RULE OF LAW IN THE EYES OF EUROPEAN CONSTITUTIONALISM: LESSONS FOR INDONESIA

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Abstract

After the pre-independence struggle of identity, Indonesia was set to become a country that would be based upon rule of law, a concept that they first clarified to be taken from the German concept of 'rechtsstaat'. However, while rule of law in both German and European sense has evolved, Indonesian case laws shows that Indonesia has dismissed the practical application of rule of law and suppress it into a philosophical tagline. Meanwhile, the founding countries had gone so far as to place a theoretical test to assess whether 'rule of law' countries truly implements rule of law. Such as through: (1) public institution's subjection to law, (2) the principle of statutory reservation, (3) the principle of effective legal protection, (4) principle of proportionality, and (5) state liability for illegal acts. Comparing European country practices and Indonesian practices, we see that Indonesia's application of rule of law has not been adequate for the country to claim the concept as its basis.

Intisari

Dalam perjuangan untuk membentuk identitas pasca kemerdekaan, Indonesia berikrar untuk menjadi negara hukum, suatu konsep negara yang diambil dari konsep 'rechtsstaat' milik Jerman. Akan tetapi, ketika konsep negara hukum di Jerman dan Eropa berkembang secara signifikan, yurisprudensi yang ada di Indonesia malah dianggap meminimalisir konsep negara hukum menjadi sebatas konsep filosofis. Padahal, negara-negara yang pertama merumuskan konsep ini sudah sampai pada tahap mengembangkan kriteria negara hukum yang dapat membuktikan jika 'negara hukum' benar-benar mengimplementasikan konsepnya negara hukum. Seperti melalui: (1) ketaatan badan negara pada hukum, (2) prinsip perlindungan hukum, (3) prinsip perlindungan hak asasi, (4) prinsip proporsionalitas dalam keputusan hukum, dan (5) prinsip tanggung jawab negara untuk pelanggaran yang dilakukan. Dengan membandingkan yurisprudensi negara Eropa dan Indonesia, penulis melihat bahwa implementasi di Indonesia belum cukup untuk mengklaim bahwa negara ini adalah negara hukum.

Keyword: *Indonesian and European constitutionalism, rule of law/Rechtsstaat, fundamental human rights, principle of legal protection, principle of proportionality.*

Kata Kunci: *Indonesia dan Konstitusionalisme Eropa, Negara Hukum/Rechtsstaat, Prinsip Hak Asasi Manusia, Prinsip Perlindungan Hukum, Prinsip Proporsionalitas.*

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A. Introduction

Article 1(3) of the 1945 Constitution of the Republic of Indonesia ('**Indonesian Constitution of 1945**') stipulates in plain sense that "The State of Indonesia shall be a state based on the *rule of law* [*negara hukum*]."[2] However, by the time Indonesia was formed, Indonesia was ought to learn a 'teen-aged' definition of rule of law, signified by the already growing concept of the Material and Formal rule of law classification as stated by Professor Utretch.[3]

Facing the development, Indonesia claimed to adopt the rule of law in a Material sense, where the country would not remain silent in abiding to the law, but proactive to ensure fairness and justice is received by citizens in the state.[4] To this extent, one would judge that the Rule of Law in Indonesian Constitutionalism is as developed as it is in the countries which stipulated the concept. Unfortunately, an objective observation would entail that Indonesia has not: (1) keep up with the ever growing concept of rule of law and (2) has not adopted "rule of law" as per its initial elucidation in the pre-amended Indonesian Constitution of 1945, mentioning *rechtsstaat*.[5] Meanwhile, *rechtsstaat* itself is a German concept of Law-governed state where the state is subject in its characteristics to abide by law, not economy, not politics, nor other sources,[6] which Indonesia has not done.

Indeed, several sources claimed that this is not a flaw of implementation as Indonesia only philosophically adopted the concept of *rechsstaat* and rule of law.[7] However, it would be unwise to completely develop a theory of constitutionalism and state without precedents from where the term was derived itself. One then cannot dismiss that a practical concept taken by the founding fathers and inserted as an elucidation into the constitution is merely an intent to adopt the concept philosophically. Hence, in light that rule of law is a practical concept, comparatively studying the Indonesian

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[2] Article 1(3), The 1945 Constitution of the Republic of Indonesia, <https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf >

[3] E. Utrecht and M. S. Djindang, Introduction to Indonesian State Administrative Law *[Pengantar Hukum Administrasi Negara Indonesia]* (Jakarta: Ichtiar Baru, 1990), p 9.

[4] Ernst Utrecht and Moh Saleh Djindang, *Ibid.,* p. 9 ; Jimly Asshiddiqie, "Gagasan Negara Hukum Indonesia," n.d., p. 3 <https://www.pn-gunungsitoli.go.id/assets/image/files/Konsep_Negara_Hukum_Indonesia.pdf.>

[5] J. Asshiddiqie, *Ibid.,* p. 1-16.

[6] J. Asshiddiqie, *Ibid.,* p. 2 ; Martin Krygier, "Rule of Law (and Rechtsstaat)," *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, 2014, p. 781-1st Column, https://doi.org/10.1007/978-3-319-05585-5_4.

[7] A. Hidayat, "Rule of Law under the Pancasila," *Research Centre for Constitutional Court of the Republic of Indonesia*, Event: Increased Understanding of Citizens' Constitutional Rights for Pancasila and Citizenship Education Teachers with National Level Achievements [*Event: Peningkatan Pemahaman Hak Konstitusional Warga Negara Bagi Guru Pendidikan Pancasila Dan Kewarganegaraan Berprestasi Tingkat Nasional*], 2017, <http://aacc-asia.org/content/articles/3_How%20the%20Pancasila%20Colours%20the%20Rule%20of%20Law%20(Translation,%20MKRI).pdf >

application to the growing German and/or European concept from where it was taken is necessary.

Taking a look at European Constitutionalism, the author then sees multiple principles that can be cross-checked to Indonesian Constitutionalism. According to Professor A.V. Dicey, there are three principles important to the constitution being: (1) sovereignty or supremacy of law, (2) equality before the law, and (3) due process of law.[8] The author would like to elaborate these elements through five headlines:[9]

1. Subjection of the public institution activity to law,
2. The principle of statutory reservation,
3. The principle of effective legal protection,
4. Principle of proportionality,
5. State liability for illegal acts of public authorities.

Supposedly, each headline would elaborate how a proper 'rule of law' would be demonstrated through one case analysis from the European region and one Indonesian case comparison. This is because there have been, again, critics that Indonesia has been trying to 'weaken' rule of law by propagating that it is more philosophical than legal,[10] that Indonesia is not subject to *rechtsstaat* though it is mentioned in the old Constitutional Elucidation, and therefore in legal implementation the rule of law is flexible.

Notwithstanding the philosophical argument, rule of law is still a very notable concept that is rather undeveloped and repressed in Indonesia. There are more or less several discussions we can find on Indonesian grounds regarding the practice of rule of law which does not compliment the concept positively. Hence, this paper wishes to discuss how far off our implementation has been in comparison to the supposed concept. To do so, this paper will analyse each headline by comparing a singular or collective case study from either the Federal Republic of Germany, the French Republic, and/or the European Union courts, against Indonesian cases. Then, upon such analysis, conclusions and recommendations on what lessons Indonesia could take to develop the concept and correct its implementation will be provided.

B. Research Question

[8] A. V. Dicey, *Introduction to the Study of the Law of the Constitution* (Indianapolis: Liberty Fund, 1885).

[9] Thomas Schmitz, "The rule of law - Introduction to the principle of the rule of law", 2022, pp. 1-3, <http://www.thomas-schmitz-yogyakarta.id/Downloads/Schmitz_ConstEurope_diagram2.pdf > ; Thomas Schmitz, "The rule of law - an often underestimated core principle of the modern constitutional state", 2022, pp. 2-3, <The rule of law - an often underestimated core principle of the modern constitutional state (thomas-schmitz-yogyakarta.id)>

[10] Arief Hidayat, *Op. Cit.*, 2017, <http://aacc-asia.org/content/articles/3_How%20the%20Pancasila%20Colours%20the%20Rule%20of%20Law%20(Translation,%20MKRI).pdf >

Based on analysis of the five headlines, has Indonesia implemented rule of law close to the initial concept of rule of law emanating from European Countries?

