J. East Asia & Int'l L. Vol. 15/No.2 (2022); 293-314
Publication type : Research Article
Section : Articles
DOI : http://dx.doi.org/10.14330/jeail.2022.15.2.04

How do Indonesian Judges Approach Human Rights in Private Law Cases? A Comparative Exploration

Shidarta* & Stijn Cornelis van Huis** & EkoRiyadi***

This explorative paper investigates the application of human rights to civil law cases in Indonesia. Human rights are often placed within the realm of public law. Yet, fundamental rights and freedoms also apply to private law cases. The human rights literature, however, does not exist in Indonesian private law. This article explores how human rights are applied in Indonesian civil law cases with reference to the models of human rights application developed by Aharon Barak and Olha Cherednychenko. We found that in Indonesia, judges apply human rights law to civil law cases indirectly, yet this application is inconsistent. The Supreme Court has attempted to increase legal unity by making case law (yurisprudensi) more accessible and by issuing internal regulations that must serve as guidelines for judges-including the application of fundamental rights in civil law cases. Case law and guidelines, however, lack thorough legal reasoning and are, therefore, difficult to apply to complex cases.

Keywords
Human Rights, Private Law, Court Decisions, Indonesian Legal System, Relationship Model

* Corresponding Author. Professor of Legal Philosophy at Bina Nusantara University, Jakarta, Indonesia. LL.B. (Tarumanegara U., Indonesia), LL.M. (Gajah Mada U., Indonesia), Ph.D. (Parahyangan U., Indonesia). The author may be contacted at: shidarta@binus.edu /Address: Bina Nusantara Business Law Department, Jln. KemanggisanIlir III No. 45, Jakarta 11480, Indonesia.

** Lectuerer at Bina Nusantara University. LL.B./LL.M./Ph.D. (Leiden). The author may be contacted at: stijn.huis@binus.edu /Address: Bina Nusantara Business Law Department, Jln. KemanggisanIlir III No. 45, Jakarta 11480, Indonesia.

*** Lecturer at Faculty of Law at the Islamic University of Indonesia, Yogyakarta, Indonesia. LL.B./LL.M. (Islamic U. of Indonesia), Ph.D. candidate (U. of Indonesia). The author may be contacted at: eko.riyadi@uii.ac.id /Address: Faculty of Law, Islamic University of Indonesia, Jln. Kaliurang KM. 14,5 Yogyakarta, Indonesia.
All the websites cited in this paper were last visited on October 25, 2022.

I. Introduction

All over the world, governments have translated human rights into basic, fundamental and/or constitutional rights and freedoms that apply to all residents within their country. Generally, legal systems recognize that fundamental rights apply to state-citizen relationships falling within the realm of public law. However, the ways these fundamental rights are applied in private law cases, or citizen vs. citizen cases, differs greatly between countries.[1]

To generalize, it is safe to state that over the years, human rights have gained impetus in private law dealings.[2] There are three reasons for this increasing role of human rights. First, power asymmetries in certain private law relations have become so large that they are considered to require quite similar approaches as those applied to state-citizen relationships, aiming to protect individuals from powerful private actors. Secondly, the idea has gained momentum that human rights are basic values applying to the entire legal system of a country: both vertically and horizontally, in the realms of public law and private law. Thirdly, protections of basic rights and freedoms are increasingly adopted in state regulations governing private law relationships with more automatic relevance in the field of private law.[3]

Despite the growing recognition worldwide that fundamental rights apply to civil law relationships, there remain large differences in how legal systems approach the matter. Olha Cherednychenko[4] and Aharon Barak[5] have attempted to capture these distinctive approaches to applying human rights in private law into four models or approaches. The first approach treats private law as subordinate to human rights law. In this model, the application of human rights is direct and explicit. The second approach views private law and human rights as complementary legal fields, which means that human rights law can be applied indirectly within the realm of private law. The third approach views private law and human rights law as separate fields but

1 Human Rights and the Private Sphere: A Comparative Study 13-5 (Dawn Oliver & Jörg Fedtke eds., 2007).

2 For details on the role of human rights in private law, *see* Jan Smits, *Private Law and Fundamental Rights: a Sceptical View*, *in* Constitutionalisation of Private Law 9-22 (T. Barkhuysen & S. Lindenbergh eds., 2006); Fundamental Rights and Private Law in the European Union 9 (G. Brüggemeier et al. eds., 2010); EU Compendium-Fundamental Rights and Private Law 10-3 (Christoph Busch & Hans Schulte-Nölke eds., 2010).

3 The Influence of Human Rights and Basic Rights in Private Law vi (Verica Trstenjak & Petra Weingerl eds., 2016).

4 Olha Cherednychenko, *Fundamental rights and private law: A relationship of subordination or complementarity?* 3(2) Utr. L. Rev. 1 (2007).

5 Aharon Barak, *Constitutional Human Rights and Private Law*, *in* Human Rights and Private Law 224-40 (D. Friedmann & D. Narak-Erez eds., 2001).

considers that under certain conditions, judges can apply human rights law in private law proceedings. The fourth approach views human rights and private law as separate fields and believes that human rights cannot be applied in private proceedings but can be applied to courts' private law rulings when assessing whether a court as a state institution has fulfilled its public law obligation to protect citizens' human rights. In this article, we utilize these models to analyze how the Indonesian legal system approaches the human rights-civil law relationship.

Historically, Indonesian private law is much influenced by Roman law, while its Civil Code-introduced in 1848 under Dutch rule-is inspired by the grand works of the *corpus iuris civilis*. In the civil law tradition of Indonesia, the subjective rights of an individual must be based on the objective legal norms that, according to private law, apply to the individual's specific situation.[6] Consequently, Indonesian judges almost never explicitly refer to (public law) human rights or constitutional rights in their legal justifications of private law decisions. However, this doesnot mean human rights are absent in private law.

