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JURIS GENTIUM LAW REVIEW is an expert-reviewed and peer-edited law journal dedicated as a place for undergraduate and graduate students from any major to contribute in scientific research and writing in regards to Business Law, Public International Law, Private International Law and Comparative Studies. The Editorial Board receives any research paper and conceptual article that has never been published in any other media. The submission requirement is available at the inside back cover of this journal.

FOREWORD FROM THE PRESIDENT OF THE COMMUNITY OF INTERNATIONAL MOOT COURT FACULTY OF LAW, UNIVERSITAS GADJAH MADA

In today's rapidly changing legal landscape, the emergence of student-led legal publications is of great significance. I am excited to introduce this year's edition of the Juris Gentium Law Review (JGLR), which underscores the importance of involving student perspectives in legal discussions.

Student-initiated legal journals, like this one, breathe new life into academic conversations. They encourage innovative viewpoints and fresh approaches to legal analysis. Welcoming students from diverse academic backgrounds, these platforms provide emerging scholars with the priceless chance to wrestle with complex matters, hone their research acumen, and make substantial contributions to the ongoing dialogues within the legal and international community.

Over the years, CIMC has closely monitored JGLR's growth. Each year, the journal expands its scope, addressing new issues. With every passing year, our expectations naturally increase, reflecting our unwavering commitment to pursuing excellence consistently. We envision this platform as a lasting haven for student expression, dedicated to exploring novel global challenges—a testament to our commitment to societal contribution. Our aspiration is for this initiative to endure, fostering a legacy of written contributions that will persist for years to come.

My heartfelt appreciation extends to all the authors for their insightful contributions, the previous and current Editor-in-Chiefs, Gregorius Brian Sukianto and Gabriela Eliana, and the remarkable editorial, technical, and administrative teams that have diligently refined their work behind the scenes. Together, they have crafted a platform that not only acknowledges the liveliness of legal discourse but also propels its evolution.

May this groundbreaking effort inspire future generations, motivating them to actively shape the legal landscape with their fresh perspectives and unwavering enthusiasm. As well as long-lasting the love and support for our big community.

Putera Pratama Tambunan

President of the Community of International Moot Court

Faculty of Law, Universitas Gadjah Mada

FOREWORD FROM THE EDITOR IN CHIEF JURIS GENTIUM LAW REVIEW FACULTY OF LAW, UNIVERSITAS GADJAH MADA

I am honored to announce the publication of Juris Gentium Law Review's Volume 9 Issue 1. This exceptional compilation was mainly prepared by the previous JGLR Board under the adept leadership of Gregorius Brian Sukianto and further refined by members of the incumbent JGLR Board's Technical Team. We received an array of diverse submissions, where we were able to collaborate with expert reviewers from different backgrounds.

Contained within this issue are three articles spanning from the invocation of non-precluded measures in the international investment law framework, an exploration of Arctic sovereignty and its interplay with the law of the sea, to a discerning analysis of the European Constitutional Law to offer recommendations for Indonesia. In essence, this year's articles aim to meaningfully contribute to the development of international law and comparative legal studies concerning pressing contemporary issues.

I would like to appreciate Gregorius Brian Sukianto as the Editor-in-Chief of the 2022 JGLR Board, members of the 2022 JGLR Board, namely A. A. Savita Padma, Annisa Adnina, Gabriella Josceline, Jonathan Abram, M. Ardiansyah Arifin, and Rayhan Yudhistira, as well as the Technical Team of 2023 JGLR Board, Salma Mawa Kamila and Alyca Azka Nariswar for curating this issue. I would also like to thank the Authors, Ishmael Ershad Murtadho, Marsha Qitara, and Stephani Gabriella Wijayawati for their dedication in composing insightful articles presented in this issue. Allow me to also extend my profound gratitude to Universitas Gadjah Mada's Faculty of Law, our Executive Reviewers, and JGLR's Supervisor. It is through the collaboration of these partners that JGLR is empowered to present this issue.

I hope that the presence of JGLR can continue to provide law students with a platform to critically scrutinize and dissect issues within the international law and comparative legal landscape, and foster the advancement of knowledge within this domain.

Gabriela Eliana

Editor in Chief of the *Juris Gentium Law Review*

Faculty of Law, Universitas Gadjah Mada

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The Applicability of the 'Necessity' Standard to Invoke 'Non-Precluded Measure' Defenses under International Investment Law

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Abstract

The 'necessity' standard is established as a centerpiece of the laws of state responsibility that enable states to justify unlawful measures under international law. However, the application of the standard has witnessed significant controversy in the invocation of 'non-precluded measure' defenses under international investment law. This controversy is best demonstrated in the series of investor-state arbitral proceedings initiated by numerous foreign investors against Argentina as a result of the 2002 Argentinian financial crisis. Here, different arbitral tribunals assessed the 'necessity' standard in different ways, hence producing differing conclusions regarding the responsibility of Argentina in invoking non-precluded measures. This paper will examine the extent to which 'necessity' is an appropriate standard to invoke non-precluded measure defenses under international investment law.

Intisari

Standar 'keharusan' dianggap sebagai salah satu inti dari hukum tanggung jawab negara yang memungkinkan negara untuk membenarkan tindakan yang melanggar hukum di bawah hukum internasional. Namun, penerapan standar tersebut telah menimbulkan kontroversi yang signifikan dalam penerapan pertahanan 'tindakan yang tidak dihalangi' di hukum investasi internasional. Kontroversi ini terlihat dalam rangkaian proses arbitrase investor-negara yang diprakarsai oleh banyak investor asing terhadap Argentina sebagai akibat dari krisis keuangan Argentina tahun 2002. Di sini, dewan-dewan arbitrase yang berbeda menilai standar keharusan melalui cara yang berbeda, sehingga menghasilkan kesimpulan yang berbeda terkait pertanggungjawaban Argentina dalam menerapkan tindakan yang tidak dihalangi. Riset ini akan memeriksa sejauh mana 'keharusan' adalah standar yang tepat untuk meminta pertahanan tindakan yang tidak dihalangi dalam hukum investasi internasional.

Keywords*: Necessity, non-precluded measures, state responsibility, international investment law*

Kata kunci: *Keharusan, tindakan yang tidak dihalangi, pertanggungjawaban negara, hukum investasi internasional*

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A. Introduction

The legal framework of international investment law ("**IIL**") concerns the protection of the rights and obligations of foreign investors from the actions of the host state. However, IIL also addresses contentious issues that may be construed as somewhat putting the host state's interest over that of the foreign investors' in specific circumstances. This gives states an avenue to 'detract' from their obligations under bilateral investment treaties ("**BIT**"). Avenues such as these are known as non-precluded measure ("**NPM**") that may be invoked by a state when it determines that it has a discretion to exercise its obligation to protect its citizens when, for example, circumstances dictate the potential to create economic instability or pose a threat to a state's essential security interests.[2] Invocation of such avenues may be conducted through a claim employing the necessity defense.[3]

The issues surrounding NPM first came to light after the International Court of Justice ("**ICJ**") ruled in several landmark cases concerning essential security interests.[4] However, NPM was further explored by various tribunals administered by the International Centre for the Settlement of Investment Disputes ("**ICSID**") when a plethora of cases were brought by United States ("**US**") investors against Argentina in the aftermath of the Argentinian government's invocation of necessity during the 1998-2002 financial crisis. The issue proved to be highly controversial due to the differing analyses and outcomes that were drawn up by the tribunals with respect to the application of the necessity standard. As the standard is an important aspect of the field of public international law ("**PIL**"), the question of whether or not 'necessity' is an appropriate standard to be used in invoking a 'non-precluded measure' defense under IIL warrants further examination.

This paper will argue that the doctrine of necessity is, to a limited extent, an appropriate standard to invoke NPM in IIL. Such premise can be supported from the standard's extremely strict requirements or thresholds that need to be fulfilled for it to be invoked, and due to its rather problematic application by ICSID tribunals in several cases. These factors may prompt suggestions for tribunals to adopt 'alternative' approaches.

B. The Essence of the Necessity Standard

The Articles of Responsibility of States for Internationally Wrongful Acts ("**ARSIWA**") codified by the International Law Commission views necessity as a 'last resort' measure. The International Law Commission ("**ILC**") defines the measure as something that can only be invoked when the state has no other way to "*safeguard an*

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[2] David Collins, *An Introduction to International Investment Law* (Cambridge: Cambridge University Press, 2017): 284.
[3] Cynthia C. Galvez, ""Necessity," Investor Rights, and State Sovereignty for NAFTA Investment Arbitration", *Cornell Journal of International Law* 43(146) (2013): 147.
[4] David Collins, "An Introduction to International Investment Law", 286.

essential interest against a grave and imminent peril".[5] The standard also requires the measure not to 'impair' or damage the essential interests of any contracting state.[6] In other words, the measure can only be invoked on an "*exceptional basis*",[7] that is when the potentially threatening situation occurs beyond the state's control. The consequence of invoking the said measure is that the state's action may be excused and the state may be relieved from their responsibilities under the agreement.[8] Nevertheless, the legal consequence also means that the state will have the burden of proof to prove the legitimacy of invoking the measures in question.

Although the doctrine of necessity, which has been accepted as customary international law ("**CIL**"), commonly refers to as the standard codified under ARSIWA, practices from ICSID tribunals shows that necessity can also be examined from the perspective of the written provisions from BITs concluded between contracting states as an NPM clause.[9] As an example of a NPM clause in a BIT, Article XI of the US-Argentina BIT reads:

> "*This treaty shall not preclude the application of either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own national security interests*".[10]

It may be argued that the necessity standard under Article 25 of ARSIWA is *lex generalis* as it is generally applicable under the realm of PIL, while necessity embedded in Article XI is *lex specialis* as it specifically adheres to the laws of IIL in accordance with the object and purpose of the US-Argentina BIT.[11] These two perspectives bear significance in analyzing the relevance of the necessity standard to be applied in IIL.