C. Analysis

a. Subjection of Public Institution Activities to Law

One of the ways to measure subjection of public institutions to law is obedience of the legislators to the constitution. Here, we would need to see how in every law creation there is alignment to constitution, previous legislations, and when there is not, then there should be proper accountability to the public. Firstly, we would then observe due consideration of the European states to their constitution, particularly Germany, in creating bills and taking responsibility for them compared to those of Indonesian processes. One first instance would be the COVID-19 policies in Germany to wear masks, have travel limitations, and several other personal limitations.[11]

On a surface level, the argument on COVID-19 policies worldwide would be that it seems to restrict fundamental rights which normally under any constitution is subject to strict limitations.[12] Notably, plenty of rights are affected by the restrictions in Germany, such as the freedom of occupation under Article 12(1) of the Basic Law for the Federal Republic of Germany of 1949 ('**Basic Law**') which were restricted by curfew for shops, restaurant, malls, and other business venues, the freedom of assembly under Article 8 of the Basic Law, or the right of movement under Article 11 of the Basic Law. Fortunately, to moderately wipe the concern, some of the COVID restrictions are actually mitigated under the Basic Law. Under Article 11(2) for example stipulates "*This right (of movement and travel) may be* ***restricted only by or pursuant to a law****, and only in* ***cases in which the absence of adequate means of support would result in a particular burden for the community****, or …to combat the* ***danger of an epidemic****…*".[13] The actual problem in German COVID-19 management was then more procedural, such as changes of law to 'ease' the government's actions.

As we would guess, Federalism plays a part in making the management of COVID-19 variable in different states of Germany according to what the states see fit, which was not preferable. However, a Federal Law—the Infection Protection Act ('**IP Act**')—legislated on 20 July 2000 and amended frequently during the pandemic, requires a Federal announcement that Germany is facing a pandemic to allow harmonised

[11] B. M. Zimmermann et al., "Motivations and Limits for COVID-19 Policy Compliance in Germany and Switzerland," *International Journal of Health Policy and Management*, April 21, 2021, https://doi.org/10.34172/ijhpm.2021.30. ; Die Bundesregierung [The Federal Government], "*Maskenpflicht Gilt Ab Sofort [Mask duty applies from now on]*," Bundesregierung [Federal Government], April 29, 2020, <https://www.bundesregierung.de/breg-de/themen/coronavirus/maskenpflicht-in-deutschland-1747318.>, accessed 23 May 2022

[12] n. Limitation of Fundamental Rights will be further discussed under Headline 2.

[13] Article 11, the Federal Republic of Germany's Constitution of 1949 with Amendments through 2012, <https://www.constituteproject.org/constitution/German_Federal_Republic_2012.pdf >

management directed by the Federal government as of early-2020.[14] Meanwhile, at the time, a formal declaration of a so-called *epidemic situation of national scope* by the German Bundestag (the German parliament) has not been made, and hence only individual measures could be taken to combat this 'epidemic'.[15] It was a clear inconvenience, regardless, the following step taken remains surprising. The IP Act was revised to allow federal authorities—in this case the Federal Ministry of Health—to possess more authority in policy harmonisation, an act argued as a centralization of power contradicting the Basic Law.[16]

In an arguably short period, the Ministry immediately released a clarification, arguing that this decision was taken under reasonable advice done after the publication of data by the Robert Koch Institute which contingently to article 35(3) of Basic Law "*If the natural disaster or accident endangers the territory of more than one Land, the Federal Government,* ***insofar as is necessary to combat the danger****, may instruct the Land governments to place police forces* ***at the disposal of other Länder (states)****…*" seems to provide the federal government may give administrative existence during a natural disaster when states are seen as not capable.[17] Speed was needed to handle this case, hence why the Ministry of Health took actions under the IP Act. Additionally, COVID-19 threatens social rights of the public and ensuring individuals were aware via a quick and speedy information delivery from public institutions can be one of the main methods to maintain trust in the government, ensure people comply with regulations, and display that the people' basic rights are fulfilled pursuant to the constitution.[18]

This ease of law drafting and speedy accountability shows the responsibility of public institutions and agents, that they have complied with their constitution and therefore the rule of law regardless of seemingly 'breaching it'. Secondly, analysing cases In Indonesia, these two components are arguably unfounded. Indonesia would not

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[14] L. Hering, "COVID-19 and CONSTITUTIONAL LAW: THE CASE of GERMANY," 2020, p. 151 <https://archivos.juridicas.unam.mx/www/bjv/libros/13/6310/21.pdf.>

[15] European Union Agency For Fundamental Rights, "Coronavirus Pandemic in the EU - Fundamental Rights Implications," 2020, p. 2, https://fra.europa.eu/sites/default/files/fra_uploads/de_report_on_coronavirus_pandemic_june_2020.pdf.

[16] Library of Congress, "Germany: Amendments to Infectious Diseases Protection Act Enter into Force," Library of Congress, Washington, D.C. 20540 USA, November 24, 2020, <https://www.loc.gov/item/global-legal-monitor/2020-11-24/germany-amendments-to-infectious-diseases-protection-act-enter-into-force/.> ; Sophie Schönberger, "Die Stunde Der Politik," Verfassungsblog, March 29, 2020, <https://verfassungsblog.de/die-stunde-der-politik/. > ; Laura Hering, *Op. Cit.,* 2020, p. 151.

[17] Article 35(1-3), the Federal Republic of Germany's Constitution of 1949 with Amendments through 2012, <https://www.constituteproject.org/constitution/German_Federal_Republic_2012.pdf> ; Laura Hering, *Op. Cit.,* 2020, p. 151. ; European Union Agency For Fundamental Rights, *Op. Cit.,* p. 13-4.

[18] B. M. Zimmermann et al., "Motivations and Limits for COVID-19 Policy Compliance in Germany and Switzerland," *International Journal of Health Policy and Management*, April 21, 2021, p. 2 https://doi.org/10.34172/ijhpm.2021.30.

contradict the constitution either by policies of mask, travel, et cetera much like Germany, as under the Indonesian Constitution of 1945 article 28H(1) it is stipulated "*Every person shall have the right…to enjoy a good and healthy environment*" and correspondingly article 28J(2) had declared that several rights of people such as freedom may be restricted for the rights of others or the communal good.[19] As one can easily see, the government is trying to provide a healthy environment for the communal benefit through COVID-19 restrictions. However, being that there exist no specific limitation clauses for individual fundamental rights that allow these restrictions like in Article 11(2) of Basic Law, Indonesian public institutions and agencies should have tried to justify the acts and policies in an elaborate manner instead of just mentioning the Constitution article of reference at the *"Mengingat: [Based on:]*" section in the preamble of a bill.

If this standard of explanation is considered unnecessary as at least the government has referenced the basis of their decision making. It is also important to note that Indonesia is a state with many regional authorities to which it has to consult in creating COVID-19 policies. In 2020, COVID-19 specific finance regulation mechanisms were given out when Government Regulation No. 1/2020 was released. It appears that there is little to no consultation with regional autonomy which is regulated under article 18, 18A, and 18B of the Indonesian Constitution of 1945 and no check and balances on government agent's actions contradicting article 27 of the Indonesian Constitution of 1945 on the release of this law and its effects.[20] Alongside this law, Government Regulation No. 21/2020 on COVID-19 restriction was also released,[21] to which contradict the higher-positioned Law No. 12 of 2011 as revised by law No. 15 of 2019 in its formation.[22] Government Regulation No. 21/2020 had not been careful in its drafting stage, one of the four stages of government regulation creation required by Law No. 12 of 2011.[23] The Government Regulation was planned to be an extension of Law No. 6 of 2018 on Health Quarantine, however in the content it had failed to include the extensive quarantine instructions such as: house quarantine, regional quarantine, hospital quarantine, that had been mentioned by Article 60 of Law No. 6 of 2018.[24] Regardless, even after all the critics, there are not much swift response to these critics and they were left to die down.

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[19] Article 28H(1) & 28J(2), the 1945 Constitution of the Republic of Indonesia After 4th Amendment in 2002, <https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf >

[20] Humas FHUI, "Kritik PSHTN FHUI Tentang Perppu 1/2020," Fakultas Hukum Universitas Indonesia, May 12, 2020, <https://law.ui.ac.id/kritis-pshtn-fhui-tentang-perppu-1-2020/.>, accessed on 12 October 2022.

[21] *Ibid.*

[22] Marita Lely Rahmawati, "Juridical Analysis Government Regulation of the Republic of Indonesia No. 21 of 2020 Concerning Large Scale Social Restrictions in the Framework of Acceleration of the 2019 Coronavirus Disease Handling [*Analisis Yuridis Peraturan Pemerintah Republik Indonesia Nomor 21 tahun 2020 tentang Pembatasan Sosial Berskala Besar Dalam Rangka Percepatan Penanganan Coronavirus Disease 2019 (COVID-19)*]" (Thesis, 2020), p. ix.