The reference to human rights by judges is almost always done implicitly by applying general principles of law. Moreover, since the introduction of the chamber system in Indonesia in 2011, every year, the private law chamber formulates legal solutions topressing legal issues to promote more consistent judgments by civil court judges. These formulations are subsequently circulated among judges widely and serve as guidelines for judges to be applied to similar cases. In these formulations, Supreme Court judges of the private law chamber also adopt human rights norms and promote their application throughout the legal system through the Supreme Court's circulars (*Surat EdaranMahkamahAgung*; SEMA).

The primary purpose of this research is to explore the role of human rights in private law judicial proceedings in Indonesia. This paperis structured as follows. Part two will describe the relationship between human rights and private law. Part three will examine how the relationship between human rights law and private law has developed in distinctive ways within certain legal systems and four different models in the legal literature that attempt to capture how human rights are approachedwithin the private law sphere. Part four will explain how Indonesian judges approach the human rights-private law relationship using the four models/approaches as an analytical framework.We will conclude that in Indonesia, the application of human rights by judges in private law cases is especially made implicitly and indirectly, with reference to general legal principles of law, yet not in a consistent way.

6 Subekti, The Specifics of Civil Law [Pokok-Pokok Hukum Perdata] (1987); W.L.G Lemaire, Het Recht in Indonesia 159-77 (1955).

II. The Relationship between Human Rights and Private Law

Human rights issues are commonly analyzed through the lens of constitutional and international law. Such analyses first concern the extent to which the constitution of a certain country has adopted human rights norms. More concretely, it means whether which the constitution stipulates the government institutions to protect human rights and may connect this to the country's human rights record. These human rights analyses address the relationship between different state institutions, as well as the state-citizen relationship. Hence, human rights law is usually placed within the field of public law. However, human rights may also concern the citizen-citizen relationship. The principle of bodily integrity, the right to life, rights to property, and many other human rights can be violated by other citizens, causing damage or harm. While criminal charges (state vs. citizen) are the realm of public law, human rights violations can also lead to private lawsuits for damages (citizen vs. citizen). In this type of private law proceedings, there are clear intersections between human rights and private law norms. Below, we focus on human rights in such private law proceedings.

A. Models of Intersections between Human Rights and Private Law

To take a look at human rights from a private law perspective, we must first examine the intersections between human rights and private law. Although these intersections are different in each legal system, there are common traits, enabling them to be categorized in certain models. The human rights-private law relationship may be categorized into the following four models: 1. the subordination model; 2. the complementary model; 3. the non-application model; and 4. the application by the judge model.[7]

Such models can be further developed by considering the nature of human rights-private law relationships, whether these are vertical or horizontal. We speak of vertical human rights when human rights are the product of legal protections by the state-subjective rights of individuals that are the product of objective human rights laws applying to all citizens of a State. Conversely, we speak of horizontal rights when rights are the result of legal acts (Indo. *perbuatanhukum;* Nl. *rechtshandeling*) between legal persons: whether individuals, corporations, or other legal entities recognized as

7 Cherednychenko, *supra* note 4.

legal subjects under private law.[8] Legal acts are conducted by legal persons for legal consequences. Those between legal persons will create rights and duties between the legal subjects involved. These private rights may be interlinked with human rights.[9]

This intersection between horizontal and vertical human rights can be evident in private lawsuits, for instance, when either judges explicitly refer to human rights law in their legal justification, or parties directly appeal to human rights law in their petitions or pleads. However, most times, one will not find such direct reference to human rights law; in the majority of cases, the application of human rights is implicit.[10]

Eric Engle suggests that the categorization of horizontal and vertical human rights needs to be expanded based on their direct or indirect application. If looking at the third-party effects that human rights have (*Drittwirkung*), this results in the following three outcomes: (1) vertical direct effect is the direct applicability of public human rights to individuals, such as in the EU when human rights of individuals are violated by a member state; (2) horizontal direct effect is found when public human rights law is directly applicable to legal relations or obligations between individuals/private parties; and (3) indirect horizontal effect is applied when private law obligations/relations are interpreted in the light of fundamental rights.[11]

Understanding these indirect-direct and horizontal-vertical effects of public human rights on private law relations/obligations is essential to grasp the four models of human rights application that we present below, based on the models developed by Cherednychenko and Barak as follows.

1.The Subordination or Direct Application Model

As understood by Olha O. Cherednychenko, the subordination model concerns legal systems that position private law relations/obligations below fundamental human rights norms.[12] In this model, enacted fundamental public human rights norms would constitute imperative law, which means that there is little room to sign those rights away through private contracts. The subordination principle is based on the superiority principle, i.e., fundamental human rights are superior to other legal norms and principles in the legal system.[13] Moreover, the superiority principle diminishes

8 The Influence of Human Rights and Basic Rights in Private Law, *supra* note 3, at 8.

9 *Id.*

10 Cherednychenko, *supra* note 4.

11 In addition to the three third-party effects, Engle adds another, which is the Economic Constitution (Wirtschaftsverfassung) and provides human rights protection in the economy for citizens. *See* Eric Engle, *Third Party Effect of Fundamental Rights (Drittwirkung)*, 5(2) Hanse L. Rev. 165-7 (2009).

12 Cherednychenko, *supra* note 4.

13 *Id.*

the effect of the principle *lex dura sed tamen scripta* (law is harsh, but it is the law), which endorses strict application of a rule, even if it has harsh effects. In the subordination model, a legal arrangement that causes a violation of the fundamental rights of one of the parties is an illegal arrangement.[14] Human rights exert a direct effect on private law whose arrangements and effects must be in accordance with human rights. Human rights are a yardstick to measure the legality of private legal relations/obligations. It means that human rights are an essential element of private law and *vice versa*. In this model, finally, basic private law rights are also considered to be human rights.[15]

Cherednychenko's subordination model has much in common with the direct application model developed by Aharon Barak. According to Aharon Barak, based on the superiority principle, human rights should always be considered part of constitutional rights. Human rights, therefore, are constitutional rights that apply not only to state-citizen relations (public law), but also to legal relationships between individuals (private law). Aharon Barak gives the example of freedom of speech, which can not only be violated by governments through prohibiting certain gatherings, but also by private parties through not allowing persons to voice their opinion.[16] Diminishing the freedom of speech simply for reasons of convenience should not be allowed, as the derogation of a human right requires strong legal grounds-whether in the realm of public or private law.