The Argentinian financial crisis is a prime example to understand the application of necessity. Here, the Argentinian government conducted several measures such as devaluing the Argentinian peso in order to stabilize the state's declining economy, which harmed numerous foreign investors.[12] Although relying on similar facts, different tribunals reached different views on to what extent the invocation of

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[5] *ILC Articles on Responsibility of States for Internationally Wrongful Acts*, UN Doc. A/56/83 (2001): Art. 25(1)(a).
[6] *Ibid*., Art. 25(1)(b).
[7] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Merits) [1997] ICJ Rep 7 (September 25), para. 51.
[8] David Collins, "An Introduction to International Investment Law", 298; Jorge Viñuales, 'Sovereignty in Foreign Investment Law' in Zachary Douglas et. al., *The Foundations of International Investment Law: Bringing Theory into Practice* (Oxford: Oxford University Press, 2014): 348.
[9] Cynthia C. Galvez, ""Necessity," Investor Rights, and State Sovereignty", 147.
[10] *Treaty between United States of America and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investment* (14 November 1991) 31 ILM 124 (1992): Art. XI.
[11] *El Paso Energy International Company v Argentine Republic, Award*, ICSID Case No. ARB/03/015 (31 October 2011): para. 552.
[12] David Collins, "An Introduction to International Investment Law", 300.

necessity was lawful or not.[13] The differing views thus sparked debate regarding the application of the necessity standard within IIL.

C. Strict Requirements to Lawfully Invoke the Necessity Standard

Since the necessity standard can be examined from the perspective of the BIT and CIL, it is highly important to examine the cumulative criteria of the necessity standard enshrined under Article 25 of ARSIWA. Mindful that the essence of the two-fold cumulative criteria has been briefly discussed above, the current analysis will only focus on the first criteria, due to its debated and somewhat controversial character. As the ICSID tribunals easily concluded that the context of the situation, along with the application of the BIT, did not impair the interest of the states nor the international community but rather the foreign investors,[14] it can be argued that impairment of the foreign investor's interest does not exactly fall under the scope of the necessity standard.[15]

Within the requirement of safeguarding essential security interests, there are several aspects of the necessity standard that are crucial to be examined: (a) whether the NPM clause to invoke necessity is self-judging; (b) whether economic emergency is sufficient to be characterized as 'grave and imminent peril' to allow the invocation of an essential security interest, and (c) the determination of what constitutes a 'last resort' measure.

a. Non-self-judging nature of NPM clauses

Self-judging clauses are treaty provisions that may give states full discretion to decide when to invoke claims of national security exceptions embedded within the treaty.[16] Invoking such may allow states to claim the necessity defense, especially to show that the situation is a "grave and imminent peril" in accordance with the necessity defense under CIL. Nevertheless, the ICJ in *Gabčíkovo-Nagymaros* opined that when states invoke necessity, the determination of the fulfilment of the cumulative requirements shall not be left to the subjective opinion of the state but rather is to be based on the objective assessment of the Court.[17] The World Trade Organization ("**WTO**") concurred with the ICJ's view.[18] In *Russia-Measures Concerning Traffic in Transit*, the Panel emphasized their power to objectively determine whether or not the action

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[13] *Ibid*., 301, 303.
[14] *CMS Gas Transmission Company v Argentine Republic, Award*, ICSID Case No. ARB/01/8 (12 May 2005), paras. 357-358; *Enron Cooperation and Ponderosa Assets, L.P v Argentine Republic, Award*, ICSID Case No. ARB/01/3 (22 May 2007), paras. 341-342.
[15] Robert Sloane, "On the Abuse of Necessity in the Law of State Responsibility", *The American Journal of International Law* 106(447) (2012): 506.
[16] David Collins, "An Introduction to International Investment Law", 288.
[17] *Gabčíkovo-Nagymaros Project,* paras. 51-52.
[18] Sebastián Mantilla Blanco & Alexander Pehl, *National Security Exceptions in International Trade and Investment Agreements: Justiciability and Standards of Review* (Switzerland: Springer, 2020): 34.

conducted by a state falls under the requirement of Article XXI(b) of the General Agreement on Trades and Tariff.[19]

The views of the ICJ and the WTO can be closely compared with the perspective of the ICSID tribunals, though with a slightly different approach, regarding the relevance of the self-judging nature of NPM clauses to invoke necessity. In *El Paso International Energy Company v. Argentine Republic* ("***El Paso***"), the tribunal rejected Argentina's claim that the invocation of Article XI is self-judging, as Argentina claimed is evident from the treaty's preparatory works.[20] Several reasons can be advanced in support of the verdict reached by the tribunal . Firstly, from a treaty law perspective, it is undisputed that a treaty shall be interpreted in light of its object and purpose.[21] *In casu*, since the US-Argentina BIT was drafted to "*maintain a stable framework for investment*" in both Argentina and the US, the tribunal indeed made a reasonable decision when it opined that the BIT's purpose would not be realized if Article XI were self-judging.[22] The tribunal opined that it must first objectively examine the situation that Argentina claimed made it necessary to invoke the NPM clause.[23] The findings of the *El Paso* tribunal are similar to the findings made by the ICJ and WTO. In this sense, if the invocation of necessity is left to the state's discretion, any state would find themselves an easy 'escape route' from their responsibilities, which in turn could damage investors.

Secondly, the tribunal also opined that the treaty must be explicit if a provision were to be self-judging.[24] Here, the *El Paso* tribunal's decision on the explicit nature of the BIT to indicate the self-judging nature of the NPM clause is the main difference between the ICSID tribunal's view and that of the ICJ's and the WTO's, in which the tribunal's reasoning leaves room for state parties to claim Article XI as self-judging. The view of the *El Paso* tribunal is shared among other tribunals adjudicating cases against Argentina. For example, the tribunal in *CMS Gas Transmission Company v. Argentine Republic* ("***CMS***") ruled that "when States intend to create for themselves a right to determine unilaterally the legitimacy of extraordinary measures importing non-compliance with obligations assumed in a treaty, they do so expressly".[25]

These views conveyed by the ICJ, WTO, and ICSID affirm the non-self-judging nature of NPM clauses. When claiming necessity, it is undisputed that the invocation of a NPM clause embedded in a BIT shall be subjected to an objective assessment conducted by the adjudicating institution that may act as a representative of the international community. Nevertheless, the view of the ICSID tribunals may hint at

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[19] *WTO Russia: Measures Concerning Traffic in Transit-Report of the Panel* (5 April 2019) WT/DS512/R, paras. 7.28, 7.101-7.104.
[20] *El Paso*, para. 610.
[21] *Vienna Convention on the Law of Treaties* (23 May 1969) 1155 UNTS 331, Art. 31(1).
[22] *US-Argentina BIT* (n 9), Preamble; *El Paso* (n 10) [604].
[23] *El Paso*, para. 610.
[24] *Ibid.,* paras. 594-595.
[25] *CMS*, para. 370; Katia Yannaca-Small, "Essential Security Interests under International Investment Law" (2007) OECD, 104-105.

the importance and relevance of using the necessity standard in IIL. On the one hand, the ruling of a tribunal on the non-self-judging nature of the NPM clause upholds the principle of legal certainty. The ruling upholds the one of the many functions of a BIT: protecting the interests of the foreign investor from the actions of the state. On the other hand, the requirement for a treaty to be explicit, which must be mutually agreed by the parties to the treaty, may also provide protection to the host state without arbitrarily depriving the interests of foreign investors should the state deem it necessary to invoke necessity at its discretion. That being said, it can be concluded that the need for an objective assessment of the invocation of an NPM clause by a dispute settlement forum represents one of the features of necessity as an appropriate standard to be used in IIL.

b. Economic emergency as a 'grave and imminent peril'

The ICJ's remark that necessity can only be invoked when the "*extremely grave and imminent*" peril must "*have been a threat to the interest at actual time*" will serve as the basis to determine the severity of the situation on one's interest.[26] However, even the ICJ's contention, in the context of necessity from ARSIWA, seems to be inconsistent to a certain extent. For example, scholars such as Robert Sloane argued that Turkey's declining economy in the case of *Russian Indemnity* - not to the extent that it poses a threat to the existence of the state - could have been identified as an essential interest that may be protected by the necessity standard under CIL.[27] These inconsistent views from *Gabčíkovo-Nagymaros* and *Russian Indemnity* may assist in comparing how the severity of the situation is interpreted in IIL.

As the US-Argentina BIT highlights the scope of a state's essential security interests,[28] and mindful that the context that the Argentinian government had endured an economic crisis, a question worth investigating is whether the existence of an economic crisis or emergency can first be considered as a state's essential security interest. Many tribunals have positively affirmed this premise within the meaning of Article XI of the US-Argentina BIT.[29] For example, the tribunal in *Continental Casualty v. Argentine Republic* ("***Continental Casualty***") reasoned that if economic emergency were not to be interpreted as an essential security interest, it would defeat the purpose of the United Nations in ensuring "*international cooperation in solving international problems of an economic...character*",[30] which reasoning is logical considering that both the US and Argentina are member states.

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[26] *Gabčíkovo-Nagymaros Project*, para. 54.
[27] James Crawford, *State Responsibility: The General Part* (Cambridge: Cambridge University Press, 2013): 308; Robert Sloane, "On the Abuse of Necessity in the Law of State Responsibility", 461.
[28] *US-Argentina BIT*, Arts. VI(3); XI.
[29] *Continental Casualty Company v Argentine Republic, Award*, ICSID Case No. ARB/03/9 (5 September 2008), para. 175; *CMS*, para. 360; *LG&E Energy Corp., LG&E Capital Corp., and LG&E International, Inc. v Argentine Republic, Decision on Liability*, ICSID Case No. ARB/02/1 (3 October 2006), para. 238; *Enron*, para. 333.
[30] *Continental Casualty*, para. 175; *Charter of the United Nations* (24 October 1945) 1 UNTS XVI, Art. 1(3).