[23] Marita Lely Rahmawati,"*Op. cit*" (Thesis, 2020), p. 221

[24] Marita Lely Rahmawati,"*Op. cit*"(Thesis, 2020), pp. 222-3

In light of this situation, Riskiyono, an Indonesian expert for the House of Parliament Legislation Body, commented that it is possible criticism easily die down as they rarely reach the legislators in the first place.[25] Most of law making are done underground and by the time it is brought to the public, it is too late to prevent the enactment. Further, there are methods of law making that can indeed go under the radar through Government Regulations in lieu of law, which does not require public participation. The creation of Government Regulation in lieu of law are often based on 'made-up' urgencies from the executive power, whose only remedy is a rejection of the regulation by the House of Parliament.[26] Even then, these political powers usually side each other and this 'made-up' urgency would be dismissed.

b. The principle of statutory reservation

A statutory reservation means that there are special cases where the regulative and executive power does not have the right to dissolve or modify guaranteed rights or obligations written in a legislature.[27] However, for 'Fundamental Rights'—or what is more known as Human Rights that is conceptually guaranteed in the Constitution—a statutory reservation should rarely exist. Rule of Law or *rechtsstaat* guarantees this, in which *rechtsstaat* as explained by Poggi is a condition where the state has such close connection to its law in the motion that it "*is the state's standard mode of expression, it's very language, the essential medium of its activity*".[28] Hence, in the exceptional cases that Fundamental Rights are to be restricted in the state's motion, a high threshold of legal reasoning would be needed to justify these limitations.

A quite surface analysis would be the government's protection of freedom of speech and expression that is normally guaranteed in all democratic constitutions. In Europe, we would look at a case in France, which concerns expressions labelled 'incitement to violence' falling outside the protection of Article 10 of the "Freedom of Expression" in the European Convention of Human Rights ('**ECHR'**). First, in the case of *Leroy v. France,*[29] this case was initially a domestic French case which discusses a cartoonist who made a satire illustration of someone standing in front of the 9/11 incident with

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[25] Joko Riskiyono, "Public Participation in the Formation of Legislation to Achieve Prosperity [*Partisipasi Masyarakat Dalam Pembentukan Perundang-Undangan Untuk Mewujudkan Kesejathraan*]," *Aspirasi* 6, no. 2 (2015).

[26] Andi Yuliani, "The Creation of 'Forced Urgency' in Government Regulations in lieu of Laws creation to Become Laws [*Penerapan Kegentingan Yang Memaksa Dari Peraturan Pemerintah Pengganti Undang-Undang Menjadi Undang-Undang*]," *Jurnal Legislasi Indonesia* 18, no. 3 (2021).

[27] I. S. Speir, "Constitutional and Statutory Reservation Clauses and Constitutional Requirements of General Laws with Respect to Corporations: The Fifty States and the District of Columbia," *SSRN Electronic Journal*, 2011, p: abstract - 1, https://doi.org/10.2139/ssrn.1820868.

[28] M. Krygier, *Op. Cit.,* p. 781-2nd Column, https://doi.org/10.1007/978-3-319-05585-5_4.

[29] The European Court of Human Rights, 2002, *Leroy* v *France,* <https://hudoc.echr.coe.int/eng#{"itemid":["001-88657"]}.> ; D. Bychawska-Siniarska, "PROTECTING the RIGHT to FREEDOM of EXPRESSION under the EUROPEAN CONVENTION on HUMAN RIGHTS Exergue Citation," 2017, p. 23, <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814.>, accessed 23 May 2022

the slogan "We all dreamt of it…Hamas did it", which is a parody using the Sony multinational company slogan ("Sony did it").[30] When it was initially brought to the first-instance court of France, it received few points of defense: (1) The topic of 9/11 was indeed a public discussion topic, (2) the action did not manage to incite violence yet. Regardless, the first instance court decided was Article 10 ECHR's protection would not be extended to the cartoonist for several reasons: (1) the illustration was made immorally and submitted close to the incident itself, (2) the poor choice of words in the slogan showed support to a massive incident that devastated many, (3) the publication was made in a politically sensitive region in which is very likely to incite violence.[31] Additionally, the clarity of ECHR helped to justify this so 'limitation of fundamental rights', as Article 10(2) of the ECHR allows the limitation of expression when they are for 'protection of morals' and 'public safety', hence based on the extensive deliberation, the court has the right to impose penalty on this 'expression'. When the cartoonist appealed to the Pau Court of Appeal, the court of appeal affirmed the lower court's decision.[32]

Hence, the case was finally brought to the European Court of Human Rights (**ECtHR**) and became *Leroy v. France*, which, in an interesting take, the ECtHR also decided that there had been no violation of Article 10 of ECHR.[33] In the decision, the court mentioned"[34]

> "*Satire is a form of artistic expression and social commentary. Given its intrinsic tendency to exaggeration and distortion of reality, it aims to provoke and disturb. Accordingly, any interference with the right of satire must be examined with particular attention. However, political satire may be subject to restrictions. Indeed, the exercise of freedom of expression involves "duties and responsibilities", as it is established by article 10, para. 2 ECHR*"
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> "*…the applicant justifies the use of terrorism…*"[35]

[30] D. Bychawska-Siniarska, "PROTECTING the RIGHT to FREEDOM of EXPRESSION under the EUROPEAN CONVENTION on HUMAN RIGHTS Exergue Citation," 2017, p. 23, <https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814.>, accessed 23 May 2022

[31] *Ibid.,* p. 23 ; Justitia, "*LEROY v FRANCE*," The Future of Free Speech, September 9, 2020, <https://futurefreespeech.com/leroy-v-france/.>, accessed 23 May 2022

[32] Justitia, "*LEROY v FRANCE*," The Future of Free Speech, September 9, 2020, <https://futurefreespeech.com/leroy-v-france/.>, accessed 10 October 2020.

[33] The European Court of Human Rights (**ECtHR**) 2 October 2008, No. 36109/03, *Leroy* v *France* ;

[34] Bicocca Law and Pluralism, "Leroy v. France, No. 36109/03, ECtHR (Fifth Section), 2 October 2008," www.lawpluralism.unimib.it, accessed October 13, 2022, <https://www.lawpluralism.unimib.it/en/oggetti/324-leroy-v-france-no-36109-03-e-ct-hr-fifth-section-2-october-2009.>

[35] The European Court of Human Rights (**ECtHR**) 2 October 2008, No. 36109/03, *Leroy* v *France,* para 42.

The extensive deliberation that *Leroy* the cartoonist had used his free speech to glorify the idea of terrorism and had not considered the responsibility to be socially aware, made it proportionate that *Leroy* shall be punished.

In Indonesia's constitution, freedom of speech is also limited in a similar way under the Criminal Code which under article 311(1) regarding Defamation stipulates "*Any person who commits the crime of slander or libel…*". However, for promotions of Terrorism, Indonesia would not have a comparable situation as any promotion of terrorism content are directly punishable by Article 6 and 7 of Government Regulation in lieu of Law No. 1 of 2002. A rather interesting case in Indonesia is rather how it then restricts speech in terms of Religion, hence if *Leroy* were to be punished in Indonesia, aside of the directly punishable incitement of terrorism, Indonesia will also be scrutinising the fact that the Prophet Muhammad is being made fun of. Here, Article 165a of the Criminal Code mentioned "*…any person who deliberately in public gives expression…*" "*…abusing or staining a religion… [shall be punished]*".[36] The problem can already be seen by the fact that these limitations are not mentioned in the Constitution but in a 'lower' law which is the Criminal Code. Meanwhile, article 28E(3) of the Indonesian Constitution of 1945 guarantees the absolute freedom to express one's mind without mentioning limitations.[37] However, it is also argued that any fundamental right in the Indonesian constitution is derogable, unless they are under article 28I who explicitly wrote"…cannot be limited under any circumstances".[38] This right to derogate is explicitly mentioned under Article 28J(2) of the Indonesian Constitution of 1945.

In a case that involves a question of 'freedom of speech' and violation of the Criminal Code limitations on it, we can see *Ahok v. District Court of North Jakarta*,[39] the court agreed in full that a comment Ahok had made regarding a religion is insulting and hence he may be punished in accordance with article 165a of the Indonesian Criminal Code. There was absolutely no dissenting opinion that should contest article 165a in its contradiction to the constitution, in which it had limited freedom of speech.[40] While it would be simple to argue that it is another fault that Indonesia could learn from the European implementation of the Rule of Law. The rights of expression in the constitution as a fundamental right can be reserved by law according to Article 28J(2)

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[36] Article 165a & Article 311(1), Indonesian Criminal Code, <https://images.procon.org/wp-content/uploads/sites/50/indonesiacriminalcodeeng.pdf>

[37] M. Marwandianto and H. A. Nasution, "Hak Atas Kebebasan Berpendapat Dan Berekspresi Dalam Koridor Penerapan Pasal 310 Dan 311 KUHP," *Jurnal HAM* 11, no. 1 (April 28, 2020): 1, https://doi.org/10.30641/ham.2020.11.1-25.

[38] Article 28I(1), 1945 Constitution of the Republic of Indonesia, <https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf>

[39] North Jakarta District Court [*Pengadilan Negeri Jakarta Utara*], *Ahok v. District Court of North Jakarta [Pengadilan Negeri Jakarta Utara]*, 2017.