2. The complementary or indirect application model

Legal systems that fall under the complementary model take a different approach. In this complementary model, human rights affect the validity of private law relations/obligations. However, private law determines how human rights norms will be accommodated. In the complementary model, human rights are seen as values that inspire private law and utilized to interpret the properties of private law rights, concepts, and principlesin which there is no subordination. Human rights are treated as other fundamental legal principles: they are applied when interpreting the scope of private law norms in concrete cases. Private law istreated as a separate legal domain even if it has intersections with human rights. When parties in a contract consider their arrangements/obligations to remain within the private law sphere (and no clear lines of public human rights have been crossed), the human rights concerned remain irrelevant.[17]

14 *Id.*

15 *Id.*

16 Barak, *supra* note 5, at 14.

17 Cherednychenko, *supra* note 4.

The complementary model is very similar to the indirect application model developed by Aharon Barak. In the indirect application model, human rights are applied in the realm of private law but in an indirect way. Aharon Barak explains how such indirect application of human rights works through the cascade effect.[18] Human rights are not explicitly incorporated into the realm of private law, but present as values that are the source of the development of private law doctrines. "Bad faith" is an example of such a private law doctrine: when somebody refuses to sell a product to a potential buyer based on the buyer's gender, then the seller can be held accountable for bargaining in bad faith.[19] In this example, the private law concept of "bad faith" has incorporated the human rights issue of discrimination based on gender.

3.The Non-application Model

The non-application model is taken from Aharon Barak. Here, human rights are considered the exclusive domain of public law which only concern state-citizen relations. Nonetheless, rights and protections are already available within the private law system itself. For instance, if an employer wants to lay off an employee who is temporarily disabled because of a work-related injury, s/he may find a judge in his or her way who declares such lay off to be against public policy. In private law, public policy has a legal limitation of the freedom to contract and may serve to protect the rights of employees because it holds that no one can lawfully do something potentially injurious to the public or against the public good. In this model, however, such protections are not viewed as part of human rights.[20]

4.The Application in the Judiciary Model

Aharon Barak lastly introduces the application in the judiciary model. This model views human rights as public rights only relevant to disputes between citizens and the state. In this model, human rights do not regulate private relations and obligations. While human rights and private law are separated realms in this model, the courts, as public institutions, are obligated to uphold human rights. If a judge of appellate court encounters a first-instance court judgment concerning a private law matter inconsistent with the human rights of an appellant, the court must overturn it. when a court judgment has allowed a person to only sell or buy products from/to persons from a certain ethnicity, for instance, this judgment must be then considered

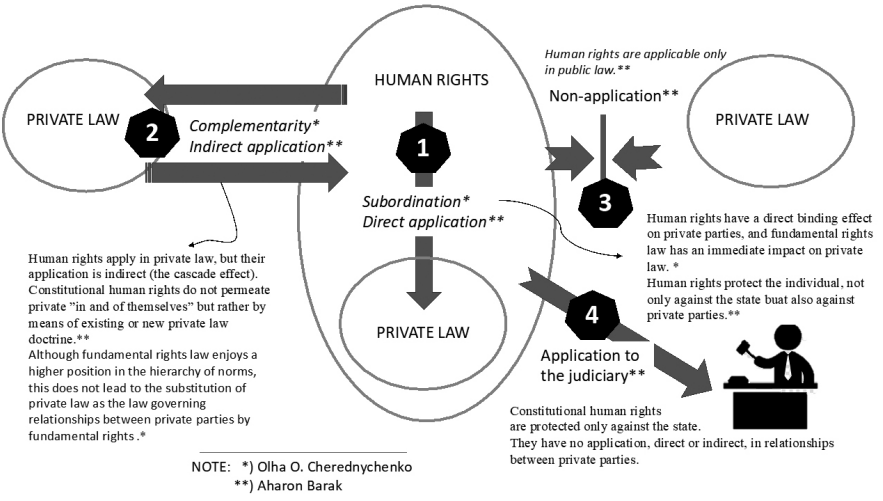
18 Barak, *supra* note 5, at 14.

19 *Id.* at 21.

20 *Id.* at 18.

inconsistent with human rights.[21] The difference with the other models is the logic that a public institution-the first-instance court-has transgressed human rights. The issue remains in the realm of public law, while the matter is a "citizen-vs-the-state" dispute. It is only the state institution that can be held accountable for the transgression of human rights.[22]

In application of the judiciary model, the court system is responsible for preventing lower courts from justifying human rights violations by private parties. Even if the human rights violation originates from a private lawsuit, the court allowed this violation, which means that the court, as a state institution, can be held accountable. In this model, the scope of preventing human rights violations in private law proceedings is limited to those that occur in the application of the law by the judiciary. It does not concern private parties.



B. Human Rights Application in Indonesian Private Law

Cherednychenkohas observed that in the German legal system, human rights tend to operate in the private law realm (especially contract law) in line with the subordination model. According to him, Dutch and British legal systems lean towards the complementary model, in which human rights law and private law are considered

21 *Id*. at 25.

22 *Id.*

23 Compiled by the authors based on Cherednychenko and Barak models.

intersected, thereby influencing each other.[24] Similarly, Aharon Barak identifies the German (and Swiss) model as examples of a country that falls into the direct application model of human rights in private law proceedings. However, Barak remarks that Germany follows the indirect model in some private law matters, as well. He says the indirect model is dominant in Italy, Spain, and Japan; the non-application model is popular in Canada; and the application in the judiciary model is inthe US.[25]

Then, what model is followed in Indonesia? If investigating this question from a normative perspective, we will find that the relationship between private law and human rights is regulated in Indonesia's 1848 Civil Code (*BurgerlijkWetboek*).