Despite the acceptance that an economic crisis or emergency can be considered as a state's essential security interest, the severity of the economic crisis was the focal point of debate in determining when a situation can be categorized as an imminent or grave threat. This is seen from the contrasting views between the tribunals in *CMS* and *Enron Cooperation and Ponderosa LP v. Argentine Republic* ("***Enron***") that heavily relied upon the assessment of the necessity standard under CIL,[31] and the tribunal in *Continental Casualty* and *LG&E Energy Corp. v. Argentine Republic* ("***LG&E***") that adopted a more balanced assessment of Article XI of the US-Argentina BIT. With regards to the former, the *CMS* and *Enron* tribunals stated that the severity of the economic crisis was not sufficient for Argentina to excuse their conduct. The tribunals require the 'total collapse' of the economy for it to be identified as a 'grave and imminent peril' as a condition of Argentina being allowed to invoke necessity.[32] Such clearly affirms the tribunals' concurrence with the ICJ's perspective in accordance with the necessity standard under CIL. Interestingly, however, the 'total collapse' criteria was opposed by the latter tribunals for two reasons, showing that the latter tribunals implicitly followed Sloane's argument in the *Russian Indemnity* case.

Firstly, the tribunal in *LG&E* opined that when invoking necessity, a state's essential security interest should not only be limited to situations that would severely threaten the state's existence, but should also include any essential interests that are at risk or require protection.[33] This is supported by the tribunal's reasoning that the existence of the "*highest degree of public disorder*" in Argentina caused by the economic crisis, and which could potentially cause the total collapse of the state as a whole, was sufficient to prompt the application of Article XI of the US-Argentina BIT.[34] Such reasoning resembles a deviation from the earlier view of how the economic crisis must be in the nature of a 'total collapse' to fulfill the 'extremely grave and imminent' threshold adopted by the ICJ and the previous tribunals. In other words, the *LG&E* tribunal made a less-restrictive interpretation in emphasizing the extent of the severity of the situation required. Secondly, the *LG&E* tribunal's view is validly elaborated by the *Continental Casualty* tribunal, stating that if necessity can only be invoked if the state's economy is in a situation of 'total collapse', it would be meaningless for a state to invoke necessity in the first place, as there would be "*nothing left to protect*" by the state after the collapse.[35] Additionally, the two tribunals made reference to Article XI of the US-Argentina BIT, arguing that the BIT "*does not require that "total collapse" of the country or that a "catastrophic situation" has already occurred*",[36] supporting the notion that the existence of an economic crisis, regardless its degree of severity, does not negate the fact that the BIT permits the state to invoke the NPM clause.

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[31] William Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations", *The Yale Journal of International Law* 35(283) (2010): 297.
[32] *CMS*, paras. 354-355; *Enron*, paras. 306-307.
[33] *LG&E*, para. 251.
[34] *LG&E*, paras. 231, 237, 245.
[35] *LG&E*, para. 195; *Continental Casualty*, para. 180.
[36] *Continental Casualty*, para. 180.

Therefore, the reasoning of the *Continental Casualty* and *LG&E* tribunals may be argued as rendering the necessity standard under CIL extremely high and challenging to be invoked by states. It is worth noting that although the necessity standard is indeed an important standard to be upheld in preventing abuse from states, it is not to be interpreted narrowly or limited to the requirements stipulated under CIL or Article 25 of ARSIWA, nor shall tribunals equate the meaning of necessity under CIL with the BIT. As the purpose of a BIT is also to protect the host state, the decision of the *CMS* and *Enron* tribunals would set an unsafe precedent–if consistently followed– that may hinder states from maintaining their sovereign interests. Thus, in determining the scope of essential security interest to apply amidst an economic crisis, the application of the necessity standard must take into account the applicable treaties that allow the state to claim a defense when it is necessary for them to safeguard essential security interests. In the context of IIL, the necessity-related provision stipulated under the BIT, which can be argued as a *lex specialis*, must also be examined considerably, separately and impartially with the threshold set by CIL.[37]

c. The need for the measure to be 'last resort'

It can be argued that adopting measures to maintain sovereignty is to be regarded as a part of the state's ability to exercise its police powers.[38] That said, the final strict requirement that states need to fulfill when claiming necessity is that the measure invoked is the 'the only way' for the state to protect the identified essential security interest. Referring again to *Gabčíkovo-Nagymaros*, Hungary's decision to suspend construction of a dam was ruled by the Court, putting it simply, as not the only way open to Hungary to prevent the risks that could have potentially emerged,[39] suggesting that there were other measures that could have been taken having regard to the magnitude of the project. The Court unfortunately did not take full account of the gravity of the measure, meaning that the Court merely took a plain interpretation of the necessity standard under CIL. Similar to the debate on the severity of an economic crisis to invoke necessity, there were differing views on how the ICSID tribunals interpreted the measures adopted by Argentina resulting from the extent of reliance on Article 25 of ARSIWA on the necessity defense.

Relying on a narrow interpretation of the threshold tests under CIL, the *CMS* and *Sempra Energy International v. Argentine Republic* ("***Sempra***") tribunals ruled that Argentina did not satisfy the threshold by demonstrating that the measure imposed by Argentina was the only way that could be implemented to save its economy. Such ruling stemmed from the traditional idea that necessity cannot be accepted if there are alternative measures that the state could exhaust, regardless of their efficiency and cost.[40] For example, responding to the differing views of the parties on the alternative

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[37] Zachary Douglas et. al., "The Foundations of International Investment Law", 350.
[38] *Ibid*., 328; *Territorial and Maritime Dispute (Nicaragua v Colombia)* (Merits) ICJ Rep 624 (November 19), para. 80.
[39] *Gabčíkovo-Nagymaros Project*, para. 57.
[40] *CMS*, para. 324.

measures available, the *Sempra* tribunal concluded that the promulgation of the Emergency Law was simply not the only measure that Argentina could carry out to cope with the economic crisis.[41] The *CMS* tribunal echoed the same ruling, stating that alternatives such as "*the dollarization of the economy, granting of direct subsidies to the affected population or industries*" and other measures would have been available.[42] From this reasoning, arguments from scholars such as Jürgen Kurtz and even the tribunals in *Sempra* and *Enron* validly pointed out that the strict test provided by CIL is extremely high to the extent that it would need great sophistication and be almost impossible to determine which one of many available measures can be deemed as 'the only way' to respond to the crisis.[43] Consequently, the NPM clause provided under the US-Argentina BIT would not be effective if the tribunals interpreted the necessity standard narrowly.

Alternatively, the *Continental Casualty* and *LG&E* tribunals, as with the matter of the severity of an economic crisis, used a more flexible and broad approach in determining this intricate requirement. The tribunals evaluated the urgency and reasonableness of the measure instead of focusing on whether the measure was plainly the 'only way'. Firstly, the tribunal in *LG&E* mainly relied on the assessment of necessity having regard to Article XI of the US-Argentina BIT,[44] to which the tribunal, upon extensive assessment of the causes of the severe economic crisis, determined that the swift promulgation of the Emergency Law was indeed necessary.[45] Although the measure was not the 'only way', the tribunal's assessment of the 'across-the-board' approach of the Emergency Law to cope with numerous public utility contracts, including evidence of the government's considerations to protect the interests of foreign investors, rendered the measure as necessary and legitimate within the meaning of Article XI in order to maintain public order.[46] The decision of the *LG&E* tribunal can be observed as a balanced approach in harmonizing between the necessity standards under the BIT and CIL. Although the measure did not fulfil the 'only way' threshold, supporting Kurtz's and the *Sempra* and *Enron* tribunals' argument, it was nevertheless the most legitimate measure that Argentina could invoke.

On the other hand, the tribunal in *Continental Casualty* used a two-tier standard that had been adopted by the WTO. The said standard involves the assessment of the

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[41] *Sempra Energy International v Argentine Republic, Award*, ICSID Case No. ARB/02/16 (28 September 2007), paras. 350-351.
[42] *CMS*, para. 323.
[43] Jürgen Kurtz, 'Building Legitimacy Through Interpretation in Investor-State Arbitration' in Zachary Douglas, et. al., "The Foundations of International Investment Law", 288; *Sempra*, para. 350; *Enron*, para. 308.
[44] Andrew Mitchell & Caroline Henckels, "Variations on a Theme: Comparing the Concept of "Necessity" in International Investment Law and WTO Law", *Chicago Journal of International Law* 14(1) (2013): 112.
[45] *LG&E,* para. 240.
[46] *LG&E*, paras. 226, 240-241; Andrew Mitchell & Caroline Henckels, "Variations on a Theme: Comparing the Concept of "Necessity"", 113.

importance of the measure from a 'least-restrictive' view.[47] For the first tier of the standard, the tribunal ruled that the imposition of a bank freeze, devaluation of the Argentinian peso, and the de-dollarization of the US Dollar were necessary measures to be utilized by Argentina in order to "*react positively to the crisis*".[48] The ruling dismissed the Claimant's contention that there were alternatives to the three measures that it claimed had escalated the crisis,[49] which would have not allowed Argentina to invoke necessity.[50] As for the second tier of the standard, the tribunal also affirmed the reasonableness of the measures invoked by Argentina, arguing that the measures represented the government's balanced approach in positively responding to the crisis while also ensuring its obligations to protect its citizens.[51] Such an approach from *Continental Casualty* emphasizes how an assessment of the proportionality of the measures may result in a successful plea of necessity, rather than assessing whether the measure was simply the 'only way' the state could have employed to protect its interests, as expressed by the *CMS* and *Sempra* tribunals.

