillan, 2008); Jakob Kirkemann Boessan and Thomas Martin, *Applying a Rights-Based Approach: An Inspirational Guide for Civil Society* (Denmark: The Danish Institute for Human Rights, 2007); Philip J. Eldridge, *The Politics of Human Rights in Southeast Asia* (London: Routledge, 2002); Deiter Helm, *Net Zero: How We Stop Causing Climate Change* (London: William Collins, 2020); United Nations Human Rights Office of the High Commissioner, *Frequently Asked Questions on a Human Rights-Based Approach to Development Cooperation* (New York and Geneva: United Nations Publication, 2006); Jude Rand and Watson, *Rights-Based Approaches: Learning Project* (Boston: Oxfam America and Care, 2007).

international human rights law.[78] It also promotes sustainability to empower people and communities, especially regarding the rights and obligations of conscripts.

This approach also increases the sensitivity of the government to human rights protection in emergency situations when mobilization and demobilization are proportionally deployed.[79] Every human is a rights holder with entitlements to exercise human rights, including conscientious objection. Meanwhile, the duty-bearers who correspond to their obligations are decision-makers. The work of an advocacy program in this matter employs the human rights-based approach that must be directed toward capacities of rights-holders as well as meaningful participation to claim legal recognition, alternative modes for national service, non-discrimination of their rights, and flexibility of claims of conscientious objection to mandatory military service and to make duty-bearers realize their obligations to recognize and to determine area, scope and institutionalization of conscientious objection in the PSDN Law.[80] All of these concerns should be prudently taken into account by the Constitutional Court as elements of conducting judicial activism to protect human rights and to review constitutionality of the PSDN Law.

Conscientious objection is accepted as one of cardinal principles and legal rights when military service is enacted in certain laws, policies, programs and actions affecting individual rights to freedom of thought, conscience and religion.[81] This objection derives from the legitimate interpretation and application of

[78] Robert E. Robertson, "Measuring State Compliance with the Obligation to Devote the "Maximum Available Resources" to Realizing Economic, Social and Cultural Rights," *Human Rights Quarterly* 16 (1994): 699; Daniel Turk, "The Realization of Economic, Social and Cultural Rights" (Report (published) presented for United Nations Economic and Social Council, 1989); Daniel Turk, "The Realization of Economic, Social and Cultural Rights" (Report (published) presented for United Nations Economic and Social Council, 1990); Daniel Turk, "The Realization of Economic, Social and Cultural Rights" (Report (published) presented for United Nations Economic and Social Council, 1991); Daniel Turk, "The Realization of Economic, Social and Cultural Rights" (Report (published) presented for United Nations Economic and Social Council, 1992).

[79] Sarah Joseph, Jenny Schultz and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford: Oxford University Press, 2000), 599.

[80] Dede Anggara Saputra, "Analisis Politik Hukum Undang-Undang Nomor 23 Tahun 2019 Tentang Pengelolaan Sumber Daya Nasional Untuk Pertahanan Negara [Political Analysis of Law Number 23 of 2019 on the Management of National Resources for State Defense]," *Lex Renaissance* 5, no. 4 (2020): 956; Bilal Ramadhan, "Pengamat: Penerapan UU PSDN Bisa Berdampak Negatif [Observer: The Implementation of the PSDN Law Can Have a Negative Impact]," Republika, published 2 June 2022.

[81] D. Prasad and T. Smythe, *Conscription: A World Survey – Compulsory Military Service and Resistance to It* (London: War Resisters' International, 1968), 56; Larry Minear, "Conscience and Carnage in Afghanistan and Iraq: US Veterans Ponder the Experience," *Journal of Military Ethics* 13, no. 2 (2014).

Article 18 of the Universal Declaration of Human Rights (UDHR) 1948 and Article 18 of the ICCPR.[82] Moreover, conscientious objection is recognized by Paragraph 11 of ICCPR General Comment No. 22 (48) (Art. 18) 1993 by the UN Human Rights Committee, which states, "Many individuals have claimed the right to refuse to perform military service (conscientious objection) on the basis that such right derives from their freedoms under Article 18. In response to such claims, a growing number of States have in their laws exempted from compulsory military service citizens who genuinely hold religious or other beliefs that forbid the performance of military service and replaced it with alternative national service. The Covenant does not explicitly refer to a right to conscientious objection, but the Committee believes that such a right can be derived from Article 18, inasmuch as the obligation to use lethal force may seriously conflict with the freedom of conscience and the right to manifest one's religion or belief..."[83] The UN Human Rights Committee's recognition of conscientious objection has led to widespread international acceptance and commitments on that matter. In its practical application, this general comment assigns member states to make regulations voluntarily and provide alternative modes of military service.[84] Furthermore, the UN Human Rights Committee imposes specific measures and standards to be taken by state parties to the ICCPR to provide alternative services as non-combatant status, non-punitive conditions, creation of independent and impartial decision-making bodies on conscientious objection, availability of

[82] Article 8, Universal Declaration of Human Rights, stipulates, "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance." This article is extensively developed in its area, scope and application in the Article 18 of the ICCPR. This article determines that, "(1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching; (2) No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice; (3) Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others; and (4). The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions."

[83] UN Office of the High Commissioner for Human Rights, "General Comments 22: The Right to Freedom of Thought, Conscience, and Religion" (Report, No. CCPR/21/Rev.1/Add.4, 1993).

[84] UN Office of the High Commissioner for Human Rights, "Conscientious Objection to Military Service, Resolution 59/1989" requires "Appeals to State to enact legislation and to make measures aimed at exemption from military service on the basis of genuinely held conscientious objection to armed forces".

information,[85] refraining from subjecting conscientious objectors to imprisonment, non-discrimination between those who accept military service and conscientious objectors,[86] and non-discrimination to conscientious objectors in civil, political, social and cultural rights at any time.[87]

The aforementioned standards have evolved and influenced the UN Human Rights Committee's legal standpoints based upon its own views on individual communications, such as from Finland, the Netherlands and Korea. All these communications are critically examined to reveal rationales, reasons and logical frameworks on conscientious objection's area, scope and application as best practices for state parties to the ICCPR. In the case of *L.T.K vs. Finland*, the Committee assumed that the ICCPR generally or Article 18 specifically does not refer to conscientious objection in its existence.[88] In *J.P.K vs. The Netherlands*, the Committee observed that the "Covenant does not preclude the institution of compulsory military service by State parties ... and the communication is inadmissible under Article 3 of the Optional Protocol" since the communication was also submitted to other dispute mechanisms.[89] In *Jarvinen vs. Finland*, the Committee recognized conscientious objection as a right under the ICCPR. It concluded on the matter of conditions to be implemented for alternative military service for conscientious objectors, namely non-discriminatory, non-punitive and reasonable.[90]

In addition to those overviews, the UN Human Rights Committee also emphasizes that recognition from national laws for conscientious objection is needed to uphold justice, certainty and purposiveness of conscientious objection

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[85] The High Commissioner for Human Rights, "Conscientious Objection to Military Service, Resolution 1993/84," War Resisters' International, published 10 March 1993.

[86] The High Commissioner for Human Rights, "Conscientious Objection to Military Service, Resolution 1995/83," War Resisters' International, published 8 March 1995.

[87] The High Commissioner for Human Rights, "Conscientious Objection to Military Service, Resolution 1997/98," War Resisters' International, published 22 April 1998.

[88] Human Rights Committee, *L.T.K. vs. Finland*, No. Communication No. 185/1984, U.N. Doc. CCPR/C/OP/2 pp. 61.

[89] United Nations Human Rights Committee, *J.P.K. vs. The Netherlands*, No. CCPR/C/43/D/401/1990, CCPR/C/43/D/401/1990 (November 18, 1991).

[90] United Nations Human Rights Committee, *Jarvinen vs. Fin*, No. Comm. 295/1988, U.N. Doc. A/45/40, Vol. II, pp. 101; UN Office of the High Commissioner for Human Rights, "Selected Decisions of the Human Rights Committee under the Optional Protocol" (Report, Vol. III, at 262," No. U.N. Doc. CCPR/C/OP/3, U.N. Sales No. E.02.XIV.1, 2002).

based on legitimate reasons, non-discrimination and proportionality. In *Yeo-Bum Yoon and Myung-jin Choi vs. Republic of Korea*, the Committee affirmed the requirements that a state party to the ICCPR has to provide rules and regulations regarding conscientious objection to compulsory military service even though Korea presented a factual reason of being invaded and that the threat is always imminent.[91] Compliance with the Committee's decisions shown by the Netherlands as well as by Finland has enlarged acceptance of the aforementioned standards, institutionalization and situations on how conscientious objection is experienced in a national legal system. At the same time, Korea maintains that conscientious objection is managed according to its national law to sustain national interests and resilience from an imminent threat of invasion. The process has been developed, but for its contextual application, it still opens room to debate and interpretation since it involves national interests and resilience as manifestations of state sovereignty. Flexibility to bring a claim has also become an important legal notion possessed by those who claim conscientious objection "either before or after entering the armed forces, given that belief can change over time".[92]

All the aforementioned developments, standards and guidance direct Indonesia to take action compatible with conscientious objection as one of the legal rights possessed by an individual in their own legal system to which the PSDN Law does not regulate conscientious objection to military service. In fact, the PSDN Law is silent on the area, scope and orientation of conscientious objection's norms and institutionalization, whereas international authorities have created comments and opinions to be used as legitimate references on the matter. It seems that the lack of attention to this matter denies Indonesian compliance to its international obligations in the ICCPR, where public scrutiny

[91] Human Rights Committee, *Yoon and Choi vs. Republic of Korea*, No. Comm. 1321-1322/2004, U.N. Doc. A/62/40, Vol. II pp. 195 (Human Rights Committee 2006); Human Rights Committee, "Report of the Human Rights Committee" (Report, No. U.N. GAOR, 62nd Sess., Supp. No. 40, U.N. Doc. A/62/40, Vol. II, Annex VII, sect. V, pp. 195, 2007); Human Rights Committee, "Selected Decisions of the Human Rights Committee under the Optional Protocol" (Report, Vol. IX, pp. 218," U.N. Doc. CCPR/C/OP/9, U.N. Sales No. E.08.XIV.9, 2008).