Article 1, paragraph (3) of the 1848 Civil Code stipulates that "the enjoyment of civil rights is independent of public rights and responsibilities (Het genot van burgerlijke regten is on afhankelijk van staatkundige regten).[26] Indonesia inherited the principles from the Dutch and French civil law traditions that place civil law on equal footing with public law and provide that rights originating in the public legal realm do not need to be explicitly codified in the private legal realm to be applicable. In this course, they do not need to be made part of the *ius constitutum* of civil law.

The fact that the public rights are applicable in the private law realm does not say much about the nature of their application. In this regard, the following questions may arise: Is the relationship hierarchal, meaning that civil law norms are subordinate to public rights?; Or is this relationship complementary, and are civil law concepts (re)-interpreted in the light of public rights (and vice versa)? Below, we will show in our normative analysis how, in some cases, Indonesia follows the complementary model, as can be inferred from Articles 1 and 3 of the 1848 Civil Code, while in other cases, it follows the subordination model, as can be inferred from Articles 1339. In Indonesia, the existence of these articles and their application by the courts have led to ambiguity concerning how the relationship between civil law and human rights should be defined. We will illustrate this ambiguity by discussing examples of judgments in which courts have established the supremacy of civil law to public rights and judgments in which public rights were considered superior.

We continue our normative analysis of Article 3 of the 1848 Civil Code which provides a negatively worded variant of Article 1: by declaring that "no punishment shall result in the civil death of a person or the loss of all civil rights." (Geenerlei straf heeft den burgerlijken dood of het verlies van alle burgerlijke reghten ten gevolge).

24 Cherednychenko, *supra* note 4.

25 Barak, *supra* note 5, at 14.

26 Indonesian Civil Code (Promulgated by publication of April 39 1847 S.NO.23), https://www.refworld.org/pdfid/3ffbd0804.pdf.

Article 3 negatively states that abolishing someone's civil rights all will lead to a person's civil death (civiliter mortuus; burgerlijke dood),which is unlawful. It indicates there are fundamental civil rights considered inalienable (for instance, the right to work, to marry, to have offspring) that cannot all at once be taken away by the State from someone with a legal sanction or a special regulation.[27] For instance, the Indonesian government cannot take the fundamental right to marry and have offspring away from HIV AIDS patients because of the considerable risk that the future wife and child will be infected.[28]

In Indonesia, the mentioned fundamental human rights are listed in Article 10 (1) of the 1999 Human Rights Law: the right to form a family and have offspring through a valid marriage.[29] Subsequently, these fundamental rights have been turned into constitutional rights by adopting them into Article 28B (1) of the Indonesian Constitution (Second Amendment 2000). It is noteworthy that the 1848 Civil Law had already recognized the existence of fundamental civil rights some 100 years before Indonesia's Independence and some 150 years before the Second Amendment of the 1945 Constitution made them constitutional rights. In other words, in Indonesia, the existence of fundamental human rights, which are considered in the realm of public law, was recognized within the private law system first. Article 3 indicates that Indonesia continued the complementary model of the Dutch civil law since the principle of the prohibition of causing a civil death recognized in the civil law system is meant to be (andis) applied in the realm of public law, particularly in the field of criminal law.[30] The sanctions referred to in Article 3 refer to all types of punishment, including and especially criminal sanctions, that the sanctions must not cause civil death.

Article 3 of the 1848 Civil Code indicates that Indonesian civil law recognizes a number of fundamental "civil rights" as superior, inalienable rights. In the complementary model, the prohibition for a legal sanction to cause a person's civil death as established in Article 3 also applies to other legal fields. There are clear intersections with criminal law, namely in the implementation of the legal sanctions mentioned in the Criminal Code. In practice, however, Article 3 is not often applied

27 On October 23, 1985, Indonesia signed the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which was approved by the UN General Assembly in its session on December 10, 1984. However, its ratification occurred more than 10 years later with Law No. 5 of 1998 on the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Indeed, the punishment that may result in civil death is not specifically mentioned in this Law No. 5 of 1998 as a violation of human rights, but it is logically understood that such punishment in inhuman.

28 Shidarta, Castration and Civil Death [Kebiri Kimia Dan Kematian Perdata], Binus University Business Law Website (Oct. 30, 2015), https://business-law.binus.ac.id/2015/10/30/kebiri-dan-kematian-perdata.

29 Law No. 39 of 1999 on Human Rights.

30 Shidarta, *supra* note 28.

because the scope of Article 3 has never been extended as to mean that every individual's fundamental rights are non-derogable.

However, there are contrary examples in Indonesian legal practice. Under some circumstances, fundamental civil rights are considered derogable. In 2020, for instance, Indonesia introduced a Government Regulation to the 2002 Child Protection Law that imposes chemical castration as a sanction for child rapists, which potentially interferes with the convict's fundamental right to have offspring. Based on the rationale that the protection of children's rights has primacy over the fundamental rights of child rape convicts, the 2020 Government Regulation makes an exception to the right to privacy, as a child rapist's identity will be published, and the convict may be ordered to wear an electronic detection device following release.[31]

There are cases in which courts have refused to order the chemical castration of child rape convicts-even under strong public and media pressure to do so. For instance, in the case of the religious Islamic boarding school teacher Herry Wirawan, who had sexually molested 12 of his pupils, who at the time of the crime were between 13 and 17 years of age, and some had given birth to the offender's children, the court decided to give a life sentence and a restitution of approx. Rp. 85 million per victim, to be paid by the Ministry of Women Empowerment and Child Protection. The judges considered that every convict should be given a chance to repent and live a normal life following release from prison.[32] Claiming the human rights of the offender had to be respected and according to Article 67 of the Criminal Code, a life sentence does not allow for additional penalties. The court neither sentenced the offender to the death penalty nor ordered chemical castration although both included in the indictment of the prosecutor. According to the court, both the death penalty and chemical castration would violate the human rights of the convict.[33] Moreover, the court reasoned that the offender was already isolated from society and the direct environment of the victims with a life sentence for a sufficiently long time. The judges of the district court considered that the right to life and offspring, and the principle of bodily integrity could not be removed from the offender.[34]

31 This Law has been amended several times, lastly with Law No. 17 of 2016 on the Stipulation of Government Regulation in Lieu of Law No. 1 of 2016 on Second Amendment to Law No. 23 of 2002 on Child Protection to become Law. In 2020, Government Regulation No. 70 of 2020 on the Procedure for Carrying out Chemical Castration, Installation of Electronic Detection Device, Rehabilitation, and Publication of the Identity of Sexual Offenders against Minors.