That being said, the approach taken in *Continental Casualty* and *LG&E* demonstrates how tribunals can strike a balance between the application of necessity in the context of the US-Argentina BIT and the necessity standard under CIL in order to protect the interests of the state on the one hand, and also the interests of the foreign investor on the other. This is also to consider whether such measures can only be used or only serve to excuse the state from their BIT responsibilities as long as the relevant circumstance is still ongoing.[52] Hence, the application of necessity from this viewpoint is only appropriate in supplementing analysis of the BIT and the relevant circumstance with strict requirements that would permit the invocation of necessity. Necessity, therefore, may not be interpreted narrowly or solely based on CIL.

D. Concerns on the Application of Necessity by ICSID Tribunals

Further arguments suggest that there are indeed issues related to how necessity is assessed and applied by tribunals. It must be made clear that sources of IIL are drawn directly from the universally accepted Article 38(1) of the ICJ Statute, with scholars such as Collins arguing that treaties are "*by far the most important source*" of IIL.[53] And in this case, scholars have affirmed that there is a significant distinction between the concept of necessity under treaty law and under CIL. William Burke-White and Andreas von Staden have notably stated that necessity under treaty law aims to permit states to act to protect their sovereign objectives, while necessity under CIL aims to

[47] William Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere", 325; *Continental Casualty*, paras. 194-196.
[48] *Continental Casualty,* paras. 205, 210, 214.
[49] *Ibid.*
[50] *ILC Articles on Responsibility of States for Internationally Wrongful Acts*, Art. 25(2)(b).
[51] *Continental Casualty*, para. 227.
[52] *LG&E*, para. 261; *LG&E, Award*, para. 86; *Continental Casualty, Annulment Committee*, para. 236.
[53] *Statute of the International Court of Justice* (18 April 1946) 33 UNTS 993, art 38(1); David Collins, "An Introduction to International Investment Law", 28, 31.

exempt liability for a state's breach of its obligations towards investors.[54] As the application of treaty law and CIL are different, equating NPM clauses under a treaty with the concept understood in the context of CIL will significantly degrade the treaty's provisions from its original and intended meaning in accordance with their object and context.[55] This is especially true considering that an interpretation of the ordinary meaning of NPM clauses should mean that BITs are supposed to balance the rights of investors with the state's objectives.[56]

The underlying concern of the ICSID tribunals' approach when adjudicating the Argentina disputes was the extent of assessment of the necessity standard provided under CIL and the standard provided within the BIT.[57] This was demonstrated by the *CMS*, *Enron*, and *Sempra* tribunals who relied heavily upon the necessity standard provided under CIL to the extent that the application of Article XI of the US-Argentina BIT was treated synonymously with CIL.[58] That is to be compared with precedents from PIL, most notably *Gabčíkovo-Nagymaros*, in which case the 1977 Treaty between Czechoslovakia and Hungary did not contain an NPM clause that would explicitly preclude the parties' actions inconsistent with the treaty if necessity were to be invoked,[59] and nor was it made it possible for the parties to invoke necessity based on the provisions of the treaty. Such absences may be argued as a valid reason for the ICJ to fully assess the claim through the necessity standard under CIL.

This is strikingly different from the Argentina cases, in which the government mainly based its plea of necessity on Article XI of the US-Argentina to justify its invocation of the NPM clause. In that instance, the BIT, as a *lex specialis*, should be treated as the primary legal basis of the dispute. Even though the necessity standard under CIL carries great significance to avoid abuse by states, the tribunal's missed opportunity to comprehensively assess necessity separately in the context of the BIT may in future result in an excess of power by tribunals. This was plainly demonstrated by the *Sempra* Annulment Committee that annulled the *Sempra* award as a result of the tribunal's failure to engage in a detailed assessment of the NPM clause under the US-Argentina BIT. The *Sempra* Annulment Committee noted that the BIT's appropriate application to the dispute supports the general rule of international law that "*a treaty will take precedence over CIL*".[60]

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[54] William Burke-White & Andreas von Staden, "Investment Protection in Extraordinary Times: The Interpretation and Application of Non-Precluded Measures Provisions in Bilateral Investment Treaties", *Virginia Journal of International Law* 48(2) (2008): 320-324.
[55] Oliver Dörr & Kirsten Schmalenbach, *Vienna Convention on the Law of Treaties: A Commentary* (Berlin: Springer, 2012): 527, 539-540.
[56] William Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere", 295.
[57] Cynthia C. Galvez, ""Necessity," Investor Rights, and State Sovereignty", 151.
[58] *Enron*, para. 334; *Sempra*, para. 376.
[59] *Treaty Between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabčíkovo-Nagymaros System of Locks* (16 September 1977) 1109 UNTS 235.
[60] *Sempra, Annulment Proceedings* (29 June 2010), paras. 174-176, 229.

E. Alternative Approaches to Assess Necessity

As part of the ICSID tribunals' rather-problematic approach in applying necessity in earlier cases, scholars have argued that there may be alternative approaches that may provide support to action by states to invoke necessity. It must be noted that although distinct from the standard provided under CIL, these approaches nevertheless reflect the essence of necessity.

One alternative suggested by scholar Alec Stone Sweet is to approach necessity using the 'proportionate framework' theory, which would requires tribunals to evaluate the appropriateness of the measure imposed from the least restrictive view.[61] That said, the proportionate framework may be regarded as a broader interpretation of the 'only way' requirement under the necessity standard established by ARSIWA. Despite the paucity of the use of the approach, the *Continental Casualty* tribunal had positively demonstrated how the proportionality assessment of the measure resulted in a successful plea for necessity by Argentina. The outcome of the test was that the measures imposed by Argentina were reasonable and legitimate to achieve the purpose of maintaining public order in accordance with Article XI of the US-Argentina BIT as the applicable law determined by the *Sempra* Annulment Committee.

Another approach was recommended by Burke-White and von Staden and relies on the 'margin of appreciation' standard formulated by the European Court of Human Rights. That standard excuses any measures issued by a state government when it is "relevant and sufficient" to safeguard values such as national security or public order.[62] This points to the niche feature of the standard which is the determination of the 'breadth of deference' of the magnitude between two factors. In the case of investment law, the breadth of deference would be the interest of foreign investors and the state's socio-economic policies related to protecting the state's interest.[63] If applied correctly without interpreting the necessity threshold narrowly, the use of this standard in the Argentina cases may be conclusive of the fact that, for example, the promulgation of economic policy does inherently result in a wide margin, and thus must be respected as a means to respond positively to the crisis.[64] This would allow a successful invocation of necessity.

F. Conclusion

It can be concluded that necessity is, to a limited extent, an appropriate standard to invoke NPM in IIL. Although the standard provided under CIL is crucial in the sense that the strict requirements provide a high degree of protection to foreign investors,

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[61] Cynthia C. Galvez, ""Necessity," Investor Rights, and State Sovereignty", 153; Alec Stone Sweet, "Investor-State Arbitration: Proportionality's New Frontier", *Law & Ethics of Human Rights* 4(1) (2010): 70.
[62] *Handyside v United Kingdom* (App. No. 5493/72) (1976) ECtHR, paras. 48, 50; William Burke-White & Andreas von Staden, "Private Litigation in a Public Law Sphere", 305.
[63] *Ibid.*, 337, 342.
[64] *Ibid.*; *Broniowski v Poland* (App. No. 31443/96) (2004) ECtHR, para. 149.

the heavy reliance on such a standard imposes a severe burden on the host state for it to invoke a NPM clause in a situation deemed as an emergency to the extent that it may render the NPM clause useless. This in turn may not create a healthy investment climate, as envisioned by the US-Argentina BIT. The requirements or thresholds of the necessity standard would also seem to be inapplicable in the context of IIL, as the party whose interest would be impaired by invocation of the NPM are the foreign investors, not the state nor the international community.

Such conclusion does not mean that the necessity standard should be ignored in its entirety. The standard, on the contrary, somewhat provides a fundamental rationale in determining when it is necessary to invoke NPM, which may act to supplement the tribunals' analysis. Nevertheless, when states invoke NPM clauses from a BIT, it is encouragement for future tribunals to adopt a more flexible approach by proportionately and separately viewing claims for the necessity defense from the perspective of both the NPM clause from the BIT and also that of the standard under CIL. Tribunals may also assess the application of necessity through alternative approaches adopted by different dispute resolution fora or even those suggested by scholars that may provide a more balanced assessment between the rights of investors and the interests of the state.