[92] Human Rights Committee, "Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee" (Report, No. CCPR/C/79/Add.61, 1993) states, "Finally, the Committee is greatly concerned to hear that individuals cannot claim the status of conscientious objectors once they have entered the armed forces, since that does not seem to be consistent with the requirements of Article 18 of the Covenant as pointed out in general comment No. 22 (48)."

has the momentum to call for advocacy and an adjudication process. The PSDN Law reduces the human rights entitlement of individuals as well as groups of individuals' legitimate expectations based on conscientious objection to military service in Indonesia. There had been hopes that legal lacunae might be answered when the Constitutional Court ruled on this matter; that it might exercise judicial activism to recognize conscientious objection to military service.

V. CONCLUSION

As a party to major international conventions on human rights and humanitarian law, such as the 1949 Geneva Conventions, the ICCPR and ICESCR, Indonesia introduced the PSDN Law, which allows for conscription and mandatory appropriation of properties without giving space to any alternative modes of public participation in defense. Thus, political willingness from the government and the legislature are required to deal with such issues in the PSDN Law. Indeed, political considerations have effectively implemented legislation that fails to properly recognize conscientious objection as an inherent human right. These political considerations cause Indonesia to not seriously bear its international obligations. By way of analogy, when some blind men were asked to describe an elephant, they each touched a different part, such as the tusks, ears, tail and trunk, and therefore gave conflicting descriptions. Ideally, the PSDN Law should be composed of all elements to describe, regulate and fulfill the broad notion of conscientious objection as one of the legal rights possessed by individuals, equivalent to the right to conscience and religion, rather than emphasize certain aspects but neglect other components. Thus, non-conformity, inconsistency, inappropriateness and overlapping provisions emerged as the main weaknesses in the PSDN Law in respect of international human rights standards reviewed before the Constitutional Court. As the protector of human rights, the Constitutional Court has the authority to decide and recognize the existence of conscientious objection as a new norm for better human rights protection. Such a move would have demonstrated originality in judicial activism carried out by the Constitutional Court.

The Constitutional Court on 31 October 2022 rejected the application against the PSDN Law.[93] However, the Court did acknowledge that the definition of threats in the PSDN Law is vague and creates legal uncertainty. The Court therefore ordered legislators to revise the PSDN Law. In its consideration of the case, the Court said that determination of the components of Human Resources, Natural Resources, Artificial Resources, and National Facilities and Infrastructure must be democratic and respect human rights. The Court also stated the PSDN Law already accommodates the principle of contentious objection because the government does not require citizens to follow conscription. The Court further stated that the determination of reserve components does not ignore the principle of volunteerism, while recognition and protection of property rights are implemented as part of human rights.

Disappointed by the Constitutional Court's decision, the petitioners said the PSDN Law means the Minister of Defense can make a unilateral determination of conscription without the voluntary consent of the people. Non-conformity, inconsistency, inappropriateness and overlapping provisions in the PSDN Law hinder civilians as the main stakeholders of the right to conscience and religion in Indonesia. This is because general principles and a rights-based approach, to some extent, needed to apply or receive more attention in the formulation of the PSDN Law. Furthermore, Indonesia's obligations under the ICCPR, i.e., to ensure respect and protection of human rights, are not effectively guaranteed, enforced and fulfilled by the PSDN Law, as it was not properly formulated in conformity with existing principles recognizing conscientious objection to military service by civilians. The Constitutional Court could have remedied this weakness through its judicial review of the PSDN Law by amending and/or changing compulsory and mandatory matters and giving room for citizens to deliver objections based on their religion and conscience.

[93] Constitutional Court of the Republic of Indonesia, Decision Number 27/PUU-XIX/2021 handed down on 31 October 2022 (Constitutional Court of the Republic of Indonesia, 2022).

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Exporting a Constitutional Court to Brunei? Benefits and Prospects

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Abstract

Negara Brunei Darussalam (Brunei) is Asia's only, and one of the world's few remaining, absolute monarchies. Brunei's much-venerated Sultan and Yang Di Pertuan Agong is accountable to only Allah as his "shadow on earth". Within the Sultanate he is head of religion, Prime Minister, and as Sultan he appoints all members to the nation's six advisory Councils. He is above the law and is the country's legislator. He can amend the constitution and bypass the Legislative Council without court oversight. Judicial review was formally abolished in 2004. The accrual of power – judicial, religious, legislative, and executive – in the hands of one man is only possible by the continued renewal of a state of emergency. Since 1962, the state of emergency has been renewed every two years and once Brunei is in a state of emergency, all powers devolve to its Sultan. There is an absence of any effective checks and balances mechanism such as a democratically elected Legislative Council, a free and open media, a judiciary with powers of constitutional review, an accountable executive government, or an engaged civil society. Because the constitutionality of sixty years of emergency rule in Brunei has never been judicially determined, this paper argues it would be the first task for an independent Constitutional Court. The need for such determination on the legitimacy of Brunei's biennial emergency proclamations is set out and a case made as to why a Constitutional Court could be the circuit breaker for a return democratic participation, rule of law, and fundamental human rights in the Sultanate. There is reflection on the obstacles to any reform which make the prospects for this unlikely in the lifetime of the current Sultan.

Keywords: Brunei, Constitutional Court, State of Emergency, Sultan, Judicial Review.

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I. INTRODUCTION

1.1. Background

Brunei is a small independent Malay Sultanate on the island of Borneo, which it shares with the Malaysian states of Sabah and Sarawak and the Indonesian provinces of Central Kalimantan, East Kalimantan, North Kalimantan, South Kalimantan, and West Kalimantan. Like neighboring Malaysia and Indonesia, the majority (70%) of its 450,000 population is Muslim but unlike its neighbors, Brunei is not a democracy. Nor does it have separation of powers. The judiciary is "formally subordinate to the executive"[1] which, in effect, means subordinate to His Majesty, Sultan Haji Hassanal Bolkiah Mu'izzaddin Waddaulah, the 29th Sultan and Yang Di-Pertuan[2] of Brunei Darussalam (hereafter the Sultan). The Sultan is also Prime Minister.[3] He is head of religion[4] with Islam the state religion[5] supported by a Ministry of Religion, a State Mufti Department, and an advisory Religious Council.[6] The Sultan is the nation's legislator,[7] Supreme Commander of the Armed Forces,[8] and head of the Council of Ministers[9] (the executive) to which Sultan Bolkiah allocated himself three additional portfolios: Minister of Defense, of Finance (following his brother Prince Jefri's misappropriation of state funds)[10] and of Foreign Affairs and Trade. The other advisory councils are the Privy Council[11] (for rank and honors); *Adat Istiadat* Council[12] (to advise on State customs); the Council of Succession & Regency (to advise on the monarchy and

[1] Joel Ng, "Rule of Law as a Framework within the ASEAN Community," *Journal of East Asia & International Law* 5, no. 2 (2012): 335.
[2] *Yang Di-Pertuan* means "He who is made Lord." It is a title for king, originally used during a period of Hindu rule. Malays in Brunei and Malaysia use it in conjunction with the term Sultan.
[3] Constitution of Brunei Darussalam, Article 4, revised edition 2011, 1959, accessed 11 December 2022.
[4] Ibid., Article 2.
[5] Ibid., Article 3(1).
[6] Ibid., Part II with more details in the Religious Council and Kadis Courts Act (Cap. 77).
[7] The Sultan can enact legislation through four constitutional provisions: *see* Constitution of Brunei Darussalam, Articles 83, 47 (1), s84 (2), and 43.
[8] Constitution of Brunei Darussalam, Article 4 (1B), which was a 2004 constitutional amendment.
[9] Ibid., Part III.
[10] The misappropriation is alleged to be more than B$40 billion and the collapse of the Amedeo construction company which Prince Jefri headed owed billions of dollars of debt. There was a long-running trial ending in an out-of-court settlement upheld by the Privy Council. *State of Brunei Darussalam & Brunei Investment Agency v. HRH Prince Jefri Bolkiah and others* (2001) UKHL 67; (2002) 2 AC 357.
[11] Constitution of Brunei Darussalam, Part IV.
[12] Ibid., Part II.

royalty).[13] The argument has been made by Tsun Hang Tey that the cumulative effect is that the Sultan is now the nation's *"Grundnorm"*[14] from which all norms and laws in Brunei derive validity.[15]

Power aggregation in the entity of the Sultan lies in part in the design of the 1959 Constitution, which transferred to the Sultan many of the exclusive powers previously held by the British Resident,[16] but the 1959 Constitution did provide for a modicum of representative democracy. The Legislative Council (LegCo) required 16 popularly elected members to sit with 17 appointed members (ex-officio, official, and nominated).[17] The Constitution gave Brunei's citizens an opportunity to vote for their LegCo representatives as contributors to political and legislative debate. High on the political agenda in 1959 was a decision on Brunei's post self-government direction: to remain a hereditary monarchy, join Malaysia as a state, or be part of an independent democratic *Negara Kesatuan Kalimantan Utara* (United States of North Kalimantan, which would have comprised North Borneo, Sarawak and Brunei). Elections were held in 1962. More than 90% of Bruneians voted.[18] The result was strongly for the *Parti Rakyat Brunei* (PRB), the Brunei People's Party, which secured all 16 elected seats in the 33-seat LegCo. The voter turnout runs contrary to the Sultan's subsequent assertion that he needs to see "evidence of a genuine interest in politics on the part of the responsible majority of Bruneians"[19] before he could consider having elections again in Brunei. Clearly, 60 years ago there was genuine interest with 90% of Bruneians voting in what would be their first and only election. However, despite the people's clear message, because the PRB and thus the result was pro-democracy and

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13 Constitutional Matters: Succession and Regency Proclamation, Part II.