[40] D. Andryanto, "Ahok Dihukum Dua Tahun, Putusan Hakim Bulat," Tempo (TEMPO.CO, May 9, 2017), <https://nasional.tempo.co/read/873676/ahok-dihukum-dua-tahun-putusan-hakim-bulat.>, accessed 23 May 2022

in regards to the rights of others. The violation here is that the court, in utilising the law limiting freedom of speech, does not use a high standard or high justification to derogate from them. This causes freedom of speech, especially in the context of religion, to likely be the basis of minority prosecution.

c. The Principle of Effective Legal Protection

In a draft of a European Constitution which has been presented by a group or European citizens, article IV section 4 has stipulated clearly that no person should ever be deprived of civil rights without a process of law, one cannot be sanctioned for doing something that is not prohibited under the law, and additionally everyone has the right to access a fair trial as well as representation in court.[41] The same is guaranteed under the enacted Article 5 to 7 of ECHR. It is also mentioned in article I, that when an individual feels as if laws that have been stipulated breach supposed 'basic rights' then one may also bring their concerns to the European court.[42] The combination of these two articles guarantees legal protection and legality, giving standing for individuals to go against the government in protecting their rights even towards already passed bills, which is normally seen as a fundamental implementation of the rule of law.[43]

This is reflected in implementation as well, when individuals bring lawsuits against certain Laws to the European Court of Justice in concern to their rights to seek income and live decently. In *Inuit Tapiriit Kanatami (ITK) v. EU Parliament & EU Council*, the ITK indigenous group protested against Regulation (EC) No 1007/2009 on trade in seal products, where 'seal products' or products normally hunted and gathered by 'inuit' or indigenous groups are prohibited from being marketed at the European internal market.[44] In article 3(1)((b)) of Regulation No 1007/2009, it was stipulated that "*...Such placing on the market (of seal product) shall be allowed only on a non-profit basis...*" which would seem as a Regulatory Act that disbenefits the ITK community and hence the claim is brought as such.[45] The General Court however, on the basis of article 263 of The Treaty on the Functioning of the European Union ('**TFEU**'), deemed that Regulation No 1007/2009 is not a regulatory act but a

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[41] Section 4, Article IV, the European Constitution, (2020), <https://europeanconstitution.eu/wp-content/uploads/2019/05/European-Constitution-Full-Text.pdf>

[42] Section 1(7), Article I, the European Constitution, (2020)

[43] R. Mańko, "Existing Mechanisms and Possible Improvements," November 2019, p. 2-3, <https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI(2019)642280_EN.pdf.>, accessed 25 May 2022

[44] R. Mańko, *Op. Cit.,* November 2019, p. *3.* ; ECJ 3 October 2013, Case C-583/11, *Inuit Tapiriit Kanatami and Others* v *European Parliament And Council of the European Union*, InfoCuria European Case Law, "Opinion of Advocate General Kokott on Case C-583/11 P," curia.europa.eu, January 17, 2013, para:4-5, 8, <https://curia.europa.eu/juris/document/document.jsf?text=&docid=132541&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=7288411.>

[45] ECJ 3 October 2013, Case C-583/11, *Inuit Tapiriit Kanatami and Others* v *European Parliament And Council of the European Union,* "Opinion of Advocate General Kokott on Case C-583/11 P," *Op. Cit.*, para:8, ; Article 3(1)((a-b)) on *Seal Product Import*, Regulation (EC) No 1007/2009 on Trade in Seal Products.

legislative act not to be annulled and cannot be brought to court for annulment by natural and legal persons as promised.[46] Receiving 3 grounds of appeal on this decision, the European Court of Justice made extensive deliberation on why the claim is untenable: (1) even in broad interpretation of Article 263 TFEU the regulation will still be considered a legislative act, (2) the regulation does not disbenefit the community as no inuit groups are even placing products on the European Market, and (3) the citizen is protected as he may still file legal actions against measures of public authorities which execute the legislation before the competent national ordinary or administrative court and this court can ask the European Court of Justice under Article 267 TFEU for a preliminary ruling on the validity of the EU legislation.[47] Alas, while even the appeals are declared unfounded later on, based on extensive reviews and analysis by the European Court of Justice that was made transparent in this case, we can see the Rule of Law emphasised and the access to legal protection guaranteed even in practice.[48]

In Indonesia, the Indonesian Constitution of 1945 also guarantees the right to fair trial and to go against the government under article 27(1), "*All citizens shall be equal before the law…*".[49] However, very rarely do we see this stand when citizens bring their right against regulatory acts of laws in Indonesia. For example, the transparent deliberation and serious view of the ECJ in the *Inuit* case is not reflected in the *WALHI v. PLTU Jambi* case in Indonesia.[50] Here WALHI (an environmentalist group from Sumatra) had claimed that the construction of PLTU Jambi would cause harm to the environment due to the smoke residue the facility would have, this would then be against article 28H of the Indonesian Constitution of 1945 that guarantees the right to a healthy environment and hence may be objected to.[51] This is also in alignment with article 53 and 55 of Law No. 9 of 2004 regarding a revision to Law No. 5 of 1986

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[46] Article 263, para 4 of TFEU *"Any natural or legal person may, under the conditions laid down in the first and second paragraphs, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.*", The Treaty on the Functioning of the European Union (TFEU), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT>, accessed 25 May 2022

; ECJ 3 October 2013, Case C-583/11, *Inuit Tapiriit Kanatami and Others* v *European Parliament And Council of the European Union*, "Opinion of Advocate General Kokott on Case C-583/11 P," *Op. Cit.*, para:30-47.

[47] ECJ 3 October 2013, Case C-583/11, *Inuit Tapiriit Kanatami and Others* v *European Parliament And Council of the European Union*, "Opinion of Advocate General Kokott on Case C-583/11 P," *Op. Cit.*, para:73-75.

[48] A. Mahmutovic and H. N. Lita, "THE EUROPEAN UNION DISTINCTIVENESS: A CONCEPT of the RULE of LAW," *Diponegoro Law Review* 6, no. 2 (October 31, 2021): 157–71, https://doi.org/10.14710/dilrev.6.2.2021. p: 157-171, p. 163.

[49] Article 27(1), The 1945 Constitution of the Republic of Indonesia, <https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf >

[50] Abdullah, "Press Release – WALHI Lawfully Sues PLTU 1 Jambi Environmental Permit – Walhijambi.or.id [*Siaran Pers – WALHI Gugat Secara Hukum Izin Lingkungan PLTU 1 Jambi – Walhijambi.or.id*]," WALHI Jambi, October 29, 2021, <https://www.walhijambi.or.id/siaran-pers-walhi-gugat-secara-hukum-izin-lingkungan-pltu-1-jambi/.>, accessed 28 May 2022

[51] *Ibid.*

concerning Administrative Court, where someone may bring a claim to the Administrative Court if they feel like their rights have been breached in the span of 90 days since citizens first heard of such potential.[52] Notably, the approach requested here to afford the fundamental right to a healthy environment would be that the administrative court revise the administrative decision allowing the construction project.

However, when the advocacy to stop PLTU Jambi construction was brought to the court, the Administrative Court denied that the claim was in alignment with article 53 of Law No. 9 of 2004 as there was "no proof as of yet" that the construction may bring harm to the environment.[53] Meanwhile, it is scientifically known that burning coal, which is the core operation a PLTU facility would do to produce electricity, makes the coal radioactive and ties harmful substances to the air around it.[54] Further, according to *Rencana Usaha Penyediaan Tenaga Listrik* or Electricity Availability Roadmap, the usage of coal to produce an estimated electricity for Indonesia has already failed in 2018, but the government suspiciously increased the share for PLTU electricity in 2019 instead or changing it to another source.[55] Alas, there is no deliberate justification either on why this claim should not be heard. In these circumstances, Indonesia should allow itself to learn from the European manner of handling citizen claims.

d. Principle of Proportionality

In the application of the court decision, the proportionality principle would mean that all decisions made by the court should be proportional. This also obliges that all statutes and laws, as well as regulations and administrative decisions made, are made reasonably, specifically when it affects normatives of human rights.[56] Proportionality can be correctly defined as an action or a law that when affecting human rights is (1) suitable for the end goal, (2) the least in breach of human rights, and lastly (3)

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[52] Article 53 & 55, Law No. 9 of 2004 regarding a revision to Law No. 5 of 1986 concerning Administrative Court, <https://jdih.esdm.go.id/storage/document/UU%20Nomor%205%20Tahun%201986.pdf.pdf>, accessed 28 May 2022

[53] *See* Supreme Court Directory on the Final Decision of the Administrative Court in Jambi Province [*Direktori Putusan Mahkamah Agung mengenai Gugatan di Pengadilan Tata Usaha Negara Jambi pada 29 April 2019*], 29 April 2019], <https://putusan3.mahkamahagung.go.id/direktori/download_file/e1729193c08e0664f3719ed23f885272/pdf/66dfa4dd1e7f7754ac684e05704f52ad>, accessed 28 May 2022

[54] S. Buchanan, E. Burt, and P. Orris, "Beyond Black Lung: Scientific Evidence of Health Effects from Coal Use in Electricity Generation," *Journal of Public Health Policy* 35, no. 3 (May 15, 2014): 266–77, https://doi.org/10.1057/jphp.2014.16. ; Lisa Marlin, "10 Major Disadvantages of Coal | Green Coast," greencoast.org, February 10, 2021, <https://greencoast.org/disadvantages-of-coal/.>, accessed 28 May 2022

[55] N. Hidayati, et. al, "Oversight of Environmental Condition 2020: Investing and Reaping a Multidimensional Crisis [*Tinjauan Lingkungan Hidup 2020: Menabur Investasi, Menuai Krisis Multidimensi*]" (Wahana Lingkungan Hidup Indonesia, 2020).