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ARCTIC SOVEREIGNTY OVER THE NORTHERN SEA ROUTE: THE UNITED STATES VS THE RUSSIAN FEDERATION

Marsha Qitara[1]

Abstract

*This paper mainly discusses the legal status of straits contained within the Northern Sea Route ('**NSR**'). It is necessary to affirm the legal status to determine the type of navigation. Currently, one State that is in contentionto Russian Federation's ('**Russia**') authority over the NSR is the United States ('**US**'), their main argument relates to the straits being of international water character and as such should not be part of Russia's authority. In any case, Russia still asserts that even the straits contained within the NSR is part of their internal waters arguing on a historical basis and Article 234 of the United Nations Convention on Law of the Sea ('**UNCLOS**'). The pressing urgency also comes from the climate change that is rapidly decreasing the ice caps in the Arctic in the recent years, consequently, this opens avenues for international navigations through the NSR. Followingthe current understanding of the Arctic sovereignty, this prompt both challenges and opportunities for Russia and could lead to the resolving of conflict between Russia and the US.*

Intisari

*Artikel ini utamanya membahas status hukum selat-selat yang terdapat di dalam Rute Laut Utara ('**NSR**'). Status hukum perlu ditegaskan untuk menentukan jenis navigasi. Saat ini, salah satu negara yang memperdebatkan otoritas Federasi Rusia ('**Rusia**') atas NSR adalah Amerika Serikat ('**AS**'), argumen utama mereka berkaitan dengan selat-selat tersebut yang bersifat perairan internasional dan dengan demikian tidak boleh menjadi bagian dari otoritas Rusia. Bagaimanapun, Rusia masih menegaskan bahwa selat-selat yang terdapat di dalam NSR merupakan bagian dari perairan internal mereka dengan berargumen berdasarkan sejarah dan Pasal 234 Konvensi Perserikatan Bangsa-Bangsa tentang Hukum Laut ('**UNCLOS**'). Urgensi yang mendesak juga datang dari perubahan iklim yang dengan cepat mengurangi lapisan es di Kutub Utara dalam beberapa tahun terakhir, akibatnya, hal ini membuka jalan bagi pelayaran internasional melalui NSR. Mengikuti pemahaman saat ini tentang kedaulatan Arktik, hal ini mendorong tantangan dan peluang bagi Rusia dan dapat mengarah pada penyelesaian konflik antara Rusia dan AS.*

Keywords: NSR, US, Russia, Straits, Navigation.

Kata Kunci : NSR, US, Russia, Selat, Navigasi.

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I. INTRODUCTION

The Northern Sea Route ('**NSR**') is defined as "a water area adjacent to the northern coast of the Russian Federation that comprises the internal sea waters, the territorial sea, the contiguous zone and the exclusive economic zone of the Russian Federation and is bounded on the east by a maritime demarcation line with the United States of America and by the parallel of the Cape Dezhnev in the Bering Strait, on the west, by the meridian of the Cape Zhelaniya to the Novaya Zemlya Archipelago, by the eastern coastline of the Novaya Zemlya Archipelago and by the western boundaries of the Matochkin Shar, Kara Gate and Yugorsky Shar Straits."[2]

It is also considered as a 'short cut' between the continents of Asia and Europe, specifically, it serves as a shipping lane between the Atlantic Ocean and the Pacific Ocean along the coast of Siberia and the Far East surpassing five Arctic Seas including the Barents Sea, the Kara Sea, the Laptev Sea, the East Siberian Sea and the Chukchi Sea.[3] What must be noted, is that as an effect of climate change, the arctic region has melted and the route became 'ice-free' for certain periods of the year[4] that becomes favorable to new alternative routes for global shipments. Evidently, the route reduced the distance between Asia and Europe as much as 40% compared to the distance through Suez Canal.[5]

To this end, the legal status of the area within the NSR has been disputed by the United States ('**US**') against the Russian Federation ('**Russia**'). Consequently, this have negatively impacted the bilateral treaties relations between the two States since 1960. The reasoning behind this is *prima facie* the US believes that the aforementioned straits are not part of the territorial waters, rather they should be part of the sea where freedom of navigation shall apply as it is part of international waters. Conversely, Russia have claimed that straits within the NSR is in fact part of territorial waters and

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[2] Viatcheslav V. Gavrilov, "Legal Status of the Northern Sea Route and Legislation of the Russian Federation: A Note," *Ocean Development and International Law* 46, no. 3 (2015): 256–63, https://doi.org/10.1080/00908320.2015.1054746.

[3] "NORTHERN SEA ROUTE - Arctic Bulk," accessed June 11, 2022, http://www.arcticbulk.com/article/186/NORTHERN_SEA_ROUTE.

[4] "Northern Sea Route," accessed June 11, 2022, https://www.nautinst.org/resource-library/technical-library/ice/guidance/northern-sea-rooute.html.

[5] Andrey Todorov, "The Russia-USA Legal Dispute over the Straits of the Northern Sea Route and Similar Case of the Northwest Passage," *Arctic and North* 29, no. 29 (2017): 74–89, https://doi.org/10.17238/issn2221-2698.2017.29.74.

thus, shall be a "national transport communication" subject to domestic laws and base this fact on historical grounds.[6]

In order to assess these claims from both States, the United Nations Conventions on the Law of the Sea ('**UNCLOS**'). As to briefly interpret Russia's point of view, it affirms that it has sovereignty over the NSR including the internal waters and territorial sea of Russia based on Article 5 and Article 234 of UNCLOS.[7] The question arises when the subject will be focused on the straits and whether they are part of the high seas or international waters which will mean that Russia does not have *de facto* sovereignty rights over the NSR. With that line of thought, the USA have claimed that the Arctics should be of "global commons" meaning that no State should claim sovereign rights over the area; for instance, the USA does not ratify the UNCLOS and as such is strong on their stance when stating that the NSR shall be part of international waters without any prejudice over national laws.[8]

Similarly, the European Union ('**EU**') has also shared the same line of though as the USA, citing that the Arctic should be considered part of the International Waters. However, they ironically deviated their position when Denmark have claimed part of the Arctic as theirs and defies the previous Statement. As such, the EU's current position is not known as they still agree with the USA as their official stance, but their member has also claimed part of the Arctic waters with their knowledge.[9] To settle such disputes of territory, sovereignty claims that extends beyond the 200-230 nautical miles (nm) of the baseline or commonly known the EEZ could be referred to and shall be submitted to the United Nations Continental Shelf Commission.

Theoretically, for Russia to ascertain their claims of sovereignty over the NSR as well as the straits that are being disputed, they must prove that the threshold of historical waters under Article 234 of the UNCLOS are met which can be presented in twofold: (1) for a considerable *length* of time, the it have *exclusively exercised* its authority over the maritime area in question and (2) the existence of acquiescence which means that

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[6] *Todorov*.

[7] Dmitry Makarov et al., "Development Prospects and Importance of the Northern Sea Route," *X International Scientific Siberian Transport Forum — TransSiberia 2022* 63 (January 1, 2022): 1114–20, https://doi.org/10.1016/j.trpro.2022.06.114.

[8] "Territorial Disputes over the Northern Sea Route - Leadership and Democracy Lab - Western University," accessed June 13, 2022, https://www.democracylab.uwo.ca/Archives/2018_2019_research/shipping_in_the_arctic/territorial_disputes_over_the_northern_sea_route_.html.

[9] *ibid.*

the Coastal States must prove that the authority is *accepted* by other countries, *especially* those that is directly affected by it.[10]

Furthermore, the subject in question – straits need also to be proven prior to the discussion of sovereignty; this is discussed by the International Court of Justise ('**ICJ**') in the *Corfu case*[11], which cited that a strait can be classified as such when it has been proven to have these two cumulative requirements: (1) geographical requirement; which means that the strait must connect two parts of the high seas and (2) functional requirement; the strait must be used for international navigation (which will also consider the volume traffic).

Moreover, UNCLOS have also categorized straits into five different categories: (1) Article 37; straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ – this will be governed by the use of transit passage, (2) Article 45(1)(b); straits connecting one part of the high seas/EEZ and the territorial sea of a foreign state – this will be governed by the non suspendable innocent passage, (3) Article 35(c); straits regulated in whole or in part by international conventions, (4) Article 45(1)(a); straits connecting one part of the high seas/EEZ and another part of the high seas/EEZ where the strait is formed by an island of a state bordering a state and its mainland – this is governed by non suspendable innocent passage , (5) Article 53(4); straits through archipelagic waters – this will be governed by the archipelagic sea lanes passage. This can then determine if the straits in NSR is eligible for innocent passage or even freedom of navigation.[12]

II. HISTORY OF THE CLAIMS

a. Russia

As Russia's main claim of the NSR is through its' historical context by citing historical waters of Article 234, it is important to assess the evidence on their claims.[13] Following the sector theory which determines the sovereignty over sectors in the earth's surface

[10] Christopher R. Rossi, "The Northern Sea Route and the Seaward Extension of Uti Possidetis (Juris)," *Nordic Journal of International Law* 83, no. 4 (2014): 476–508, https://doi.org/10.1163/15718107-08304004.

[11] *Corfu Channel Case* (U.K./Albania), 1949 *ICJ Reports* p. 28.

[12] Xiaoxu Shi and Xiaoqi Sun, "Research on Innocent Passage System of Territorial Sea" 319, no. Ichssr (2019): 425–30, https://doi.org/10.2991/ichssr-19.2019.81.

[13] Leilei Zou and Shuolin Huang, "A Comparative Study of the Administration of the Canadian Northwest Passage and the Russian Northern Sea Route," in *Asian Countries and the Arctic Future* (WORLD SCIENTIFIC, 2014), 121–41, https://doi.org/10.1142/9789814644181_0008.

measured in meridians of longitude, Russia or rather the Union of Soviet Socialist Republic ('**USSR**') at the time applied this to that of the Arctics.[14]

The sector theory itself has two thresholds: (1) a base line along the Arctic Circle through territory sorting under uncontested jurisdiction of a regional state and (2) two sides define meridian longitude extending from the North Pole south to the most easterly and westerly points of the Arctic Circle within the State, this is considered as ambiguous since the first interpretation revolves around a specific version of the contiguity principle and the second one discusses the means of sovereignty claims such as effective occupation when it comes to delimiting geographical areas.[15]

On 15 April 1926, the USSR adopted a decree based on the sector theory declaring all lands and islands situated in the Arctic Ocean as theirs except for islands that are already regarded in the sovereignty of other countries such as archipelago of Svalbard.[16] The intention behind this is to safeguard the economic and national interest of the USSR. In the coming years of 1926 and 1950 respectively, the USSR expanded their sector by claiming open ice-infested waters. At the end of that year, 43% of the Arctic Ocean including a significant part of the Central Arctic Basin.[17]

Furthermore, in 1951, the ICJ has affirmed in the *Anglo-Norwegian Fish Case*,[18] that all waters enclosed by straight baselines, including those where a historic title has been established has the status of internal waters. However, in the 1960s, 1970s, and 1980s, lawyers of the USSR view that all Arctic states were entitled to their own sector in the Arctic Ocean, but they specified which features are essentially *claimed* by a coastal state in line with what was permitted by UNCLOS and the understanding of the sector theory.[19]

b. USA

The change in perspective since the 1960s exhibited by the Soviet lawyers prompted other States, specifically the USA to challenge the legality of the decree and overall, the sector theory. In 1962 – 1968, the USA Government started to dispatch USA Coast

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[14] "ARCTIS | Northern Sea Route and Jurisdictional Controversy," accessed June 13, 2022, http://www.arctis-search.com/Northern+Sea+Route+and+Jurisdictional+Controversy; First Voyages, "History of the Northern Sea Route," *Remote Sensing of Sea Ice in the Northern Sea Route* 1222 (2006): 1–23, https://doi.org/10.1007/978-3-540-48840-8_1.