14 Grundnorm is a term coined by Austrian jurist Hans Kelsen to mean the norm, or rule, that forms an underlying basis for a legal system. It signifies the source of legitimacy for the constitution and all laws.

15 Tsun Hang Tey, "Brunei's Revamped Constitution: The Sultan as the *Grundnorm*?" *Australian Journal of Asian Law* 9, no. 2 (December 2007): 264.

16 Ann Black, "The Syariah Factor: One of many Challenges for Foreign Judges in the Courts of Brunei Darussalam," in *The Cambridge Handbook* of *Foreign Judges on Domestic Courts*, eds. Anna Dziedzic & Simon Young (Cambridge: Cambridge University Press, 2023), forthcoming.

17 Constitution of Brunei Darussalam, Part VI allowed for eight ex-officio, six official and three nominated members, with the Sultan having power to remove any of the official and nominated members at will. See Constitution of Brunei Darussalam, Article 31 (1).

18 Tey, "Brunei's Revamped Constitution," 267.

19 Sultan Bolkiah in an interview reported in Clark Neher and Ross Marley, *Democracy and Development in Southeast Asia* (Boulder: Westview Press, 1995), 145.

anti-monarchy, it was not accepted by the then Sultan (Omar Ali Saifuddien III) the father of the current Sultan. Thwarted from joining the government, PRB members staged an armed coup against the Sultan, who immediately proclaimed a state of emergency. Within days, British forces quashed the uprising. The coup leaders fled or were imprisoned,[20] the PRB banned and remains so today. The same state of emergency continues six decades later.[21]

Against this background, the research question is whether a Constitutional Court with judicial review could act as a circuit breaker to end absolute autocratic rule in Brunei and to pave the way for restoring LegCo elections. Thirty consecutive emergency proclamations have disfranchised Bruneians of their constitutional right to vote and allowed absolute power to concentrate in the hands of one man. Was this constitutional? This question has never been determined by Brunei's judiciary. The question of constitutionality is ripe for determination. The following part of this paper analyses arguments for judicial review of Brunei's constitutional provisions on emergency proclamations particularly in the absence of any effective checks and balances mechanisms, LegCo debate, or media scrutiny. The third part assesses additional consequences from perpetuating a state of emergency on constitution amendment and interpretation, on the independence and functioning of the courts of law, and on fundamental rights and freedoms in the Sultanate. The fourth part asks whether an independent constitutional court could have advantages over the current common law-informed Supreme Court. The last part comes back to the realities of entrenched power in Brunei by evaluating the practicalities and obstacles to reform, concluding that the possibility is, at best, remote during the reign of Sultan Bolkiah. All is not futile, as an increasing role for Syariah has brought changes to Brunei's legal landscape, which makes a conversation on constitutional reform worthy of debate and dialogue.

[20] The last coup member was released from prison in 2009.

[21] The most recent two-year extension was proclaimed in March 2021 and will require renewal in March 2023. The Emergency (Confirmation and Validity of Emergency Provisions) Order (2004) gives the Sultan discretion to issue emergency orders which are "desirable in the public interest". No judicial review of these emergency orders is possible.

II. SIXTY YEARS OF EMERGENCY POWERS

Emergency powers are found in many of the world's constitutions including in those of neighboring Malaysia,[22] Singapore,[23] and Indonesia.[24] Their function is to lawfully enable the executive, for the duration of the emergency, to enact laws and to take actions necessary for the nation's security, its law and order; to protect lives and property; to safeguard essential services; and provide relief until normalcy returns.[25] Such powers may include (1) allowing a government to limit or suspend constitutional rights when the pre-conditions for an emergency arise; (2) specifying expiry to prevent normalization of emergency powers; (3) concentrating decision-making in the executive by temporarily bypassing the legislature or postponing elections; and (4) having a checks and balances mechanism against abuse of such powers. Each will be considered in turn.

2.1. Precondition for a Proclamation of Emergency

> Article 83 (1): Whenever it appears to His Majesty the Sultan and Yang Di-Pertuan that an occasion of emergency or **public danger** is imminent, exists or has arisen whereby the security or economic life of Brunei Darussalam, or any part thereof, is or may be threatened, whether by **war or external aggression or internal disturbance**, actual or threatened, he may by Proclamation [hereinafter a "Proclamation of Emergency"] declare a state of emergency either in the whole of Brunei Darussalam or in such part of Brunei Darussalam as may be specified in the Proclamation [emphasis added].

The events of 1962, known as the Brunei Rebellion, met these pre-conditions. There were constitutional grounds by which Sultan Omar could hold that there was public danger and actual internal aggression threatening Brunei's security and its economy. The vital oil town of Seria was under siege and the military wing of the PRB was armed and on the streets. The first proclamation on 12 December 1962 was valid. With the assistance of British forces and local police, the coup or rebellion was defeated within days. Sporadic acts of violence occurred over the next five months until the capture of PRB strategist Yassin Affandi, and

[22] Constitution of Malaysia, Article 150.
[23] Constitution of Singapore, Article 150.
[24] Constitution of the Republic of Indonesia, Articles 12 and 22.
[25] "Emergency Powers in Constitutions," ConstitutionNet, accessed 30 May 2022.

PRB leader Azahari went into exile in Indonesia. The PRB was declared illegal and acts of its armed members held treasonous. Forty of the rebels died and 3,400 captured and went on trial. The same justification of emergency from 60 years ago, is no longer applicable. The opposite is true: Brunei is stable, peaceful and prosperous, which is reflected in its name – Brunei Darussalam, an Abode of Peace. The State Mufti described it as a blessed nation "where citizens and residents enjoy prosperity, feel content and are at peace and ease".[26]

2.2. Specifying Expiry for A State of Emergency

> Article 83 (2): No Proclamation of Emergency shall be in force for more than 2 years, without prejudice, however, to the right of His Majesty the Sultan and Yang Di-Pertuan to issue another such Proclamation at or before the end of that period. 2A. Notwithstanding Clause (2), His Majesty the Sultan and Yang Di-Pertuan may by another such Proclamation declare the cessation of a state of emergency in the whole of Brunei Darussalam or in such part of Brunei Darussalam as may be specified in the Proclamation before the end of 2 years.

This sets two years' duration for a proclamation with automatic expiry at the end of that period. It does, however, permit the Sultan to issue another proclamation predicated on the continuing application of the pre-conditions of public danger, war, internal unrest as contained in Article 83 (1), as discussed above. The legality of issuing further proclamations when the constitutional preconditions are absent warrants judicial review.

2.3. Concentrating Decision-Making: Powers of the Sultan During a State of Emergency

> Article 83 (3): When a Proclamation of Emergency has been made and so long as such Proclamation is in force, His Majesty the Sultan and Yang Di-Pertuan may make any Orders **whatsoever which he considers desirable in the public interest**; and may prescribe penalties which may be imposed for any offence against any such Order; and may provide for the trial by any court of persons charged with such offences [emphasis added].

This Article gives full discretion to the Sultan to enact civil and criminal laws which impact on the rights, liberties and lives of Bruneians. It is subjective,

[26] Rokiah Mahmud, "Blessed as a Zikir Nation," *Borneo Bulletin*, 12 May 2021.

lacking an objective component, such as reasonableness, but is required to correlate with the public interest. The breadth of the discretion highlights why lawmaking under Article 83 should be done sparingly and only when a genuine need as outlined in Article 83 (1) arises. A rule of construction is that a section must be read in light of its context which, here, is when Brunei is in an emergency or crisis and the laws emanating should thus correlate. Since the 1960s, Emergency Orders of the Sultan pursuant to Article 83 (1) lack this correlation. In the hundred or so Emergency Orders currently on the government website[27] few are crisis measures – for example, the Arbitration Order 2009, Beauty and Health Establishments Order 2009, Tobacco Order 2005, Employment Agencies Order, Halal Certificate and Halal Label Order 2005, and the Pawnbrokers Order 2002. Two of Brunei's most contentious pieces of criminal legislation – the Syariah Penal Code Order 2013 (hereafter SPCO) and the Syariah Courts Penal Code Procedure Order 2018 – were by emergency lawmaking. The only reason for this was to avoid public commentary prior to the Orders taking effect and to minimize debate within the LegCo. To use royal fiat emergency powers for a major change to the legal landscape of multi-ethnic, multi-religious Brunei without prior consultation with the men or women of Brunei, both Muslims and non-Muslims, on whose lives the Orders will have a major impact, raises questions of political expediency and lack of accountability. The SPCO was proclaimed as law in a *titah*[28] (a royal speech). Once proclaimed, open and honest discussion especially criticism or questioning of any aspects of the SPCO was prohibited. In addition to comprehensive censorship laws, the SPCO has its own penal sanctions, criminalizing any person who publicly opposes the SPCO (as a law dealing with Islam)[29] or his Majesty's *titahs.*[30] The Sultan faced considerable international condemnation, but such criticism was not legally possible from within Brunei. The International Commission of Jurists (ICJ), for

[27] Government of Brunei Darussalam website, accessed 12 November. https://www.agc.gov.bn.