[56] J. Cianciardo, "The Principle of Proportionality: The Challenge of Human Rights," *Journal of Civil Law Studies* 3 (2010): 177–86, p. 179.

proportional in a strict sense or the aim and the cost is balanced.[57] In the European Union legal order, the Treaty on European Union ('**TEU**') article 5(4) also consolidates this principle, mentioning "*Under the principle of proportionality, the content and form of Union action shall not exceed what is necessary to achieve the objectives of the Treaties*."[58] A commitment that any European Union member will choose the mildest intervention and not exceed the exercise of powers required to reach a goal. Now, in statutes and laws, it is rare that an unproportional legal document would pass judicial reviews and hence less cases of disproportionality would be found. This segment will then try to look at court decisions.

In Europe, this principle as predicted is highly upheld in court. As a matter of fact, in 1956, mention of this principle was already enunciated. In *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*, where Belgium had accused the High Authority of European CSC's decision No. 22/55 of 28 May 1955 of being not proportional to its means.[59] In the case, decision No. 22/55 of 28 May 1955 had exercised the institution's right to reduce price points in order to fix resources' price list. It argues that Belgium has caused disadvantages in production and had only remained as a producer of coal through the help of the Equalization scheme; hence, if Belgium refused to lower its prices for the benefit of the market, the Equalization scheme payments may be stopped or reduced.[60] The court deemed that this indirect action of the European CSC to the Equalisation scheme payment is not really suitable to the aim which is to affect prices of Belgian coal to suit the market and argued the only proportional action which should have been done was to reduce prices of Belgium coal directly to benefit Belgian coal consumers,[61] which, while not explicitly arranged in the treaty, is an implied competence in conducting regulatory functions.[62] Later on, the principle of proportionality became a central part of the fundamental rights jurisprudence of the European Court of Justice, and was therefore integrated in Article 52(1) of the Charter of Fundamental Rights of the European Union.

In Indonesia, the principle of proportionality is also widely recognized in Law No. 28 of Year 1999 regarding Principles of Governance,[63] Article 3 had mentioned the

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[57] *Ibid,* p. 181.

[58] The English-language version of Article 5(4), Treaty on European Union, C 202/18 Official Journal of the European Union (adopted on 7 June 2016)

[59] ECJ 29 November 1956, *Fédération Charbonnière de Belgique* v *High Authority of the European Coal and Steel Community*, Case 8/55, ECLI:EU:C:1956:11, p. 297, para. 3.

[60] ECJ 29 November 1956, *Fédération Charbonnière de Belgique* v *High Authority of the European Coal and Steel Community*, Case 8/55, ECLI:EU:C:1956:11, pp. 298-9.

[61] ECJ 29 November 1956, *Fédération Charbonnière de Belgique* v *High Authority of the European Coal and Steel Community*, Case 8/55, ECLI:EU:C:1956:11, pp. 299-300.

[62] D. Kabat-Rudnicka, "Autonomy or Sovereignty: The Case of the European Union," *International and Comparative Law Review* 20, no. 2 (December 1, 2020): 73–92, p. 81, https://doi.org/10.2478/iclr-2020-0018.

[63] An English Version of this law is available: <http://www.flevin.com/id/lgso/translations/Laws/Law%20No.%2028%20of%201999%20on%20St

principle of proportionality as a principle prioritising balance of rights and obligations of public officials in running governance.[64] Some Indonesian scholars also perceive it as *asas keseimbangan* or the principle of balance,[65] which state interests should indeed be pursued to the maximum lengths but in consideration of not breaching civilian's rights. While there is not much known case in Indonesia specifically denouncing Indonesia's usage of proportionality, it should be said that the application is quite neglected. In the case of Shiraz Husain v. L I L U which discusses a patch of land. The appellant Husain has brought the case to the highest level of appeal being the supreme court after noting that the decision rendered by the previous appeal in the High Court of Surabaya was not valid, this is because the High Court of Surabaya accepted the ruling of the District court of Jember without proportional reasoning, when in fact the object of the decision in the District Court of Jember is mistaken and there was a mis procedure in composition of the court.[66] Here, it is not explained or elaborated what a 'proportional reasoning' would be, nor was the demand answered by the supreme court who simply justified the High Court's decision by saying that the decision was correct as the High Court was only mandated to see if there were any failure to fulfil lawful instructions.[67] However, the Supreme Court did not manage to justify why the High Court did not give reasoning for their decision as that was the appellant's claim, nor did they answer the proportionality part by perhaps explaining what proportionality actually is and how it has been implemented in one way or another.[68]

e. State liability for illegal acts of public authorities

As established explicitly and implicitly above, a constitution is a directly binding law and any actions taken not in line with its provisions are illegal. Most particularly, illegal acts often happen by the hands of those given discretion to protect civilians from immediate danger, the police forces. The affiliation between illegal acts and public officers, specifically police, grew both from A. V. Dicey's theory on the contrast of rule of law and the French term droit Administratif.[69] Droit administratif in this context is to be regarded as Dicey's explanation, a part of law (French law) that arranges position

ate%20Organizer%20who%20is%20Clean%20and%20Free%20from%20Corruption,%20Collusion,%20and%20Nepotism.pdf>

[64] Article 3, Law No. 28 of Year 1999 regarding Principles of Governance, Republic of Indonesia

[65] Dr. Drs. Ismail, M.Si, Governance Ethics: Norms, Concepts, and Practices of Government Ethics [*Etika Pemerintahan: Norma, Konsep, Dan Praktik Etika Pemerintahan*] (Yogyakarta, Indonesia: Lintang Rasi Aksara Books, 2017).

[66] *Shiraz Husain* v *L I L U* [2017], Indonesian Supreme Court Decision [*Putusan Mahkamah Agung Indonesia*] Nomor 1351 K/Pdt/2017, pp. 9-10, <https://putusan3.mahkamahagung.go.id/direktori/putusan/b455e805555c257c1593398cc0d2b968.html>, putusan.mahkamahagung.go.id.

[67] *Shiraz Husain* v *L I L U* [2017], *Op. Cit*, p. 14.

[68] *Shiraz Husain* v *L I L U* [2017], *Op. Cit*, p. 14.

[69] A. V. Dicey, *Ch. The Rule of Law Contrasted with Droit Administratif in Introduction to the Study of the Law of the Constitution 6th Edition* [commonly known: Dicey on the Law of the Constitution] (London: Macmillan, 1902).

and liabilities of state officials, the rights of private individuals dealing with officers, and rights and liabilities enforcement procedure.[70] In his writings, Dicey displays an unfavourable view to droit administratif as he considers:[71]

> "*The first of these notions is that the government, and every servant of the government, possesses, as representative of the nation, a whole body of special rights, privileges, or prerogatives as against private citizens…*"

Which in one way or another displays a dissent on how these public officials or servants are concepted to have such a specialty when dealing with civilians around them. Nonetheless, it is widely recognized today any actions even by public officials which goes against human rights values––which is normally protected by constitution or elucidating laws as fundamental rights––are a state responsibility giving rise to liability for compensation or restitution to the people harmed.[72] The concept, while now widely associated with international law on state responsibility,[73] is seen in this article as a concept firstly arising from the national level and is applicable to acts of assault on civilians by public officials. It is also notable to know that states are also liable in the European Union for any civilian damages that occurred due to violation of European Union law. In the European Court of Justice case of *Francovich v Italy C-6/90* joint with *Danila Bonifaci v Italy C-9/90 D*, the European Union stipulated a strict regime of state liability to compensate civilians who suffered due to the states failing to implement a European Union initiative into national law.[74] Hence, aside from obedience to state laws, public officials and authorities in European Union member states are usually very careful as to not violate European Union law as well.

Returning to national conversations, in France, article 68-(1) of the Constitution of the Fifth Republic emphasised that any criminal actions–illegal actions–conducted by members of the government are protected by no means of immunity and may be tried.[75] Further, the Civil Servants' Rights and Obligations Act of 13 July 1983 as amended by the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016 also prescribes punishment for illegal actions of civil servants. Moving to the French Declaration of Human and Civic Rights which are often referred as a breakthrough in the right of civilians for protection, article 4 and 5 mentions explicitly

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[70] E. M. Parker, "State and Official Liability," *Harvard Law Review* 19, no. 5 (March 1906): 335-349, pp, 335-6, https://doi.org/10.2307/1323012.