32 *See Herry Wirawan: Indonesian teacher who raped 13 female students jailed for life*, BBC News (Feb. 15, 2022), https://www.bbc.com/news/world-asia-60384652.

33 *Id*.

34 Shella Latifa A., *The Considerations of the Judge for Denying the Death Penalty and Chemical Castration in the Herry Wirawan Case* [Pertimbangan Hakim Tak Kabulkan Hukuman Mati hingga Kebiri Kimia pada Herry Wirawan], Tribune news (Feb. 2, 2022), https://www.tribunnews.com/regional/2022/02/15/pertimbangan-hakim-tak-kabulkan-

In other cases, however, courts have applied the new sentences for child rape in the 2020 Government Regulation. In case of *69/Pid.Sus/2019/PN.Mjk*, for instance, the court of Mojokerto sentenced the accused to 12 years in prison and an Rp. 100 million fine, with the additional sentence of chemical castration.[35] In appeal, the High Court of East Java upheld the ruling.[36] However, the convict subsequently decided to accept the sentence and not appeal in cassation. The inconsistency in rulings demonstrates that there are differing opinions among judges as to whether chemical castration violates the fundamental and non-derogable rights of the offender. However, the issue of chemical castration, resulting in the inability to have sexual relations or offspring after the conviction, causes the civil death of an ex-offender, as Article 3 of the 1848 Civil Code does not considered in the legal justifications of court rulings.[37]

Complementarity between civil law and human rights norms can also be found in Indonesian contract law. Provisions concerning the freedom of contract (partijautonomie) are included in Book III of the 1848 Civil Code. However, the freedom of contract does not mean that parties can waive all rights/obligations. Mandatory norms in private law (*dwingendrecht*, *normamemaksa*) can not be waived through contract. Article 1339 of the 1848 Civil Code stipulates that a contract should meet a number of absolute requirements. For instance, the voluntary principle-a contract may not be coerced to one of the parties-must be met. The voluntary principle does not have to be made explicit in contracts as it is an essential norm (*unsuresensialia*) and part of mandatory law.

Regulatory norms are not always mandatory laws. So, parties can overrule these norms through contract. The voluntary principle requires that both parties must provide their agreement to any waivers of private law rights/obligations. As general private law norms that are not explicitly overruled by the parties still apply, these general norms do not need to be explicitly mentioned in the contract and will apply naturally (*unsurnaturalia)*. According to the *lex dura sed tamen scripta* doctrine, general private law norms precede over the "freedom of contract" principle. After some research, we found only a few exceptions to this doctrine.[38] In a case of *the Government*

hukuman-mati-hingga-kebiri-kimia-pada-herry-wirawan.

35 *See* Court Verdict Number 69/Pid.sus/2019/PN.Mjk. *See also Rape: Indonesian man to face castration*, Vanguard (Aug. 26, 2019), https://www.vanguardngr.com/2019/08/rape-indonesian-man-to-face-castration.

36 Ishomuddin, *Sentence to Chemical Castration, Mojokerto District Court Judge: The Defendant's Actions Are Sadistic* [Vonis Kebiri Kimia, Hakim PN Mojokerto: Perbuatan Terdakwa Sadis], Tempo (Aug. 26, 2019), https://nasional.tempo.co/read/1240505/vonis-kebiri-kimia-hakim-pn-mojokerto-perbuatan-terdakwa-sadis.

37 *Supra* note 35.

38 *See* Putusan Perdata, the directory of the court decisions in the Supreme Court website. https://putusan3.mahkamahagung.go.id/direktori/index/kategori/perdata-1.html.

of Indonesia v. PT Newmont Nusa Tengara, the Supreme Court, in its legal consideration, argued that the contract between the parties had to be viewed as *lex specialis,* a more specific legal act that had put aside the existing general laws as being *lexgeneralis*. The Supreme Court judges, in this case, considered that private contracts could put aside state law provisions.[39] Their reasoning is based on the private law principle of *Pacta Sunt Servanda* adopted in Article 1338 (1) of the 1848 Civil Code that "all valid agreements apply to the parties as law."[40]

Such ambiguity regarding the position of fundamental rights in the realm of private law is not unique to Indonesia. Cherednychenko has illustrates that in Germany, such ambiguity also exists.[41] Since the establishment of the Constitutional Court, "the constitutionalisation of private law" has taken place. From a viewpoint of constitutional law, a private law right will automatically turn into a human right. This tendency to view all fundamental rights-including private law ones-as public human rights can also be found in AharonBarak's use of the concept "constitutional human rights."[42]

In Indonesia, there is no such limited view of human rights as fundamental rights that are guaranteed by the Constitution. Indonesia's 1945 Constitution is not divorced from other legal regulations. Articles 27-34 of the 1945 Constitutionare attached to many other pieces of legislation, such as the People's Consultative Assembly's Decree No. XVII/MPR/1998 and several laws/acts, including in the realm of private law.[43] Aharon Barak argues that human rights shouldbe interpreted through the constitution which leads to "constitutional human rights."[44] By viewing all human rights as falling under the fundamental rights mentioned in the 1945 Constitution, Aharon Barak not only turns universal human rights into positive law, but also makes them the highest norms in the legal system. "Human rights" become "constitutional rights," and "constitutional rights" become "fundamental values."[45] This constitutional approach to human rights is displayed in the proportionality doctrine.[46]

The proportionality doctrine encompasses a legal mechanism to establish the scope

39 The Supreme Court Decision No. 13/B/PK/PJK/2013 between the Governor of Nusa Tenggara Barat and PT Newmont Nusa Tenggara.