[28] Announced in a *titah* for His Majesty's birthday on 15 July 2013. *Titah* are royal speeches in which the Sultan announces policy. Most *titah* can be accessed in Malay, with some translated into English, from the Government of Brunei's website, accessed 12 November, 2022. www.rtb.gov.bn/Titah.

[29] Syariah Penal Code Order, Article 220 (d), 2013.

[30] Syariah Penal Code Order, Article 230, 2013.

example, denounced the Order "as a blueprint for human rights violations",[31] and Amnesty International claimed it took Brunei back to the "dark ages" making "a mockery of the country's international human rights commitments" and called for its immediate revocation.[32] The Sultan strongly defended the SPCO, warning critics in Brunei that they "cannot be allowed to continue committing these insults, ...the first phase of implementing the Syariah Penal Code Order will be very relevant to them".[33] This was a reference to sections of SPCO which make it a heresy to question any aspect of this Emergency Order. When a blogger posted that rather than stoning for *zina*[34] (adultery), whipping was more in keeping with Quranic passages such as 24:2, he was arrested and charged with heresy.[35]

2.4. Checks and Balances

Checks and balances in constitutions are to limit arbitrary or excessive discretionary power and prevent overuse or abuse of powers. To ensure the executive does not exceed its authority, the checks and balances come from both the legislature and the judiciary. These are discussed below. Brunei is not a democracy, but even in democracies there are also additional checks from the media, civil society, and the citizenry. By voting, citizens hold their representatives to account, and through petitions, protests, consultations, submissions, and letters to their elected representatives, they act a check on the power of those who enact and who implement the law.

2.4.1. Legislative Council Scrutiny

> Article 83 (7): Every Order made under this Article shall, at the next meeting of the Legislative Council, be **laid before that Council** and that Council may resolve that any such Order shall, to the extent and as from such date as may be specified in such resolution, either cease to have effect (and any such cessation shall, if assented to by His Majesty the Sultan and Yang Di-Pertuan, have the same effect as the repeal of a written law) or be passed by that Council [emphasis added].

[31] "Brunei: New Penal Code a Blueprint for Human Rights Violations," International Commission of Jurists, 27 January 2014.

[32] "Brunei Darussalam: Revoke new Penal Code allowing stoning, whipping and amputation," News, 30 April 2014.

[33] "Sultan hits back at rare criticism over sharia," *The Star Online* 26 February, 2014.

[34] Syariah Penal Code Order, section 69, 2013.

[35] *See* Ann Black, "Casting the first stone: the significance of the Syariah Penal Code Order for LGBT Bruneians," *Australian Journal of Asian Law*, 20 no.1 (2019).

This Article is designed as a check on abuse of emergency power. Every Order made pursuant to Article 83 (1) must be laid before (presented to) the Legislative Council. Scrutiny of the workings of the LegCo over six decades shows this check on abuse of power is meaningless.

Following the Brunei rebellion of December 1962, the LegCo was dissolved by the Emergency (Suspension of Constitution) Order, 1962. As the PRB had resoundingly won that year's election, the Sultan had no appetite to restore elections or have any elected representatives in the LegCo. With the 1967 abdication of Sultan Omar and the coming to power of Sultan Bolkiah, the new ruler used his emergency powers to change the composition of the LegCo[36] to a body entirely appointed by him. It guaranteed continuation of rule by royal decree. When full independence from Britain came in 1984, the Sultan's independence *titah* announced Brunei "shall forever be a sovereign **democratic** and independent Malay Muslim Monarchy [emphasis added]"[37]. The word "democratic" belied the meaning. It did not mean elections and a return to participatory representative government: the exact opposite. Parts VI and VII of the Constitution on the Legislative Council were suspended. Instead, an ideology called *Malay Islam Beraja* (MIB) was unveiled to justify absolute rule based on Brunei tradition: because pre-colonial Sultans ruled absolutely, then all later Sultans could legitimately rule absolutely. This misinterprets the checks and balances that existed in pre-colonial Brunei's stratified society especially from the wazirs and nobles. It is also illogical as slavery was part of pre-colonial Brunei but that would not *ipso facto* make it valid today. Braighlinn argues that MIB promotes "royal absolutism under a divine mandate".[38] It uses Islam "as a special, legitimising prop to 'B' (*Beraja*/the Monarchy), which is reciprocally protected".[39] MIB provided an alternative to representative democracy. Mindful perhaps of the PRB and the events of 1962, there was, and one suspects still is,

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[36] Emergency (Council of Ministers and Legislative Council) Order, 1970.

[37] *Titah* at the Promulgation of Brunei Independence, 1 January 1984.

[38] G. Braighlinn (pseudonym), *Ideological Innovation under Monarchy: Aspects of Legitimation Activity in Contemporary Brunei* (Amsterdam: VU University Press, 1992), 43.

[39] Ibid., 22.

concern that a democratic participatory process would challenge the Sultan's absolutist control politically and financially over the nation.[40]

Twenty years on from independence there was optimism[41] that the "winds of change" from Indonesia would spread to Brunei to bring a *reformasi* (reform) from which there could be a transition to a constitutional monarchy with parliamentary democracy. In 2004, the Sultan gave a speech noting coming constitutional reforms would increase political participation through a reinstated LegCo.[42] Whilst the LegCo was re-instated it was as an entirely Sultan-appointed body.[43] It met once in 2004 in a wonderful new LegCo building where the members "rubber-stamped" a series of major constitutional amendments further entrenching the Sultan's powers. These included his avenues for law-making,[44] abolishing judicial review,[45] strengthening the Sultan's executive control,[46] and, enshrining protection for MIB, Islam, the Sultan and the royal family,[47] from criticism. It was a retreat from, not a move toward, democracy, inclusivity, transparency, and accountability.

The LegCo continues to meet once each year, with considerable pomp and ceremony. Four features demonstrate how in reality it is a subservient show chamber with no genuine legislative power. First, members[48] are appointed by the Sultan, serve "at his pleasure"[49] and can be removed by him, without giving reasons. Second, there are censorial limits on what can be said. The 2004 amendments clarified that a LegCo member can lose their seat or be suspended[50] if "disloyal" or "disaffected" toward the Sultan.[51] The meaning of

[40] Tey, "Brunei's Revamped Constitution," 267.
[41] Mohd Yusop Hj Damit, "Brunei Darussalam: Steady Ahead," *Southeast Asia Affairs* (2004): 63, 66, 67.
[42] M. Salleh, "Brunei: New era dawns in Brunei," *Borneo Bulletin*, 17 July 2004.
[43] It was dissolved in 2005 and another Legislative Council established again with appointed members.
[44] Constitution of Brunei Darussalam, Articles 39 & 47.
[45] Ibid., Article 83.
[46] Ibid., Article 84 C.
[47] Ibid., Article 53 (1A).
[48] The 33 members include the Sultan with the Crown Prince, 13 cabinet ministers (ex officio members) with 18 other appointed members, two titled persons, seven prominent citizens, and eight representatives from the four districts who are indirectly elected. A Selection Committee appointed by the Sultan approves them and after the district vote makes recommendations to the Sultan. If he rejects a candidate, then an alternative candidate must go before the Selection Committee. See: Constitution of Brunei Darussalam, Schedule 2.
[49] Constitution of Brunei Darussalam, Articles 40, 47.
[50] Ibid., Article 31(4).
[51] Ibid., Article 30.

what amounts to "disloyalty" or "disaffection" is undefined, but subjective. Third, the Constitution prohibits comments derogatory to the Sultan, the royal family, and the MIB state ideology.[52] Given the dominant role of the Sultan and MIB in every aspect of Brunei's political life, open, free and fearless debate on laws, policies and future directions for the Sultanate is impossible. Commentators note that "debates are rarely heard".[53] The Sultan told members in 2006 not to be afraid to express their views, if these views were positive and led to consensus;[54] which results in acquiescence or endorsement of his views. Fourth, another of the 2004 constitutional amendments establishes that laws enacted by the Sultan do not require the LegCo's "advice and consent". Any member of the LegCo can, in theory, introduce a bill, propose a motion for debate, have it passed by a majority of the Chamber, to become law with the Sultan's royal assent,[55] but His Majesty can amend it without reference back to the LegCo. If a bill fails to pass to LegCo, Article 47 of the Constitution gives the Sultan reserve powers to declare it has legal effect anyway.

Cumulatively, the 2004 amendments render Article 83 (7) impotent as a check on executive power during this ongoing state of emergency. They are directly counter to the ASEAN Human Rights Declaration (AHRD), signed by Brunei in 2012, in which Article 25 specifies that:

(1) Every person who is a citizen of his or her country has the right to participate in the government of his or her country, either directly or indirectly through democratically elected representatives, in accordance with national law.

(2) Every citizen has the right to vote in periodic and genuine elections, which should be by universal and equal suffrage and by secret ballot, guaranteeing the free expression of the will of the electors, in accordance with national law.

[52] Ibid., Article 53 (1A).

[53] Samuel C.Y. Ku, "Brunei in 2009. Maturity in Doubt?" Asian Survey 50, (2009): 263.

[54] Hj Mohd Yusop Hj Damit, "Brunei Darussalam: Towards a New Era," in *Southeast Asian Affairs*, eds. Daljit Singh & Lorraine Salazar (Singapore: ISEAS, 2007), 104.