[71] *Ibid.* p. 336. ; A V Dicey, *Op. Cit.,* (London: Macmillan, 1902).

[72] Mark Gibney, Katarina Tomagevski, and Jens Vedsted-Hansen, "Transnational State Responsibility for Violations of Human Rights," *Harvard Human Rights Journal* 12 (1999): 267–95, pp. 267-8.

[73] *Ibid.*

[74] European Court of Justice, Francovich and Others v Italy (*Joined Cases C-6/90 and C-9/90*) (1991), <https://eur-lex.europa.eu/resource.html?uri=cellar:7a76ea3f-a919-475c-8cbe-29e0b260ebc4.0002.03/DOC_1&format=PDF>

[75] The French Republic - ELYSEE [Translation], "The Constitution of the Fifth Republic," November 20, 2012.

the grant of liberty for the people, in which anything that does not harm others may be done by the people and they may not be punished for it.[76] Now in the prevention of over-exercise of liberty, law is certainly placed, however, arguably even in excessive use of liberty that disobeys law any use of force that is disproportionate is illegal. Certainly if the exercise of liberty here does not harm others to a certain extent, such extreme cases being a serial kidnapping, then use of force to press liberty would not be legal. However, in September 14 2021, Amnesty France has noted an abusive use of force to press down the liberty of French citizens holding an 'illegal music rave' namely the Redon rave by firing tear gas, throwing sting-ball grenades, and launching several GM2L explosive grenades to attendees of the Redon rave.[77] Here, the force had caused injuries ranging from light to heavy, and regardless of the illegality of such gathering, the use of force against attendees is not legal and accountability of the state on actions of these officials is requested.[78]

Continuing on the media reports, Anne-Sophie Simpere, an author of in Amnesty International France, disclosed French police would deal with the excessive use of force internally with a mechanism called IGPN, while France does have an *ombudsman* or an investigation body for public authorities it was admitted that the body was weak and hence is not used properly.[79] As guessed, there is then no proper accountability response from the police even after their internal investigation. Though citizen can also take remedies before the European Court of Human Rights afterwards, this highlights a problem to prove the use of excessive force in practice. In a previous case in 2016, normally known as the "French George Floyd" due to suspicion of racism, police use of force in the Paris suburb area of Beaumont-sur-Oise took the life of Adama Traoré which gives rise of numerous protest against illegal police violence in France that does not seem to bring consequences for the police.[80] However, In 2020, despite the annual protests done by the family of Traoré since date of occurrence, French medical experts working alongside the police absolved the involved officers from fault over Traoré's death.[81] This led to the most massive protest yet outside the

[76] The French Declaration of Human and Civic Rights (adopted on 26 August 1789), France's National Constituent Assembly, art 4&5. <https://www.conseil-constitutionnel.fr/sites/default/files/as/root/bank_mm/anglais/cst2.pdf>, accessed 29 June 2022

[77] Amnesty International, "France: Abusive and Illegal Use of Force by Police at Redon Rave Highlights Need for Accountability," *Amnesty International*, September 14, 2021 <https://www.amnesty.org/en/latest/news/2021/09/france-abusive-and-illegal-use-of-force-by-police-at-redon-rave-highlights-need-for-accountability/>.

[78] *Ibid.*

[79] D. Coffey, "Report Points to Excessive Police Violence, Illegal Use of Force at Rave Party," *RFI*, September 15, 2021, <https://www.rfi.fr/en/france/20210915-report-points-to-excessive-police-violence-illegal-use-of-force-at-rave-party.>, accessed 1 July 2022

[80] BBC Author, "Adama Traoré: French Anti-Racism Protests Defy Police Ban," *BBC News*, June 3, 2020, sec. Europe, <https://www.bbc.com/news/world-europe-52898262.>, accessed 1 July 2022

[81] J. Beaman, "Underlying Conditions: Global Anti-Blackness amid COVID-19," *City & Community*, September 2020: 516-19, p. 518, https://doi.org/10.1111/cico.12519. ; Christina Okello, "Alleged French Police Brutality in the Spotlight as Traoré Death Resurfaces," *RFI*, June 3, 2020, <https://www.rfi.fr/en/france/20200603-french-police-brutality-in-the-spotlight-as-adama-traor%C3%A9-death-surfaces-again-george-floyd-us.>, accessed 1 July 2022.

Tribunal de Paris courthouse amidst the pandemic,[82] but again no justice was served and no accountability was rendered by the state. In the two cases, the article 68-(1) of the French Constitution is indeed not breached in literal terms, as the illegal actions were not done by government members, but policemen and civil servants that are not considered in scope of Article 68-(1). However, the cases are a violation of the Civil Servants' Rights and Obligations Act of 13 July 1983 as amended by the Civil Servant Ethics and Rights and Obligations Act 2016-483 of 20 April 2016 on integrity and respect to law obligation for civil servants. Hence, in a social-civilian and practical view, the state has indeed failed to protect the rule of law through special treatment and mechanisms made for public authorities, much to the dislike of A. V. Dicey to the concept.

In the comparative view of Indonesia, the situation does not get much better. Under Chapter XA of the Indonesian Constitution of 1945 on Human Rights––or in internationally aligned translation fundamental rights––article 28H(1) guarantees that every citizen shall have the right to live prosperously in all aspects and enjoy a safe-environment, in article 28I(1) it is then clarified to provide those rights people then have freedom from torture, freedom of thought, freedom of religion, and a guarantee to not be treated discriminatively under the law.[83] This has clearly outlined that no one, including any public authority, may go against the freedom of a citizen or their rights when not in *lieu* of law. Furthermore, in the Indonesian scholarly perspective, illegal public authority actions can also be categorized into two realms: (1) illegal acts with economic motives or (2) illegal acts with non-economic motives, in which the slightest immoral actions could have easily been deemed illegal.[84] In practice though, Indonesian citizens are considered to be rather resigned when faced with illegal actions of public officials.[85] This is due to the amount of authority given to public officials by the Indonesian government as well as the precedence of lack of justice citizens receive when going against a public official.[86]

A case example of Indonesia is found in 2019, when a collective Hindu religion believers went to pray in a non-temple residence in Bantul, Yogyakarta. This practice was, however, stopped by the many protests of citizens around the area who are non-Hindu believers and who also successfully called police forces to disrupt the practice and stop it.[87] The news was scrutinised by media everywhere as Indonesian Police has

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[82] *Ibid.*

[83] Article 28H(1) & 28I(1), The 1945 Constitution of the Republic of Indonesia, <https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf>, accessed 30 June 2022

[84] B. N. Arief, Law Enforcement and Crime Policy [*Masalah Penegakan Hukum Dan Kebijakan Penanggulangan Kejahatan*], p. 13 (Bandung: Citra Aditya Bakti, 2001).

[85] A. Syamsuddin, Integrity of Law Enforcers: Judges, Prosecutors, Police, and Lawyers [*Integritas Penegak Hukum : Hakim, Jaksa, Polisi, Dan Pengacara*], p. 11 (Jakarta: Penerbit Buku Kompas, 2008).

[86] *Ibid.*

[87] Kompas Cyber Media, "Residents of the Piodalan Ceremony in Bantul 'Disbanded': Hindus Need a House of Worship Page All, [*Fakta Upacara Piodalan Di Bantul 'Dibubarkan' Warga: Umat Hindu*

the authority to investigate something before taking proper actions,[88] but in this case the police had failed to properly investigate that the gathering was a religious exercise done in a non-temple location due to restrictions of law in building a temple.[89] This is especially scrutinised as the reasoning used by Bantul's Deputy Regent Abdul Halim to justify the call of police was that civilians are scared of the gathering, thinking it was some kind of illegal religion's gathering.[90] Furthermore, he reasoned that there was no intolerance to religion, just misunderstandings.[91] Regardless of the Deputy Regent's attempt to justify police action at the time, it is clearly stipulated under Indonesian law article 16(1)(l) and 16(2)((a)) of Law No 2 of 2002 that any discretion of action taken by the police shall be "*responsible according to law*" and "*not against any law*".[92] Any brash action taken here is clearly a violation of the responsibility of the police, especially noting that this disruption of religious practice is against article 28E(1) of Indonesian Constitution of 1945 or Indonesian Constitution regarding the right to choose and practice religion.[93] In this case, the same result to the French cases can be seen, that at the end of the day no liability of the state was handed to civilians as compensation. This is because again, the state does not admit the unlawful illegal actions as unlawful or illegal.

D. Conclusion And Recommendation

Overall, through a case analysis on subjection of public institutions to law, statutory protection of fundamental rights, fair access to trial, consideration of the proportionality principle, and liability of the state for illegal actions of its officers, the author concludes that the Indonesian rule of law concept is underdeveloped in comparison to the nations where it was derived.