40 Article 1338 modified the formulation of the original meaning of "Pacta sunt servanda" that means "agreements must be kept." *See Pacta Sunt Servanda*, Britannica, https://www.britannica.com/topic/pacta-sunt-servanda.

41 Cherednychenko, *supra* note 4.

42 *Id.*

43 Several laws intersect with private law, such as Law No. 8 of 1999 on Consumer Protection and Law No. 13 of 2003 on Manpower.

44 Barak, *supra* note 5, at 25.

45 *Id.*

46 *Id.*

and limits of human rights. The central question that the proportionality doctrine seeks to answer is whether a certain limitation of citizens' rights constitutes a violation of a fundamental constitutional right or not. To answer this question, a judge will look at four criteria: (1) the limitation serves an appropriate objective; (2) the measures that limit a right are taken following a proper rational weighing process; (3) there is no alternative solution available that can achieve the same objectives with less limitation of the fundamental right; and (4) there must be a proper balance (proportionality strictu sensu) between the social necessity to fulfill the objectives and the social harm inflicted by limitation of a constitutional right.[47]

Aharon Barak signaled that the proportionality doctrine had been mostly applied in reviewing the constitutionality of statutes. Judges have no obligation to apply the proportionality principle in complex cases involving fundamental rights. However, by analyzing relevant cases, one may find indications and patterns of how human rights are applied in civil court cases in Indonesia. Realizing that the casuistic nature of our exploration cannot be used to make strong generalizations, it opens space for more elaborate discussions of the topic.

III. Application of Human Rights in Indonesian Private Law

Judges in Indonesia often do not refer to constitutional rights and freedoms when applying human right normsin civil law cases. This would imply a preference for a complementary model or indirect application of human rights, in which judges do not feel themselves restricted to the articles in statutes pertaining to human rights. Judges may not even mention the human rights articles at all. In the Supreme Court judgment 179 K/Sip/1961 regarding an inheritance case, for instance, the judge simply declared: "... on the basis of general humanism and feelings of justice and based on the principle of equal rights for men and women..." Only in few cases in which the Supreme Court applied human rights norms, the judge mentions the relevant constitutional article (Supreme Court judgment 300 K/Pdt/2010). No articles from the ratified international conventions were cited by the judges. More often, judges refer to relevant case law (*e.g.*,

47 Aharon Barak, Proportionality, Constitutional Rights and Their Limitation 99-106 (2012). This doctrine, according to Barak, stemmed from a theory developed after World War II. It has expanded the concepts of constitutional law, thereby blurring the lines between constitutional and civil law. This development simultaneously gave rise to purposive interpretation. Barak's reasoning is criticized in Ariel Bemdor & Tal Sela, *How Proportional is Proportionality?*, 13 (2) Int'l J. Const. L. 530 (2015).

Supreme Court judgment 2078 K/Pdt/2009). The justification of a case is sometimes based on relevant empirical evidence. Conversely, in other cases, the presented empirical evidence is not considered by the judge (Supreme Court judgment 714 PK/Pdt/2019). In cases concerning immovables, especially those concerning customary land, human rights considerations are often put aside, and a formalistic approach among judges is dominant. This has significant consequences, as customary land often lacks written proof and authentic documents.[48]

Law is a hierarchal system, with constitutional norms at the top of the pyramid. In Indonesia's complementary model, however, judges do not necessarily follow a coherent hierarchy strictly when adjudicating civil law cases that involve human rights and apply human rights norms; they do not necessarily provide clear legal reasoning or justification that explains the interrelations of relevant norms and their connections to the facts of the case. For example, the highest but most abstract norms in Indonesia's legal system, "Pancasila" may be directly applied as legal justification by a judge adjudicating a civil case. These values are considered the fundamental norms of the Indonesian state (Staatsfundamentalnorm).[49] The position and the actual wording of these values need not be explicitly explained. In the judge's legal consideration, as we have seen at the very start of this section, Judgment 179 K/Sip/1961 simply mentions humanism *(*perikemanusiaan*)* as a norm for general application without describing its origins and how it specifically must be applied to the case at hand.[50]

Under this normative framework, one category appears to be the most-favored legal source of judges when adjudicating civil cases. This category has been called "regulations below the level of statutes."[51] In Indonesia, there are many different types of regulations within this category, as listed in Article 8 of Law 12/2011 concerning Law Making.[52] Among the regulations below, the statutes mentioned are regulations and

48 Supreme Court judgment 22/Pdt.G/2004/PN.Ab. *See also* Shidarta, *Display of Legal Reasoning Approaches in Decisions concerning Customary Land* [Peragaan Pola Penalaran Hukum dalam Putusan Kasus Tanah Adat], 3 Jurnal Yudisial 269 (2010).

49 Shidarta, The Law of Reasoning and Legal Reasoning [Hukum Penalaran Dan Penalaran Hukum] 247-9 & 257 (2013).

50 The Supreme Court of Indonesia has sought to publish as many of its rulings digitally as possible, but prioritizing decisions of recent years. Judgment 179K/Sip/1962 was not found in its full publication, but excerpts from this judgment can be found in: https://putusan3.mahkamahagung.go.id/yurisprudensi/detail/11e93a313416280ab9c0303834343231.html.

51 Maria Indrati S., Science of Legislation [Ilmu Perundang-Undangan] 91-103 (2007).

52 Article 8 of Law No. 12 of 2011 on Legislative Formation stipulates: (1) Types of legislation, other than the one referred to in Article 7 paragraph (1), including regulation issued by the People's Consultative Assembly, the House of Representatives, the Regional Representative Council, the Supreme Court, the Constitutional Court, the Supreme Audit Institution, the Judicial Commission, the Central Bank of Indonesia, Ministry, Agency, Institution, or Commission established according to any National Law or by the Government as mandated by the Law, Provincial House of Representatives, Governor, District House of Representatives, Mayor/Regent, Chief of Village or its equivalent; (2)

policies of the Supreme Court whose regulations and policies include the guidelines for the courts on legal issues that frequently involve human rights violations. An example of such regulation is Supreme Court Regulation 3/2017 concerning the Guidelines for the Adjudication of Cases involving Women.