[55] Constitution of Brunei Darussalam, Article 40 (1).

2.4.2. Judicial Review

An accepted mechanism for curtailing extension of emergency powers beyond constitutional parameters lies with the judiciary, acting as an independent arm of government ensuring constitutional integrity. Brunei's constitution does not contain a guarantee of judicial independence[56] and judicial review was specifically excluded in the 2004 constitutional amendments. Article 84 C (1) clarified that "the remedy of judicial review is and shall not be available in Brunei Darussalam". Article 84 C (2) added:

> For the avoidance of doubt, there is and shall be no **judicial review in any court** of any act, decision, grant, revocation or suspension, or refusal or omission to do so, any exercise of or refusal or omission to exercise any power, authority or discretion by His Majesty the Sultan and Yang Di-Pertuan, **or any party acting on his behalf or under his authority** or in the performance of any public function, under the provisions of this Constitution or any written law or otherwise... [emphasis added].

The Supreme Court Act (Cap. 5) was similarly amended. It also stated that the only review power for the Supreme Court is its supervisory power over inferior courts.[57] The Attorney-General justified the ouster of judicial review on cultural grounds, namely that "an adversarial system of judicial review may not be suitable for Brunei".[58] In 2015, the President of Brunei's Law Society called for the return of judicial review as there were "no checks and balance" on government authority and it was necessary in "the interests of justice ... in upholding the rule of law".[59] He asked whether section 84 C can "produce order and justice in the relationship of man and man and between man and the state".[60]

III. CONSEQUENCES OF OPEN-ENDED EMERGENCY POWERS

3.1. Constitutional Amendment and Interpretation

> Article 85. (1): His Majesty **the Sultan** and Yang Di-Pertuan may, by Proclamation, **amend, add to or revoke any of the provisions of this**

[56] Ann Black, "Judicial Independence in Brunei Darussalam," in *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity*, eds. H.P. Lee and Marilyn Prittard (Cambridge: Cambridge University Press, 2018), 57.

[57] Supreme Court Act, Cap. 5, section 20.

[58] Attorney- General Kifrawi, "Speech of the Opening of the Legal Year 2007" (Government Website, 27 March 2007).

[59] Attorney-General Rozaiman cited in Quratul-Ain Bandial, "Law Society Calls for Return of Judicial Review," *Brunei Times*, 14 April 2015.

[60] Attorney-General Rozaiman.

> **Constitution** including this Article; and this Constitution shall not otherwise be amended, added to or revoked [emphasis added].

This grants the Sultan sole power for constitutional amendment. He is required to consult with the Privy Council, whose advise he need not take,[61] and also, as he did in 2004, to lay a draft of the proclamation for constitutional amendments before the Legislative Council for debate and receive a report from its speaker.[62] Once again, the Sultan can ignore the speaker's advice by declaring his proclamation has effect in its original form or with any amendments he thinks fit.[63] Although, unlike Article 83, there is a requirement here for debate and for a report from the speaker, the shackles imposed on the LegCo, (discussed above) makes opposition or genuine input unlikely.

Brunei's Supreme Court does not have power to interpret the Constitution. When a question arises in a case "involving, arising from, relating to, or in connection with, the meaning, interpretation, purpose, construction, ambit or effect of any of the provisions of this Constitution"[64] the Court must refer the question to the Sultan or make a submission to him requesting the question be referred to an ad hoc Interpretation Tribunal.[65] The Sultan appoints members to the tribunal[66] who serve "at his pleasure"[67] and are remunerated by him. There are no reports of the tribunal being constituted to consider a constitutional matter. The Judicial Committee of the Privy Council cannot hear any question involving "the meaning, interpretation, construction or effect of any of the provisions of that Constitution".[68] This is a void a Constitutional Court could fill.

3.2. Adjudication

The 2004 ousting of judicial review was not only a constitutional amendment, but was included in other legislation including the Supreme Courts Act (Cap.

[61] Constitution of Brunei Darussalam, Article 85 (2).
[62] Ibid., Articles 85 (3) & (4).
[63] Ibid., Article 85.
[64] Ibid., Article 86 (1).
[65] Ibid., Articles 86 (2) & (3).
[66] Ibid., Article 86 (7).
[67] Ibid., section 86 (7).
[68] Brunei (Appeals) Order 1989.

5),[69] the Intermediate Courts Act (Cap. 162),[70] Syariah Courts Act (Cap. 184),[71] the Special Relief Act (Cap. 109)[72] and Internal Security Act (Cap. 133).[73] The latter is of concern as it does not include a presumption of innocence and allows for detention without trial for up to two years with indeterminate extensions. Additionally, the common law equitable remedies of *mandamus,* prohibition and *certiorari*, *habeas corpus*, and applications for declarations and injunctions were excluded.[74] These amendments give the Sultan unprecedented control over both streams of courts: Syariah[75] and common law courts, which are directly administrated by the Department of the Prime Minister. The Sultan appoints judges to both Syariah and common law courts, all of whom serve "at his pleasure".[76]

From 2004, additional discretionary powers over courts' adjudication were given to the Sultan including power to direct the court to hear cases *in-camera*[77] (that is, not open to the public) including any cases in which a party may "directly or indirectly" reference the Sultan.[78] He can direct the Supreme Court (and Intermediate and Syariah courts) to hold proceedings at a time and venue he orders,[79] reiterating that his directions cannot be appealed or reviewed.[80] Any reproduction or publication of a judgment that might lower or adversely affect the "position, dignity, standing, honour, eminence of sovereignty" of the Sultan is prohibited.[81] The Sultan cannot be compelled to attend any court proceeding[82] and can exempt "any person required by the court to attend" or who has been to summoned from the duty to do so.[83] Legalizing closed trials, witnesses exemptions and allowing non-disclosure or non-reporting of court decisions,

[69] Sections 20A to 20 E.
[70] Section 6.
[71] Syariah Court Act, Cap. 184, section 27 (B).
[72] Section 6 (A).
[73] Section 6 (2).
[74] Constitution of Brunei Darussalam, Article 84 I (3).
[75] Syariah Courts Act, Cap. 184, section 27 (B).
[76] Supreme Court Act, Cap. 5, section 8 and Syariah Courts Act (Cap. 184) section 12.
[77] Ibid., Cap. 5 section 15 (5).
[78] Ibid., Cap. 5 section 15 (4).
[79] Ibid., Cap. 5 section 15 (6).
[80] Ibid., Cap. 5 section 15 (7).
[81] Ibid., Cap. 5 section 15 (8).
[82] Ibid., Cap. 5 section 34 (1) and is also in the Succession and Regency Proclamation 1959, section 25(b).
[83] Ibid., Cap. 5 section 34 (2).

are an anathema to an open accountable judicial system, whether these powers are employed frequently or rarely. Reports from practitioners in Brunei are that courts do operate fairly and openly, with judicial independence. However, the provisions set out above give rise to *de jure* concerns on judicial independence.[84]

This is reflected in Brunei's decision not to be a signatory to the International Covenant on Civil and Political Rights which carries through into other civil and political freedoms considered below. Brunei is however a signatory to the ASEAN Human Rights Declaration (AHRD) with Article 10 affirming "all the civil and political rights in the Universal Declaration of Human Rights".

3.3. Freedoms of Speech, Association, and Religion

A core role of many constitutional courts is protection of human rights and civil liberties. This arises through constitutional guarantees for specific freedoms often through a bill of rights, or as a signatory to international rights-based conventions of the United Nations. Brunei is the only state in Southeast Asia whose constitution contains neither a bill of rights nor protections for fundamental liberties, except for religion in Part II. Although a signatory to the Universal Declaration of Human Rights (UDHR), Brunei is not a state party to the International Covenant on Civil and Political Rights (ICCPR), while its ratification of the Convention on the Rights of the Child (CRC) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) contained both general reservations for provisions "contrary to the beliefs and principles of Islam" and some express reservations.[85] Brunei is a signatory to the Universal Islamic Declaration of Human Rights, and the ASEAN Human Rights Declaration. It is possible in a common law context, for fundamental liberties to be deemed inherent, and for this reason, together with UDHR and AHRD, a brief overview will follow of four core freedoms: freedom of religion, speech, association, and equal protection of the law.

[84] Ann Black, "Judicial Independence in Brunei Darussalam," 62-68.

[85] Convention on the Rights of the Child, New York, 20 November 1989, in force 2 September 1990, 1577 UNTS. 3; Convention on the Rights of Persons with Disabilities, New York, 30 March 2007, in force 3 May 2008, 2515 UNTS 3; Convention on the Elimination of All Forms of Discrimination against Women, New York, 18 December 1979, in force 3 September 1981, 1249 UNTS 13.

Whilst a constitutional court could hold these to be inherent and thus incorporated into Brunei's legal system there is however a paradigm difference. Brunei sees human rights not as universal but through its prism on Islam and Syariah requirements. The Sultan summed up that, "as Muslims, we uphold human rights with the Quran as our foothold",[86] prioritizing Allah-granted human rights over fallible "man-made" rights. Brunei's Mufti bin Juned affirms that "Islam has its own human rights" which "never change".[87] Only when there is no compromise or contradiction with Islam are provisions of "man-made" international rights instruments valid.