Notably, this may be attributed to the short and non-elaborative text of the Indonesian Constitution of 1945 in comparison to European Constitutions in combination with the low initiative of government authorities to elucidate their basis of actions. Indeed, in 1945 both the Indonesian and European concepts were underdeveloped, however

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Butuh Rumah Ibadah Halaman All,]" KOMPAS.com, November 14, 2019, <https://regional.kompas.com/read/2019/11/15/06360041/fakta-upacara-piodalan-di-bantul-dibubarkan-warga--umat-hindu-butuh-rumah?page=all.>, accessed 30 June 2022

[88] Article 1(9), 16(1), 16(2), *Indonesian Law No. 2 of 2002 regarding the Police Forces of Republic of Indonesia*, Dewan Perwakilan Rakyat [House of Representatives] Indonesia, 2002.

[89] Kompas Cyber Media, *Op. Cit.,* November 14, 2019.

[90] Kompas Cyber Media, *Op. Cit.,* November 14, 2019. ; BBC Author, "Hindu Prayer Ceremony in Bantul Forced to Stop, Deputy Regent: 'This is just a communication problem, don't exaggerate it as if it were a case of intolerance [*Upacara Doa Umat Hindu Di Bantul Dihentikan Paksa, Wakil Bupati: 'Ini Masalah Komunikasi Saja, Jangan Dibesar-Besarkan Seolah-Olah Kasus Intoleransi*],'" BBC News Indonesia, November 14, 2019.

[91] BBC Author, *Ibid.*, November 14, 2019.

[92] Article 16(1)(l), 16(2), *Indonesian Law No. 2 of 2002 regarding the Police Forces of Republic of Indonesia*, Dewan Perwakilan Rakyat [House of Representatives] Indonesia, 2002.

[93] Article 28E(1), The 1945 Constitution of the Republic of Indonesia, <https://jdih.bapeten.go.id/unggah/dokumen/peraturan/116-full.pdf>

the striking difference in modern times is the willingness of European Courts to develop elements of rule of law. Seemingly, this is exacerbated by how Indonesian authorities tend to implement the law as it is, with no proper deliberation and comparison first with higher laws, additionally it can be argued that sentiments of politics still influence court proceedings when concerning religion and ethnicity. Then, when faced with confrontations such as claims of the society that government actions are crossing civilian rights, the court and governmental institutions are often uncooperative and biased, at one point even trying to make innocent civilians look like rioters. All of these are not found within the European Cases analysed. Onto the consideration of proportionality, the author sees indeed that Indonesia has given mention to proportionality, but not in the sense or clarity that European Courts have such as "to reach its goals". Rather, Indonesia used the term in demand of the applicant for "proportional reasoning" on his case, which (1) was not elaborated upon and (2) is unanswered by the court decision. Lastly, onto the liability of the state for illegal action of public authorities––while noting that this part requires further analysis and comparisons to other European nations but France was chosen as comparison noting the dissent of English scholar A.V. Dicey to the concept of administrative authority––France and Indonesia actually have similar failures especially in regards to liability for their police's actions. Outlined, the problem relies in the large amount of authority given to the officers and the fact that dispute settlement mechanisms are kept amongst the officials or to bodies close to the officials with no public hearing or public transparency.

It is then under those regards, the author sincerely recommends that (1) the constitutional law implementation in Indonesia, especially on the rule of law principle, is not treated as some philosophical basis but as a highest legal norm whose implementation can follow those of its advanced counterparts. On (2), it is notable that the European concept of rule of law has been developed for a long duration, Indonesia should be open to taking notes from European methods of rule of law implementation. Lastly, for (3), both in Europe and Indonesia, there would always be rooms of improvements where individual countries are still in the same stage as Indonesia for a particular rule of law implementation such as accountability of the state for government officials. Here, the countries may then invent the wheel starting from strengthening independent investigators like the *ombudsman* for public officials misdoing and unlawful discretions.

BIBLIOGRAPHY

Books

Amir Syamsuddin. *Integritas Penegak Hukum : Hakim, Jaksa, Polisi, Dan Pengacara*. Jakarta: Penerbit Buku Kompas, 2008.

Asshiddiqie, Jimly. "GAGASAN NEGARA HUKUM INDONESIA," n.d. https://www.pn-gunungsitoli.go.id/assets/image/files/Konsep_Negara_Hukum_Indonesia.pdf.

Barda Nawawi Arief. *Masalah Penegakan Hukum Dan Kebijakan Penanggulangan Kejahatan*. Bandung: Citra Aditya Bakti, 2001.

Beaman, Jean. "Underlying Conditions: Global Anti-Blackness amid COVID-19." *City & Community*, September 2020. https://doi.org/10.1111/cico.12519.

Dicey, A V. *Introduction to the Study of the Law of the Constitution*. Indianapolis: Liberty Fund, 1885.

———. *Introduction to the Study of the Law of the Constitution*. London: Macmillan, 1902.

Ernst Utrecht, and Moh Saleh Djindang. *Pengantar Hukum Administrasi Negara Indonesia*. Jakarta: Ichtiar Baru, 1990.

M.Si, Dr. Drs. Ismail. *Etika Pemerintahan: Norma, Konsep, Dan Praktik Etika Pemerintahan*. Yogyakarta, Indonesia: Lintang Rasi Aksara Books, 2017.

Journal Articles

Beaman, Jean. "Underlying Conditions: Global Anti-Blackness amid COVID-19." *City & Community*, September 2020. https://doi.org/10.1111/cico.12519.

Buchanan, Susan, Erica Burt, and Peter Orris. "Beyond Black Lung: Scientific Evidence of Health Effects from Coal Use in Electricity Generation." *Journal of Public Health Policy* 35, no. 3 (May 15, 2014): 266–77. https://doi.org/10.1057/jphp.2014.16.

Bychawska-Siniarska, Dominika. "PROTECTING the RIGHT to FREEDOM of EXPRESSION under the EUROPEAN CONVENTION on HUMAN RIGHTS Exergue Citation," 2017. https://rm.coe.int/handbook-freedom-of-expression-eng/1680732814.

Cianciardo, Juan. "The Principle of Proportionality: The Challenge of Human Rights." *Journal of Civil Law Studies* 3 (2010): 177–86.

Gibney, Mark, Katarina Tomagevski, and Jens Vedsted-Hansen. "Transnational State Responsibility for Violations of Human Rights." *Harvard Human Rights Journal* 12 (1999): 267–95. https://harvardhrj.com/wp-

content/uploads/sites/14/2020/06/12_Gibney_Transnational-State-Responsibility-for-Violations-of-Human-Rights.pdf.

Hasrul, Muhammad. "ASPEK HUKUM PEMBERLAKUAN PEMBATASAN SOSIAL BERSKALA BESAR (PSBB) DALAM RANGKA PENANGANAN CORONA VIRUS DISEASE 2019 (COVID-19)." *Lembaran Gagasan Mahasiswa Yang Solutif Dan Inovatif* 3 (2020).

Hering, Laura. "COVID-19 and CONSTITUTIONAL LAW: THE CASE of GERMANY," 2020. https://archivos.juridicas.unam.mx/www/bjv/libros/13/6310/21.pdf.

Hidayat, Arief. "Rule of Law under the Pancasila." *Event: "Peningkatan Pemahaman Hak Konstitusional Warga Negara Bagi Guru Pendidikan Pancasila Dan Kewarganegaraan Berprestasi Tingkat Nasional*, 2017.

Kabat-Rudnicka, Danuta. "Autonomy or Sovereignty: The Case of the European Union." *International and Comparative Law Review* 20, no. 2 (December 1, 2020): 73–92. https://doi.org/10.2478/iclr-2020-0018.

Krygier, Martin. "Rule of Law (and Rechtsstaat)." *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)*, 2014, 45–59. https://doi.org/10.1007/978-3-319-05585-5_4.

Mahmutovic, Adnan, and Helza Nova Lita. "THE EUROPEAN UNION DISTINCTIVENESS: A CONCEPT of the RULE of LAW." *Diponegoro Law Review* 6, no. 2 (October 31, 2021): 157–71. https://doi.org/10.14710/dilrev.6.2.2021.157-171.

Marwandianto, Marwandianto, and Hilmi Ardani Nasution. "Hak Atas Kebebasan Berpendapat Dan Berekspresi Dalam Koridor Penerapan Pasal 310 Dan 311 KUHP." *Jurnal HAM* 11, no. 1 (April 28, 2020): 1. https://doi.org/10.30641/ham.2020.11.1-25.

Parker, Edmund M. "State and Official Liability." *Harvard Law Review* 19, no. 5 (March 1906): 335. https://doi.org/10.2307/1323012.