IV. Human Rights in the Supreme Court's Internal Regulations

Our analysis of civil law cases suggests that the complementary model, as it is applied in the Indonesian context, has several weaknesses**.** First**,** the principle that judges in civil cases take a passive attitude to a case is often strictly applied. It means that judges are not inclined to relate their legal considerations to human rights unless one of the parties explicitly mentions a human rights violation in the claim. Judges will use a narrow perspective by limiting their legal reasoning only to what has been brought to the fore by the parties in a case.[53]

Second, generally judges consider that human rights law is located in the realm of public law and will mainly be applied by a limited number of judges who respect human rights in their judgments. Even those judges will only apply human rights to civil law cases if they face a complex or even extreme case in which human rights violations involve vulnerable victims of a massive scale, and/or have attracted a lot of public attention.[54]

This situation has encouraged the Supreme Court to design interventions by issuing guidelines through circulars. Civil law cases generally do not involve other state institutions, such as the police or the prosecutor in criminal cases. It means that the Supreme Court is the most apt institution to intervene to create more legal unity. Since 2012, the Supreme Court has issued the results of the plenary meeting of the chambers of the Supreme Court in which solutions for complex/urgent cases are offered as guidelines for lower courts. The legal issues discussed in the plenary meeting are diverse and may concern procedural and substantive legal issues-including those in

Legislation, as referred to in paragraph (1), which is recognised and legally binding if it is mandated by any higher legislative product or established based on each respective authority.

53 Lord Bingham of Cornhill, *The Judges: Active or Passive: Maccabaean Lecture in Jurisprudence*, *in* 139 Proceedings of the British Academy (Peter Marshall ed., 2005).

54 *See*, *e.g.*, Court Decision No. 118/Pdt.G/LH/2016/PN Plk. In the case that attracted public attention, the judges referred to Article 8 of Law No. 39 of 1999 which states that protection, promotion, enforcement and fulfilment of human rights which is the responsibility of the state.

connection with human rights. A selection of such circulars is summarized in Table 1.

Table 1 Supreme Court Circulars applying Human Rights Norms to Civil Law[55]

CircularNo.	Chamber	Norm created
07/2012[56]	Civil law	Concerning divorce, in view of Arts. 47 and 50 of the Marriage Law, a divorce will not end parental authority [of one of the parents] and will not create custody [of one of the parents] (compare Art. 299 Civil Code). The judge is competent to appoint one of the parents as the person as daily caretaker and responsible for the daily upbringing of the childreninvolved (Art.41 Marriage Law).
04/2014	Civil law	If two companies merge and an employee does not agree: The employee who is not willing to work for the new company remains his rights on severance pay (Art. 163 jo Art. 156 13/2003 concerningLabour Law).
04/2014	Religious law	The issue: If husband and wife are separated for more than three months, must this be considered sufficient grounds for divorce, or must the judge establish that the marriage is broken and can occur after one month only? A marriage suit (by the wife) can be granted if the facts of the case prove that the marriage is broken, based on the following indicators: - A reconciliation attempt has been conducted but failed. - The communication between husband and wife is troubled. - At least one of the spouses does not fulfil her/his marital duties. - The couple lives separated from bed or house. - Other issues (there is a third person, domestic violence, gambling, etc.).[57]
03/2015	Agama	A court judgment concerning child support must be followedand the amount increased with 10%-20% per year. The amount of child support of the judgment excludes the additional responsibility for medical and educational costs.
04/2016	Criminal law[58]	If a husband performs a second marriage without his first wife's permission, this means that Art. 279 of the Criminal Code is applicable.

55 Compiled by the authors based on the summary of all the Supreme Court circulars regarding the plenary meetings in 2012-17. *See* the online directory of the Supreme Court, https://putusan3.mahkamahagung.go.id/peraturan/index/kategori/sema.html.

56 Different chambers have different templates. The template used by the criminal law chamber, for example, has a column for issues with an elaboration of the background, while other chambers do not have it. It shows that the Chief Justice gives full trust to each chamber and simply signs circulars without correcting and/or reprinting the result of plenary sessions.

57 Interestingly, the chamber used colloquial terminologies, such as PIL (lover) and WIL (mistress) (popular acronym of "other desired man/woman"). Also, it is used in the circular.

58 This formulation was discussed in the plenary session of the criminal law chamber. However, it corresponds with human

01/2017	Civil law	The right of the biological mother to have custody over an underage child following a divorce can be designated to the father when it is expected that this will have positive effects on the development of the child after taking into consideration the interests/condition/ wishes of the child during the divorce process.
01/2017	Civil law	An application for the revocation of a well-known trademark on the grounds of bad faith does not expire and can always be accepted (Vide Art. 21 (3) andArt. 77 Law 20/2016 onTrademarks and Geographic Indications.
01/2017	Religious Law	In the framework ofthe adoption of Supreme Court Regulation 3/2017 concerning Guidelines for the Adjudication of Cases involving Women with the objective of protecting women's post-divorce rights, specifically *nafkah iddah* (maintenance of the wife during the waiting period following a *talaq*), *mut'a*h (consolation gift), dan *nafkah madliyah* (due spousal maintenance), the judge may add the sentence to the judgment, "which must be paid before the husband's pronunciation of the talaq." If the wife has no objections, the session of the pronunciation of the *talaq* can proceed even though the husband has not paid the amount of post-divorce rights established in the court judgment. (This provision changes C12, of circular 3/2015, in casu *nafkah iddah*, *mut'ah*, and *nafkah madliyah*).
01/2017	Religious law	The judgment concerning the designation of custody *(*hadlanah*)* must mention the obligation for the custody holder to facilitate the other parent to meet his/her child(ren). In the legal consideration, the judge must mention that obstructing the other parent to meet the child(ren) can be grounds for retraction of custody rights.
3/2018	Civil law	Regarding the issue of a divorce suit in the context of a marriage that has not been registered at the civil registry, the civil court can accept and grant such divorce case only if the marriage took place before the 1974 Marriage Law and Government Regulation 9/1975 came into force.
03/2018	Civil law	Employees' right to payment of wage during the termination process: In case a fixed-term employment agreement (PKWT) has been changed into a permanent employment agreement (PKWTT), the employee loses the right to payment of wage during the termination processin case of termination of employment (PHK).