3.3.1. Freedom of Religion

Part II of the Brunei Constitution defines Islam as the state religion with the definition section specifying the Islamic religion is "according to the Shafeite [Sunni] sect of Ahlis Sunnah Waljamaah",[88] adding that "all other religions may be practiced in peace and harmony".[89] The peace and harmony provision is not, as it would seem at first glance, to grant religious freedom to non-Muslims but ensures Muslims do not see or hear any non-Islamic religious practices,[90] or receive information on a religion other than Islam. If any aspect of another religion is visible, it can be subject to the criminal offense of propagating a religion other than Islam to a Muslim.[91] Exposure to "other religions" in public places includes schools, where non-Muslims must take courses of Islam and MIB,[92] but who are forbidden from receiving instruction in their own religion. Other criminal law restrictions on non-Muslims include having religious symbols such as a crucifix or trigram from the ancient *I Ching* as an item of jewelry or on clothing, or saying words reserved only for Muslims. The SPCO has a list of words[93] not

[86] *Titah* cited in "Laws of Islam Seek Blessings Not Oppression," *Borneo Bulletin*, 5 November 2017.
[87] "Syariah not against Human Rights," *Borneo Bulletin,* 24 October 2013, 4.
[88] Constitution of Brunei Darussalam, Article 2.
[89] Ibid., Article 2.
[90] Fatwa (Siri 03/2005) reported in "Muslims must not follow non-Islamic celebrations," *Borneo Bulletin*, 28 December 2014. The Grand Mufti asserted, "[B]elievers of other religions that live under the rule of an Islamic country, according to Islam, may practise their religion or celebrate their religious festivals among their community, with the condition that the celebrations are not disclosed or displayed publicly to Muslims."
[91] Syariah Penal Code Order, section 209 (1), 2013.
[92] Compulsory Religious Education Act, Cap. 215.
[93] Syariah Penal Code Order, Fifth Schedule, 2013.

to be used including *Allah*, the Arabic and Malay word for God. Since the 15th Century, Christian bibles, hymnals and other texts used 'Allah' in their Malay versions. Prohibitions on religious publications extend to "quotations, excerpts or citations" from holy books and texts, or ones which "state the history, principles, teachings, characteristics, policies, performances, ceremonies, customs, charitable deeds, dogmas, orders or organizations of that religion".[94] The animistic practices which indigenous Borneans observed for millennia are also criminalized, such as visiting *keramat* shrines, which animists believe have spirits who can mediate with God[95] or using services of *bomoh* (shamans and magic healers).[96]

The "practice in peace and harmony" provision does not extend to Muslims who do not follow Shafi'i school interpretation. The SPCO Order prohibits interpretative Islamic democracy through the criminal offense of apostasy/ *irtidad*, which extends to denying a *hadith* of the Prophet or *ijma* (consensus of Bruneian scholars) as a source or authority for a ruling.[97] The Sultan called on the authorities to strictly enforce the laws against the infallibility of *hadith* and *ijma*.[98] There are regular reminders from the Sultan for vigilance against "the devious teachings virus",[99] insisting the nation's imams give a unified message in their religious sermons, preaching, talks and writings. A government *Aqidah* (Doctrine/Faith) Control Section[100] monitors for deviancy.[101] Shia Islam,[102] Ahmadiyyah, a range of Sufi groups, Al-Arqam, Ba'hai, and Silat Lintau are banned as heretical and deviant.

These features compromise Brunei's commitment to the AHRD, where Article 22 guarantees citizens of member states "the right to freedom of thought, conscience and religion" adding that "all forms of intolerance, discrimination and incitement of hatred based on religion and beliefs shall be eliminated".

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94 Ibid., section 125.
95 Dominik Muller, "Sharia law and the Politics of "Faith Control" in Brunei Darussalam*," Internationales Asienforum: International Quarterly for Asian Studies* 46 (2015): 329.
96 Muller, "Sharia Law": 313.
97 Syariah Penal Code Order, section 111 (b), 2013.
98 Azlan Othman, "Imams remind Ummah against anti-Hadith groups," *Borneo Bulletin*, 30 March 2013.
99 Lyna Mohamad, "Vigilance on Deviant Teachings," *Borneo Bulletin,* 31 December 2006.
100 Muller, "Sharia law," 320.
101 The Sultan's titah for New Year of Hijrah 1439 reminded the country to be wary of Akidah Deviation, reported in "His majesty reminds the country to be wary of Akidah Deviation," *Borneo Post*, 23 September 2017.
102 The second-largest group of Muslims after Sunni adherents.

3.3.2. Freedom of Speech

In addition to limitations on what members of the six advisory Councils can say (outlined earlier), there are criminal and regulatory laws limiting freedom of speech in the wider community – public forums, in print, electronic and social media. In essence, any statement verbally, in print, online or visual, that could be interpreted as criticism of the Sultan, the royal family, Islam, the government or MIB is subject to criminal sanction. For example, the Sedition Act (Cap. 24) makes statements which are "derogatory of the Sultan, the Royal family, Islam or MIB" seditious.[103] The Internal Security Act (Cap. 133) criminalizes any act, "speech or publication done with the intention of inciting disaffection for the Sultan" or his government.[104] The SPCO criminalizes "printing, disseminating, importing, broadcasting, and distributing publications contrary to Islamic law".[105] There are controls on media ownership,[106] with close monitoring, regulating and censoring of all means of communication – press, internet[107] (government-owned) and television. It makes expression of alternate, as well as critical, opinions not possible. Senior Counsel from the Attorney-General's Department explained that while there are laws protecting freedom of expression in many Western countries, in Brunei "there are no such rights of freedom of expression as the likes of in the US and in the UK... censorship in more conservative countries like Brunei is crucial" as it prevents "various levels of the community from being exposed to negative information".[108] Distributing a satirical video via mobile phone depicting members of the royal family resulted in conviction and a year's imprisonment for three Bruneians.[109] Brunei's comprehensive restrictions run contrary to Article 23 of the AHRD, which guarantees "the right to freedom of opinion and expression,

[103] Sedition Act, Cap. 24, section 4.

[104] Sedition Act, Cap. 24, section s3 (1)(i); Internal Security Act (Cap. 133), which allows detention without trial for up to two years with indeterminate extensions, specifically ousts judicial review of detention orders.

[105] Syariah Penal Code Order, sections 213, 214 & 215, 2013.

[106] Newspaper Act (Cap. 105) gives considerable powers to the Minister to issue permits, which he can rescind with showing case.

[107] Internet practice codes stipulate that content must not be subversive, promote illegitimate reform, incite disharmony or instability, or fall out of line with "Brunei Darussalam's religious values, social and societal mores. Yazdi Yahya, "Censorship is still important," *The Brunei Times*, 19 November 2007.

[108] Roz Alai Zin, "Rights, Social Responsibilities of Bloggers," *The Brunei Times*, 26 September 2010.

[109] Offense under the Sedition Act (Cap. 24). Reported in Amnesty International Submission to the UN Periodic Review on Brunei Darussalam.

including freedom to hold opinions without interference and to seek, receive and impart information". It explains why international organizations such as Freedom House categorize Brunei as "not free".[110] In 2021, Brunei was ranked 153rd on the World Press Freedom Index.[111]

3.3.3. Equality

Whilst there are passages in the Quran which emphasize equality between men and women (for example Quran: 4:1, 9:71, 33:35) Brunei has no national legislation endorsing gender equality or protection from discrimination in line with Article One of CEDAW.[112] Currently, in Brunei's six advisory Councils to the Sultan, only two – the Executive and Legislative Councils – have had female appointees. Brunei's Constitution makes accession to the throne strictly paternal and lineage is based on lawful sons of the reigning Sultan, or sons of sons of the Sultan's "blood line".[113] Islamic morality offences in the SPCO impact disproportionally on women, LGBT people and anyone who does not conform to strict norms on gender and sexuality. Under Brunei's Islamic law, women are not the equal of men when giving evidence[114] and are disqualified from providing testimony for some offenses.[115] Women victims of homicide or personal injury receive half the criminal compensation (*diyat*) of the amount received by men, and in inheritance a daughter inherits half the portion of her brother, and a wife half that of her husband.[116] Women are also disadvantaged in marriage[117] and divorce[118] and a father is the legal guardian[119] for children.

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110 "Expanding Freedom and Democracy," Freedom House.

111 "The Ranking," Reporters without Borders. https://rsf.org/en/ranking.

112 For the purposes of the present Convention, the term "discrimination against women" shall mean any distinction, exclusion or restriction made based on sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

113 Succession and Regency Proclamation, section 4, 1959.

114 Syariah Courts Evidence Order, sections 106 and 107, 2001.

115 These include *hudud* (crimes) in Brunei's SPCO Part IV Ch.1, including theft, robbery, adultery, same-sex intimacy, false accusations of adultery, alcohol consumption and apostasy, and *qisas* (equal physical retaliation for injury to a person known as 'talion' or 'an eye for an eye') including murder, manslaughter, and grievous bodily harm.

116 Inheritance law is not codified, so principles of Shafi'i jurisprudence apply.

117 Islamic Family Law Act, Cap. 217: polygamy is available for a husband: section 23(1) and only women require wali (guardian's) permission to marry, in section 8.

118 Section 41 allows a husband divorce by pronouncement (*talaq*) notified to the Registrar, whereas a wife needs a court determination (sections 43, 44, 45, 46, and 48) to establish her ground for divorce.

119 Section 95: "the father shall be the first and primary natural guardian of his minor child", which devolves along the paternal line. A mother loses custody if she remarries after a divorce.