Rahmawati, Marita Lely. "ANALISIS YURIDIS PERATURAN PEMERINTAH REPUBLIK INDONESIA NOMOR 21 TAHUN 2020 TENTANG PEMBATASAN SOSIAL BERSKALA BESAR DALAM RANGKA PERCEPATAN PENANGANAN CORONA VIRUS DISEASE 2019 (COVID-19)." Thesis, 2020.

Riskiyono, Joko. "Partisipasi Masyarakat Dalam Pembentukan Perundang-Undangan Untuk Mewujudkan Kesejathraan." *Aspirasi* 6, no. 2 (2015).

Speir, Ian S. "Constitutional and Statutory Reservation Clauses and Constitutional Requirements of General Laws with Respect to Corporations: The Fifty States and the District of Columbia." *SSRN Electronic Journal*, 2011. https://doi.org/10.2139/ssrn.1820868.

Zimmermann, Bettina M., Amelia Fiske, Stuart McLennan, Anna Sierawska, Nora Hangel, and Alena Buyx. "Motivations and Limits for COVID-19 Policy Compliance in Germany and Switzerland." *International Journal of Health Policy and Management*, April 21, 2021. https://doi.org/10.34172/ijhpm.2021.30.

1789 The French Declaration of Human and Civic Rights, France's National Constituent Assembly

Legislations

1789 The French Declaration of Human and Civic Rights, France's National Constituent Assembly.

1858 Constitution de la Ve République [Translation: The Constitution of the Fifth Republic], The French Republic.

1950 European Convention on Human Rights, Council of Europe

1945 Constitution of the Republic of Indonesia.

2012 Consolidated Version of The Treaty on the Functioning of the European Union, Official Journal of the European Union, C 324/49

2016 Treaty on European Union, European Union Commission

Basic Law for the Federal Republic of Germany in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 29 September 2020.

Government Regulation of the Republic of Indonesia No. 1 of 2020 regarding the Implementation of Special Economic Zones.

Government Regulation of the Republic of Indonesia No. 21 of 2020 regarding Large-Scale Social Restrictions in the Context of Accelerating the Handling of Corona Virus Disease 2019 (COVID-19).

Regulation (EC) No 1007/2009 of the European Parliament and of the Council of 16 September 2009 on trade in seal products.

Kitab Undang-Undang Hukum Pidana Indonesia [Translation: The Criminal Code of Indonesia].

Law No. 2 of 2002 of the Republic of Indonesia regarding the State Police of the Republic of Indonesia.

Law No. 9 of 2004 regarding a revision to Law No. 5 of 1986 concerning Administrative Court.

Jurisprudences

[Leroy v. France, 2008] Leroy v. France, No. 36109/03, ECtHR (Fifth Section), 2 October 2008.

EU Lex. Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community. Case 8-55., Europa.eu § Judgment of the Court of 29 November 1956 (1956).

Inuit Tapiriit Kanatami and Others v *European Parliament And Council of the European Union,* ECJ 3 October 2013, Case C-583/11.

Inuit Tapiriit Kanatami and Others v *European Parliament And Council of the European Union,* ECJ 3 October 2013, Case C-583/11, "Opinion of Advocate General Kokott on Case C-583/11 P"

Shiraz Husain v. LILU, Putusan Mahkamah Agung Indonesia [Indonesian Supreme Court Decision] Nomor 1351 K/Pdt/2017, putusan.mahkamahagung.go.id.

WALHI v. PLTU Jambi, Putusan Mahkamah Agung mengenai Gugatan di Pengadilan Tata Usaha Negara Jambi pada 29 April 2019 [Supreme Court Directory on the Final Decision of the Administrative Court in Jambi Province, 29 April 2019].

Miscellaneous

Abdullah. "Siaran Pers – WALHI Gugat Secara Hukum Izin Lingkungan PLTU 1 Jambi – Walhijambi.or.id." WALHI Jambi, October 29, 2021. https://www.walhijambi.or.id/siaran-pers-walhi-gugat-secara-hukum-izin-lingkungan-pltu-1-jambi/.

Amnesty International. "France: Abusive and Illegal Use of Force by Police at Redon Rave Highlights Need for Accountability." *Amnesty International*, September 14, 2021. https://www.amnesty.org/en/latest/news/2021/09/france-abusive-and-illegal-use-of-force-by-police-at-redon-rave-highlights-need-for-accountability/.

Andryanto, Dian. "Ahok Dihukum Dua Tahun, Putusan Hakim Bulat." Tempo. TEMPO.CO, May 9, 2017. https://nasional.tempo.co/read/873676/ahok-dihukum-dua-tahun-putusan-hakim-bulat.

BBC Author. "Adama Traoré: French Anti-Racism Protests Defy Police Ban." *BBC News*, June 3, 2020, sec. Europe. https://www.bbc.com/news/world-europe-52898262.

———. "Upacara Doa Umat Hindu Di Bantul Dihentikan Paksa, Wakil Bupati: 'Ini Masalah Komunikasi Saja, Jangan Dibesar-Besarkan Seolah-Olah Kasus Intoleransi.'" *BBC News Indonesia*, November 14, 2019. https://www.bbc.com/indonesia/indonesia-50408575.

Bicocca Law and Pluralism. "Leroy v. France, No. 36109/03, ECtHR (Fifth Section), 2 October 2008." www.lawpluralism.unimib.it. Accessed October 13, 2022. https://www.lawpluralism.unimib.it/en/oggetti/324-leroy-v-france-no-36109-03-e-ct-hr-fifth-section-2-october-2009.

Coffey, David. "Report Points to Excessive Police Violence, Illegal Use of Force at Rave Party." *RFI*, September 15, 2021. https://www.rfi.fr/en/france/20210915-report-points-to-excessive-police-violence-illegal-use-of-force-at-rave-party.

Dewan Perwakilan Rakyat [House of Representatives] Indonesia. Law No. 2 of 2002 regarding the Police Forces of Republic of Indonesia (2002). https://www3.bkpm.go.id/images/uploads/prosedur_investasi/file_upload/UU_2_2002.pdf.

European Union Agency For Fundamental Rights. "Coronavirus Pandemic in the EU - Fundamental Rights Implications," 2020. https://fra.europa.eu/sites/default/files/fra_uploads/de_report_on_coronavirus_pandemic_june_2020.pdf.

FHUI, Humas. "Kritik PSHTN FHUI Tentang Perppu 1/2020." Fakultas Hukum Universitas Indonesia, May 12, 2020. https://law.ui.ac.id/kritis-pshtn-fhui-tentang-perppu-1-2020/.

Hidayati, et. al, Nur. "Tinjauan Lingkungan Hidup 2020: Menabur Investasi, Menuai Krisis Multidimensi." Wahana Lingkungan Hidup Indonesia, 2020.

justitia. "LEROY v FRANCE." The Future of Free Speech, September 9, 2020. https://futurefreespeech.com/leroy-v-france/.

Library of Congress. "Germany: Amendments to Infectious Diseases Protection Act Enter into Force." Library of Congress, Washington, D.C. 20540 USA, November 24, 2020. https://www.loc.gov/item/global-legal-monitor/2020-11-24/germany-amendments-to-infectious-diseases-protection-act-enter-into-force/.

Mańko, Rafał. "Existing Mechanisms and Possible Improvements," November 2019. https://www.europarl.europa.eu/RegData/etudes/BRIE/2019/642280/EPRS_BRI(2019)642280_EN.pdf.

Marlin, Lisa. "10 Major Disadvantages of Coal | Green Coast." greencoast.org, February 10, 2021. https://greencoast.org/disadvantages-of-coal/.

Media, Kompas Cyber. "Fakta Upacara Piodalan Di Bantul 'Dibubarkan' Warga: Umat Hindu Butuh Rumah Ibadah Halaman All." KOMPAS.com, November 14, 2019. https://regional.kompas.com/read/2019/11/15/06360041/fakta-upacara-piodalan-di-bantul-dibubarkan-warga--umat-hindu-butuh-rumah?page=all.

Okello, Christina. "Alleged French Police Brutality in the Spotlight as Traoré Death Resurfaces." *RFI*. June 3, 2020. https://www.rfi.fr/en/france/20200603-french-police-brutality-in-the-spotlight-as-adama-traor%C3%A9-death-surfaces-again-george-floyd-us.

Schönberger, Sophie. "Die Stunde Der Politik." Verfassungsblog, March 29, 2020. https://verfassungsblog.de/die-stunde-der-politik/.

The Federal Government [Die Bundesregierung]. "Maskenpflicht Gilt Ab Sofort." Bundesregierung, April 29, 2020. https://www.bundesregierung.de/breg-de/themen/coronavirus/maskenpflicht-in-deutschland-1747318.

Yuliani, Andi. "Penerapan Kegentingan Yang Memaksa Dari Peraturan Pemerintah Pengganti Undang-Undang Menjadi Undang-Undang." *Jurnal Legislasi Indonesia* 18, no. 3 (2021).