[15] *Ibid.*

[16] ARCTIS | Northern Sea Route and Jurisdictional Controversy' (n 12).

[17] Leonid Timtchenko, "The Legal Status of the Northern Sea Route," *Polar Record* 30, no. 174 (1994): 193–200, https://doi.org/10.1017/S0032247400024256.

[18] Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. Reports 133.

[19] Timtchenko, "The Legal Status of the Northern Sea Route."

Guard vessels *Edisto and East wind* to conduct "hydrographic research" in what international law regarded as high seas in the Chukchi, East Siberian, Laptev, Kara and Barents Seas that was designed to accurately categorize the high seas status of these waters.[20]

In retrospect, this became the start of the conflict between the two States as the USSR consider the vessels as warships and asserted that the Laptev and Sannikov straits were not to be navigated as it is part of their internal waters on the basis of history since the vessel did not navigate through those straits but in 1966, it was still considered as a threat that they publicly declare them as having an "unfriendly nature."[21] The same year, the USSR made a policy to deter the North Atlantic Treaty Organization ('**NATO**') naval forces to be removed from the Arctic and the Military Publishing House of the Ministry of Defense of the USSR published "A Manual of International Maritime Law" that reinstated their sovereignty by stating that the sovereign rights extends not only through the effective economic, organizational and scientific research of the polar seas and islands but also the special geographical and climatic conditions of the region.[22]

Two decades later, it must be noted, the sector principle has never been officially rejected, reaffirmed, or reconsidered but since the establishment of UNCLOS in 1982, it has certainly collapsed. Moreover, in the year 1985 the USSR's navy published the "International Law of Sea Manual" that states two contradicting sentences. In the first one it mentions that the Arctic Sector converging at the North Pole should *not* constitute State boundaries. However, in the next sentence it provides that the *special character* and importance of the Arctic seas for the coastal States give grounds to consider the polar sectors as zones of their economic and defense interests and to use appropriate meridians for delimitations.[23]

For instance, an expert on International Maritime Law in the year 1992 has provided his views by saying that "Even today, it could be argued that some doubt remains in relation to the sector concept. It may suffice to draw attention to the curious inclusion in the annex of issue 1 of the 1986 Soviet Notices to Mariners entitled 'Legal Acts and Regulations of the USSR State Organs on Questions of Navigation' – a reprint of the 1926 Decree; this inclusion in a maritime law context is somehow unusual and even

[20] *Ibid.*

[21] Blunden, Margaret. "Geopolitics and the northern sea route." *International affairs* 88, no. 1 (2012): 115-129.

[22] *Ibid.*

[23] *Ibid.*

inappropriate, unless it is indicative of the fact that the sector still serves a *purpose* of the Soviet maritime law.[24]

III. CURRENT POSITION

a. Russia

i. Current Situation

As mentioned previously, the ice is rapidly decreasing in the arctic due to global warming and in addition, the infrastructure and technological problems in Russia are also resolved, both these factors have increased the commercial attractiveness of the NSR that is evident from the 799 permits issued by the NSR administration as part of their domestic laws. Furthermore, the Russian government is asked to grow the size of cargo traffic up to 80 million tons by 2024 as per the Executive Order on National Goals and Strategic Objectives of the Russian Federation through to 2024.[25] This is not seen as a challenge because as the ice cleared out, both the NSR and the Northwest Passage ('**NWP**') is considered to be of geopolitical interest and have increased 103% in 2020 ever since 2017 and reached 31.5 million tons in 2019.[26]

Even if the majority of that number belongs to Russia's own vessels, the NSR have been attracting more attention from foreign ships especially the Asian region, *inter alia* shipping companies from China, Japan, and South Korea for their trade purposes with Europe. Over time, seeing that the passage is more efficient compared to the Suez Canal, it is expected that European States to follow the same trend.[27]

The benefits of the NSR could be seen from the oil spill that happened in back in 2021, where the 400 meters, 200 tone container, the *Ever Given* obstructed the Suez Canal at 6 kilometers north from its southern entrance. This vessel is owned by the Japanese shipping firm "SHOEI-KISEN KAISHA, Ltd.," a subsidiary of "Imabari Shipbuilding Co., Ltd that resulted in a $500 million compensation to the Suez Canal authorities causing up to $10 billion global cost highlighting the economic benefits of the NSR. [28]

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[24] Timtchenko, "The Legal Status of the Northern Sea Route."

[25] "The President Signed Executive Order On National Goals and Strategic Objectives of the Russian Federation through to 2024 • President of Russia," accessed June 13, 2022, http://en.kremlin.ru/acts/news/57425.

[26] "Permissions for Navigation in the Water Area of the Northern Sea Route," accessed June 13, 2022, http://www.nsra.ru/en/rassmotrenie_zayavleniy/razresheniya.html?year=2019.

[27] Viatcheslav Gavrilov, "Russian Legislation on the Northern Sea Route Navigation: Scope and Trends," *Polar Journal* 10, no. 2 (2020): 273–84, https://doi.org/10.1080/2154896X.2020.1801032.

[28] Sakiko Hataya and Michael C. Huang, "The Opportunity and Challenges of the Northern Sea Route (NSR) after the Suez Obstruction of 2021" 56743556, no. 22 (2021): 1–13; "The-Largest-Oil-Spill-Event-Detected-near-the-Entrance-of-the-Suez-Canal," n.d.; Alexei Bambulyak and Sören Ehlers, "Oil Spill Damage: A Collision Scenario and Financial Liability Estimations for the Northern Sea Route Area," *Ship Technology Research* 0, no. 0 (2020): 148–64, https://doi.org/10.1080/09377255.2020.1786932.

Within this time, an alternative route such as NSR has garnered significant attention as it is labelled as the most optimal in "risk diversification" and the most prominent option for "realization." In any case, utilizing the NSR will be a mutual benefit to Russia and other States. As mentioned above, it decreases the navigation distance by as much as 40%, additionally, it will be a good opportunity for a development opportunity when it comes to the natural resource of mining in the Siberian and Russian Far East regions.[29]

ii. for Arctic Sovereignty

1. UNCLOS

Prior to discussing about the relevant legal provisions that applies, it is important to affirm the claim that NSR is in *de facto* Russia's sovereign rights. With that in mind, citing the discussion above two legal questions must be answered: (1) whether Russia have fulfilled the historical claim over the NSR through Article 234 of UNCLOS; and (2) what is the categorization of the straits being disputed?

To answer the first question, we must bear in mind first the verbatim of the Article which provides that:

"Coastal States have the right to adopt and enforce non-discriminatory laws and regulations for the prevention, reduction and control of marine pollution from vessels in ice-covered areas within the limits of the exclusive economic zone, where particularly severe climatic conditions and the presence of ice covering such areas for most of the year create obstructions or exceptional hazards to navigation, and pollution of the marine environment could cause major harm to or irreversible disturbance of the ecological balance. Such laws and regulations shall have due regard to navigation and the protection and preservation of the marine environment based on the best available scientific evidence"

Here, it must be noted that the Article is under Section 8 entitled 'Ice-Covered Areas,' but this shall not be a point of conflict as the verbatim states the domestic laws shall protect the marine environments in cases of *severe climatic conditions* and pollution in addition to any obstructions or exceptional hazards that could be caused due to navigation. In this instance, Russia is in line with the Article 234 of UNCLOS.

Going beyond the *prima facie* understanding, the two thresholds that have been mentioned above to assert historical basis of Article 234 is (1) for a considerable *length* of time, the it have *exclusively exercised* its authority over the maritime area in question and (2) the existence of acquiescence which means that the Coastal States

[29] *Ibid.*

must prove that the authority is *accepted* by other countries, *especially* those that is directly affected by it.[30] To analyze this, first, it can be noted from the history that Russia or as it is known before the USSR have claim sovereignty over the NSR since 1926, which makes it a considerable amount of time to claim that it has exclusively exercised its authority over the maritime area in question. Second, when it comes to acquiescence, it could be noted that not all States are in favor of this arrangement seeing that the US is against this and as well as the official stance of the EU as of now. Therefore, the eligibility of Russia to claim the NSR over historical grounds is up for debate.

Proceeding to the discussion of the strait, a twofold requirement is also present, namely: first, Geographical Requirement (location of the strait) and second, Functional Requirement (it's purpose as a passage for trading link).[31] *In Casu,* the geographical requirement is clearly met as the Matochkin Shar, Kara Gate, Yugorsky Shar is between the high seas of the Arctic Ocean. Moreover, the functional requirement is also met seeing the current data of the NSR, States from Asia such as Japan, South Korea, China and Singapore and seeing that it is an efficient and feasible alternative route, its functionality will only increase.[32]

After establishing that the straits are legally accurate in accordance with the above mentioned threshold, it can now be categorized as one of the straits mentioned in UNCLOS, the importance of this is to know the type of navigation. As the geographical requirement that is met is between two of the high seas, it will be in line with Article 37 of UNCLOS stating strait connecting one part of the high seas with another that grants transit passage. This will mean that even if Russia claims sovereignty over the NSR, the specific straits will *not* be part of their domestic laws as freedom of navigation applies.