3.3.4. Freedom of Association

The Societies Act (Cap. 66) requires registration of any group with five or more members whether commercial, social, religious, political, employment, advocacy or community sector based. Registration with the Registrar of Societies is refused if the purpose is "unlawful" or "incompatible with the peace, public order, security or public interest" of Brunei. For this reason, political groups who oppose the current political regime cannot be registered. When the Brunei National Development Party (BNDP) announced its policy calling for parliamentary democracy, elections, repeal of emergency laws and constitutional monarchy it was de-registered and its leader arrested under Internal Security Act (Cap. 133). Similarly, as same-sex intimacy is criminalized under the Penal Code and the SPCO, LGBTIQ organizations cannot register in Brunei. To be a member of an unregistered group risks imprisonment for up to three years and fines of up to B$10,000.[120]

IV. ADVANTAGES OF A CONSTITUTIONAL COURT

Judicial review is found in more than 80% of the world's constitutions[121] and is inherent in superior courts' jurisdiction in common law nations. There are theories on whether judicial review is a product of the increasing importance accorded to human rights protection since World War II;[122] or is a way to constrain parliamentary majorities and/or the executive branch of government;[123] or comes with progressive change in Third Wave Democratization after authoritarianism;[124] or is implemented by elites to preserve what Ran Hirschl argues is their own "political hegemony"[125] rather than as a tool for democratic "horizontal accountability".[126] Judicial review in theory and practice may not

[120] Societies Order, sections 41 and 42, 2005.

[121] Yasushi Hazama, "Hegemonic preservation or Horizontal Accountability," (Paper for 2010 Annual Meeting of the American Political Science Association, 2-5 September 2010).

[122] Alec Stone Sweet, "Constitutional Courts," in *The Oxford Handbook of Comparative Law,* eds. Michel Rosenfeld and Andras Sajo (Oxford: Oxford University Press, 2012), 817.

[123] Hazama, "Hegemonic Preservation", 1.

[124] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003), 34.

[125] Ran Hirschl, *Towards Juristocracy: the Origins and Consequences of the New Constitutionalism* (Cambridge: Harvard University Press, 2004).

[126] Ibid.

be a liberal panacea but its absence, as in Brunei, means no accountability, no constraint on authoritarianism, no parliamentary input, and minimal human rights protections. To address any of these, judicial review is both a desirable and necessary precondition.

For Brunei, there are distinctive features of the constitutional court model that warrant consideration. First, the nature of the constitutional court's design for review allows for abstract and *principaliter* review, which may better suit the Bruneian context. Second, there is a lack of tradition and thus association with judicial review in Brunei's current common law and Syariah courts. Third, and importantly, Brunei's current dual legal system is moving gradually toward a hybrid system of common law and Syariah with one court system administering both sets of laws. As the constitutional court model has been incorporated in many Muslim nations, like Brunei, which have Syariah a source of law and with a monarch or emir as ruler, there is experience from which to draw.

Tracing the history of constitutional courts, Albert Chen writes that both the concept and the institution are relatively new inventions in legal history.[127] Common law principles of judicial review go back to the early 19th century. The US Supreme Court case of *Marbury v Madison*[128] is a benchmark. In it, Chief Justice Marshall articulated that power of a legislature is limited by its constitution; any law made by a legislature which is repugnant to it must be void; and the court has the power and authority to determine the outcome of any conflict between legislation and the constitution.[129] The common law model, known as the Anglo-American model, vests the power of constitutional review in the ordinary courts, which also hear cases involving civil, criminal, and public law. The power to decide constitutional questions with finality rests with its superior (apex) court typically the High or Supreme Court. By contrast, the European (civil law) model, conceived by Kelsen and adopted in 1920 in Austria then extended to other civil law jurisdictions vests this power in a specialist centralized

[127] Albert H.Y. Chen, "Constitutional Courts in Asia: Western Origins and Asian Practice," in *Constitutional Courts in Asia*, eds. Albert H.Y. Chen and Andrew Harding (Cambridge: Cambridge University Press, 2018), 1.
[128] 1 Cranch 137 (1803).
[129] 1 Cranch 137 (1803).

constitutional court, outside the ordinary court hierarchy. It performs the function of negative legislation or nullifying an unconstitutional norm.[130] Importantly, a constitutional court can employ abstract review, which unlike the common law model, does not rely on the facts and circumstances of an actual case being in litigation before the court.[131] The constitutional court can therefore review when the only or principal issue is the constitutionality of a law (*principaliter*) whereas in common law, constitutional review is incidental to the decision a court will make as to which litigating party wins the case (*incidenter*).[132] These three features of nullification, abstract review and *principaliter* are arguably more suitable for a small jurisdiction like Brunei with a generally non-litigious legal culture and where questions of unconstitutionality are ripe for judicial interpretation.

A second advantage is that because the common law courts were constrained by Brunei's laws rendering judicial review outside the courts' powers, no tradition of review developed in the Sultanate. Although senior international judges from other common law jurisdictions do sit on the High Court, their judicial review experience from their own common law jurisdictions is neutered by Article 84 C of the Constitution, and Section 20 of the Supreme Court Act (Cap. 5). Whilst the courts' reputation for independence, professionalism and impartial decision-making is high, especially for commercial, civil and criminal law matters, the lack of human rights protections in the Constitution and legislation means the common law courts are unlikely to be seen as protectors of citizens' human rights. Brunei's ethnic and religious minorities[133] experience discrimination in legislation such as the SPCO and the Compulsory Religious Education Act (Cap. 215) but cannot turn to courts as their protectors. Despite Brunei's CEDAW obligations, the courts would not be seen as guardians and protectors for gender equality nor sexual orientation. Without this association of an established tradition in the common law courts, it would seem a fresh approach with a dedicated review role from a constitutional court could better change current perceptions.

[130] Chen, "Constitutional Courts in Asia," 3.
[131] Ibid., 4.
[132] Ibid.
[133] Two-thirds of the Brunei's population of 434,076 are Malay, and 16% are Chinese with 10% Indian, indigenous and other ethnic groups, and expatriates. Many in the ethnic minorities are also non-Muslims.

The third reason is that Brunei is no longer a nation where the common law is the main or superior source of law; nor are common law courts the sole venues for conflict resolution. Since independence in 1984, the Sultan's stated goal was to reduce Brunei's colonial legal legacy and to align the Sultanate's laws with Islam by ensuring Syariah compliance. Today, the jurisdiction of the Syariah courts mirrors that of the common law courts and the recent SPCO gives both courts concurrent jurisdiction for a range of criminal offenses.[134] There are moves toward a "hybrid"[135] legal system, signaling a desire to move from two separate parallel courts to one court administering both Syariah and common law. If the transition to hybrid does occur, a constitutional court could contribute by guiding its efficacy in a way neither the common law nor the Syariah courts could. Constitutional courts are found in many Muslim nations today where, like Brunei, the constitution specifies Islam as its state religion and where courts administer Syariah law. Many of these nations, including Bahrain, Kuwait and Morocco, have a royal family. Powell and Rothkopf identified and compared 22 Muslim-majority nations: 84% with Islam as the state religion have a constitutional court for some degree of judicial review.[136]

A constitutional court could also consider the validity of the Syariah exemptions in CRC and CEDAW. The CEDAW Review Committee noted that, in its opinion, the principles of the Convention did not run counter to the fundamental principles of Islam, a stance Musawah, (an organization that advocates for equality and justice in Muslim laws)[137] supports. Musawah's submission questioned the assumption underpinning Brunei's CEDAW reservations by advocating that diversity of opinion has been well accepted and celebrated in Islamic jurisprudence and means there is not a unified, monolithic "divine law".[138] Moreover, it argued that Brunei's codified Islamic laws are not God-given per se but adopted by men

[134] Syariah Penal Code Order, 2013; Syariah Penal Code Procedure Order, 2019.

[135] "Unique hybrid legal system mooted," *The Brunei Times* (5 January 2012); Human Rights Resource Centre, *Keeping the Faith: A Study of Freedom, Conscience and Religion in ASEAN* (Indonesia: Human Rights Resource Centre, 2015): 57, 79.

[136] Emilia Justyna Powell and Ilana Rothkopf, "Constitutional Courts and Rule of Law in Islamic Law States: A Comparative Study," *JLC-Mena* 1 (2020), accessed 11 November 2022.

[137] "Musawah Thematic Report on Muslim Family law: Brunei Darussalam," 59th CEDAW Session (October 2014).

[138] Ibid.

serving on committees. It means they are "man-made" and can change to be equal and just[139] to better reflect Quranic values of "equality, justice, compassion and mutual respect"[140] whilst aligning with contemporary international human rights principles.

V. PROSPECTS: OBSTACLES AND REALITIES

If past acts predict future directions, it is unlikely that Sultan Bolkiah will implement any form of constitutional review in Brunei. If he did so now, like his 2004 commitment to restore the Legislative Council, there would be legitimate concerns that a constitutional court could become another tool for Sultan to control. As Powell and Rothkopf found, the establishment of a constitutional court does not "automatically improve the quality of these countries' good governance or rule of law" and can in Muslim nations become an institution for a ruling elite to impose a "politicized, top-imposed one interpretation"[141] of Islam and cite "tradition" to endorse their own position. This accords with Ran Hirschl's theory that judicial review is not automatically the liberalizing and democratizing tool it is assumed to be but can instead operate for the hegemonic preservation of threatened elites.[142]

As it stands, the Sultan, the royal family, traditional conservative Islamic scholars, and Brunei's elites do benefit directly from the continuation of the state of emergency, which generates concentration of power, and an absence of accountability through elections, judicial oversight or community commentary. For 60 years, Bruneians have lived with and come to accept a state of emergency that ignores their nation's Constitution that allowed for democratic participation. Sultan Bolkiah justified lawmaking by Emergency Order as "in keeping with tradition and values" of Brunei and necessary "for the country's peace and stability" when facing "future challenges".[143] This rationale feeds the Sultan's paternalism that he sees no signs of Bruneians being sufficiently responsible, interested, or

139 Ibid.
140 Ibid.
141 Powell and Rothkopf, "Constitutional Courts and Rule of Law."
142 Hirschl, "*Towards Juristocracy.*"; and Hazama, "Hegemonic preservation," 3.
143 Azlan Othman, "His Majesty Announces Big Changes for Brunei," *Borneo Bulletin*, 16 July 2004.

ready to participate in elections.[144] It flies counter to Brunei's high level of literacy, educational attainments, and standard of living. Instead, the MIB ideology draws on nationalism, religion and tradition to justify the authoritarian status quo with MIB systematically inculcated in schools, universities, workplaces, government departments, mosques, and through the media. The government and media "tirelessly emphasise how anything they do is in support of and rooted in MIB".[145] As no alternative view can lawfully be presented the concept is uncontested.