2. Russian Federal Legislation

Moving to the point of the current applicable domestic laws that Russia provides, it currently still holds sovereignty over the NSR and have provided Federal Laws to regulate navigation. The original regulation is called the 1999 Merchant Shipping Code of the Russian Federation ('**MSC**') which is added to the Federal Law Number 132-FZ ('**FL No. 132-FZ**'), the former laid down the certainty of their sovereignty by defining

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[30] Rossi, "The Northern Sea Route and the Seaward Extension of Uti Possidetis (Juris)."

[31] "ARCTIS | The Northeast Passage and Northern Sea Route 2," accessed June 14, 2022, http://www.arctis-search.com/The+Northeast+Passage+and+Northern+Sea+Route+2; Alexander Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law," *Polar Journal* 10, no. 2 (2020): 285–302, https://doi.org/10.1080/2154896X.2020.1844404.

[32] "ARCTIS | The Northeast Passage and Northern Sea Route 2"; Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

the NSR as a "historically developed national transport communication with legally determined boundaries of its water areas." The latter amended Article 5.1 of the MSC by establishing the NSR Administration ('**NSRA**') – a federal state institution responsible for compliance in *inter alia* issuing permits and icebreaker assistance.[33]

In January of 2013, a special rule was approved by the Ministry of Transport of the Russian Federation ('**2013 Rules**') replacing the Rules of Navigation on the Seaways of the Northern Sea Route of 1990 ('**1990 Rules**'). There are key differences that was made based on the global trends such as: (1) Waiting period for granting permissions, (2) Submission of Applications, and (3) Icebreaker assistance. The first point correlates to the period after submitting application for the permit, in the 1990 Rules, the waiting period is four months while in the 2013 Rules it is reduced to 25 working days. The second point deals with the submission of applications where in the 1990 Rules requires the application to be submitted through a telegraph with an additional NSRA inspection of the vessel, the 2013 Rules only requires the application to be submitted electronically via the internet with no inspection from the NSRA. The third point discusses the need of an 'escort' when operating an icebreaker; the 1990 Rules, some parts of the NSR requires an escort at all times while the 2013 Rules support independent navigation by allowing icebreakers to be operated without assistance in line with the ice class of a ship.[34]

b. USA

i. Present Situation

What must be noted is the different interpretations that cause the dispute between the two States lies in the legal status of *some parts* of the NSR. For instance, in 1965, the USA believes that as far as the Dmitry Laptev and Sannikov Straits are concerned, it does not believe that there is any basis for the claim that these waters could be claimed on historical grounds. Even if the USA are "sympathetic with efforts which have been made by the USSR in developing the Northern Seaway Route and appreciates the importance of this waterway to the Soviet's interests, it cannot admit that these factors have an effect of changing the status of the waters of the route under international law."[35]

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[33] Gavrilov, "Russian Legislation on the Northern Sea Route Navigation: Scope and Trends"; BjÖrn Gunnarsson and Arild Moe, "Ten Years of International Shipping on the Northern Sea Route: Trends and Challenges," *Arctic Review on Law and Politics* 12 (2021): 4–30, https://doi.org/10.23865/arctic.v12.2614.

[34] *Ibid.*

[35] Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

As of the year 2019, USA is still firm on its grounds by stating that parts of the Northern Sea Route are in fact part of international waters. USA officials have spoken and disputed Russia's stance on this matter especially their claim that the USA naval vessels have threatened them when the vessels are sent to practice their right for Freedom of Navigation ('**FON'**) Operation.[36] This was voiced out by USA Secretary of the Navy, Richard Spencer, stating "having some ships make the transit in the Arctic. Freedom of Navigation should be applied up there." This statement was supported and echoed by General Curtis Scaparrotti, former Supreme Allied Commander in Europe which agrees and further suggested that a FON Operation should be aimed at Russia. Furthermore, former Secretary of State Mike Pompeo have stated that "we're concerned about Russia's claim over the international waters of the Northern Sea Route."[37] Subsequently, The Department of Defense unclassified June 2019 Arctic Strategy prompted that the USA interests in the Arctic includes "ensuring freedom of navigation and overflight" hinting that Russia is in fact the threat in the Arctic.[38]

Regardless, up to this point even USA scholars such as Professor Andrew Serdy, a maritime law expert at the University of Southampton stated that as much of the route is within Russia's internal waters, international law will be in support of that; he added and explained that the USA arguing that a series of straits in the bounds of the NSR is used for international navigation by interpreting 'used' as 'usable' contrary to other States, this led them to believe that a different regime shall apply, supposedly one that is more favorable to navigation in the law of the sea.[39] However, since the passage have not been as functional to other States other than Russia and even then, other States still accepts Russia's authorization, there is no 'special regime' that applies, giving Russia the right to control the territory in accordance with international law.[40]

ii. The Bering Strait Region

The Bering strait region ('**BSR**') is a perfect example to outline the current approach that the USA have with the straits in the NSR. Here, the BSR have managed to put USA and Russia in the same side as both their interest is to assure the safe and sustainable

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[36] N S Lipunov, "THE INTERNATIONAL DIMENSION OF THE NORTHERN SEA ROUTE," 2021.

[37] *Ibid.*

[38] Kristian Atland, "The Introduction, Adoption and Implementation of Russia's 'Northern Strategic Bastion' Concept, 1992–1999," *International Journal of Phytoremediation* 20, no. 4 (2007): 499–528, https://doi.org/10.1080/13518040701703047; "Now Is Not the Time for a FONOP in the Arctic - War on the Rocks," accessed June 14, 2022, https://warontherocks.com/2019/10/now-is-not-the-time-for-a-fonop-in-the-arctic/.

[39] "Northern Sea Route Makes Russia and China New Polar Powers," accessed June 14, 2022, https://www.raconteur.net/global-business/usa/northern-sea-route/; Andrey Todorov, "Dire Straits of the Russian Arctic: Options and Challenges for a Potential US FONOP in the Northern Sea Route," *Marine Policy* 139 (May 1, 2022): 105020, https://doi.org/10.1016/J.MARPOL.2022.105020.

[40] *Ibid.*

use of the BSR. Geographically, the BSR in itself is the only narrow international gateway and passage between the Arctic and the Pacific oceans with 47 nautical miles wide and in its narrowest point separates Russia and USA by two nautical miles between Big Diomede and Little Diomede islands. Though there are no binding instruments that defines the BSR, it is home to not only an abundance of marine life but also the habitat of Chukchi, Inuit, and Siberian Yupik tribes inherent of their culture, language, and identity.[41] To reiterate, though their interest to protect the ecosystem and indigenous people might be similar, the USA still disagrees on the part of the legal status of NSR waters and the requirement of Russian authorities to commence FON.[42] However, in UNCLOS there has never been a categorization of abstract FON that USA is currently implying there is only concrete FON regulated in Article 87 of UNCLOS, nevertheless, the USA does not ratify UNCLOS so it could be given the benefit of the doubt. This reflects that current bilateral cooperation between the two State does not address these issues and shall be renewed.[43]

To elaborate, in 2015, the USA have sought clarifications on whether or not the NSR extends into and through the BSR as it is mentioned in Article 5.1 of the MSC. To this end, Russia and USA agrees that the BSR is a strait *used for international navigation* but deviate clearly on the NSR's status bringing back the argument of historical relevance. The USA continues to reiterate that the NSR contain straits used for international navigation and as such, the regulations posed by Russia for the NSR is an infringement of FON within the EEZ, right of innocent passage in the territorial sea, and the right of transit passage through straits used for international navigation.[44] The USA Department of State have formally objected the aspects to the 2013 Rules citing that it is inconsistent with international law by stating the reasoning above and the lack of any express exemption for sovereign immune vessels.[45] Despite this, the USA still showed support for the navigational safety and environmental protection objectives of the NSR scheme and acknowledge that Russia have cited Article 234 UNCLOS as a basis but disagreed that the regulations set is in line with the article.[46]

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[41] Julie Raymond-Yakoubian and Raychelle Daniel, "An Indigenous Approach to Ocean Planning and Policy in the Bering Strait Region of Alaska," *Marine Policy* 97 (November 1, 2018): 101–8, https://doi.org/10.1016/j.marpol.2018.08.028.

[42] Paul Arthur Berkman, Alexander N. Vylegzhanin, and Oran R. Young, "Governing the Bering Strait Region: Current Status, Emerging Issues and Future Options," *Ocean Development & International Law* 47, no. 2 (April 2, 2016): 186–217, https://doi.org/10.1080/00908320.2016.1159091.

[43] Betsy Baker and Global Fellow, "Beyond the Northern Sea Route : Enhancing Russian-United States Cooperation in the Bering Strait Region," no. 8 (2021); Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

[44] Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

[45] *Ibid.*

[46] *Ibid.*

IV. CHALLENGES AND OPPORTUNITIES

Before the effects of climate change inclusive of global warming that resulted in a dangerous rate of melting ice caps in the Arctic, navigation through the Northern Polar Region such as the NWP and NSR are done in specific seasons, usually from July to September as the ice melts per the season and make way for vessels to pass through; by October the ice caps start to reform making it impossible for navigation.[47] The silver lining from this impact is that the NWP and NSR has been more accessible in the last five years and is used and considered as an alternative
shipping route seeing that it is more efficient compared to the Suez Canal; in specifics, the NSR has been functional and utilized by Asian States mentioned above such as China, Singapore, Japan and South Korea when they are trading with European States.[48]

With the increase of shipping companies to utilize the route, seen as a ramification of geopolitical interest, it is important to outline the challenges that Russia may face as they are currently holding the authority over the area and opportunities that they might gain.

a. Challenges

i. National Security

The first challenge will undoubtedly be the maintenance of national maritime security of Russia. Like other Arctic States, opening navigation to this extent may pose a greater threat to the State as the interest and aspiration of the other States passing through might not be limited to trade and is conclusively unpredictable. By giving them access as well as examples of technologies that could be of safe use in these areas (i.e., icebreakers and ice strengthened vessels), it may be utilized in a non-good faith manner and instead presses the urgency to protect the State.[49] This hostile international environment could purported by the East-West tensions with a 'build up' in military presence of foreign states in the area increasing the potential of conflict.[50]

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[47] Motohisa ABE and Natsuhiko OTSUKA, "Northern Sea Route (NSR) as a Major Transport Route: Opportunities and Challenges," *Asian Transport Studies* 5, no. 4 (2019): 617–34.

[48] Vylegzhanin et al., "Navigation in the Northern Sea Route: Interaction of Russian and International Applicable Law."

[49] Emmaline Hill, Marc LaNore, and Simon Véronneau, "Northern Sea Route: An Overview of Transportation Risks, Safety, and Security," *Journal of Transportation Security* 8, no. 3–4 (2015): 69–78, https://doi.org/10.1007/s12198-015-0158-6; Irina Akimova, "Northern Sea Route as the Main Driver for the Arctic Development :," 2018.

[50] Arild Moe, "A New Russian Policy for the Northern Sea Route? State Interests, Key Stakeholders and Economic Opportunities in Changing Times," *Polar Journal* 10, no. 2 (2020): 209–27, https://doi.org/10.1080/2154896X.2020.1799611.

Furthermore, we must bear in mind that some States, particularly the US is against the sovereignty that Russia is currently possessing; as such, in allowing innocent passage or even accepting FON, this may be used to the counterparts' advantage in conducting a FONOP and declaring that Russia *de jure* does not have the sovereignty that they claim to have. With this in mind, it is suggested that Arctic States such as Russia develop a better patrol strategy to prevent such threats to realize in terms of their maritime security.[51]

ii. Technology and Mapping

To start, it is clear that the safe navigation in the Arctics is a challenge in itself because of the rapidly changing landscapes of the ice which results in: (1) the global positioning system is limited by satellite coverage, (2) magnetic compasses will lose its' north point, and (3) gyrocompass is not accurate.[52] That said, the lack of conventional icebreakers in addition to the challenges that arise for navigational technology prompts dangerous routes and may cause safety of vessels that choose to travel through complimentary to the need of regulations by a State as standardized by Article 234 of UNCLOS.[53]

iii. Infrastructure

An adequate port infrastructure is important when dealing with types of vessels that is going to navigate through the NSR. As of now, there are seven principal Arctic seaport along the NSR including Amderma, Dikson, Khatanga, Tiksi, Pevek and Mys Shmidta.[54] The requirement is usually twofold: (1) safety of the vessel and (2) environmental protection, in line with Article 234 of UNCLOS. Presently, the ports in the NSR area, specifically in the Bering strait does not support vessel traffic and does not meet the requirement of search and rescue operation standardized by the USA. Alaskan Senator, Begich have affirmed in 2015 that ports "do not have adequate staging, support and disaster response facilities in the Bering Strait area," but they are currently developing infrastructure and simplifying port clearance by partnering with private industry in order to assure shipping safety and consequently, security and economic development in the region.[55]

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[51] Hill, LaNore, and Véronneau, "Northern Sea Route: An Overview of Transportation Risks, Safety, and Security."

[52] Hill, LaNore, and Véronneau; Taedong Lee and Hyun Jung Kim, "Barriers of Voyaging on the Northern Sea Route: A Perspective from Shipping Companies," *Marine Policy* 62 (2015): 264–70, https://doi.org/10.1016/j.marpol.2015.09.006.

[53] Sodhi, Devinder S. *Northern Sea Route Reconnaissance Study: A Summary of Icebreaking Technology*. Vol. 95. No. 17. DIANE Publishing, 1995.

[54] ABE and OTSUKA, "Northern Sea Route (NSR) as a Major Transport Route: Opportunities and Challenges"; Hill, LaNore, and Véronneau, "Northern Sea Route: An Overview of Transportation Risks, Safety, and Security."

[55] *Ibid.*

b. Opportunities

iv. Economy

As stated briefly above, Russia is planning to economically develop the Arctic areas and it has been an emphasis for the past year in the top political leadership. Evidently, the concrete example would be the 2013 Rules reflecting the strategy and this is echoed in March 2020 in the 'Foundation for state policy of the Russian Federation in the Arctic for the period until 2035.'[56] In specifics, the plan is strategized to increase investment in icebreaker and infrastructure as well as targeting the transport of 80 million tons of cargo on the NSR by 2024 which will greatly benefit Russia's economy.[57]

v. International Cooperation

In relation with the economic benefits, partnership with not only private industries but also other States will surely be a benefit in the political sphere of Russia. To illustrate, with China, they have established a partnership where China becomes the biggest beneficiary when it comes to the NSR. This started with the XI 5-years plan back in 2006 – 2010 regarding a special scientific research program in the area and presently, 5% - 15% of the Chinese International cargos passes through the NSR, specifically containers.[58] The reason behind this is that China plan an initiative called 'The Polar Silk Road' to integrate three major economic centers: North America, East Asia and Western Europe through the use of navigable Arctic Circle and their routes.[59] Their partnership is usually in form of joint ventures for Russian companies and research centers. Existing agreements is evident from the Rosneft and CNPC agreement to develop Zapando-Prinovozemelniy field in the Barets Sea, South-Russkiy and Medinsko-Varandeiskiy field in the Pechora Sea.[60] This is a precedent that could be set with other States as well to help develop the infrastructure and overall navigation in the NSR.[61]

V. CONCLUSION

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[56] Moe (n 38); VP Fedorov and others, 'The Northern Sea Route: Problems and Prospects of Development of Transport Route in the Arctic' (2020) 434 IOP Conference Series: Earth and Environmental Science.

[57] Moe, "A New Russian Policy for the Northern Sea Route? State Interests, Key Stakeholders and Economic Opportunities in Changing Times"; V. P. Fedorov et al., "The Northern Sea Route: Problems and Prospects of Development of Transport Route in the Arctic," *IOP Conference Series: Earth and Environmental Science* 434, no. 1 (2020), https://doi.org/10.1088/1755-1315/434/1/012007.

[58] Akimova, "Northern Sea Route as the Main Driver for the Arctic Development :"

[59] Tianming, Gao, and Vasilii Erokhin. "China-Russia collaboration in shipping and marine engineering as one of the key factors of secure navigation along the NSR." *China's Arctic Engagement* 9 (2021): 234.

[60] *Akimova.*

[61] D. F. Skripnuk et al., "The Northern Sea Route: Is There Any Chance to Become the International Transport Corridor?," *IOP Conference Series: Earth and Environmental Science* 434, no. 1 (2020), https://doi.org/10.1088/1755-1315/434/1/012016.

To summarize, there is still a clear line of debate on the legal status of the NSR especially between Russia and USA. Their main concern is the straits that is contained within the NSR and whether or not those straits would be part of international waters as opposed to internal waters that will be under the authority of Russia. This determination will also affect the type of navigation that is allowed within the straits – either transit passage, innocent passage, or FON.

In due regard, it can be seen that Russia have continuously stand firm on the basis that they sovereignty over the NSR citing historical relevance within Article 234 of UNCLOS as the reasoning. Even if this is true seeing from their history, the two threshold that is made by the *Corfu Case* was not satisfied specifically the acquiescence requirement. In any case, the strait falls under Article 37 of UNCLOS which permits transit passage in line with the current practices that Russia is doing.

In relation to the acquiescence, USA is currently the only State that has officially and explicitly declared its objection to the legal status of NSR. This was made clear especially when discussing the BSR. As a matter of fact, geographically the BSR still falls between Russia and the USA and even Russia agrees that the specific strait shall be of international water status, but they refuse to affirm this as this would weaken their position on the legal status of the NSR itself.

Regardless of this debate, the NSR has proven an increase in its functionality, mainly because of the melting ice caps caused by the rapid rate of increased temperature due to global warming. In recent years, the seasons of navigation do not seek much importance and an increase in States passing through the NSR is evident. This poses challenges and opportunities for Russia to overcome and seek. Particularly the challenges that was and will be faced includes the matter of maritime security, arctic navigation, and port infrastructure; while the opportunities that should be looked forward to is the increase in economy and international cooperation that will hopefully be a solution to the challenges. As of now, the most prominent example is their partnership with China seeing that agreements have been made and joint ventures are set up to help Russia's companies and research center to counter the current challenges and hopefully be a precedent for conflicting States.

VI. RECOMMENDATIONS

a. Recommendations

i. Settling conflict with USA through Negotiations

After an analysis of the BSR, it could be clearly seen that Russia and the USA shared similar interest as well, namely, that they agree a regulation should be made especially in the BSR to protect marine life in line with Article 234 UNCLOS as well as the

indigenous people. Though theoretically, sovereignty claims over the legal status of the sea could be referred to the United Nations Continental Shelf Commission, seeing that they do have similar interest in mind, they could conduct a more effective dispute settlement through negotiation primarily discussing the legal status and a future of international cooperation.

ii. Draft Amendments of the Current Federal Legislation

As Russia has amended their Federal Legislation before, it could be concluded that they are open to the dynamic changes that is inherent in international law. With the Executive Orders providing plans to welcome more international navigations through the NSR, it is important to update the current legislations to adapt to that change and assure that the challenges such as maritime security could be prevented and regulated thoroughly.

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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*"
>
> "*…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.

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