The people of Brunei appear to forgo democratic participation and freedoms in return for stability, economic security, and financial benefits. Brunei's wealth from petro-carbon resources and international investments[146] gives them one of the highest standards of living in Asia with a gross domestic product (GDP) of US$71,809.30 per capita, based on purchasing power parity (PPP), without the need for income tax or sales tax and ranks fifth in the world by GDP per capita PPP.[147] Brunei is a rentier state with most revenue coming from "rents" exploiting natural resources, not from domestic taxation. History shows that when citizens pay taxes they demand accountability and representation in government, but rentier arrangements do the opposite, giving support to undemocratic authoritarian regimes.[148] Overlooking the vast wealth personally accrued to the Sultan and the royal family, Bruneians are told that it is only because of his personal generosity that they have such a high standard of living with comprehensive social welfare benefits, universal health care and education, subsidized hajj pilgrimages, preferential government loans, well-paid public sector employment, infrastructure, and splendid public buildings.[149] It fosters a deep sense of gratitude, loyalty and acceptance of the status quo which the government website describes as "an undivided and unconditional loyalty to His Majesty the Sultan and Yang Di Pertuan".[150]

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[144] Neher, *Democracy and Development,* 145.
[145] Muller, "Sharia law," 317.
[146] The oil and gas sector accounts for two-thirds of Brunei's GDP, 98% of its exports, and 93% of government revenues.
[147] Robert Bociaga, "Brunei: Spoiled Subject of the Sultan," *The Diplomat*, 11 February 2020.
[148] Ahmet T Kuru, "Authoritarianism and Democracy in Muslims Countries: Rentier States and Regional Diffusion," *Political Science Quarterly* 129, no. 3 (2014): 399.
[149] Ann Black, "Marching to the Beat of a Different Drum: Royalty, Women, and Ideology in the Sultanate of Brunei Darussalam," *Royal Studies Journal* 7, no. 2 (2020): 108; Noraini Ahmad, "Policy Implications for Working Women in Brunei," *Japan Labour Issues* 3, no. 1 (2019): 40.
[150] "Information Department, Government of Brunei," *The Borneo Post*, accessed 12 November 2022.

These factors, it would seem, mitigate against a constitutional court or any form of judicial review being introduced any time soon, but circumstances can change in a country. Given Brunei's economic dependency on petro-carbon resources, which are diminishing, along with the world's support for them, economic and financial restructure is inevitable in coming decades. The Sultan has reigned for over sixty years and in time the crown prince, Billah, will inherit the throne. With this will come political change and a renegotiation of the personal bond between Sultan Bolkiah and his people. Known as *Sentiasa Bersama Rakyat* (always together with his people) Sultan Bolkiah is said to know and love his people who accept that in 'his wisdom' he will only act in their best interest. This personal intimate symbiotic relationship contrasts with western separation of powers, and democratic representative institutions but will need renewing by Bolkiah's successor. Brunei's strategic position and proximity to the South China Sea brings future uncertainties to the region, and international tensions may necessitate realignments and future changes. Lastly, today's global interconnectedness means that all the Sultanate's censorship and restrictions on human rights cannot stop new generations of Bruneians gaining awareness of alternative ways of governing.

VI. CONCLUSION

As Asia's only absolute monarchy, Brunei is an outlier and is out of step with the democratization that has taken place throughout Asia. It is one of the most affluent nations in the region and has a highly educated population, but citizens lack basic freedoms valued and protected in other nations, including freedom of speech, the press, association, and genuine religious freedom. Despite the constitutional provision for elections to the LegCo, Bruneians today are disenfranchised. All of this is possible because a state of emergency implemented for genuine reasons 60 years ago continues unchallenged today. The repugnancy of emergency proclamations, law-making by emergency orders, and denial of elections warrants judicial determination. To do so would undermine the supremacy of the existing power elite, making it unlikely to happen but that

does not negate the need to raise and canvass options in forums outside Brunei, including ASEAN. Were reforms to come to Brunei one day, an independent separate constitutional court would have advantages over an Anglo-American integrated model.

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AUTHOR GUIDELINE

Constitutional Review Journal is a medium intended to disseminate research or conceptual analysis on constitutional court decisions all over the world. The journal is published twice a year in May and December. Articles published focus on constitutions, constitutional court decisions, and topics on constitutional law that have not been published elsewhere. The journal is aimed for experts, academicians, researchers, practitioners, state officials, non-governmental organizations, and observers of constitutional law.

Board of Editors of the Constitutional Review Journal invite those who are interested to submit articles based on the criteria above and the manuscript submitted must conform to author guidelines as stated below.

1. Manuscripts have to be written in English.
2. The translation of any foreign language in body text, footnotes, and bibliography need to be added (in a bracket) after the sentence/word in foreign language.

   Example:

   Foreign language in bibliography

   Corte Costituzionale Italiana [Italian Constitutional Court]. Sent. 194/2013 Giudizio di legittimità costituzionale in via principale [Judgment on question of constitutionality] No. 194/2013 (July 17, 2013).

   Foreign language in footnote:

   Carlo Azeglio Ciampi, Intervento del Presidente della Repubblica Carlo Azeglio Ciampi in occasione della consegna delle medaglie d'oro ai benemeriti della cultura e dell'arte [Speech of the President of the Italian Republic Carlo Azeglio Ciampi on the delivery of the Gold Medals for Culture and Arts merit], May 5, 2003.

Foreign language in body text:

Therefore, the founding fathers of the Indonesian Constitution made the Negara Kesatuan [Unitary State] the central feature of the new Indonesian statehood, as it is set out most prominently in article 1(1)6 and 25A.

3. The authors who are not native speakers of English need to seek the assistance of a native speaker to proofread their articles before submitting them to the committee.
4. Manuscripts submitted must be original scientific writings and do not contain elements of plagiarism.
5. Submitted manuscripts have not been published elsewhere. The manuscripts are also not under consideration in any publishers.
6. The length of the manuscripts including footnotes are around 8000-10.000 words.
7. Manuscripts are written in A4 paper, 12 point Times New Roman, 1.5 space and written in standard and correct grammatical language.
8. Main headings, sub-headings, and sub-sub-headings of the article should be numbered in the manuscript with the following example:

   I. Main Heading

      1.1. Sub-heading

         1.1.1. Sub-sub-heading

   II. Main Heading

9. The following is the structure of the journal:

   I. Title

   - Title of manuscripts should be specific and concise in no more than 10 words or 90 hits on the key pad which describes the content of the article comprehensively.
   - It is typed by using Times New Roman 16, upper case, alignment: center text.

II. Identity

- The identity covers the author's name, affiliation, and e-mail address.
- The name is typed under the title by using Times New Roman 12, bold, alignment: center text then put asterisk after the name.
- The content of the asterisk is about short explanation of the author(s), could be short biography (short bio) or gratitude, and placed in a footnote. Example:

Example of identity with the asterisk

INDONESIA'S JUDICIAL REVIEW REGIME IN COMPARATIVE PERSPECTIVE

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Example of the explanation of the asterisk:

of legal and political authority lock into and mutually support each other. The fourth section uses this conceptual framework to assess the Indonesian Constitutional Court's approach to its mandate after 2003. Under its first two chief justices, the paper notes, the Court engaged in a concerted effort to build public understanding of its legitimate role in national politics. The Court's abrupt switch between its first Chief Justice, Jimly Asshiddiqie's legalist conception of

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III. Abstract

- The abstract should be written vividly, full and complete which describes the essence of the content of the whole writing in one paragraph.

- Font: Times New Roman, font size: 12, alignment: justify text, space: 1.5, margin: Normal.
- Total words: No more than 350 words.

IV. Keywords

- Preceded by the word "Keywords" in bold style (**Keywords**).
- Font: Times New Roman, font size: 12, lower case, alignment: justify text.
- Selected keywords have to denote the concept of the article in 3-5 terms (*horos*).

V. Body

The body of the manuscript should cover introduction, method, analysis and discussion, and conclusion.

- **Introduction:** It presents a clear information concerning the issue that will be discussed in the manuscript. The background of the article is presented in this section. The end of the introduction should be finished by stating the signification and the objective/ aim of the article.
- **Method:** It is an optional section for articles which are based on research.
- **Analysis and discussion:** Analysis and discussion are presented continuously. It provides the elaboration of the result of your article.
- **Conclusion:** This section is the most important section of your article. It contains the overall explanation of your article. It should be clear and concise.
- **Reference:** The paper needs to cover at least 10 articles from reputable journal. Our reference uses The Chicago Manual of Style (CMS).

  Consult to: http://www.chicagomanualofstyle.org/ https://www.chicagomanualofstyle.org/tools_citationguide/citation-guide- 1.html.

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