It remains unclear to what extent judges of lower courts apply the guidelines issued as Supreme Court circulars. Research conducted at the Religious Court investigated the

rights in the private law realm, including legal protection for any woman (wife) who found her husband remarried without her consent.

extent to which judges implemented the guideline in circular 3/2015 on child support. It appeared that of the seven judgments on child support, only three followed the guideline to adopt the statement that the amount of child support established in the judgment must be increased by 10%-20% per year. The majority did not follow the circular.[59] Of course, the interested party can always appeal when s/he feels that the non-application of the guidelines concerning child support harms her/his interests. According to Amran Suadi, the head of the Religious Chamber of the Supreme Court, non-application of Supreme Court guidelines will be corrected once a case reaches the Supreme Court.[60]

A conventional mechanism through which the Supreme Court can increase the unity of legal system by making precedents through its judgments (yurisprudensi). At the moment, relevant *yurisprudensi* is not mentioned in the Supreme Court guidelines. The Supreme Court circular 1/2017 includes a provision, which states: "The right of the biological mother to have custody over an underaged child following a divorce can be designated to the father when it is expected that this will have positive effects on the development of the child after taking into consideration the interests/condition/ wishes of the child during the divorce process.[61] *Yurisprudensi* on this issue has been widely applied by judges. The Supreme Court judgment 102 K/Sip/1973 of 24 April 1975 is often cited as stating that in custody suits concerning small children, the natural mother will be granted custody since this is in the best interests of the child, unless it is proven that the mother is incapable of providing sufficient care of the child.[62] The circular of the Supreme Court does not show what criteria must be applied in the weighing process: when is a mother inept to provide care? Is it now sufficient that care of the father provides better opportunities to the child for him to receive custody (even if the mother is also able to provide good care)? Much remains unclear.

Moreover, if analyzing the Supreme Court judgment 102 K/Sip/1973, it becomes clear that, in fact, the Supreme Court judges did not underline the mother's right to custody over young children (even if it did state that for young children, motherly care is preferred), but considered the case a mistrial because not all parties were heard

59 Mohammad Farhan et al., *Implementation of the Supreme Court Circular Number 3 of 2015 in the Religious Court of Sawahlunto* [Implementasi Surat Edaran Mahkamah Agung Nomor 3 Tahun 2015 Pada Pengadilan Agama Sawahlunto], 19(2) Jurnal Ilmiah Syariah 245 (2020).

60 Interview with Amran Suadi, Head of the Religious Law Chamber of the Supreme Court (Feb. 25, 2022).

61 *See* the Supreme Court circular 1/2017, https://jdih.mahkamahagung.go.id/legal-product/sema-nomor-1-tahun-2017/detail.

62 The term "102 K/Sip/1973" appeared as many as 2005 times indicating that the decision is very popular among judges dealing with such a case. *See* Ditemukan 2003 Data, DirektoriPutusan, https://putusan3.mahkamahagung.go.id/search.html?q=%22102+K%2FSip%2F1973%22.

in the case as required by Article 63 of the Marriage Ordinance (no longer in force today).[63] The problem was that the father's claims were not thoroughly investigated, so that there was a mistrial that had to be repeated by the civil court of Ujung Pandang (now Makassar). The Supreme Court did not decide at all that the mother was granted custody over the young child involved, yet in legal practice, judges tend to use jurisprudence this way. Perhaps judges also do this in view of Article 105 of the 1991 Compilation of Islamic Law, which stipulates that custody for children of 12 years old and younger in principle will be assigned to the mother. As there is no similar legal regulationfor non-Muslims, judges perhaps look for other legal sources to create consistency across the religious and civil law systems. The reformulation in the circular mentions the rights of the mother to custody over young children that can be assigned to the father - without mentioning the legal basis of these rights. It points at implicit application of *yurisprudensi,* as such rights are not mentioned in the Marriage Law or the Civil Code.[64] Therefore, the Supreme Court attempted to clarify the legal issue through a circular. Because the legal reasoning/justification is not published, however, significant unclarities remain.

V. Conclusion

In this article, we argue that Indonesia applies the complementary model or indirect application of human rights in civil law cases. The principle of proportionality - and related concepts of fairness and justice - provide ample room to harbor fundamental human rights, and Indonesian judges have used this room in civil law cases to protect the rights of Indonesian citizens. The indirect application approach applied in Indonesia gives judges relatively large freedom of choice about whether and how to apply human rights in civil law cases.

In Indonesia, the result is a disparity in the application of human rights, as the cases discussed in this paper illustrate. There is no standard that guides judges on how and when to apply human rights to particular legal cases. Indonesia has ratified all core

63 Article 63 of the Marriage Ordinance is a regulation that applies to Christian Indonesian citizens, which was revoked after the enactment of Law No. 1 of 1974 concerning marriage. This article requires the judge to listen to the opinions of the blood and marriage relatives before deciding which of the biological parents will receive custody.

64 If analyzing the syllogism in this decision, there is the major premise: "The action by judexfacti to listen to the closest relatives by blood and by marriage of the child concerning who shall be best appointed as a trustee is a procedure to meet the requirements in deciding who shall be entitled to trusteeship in a divorce case." This premise was actually created by the Supreme Court judgment 102 K/Sip/1973.

human rights instruments and is committed to harmonizing national legislation with the adopted human rights norms and apply them in practice. It is thus necessary for judges of the Supreme Court and lower courts to provide a complete and coherent legal reasoning of how they weigh human rights to other interests in civil law cases to ensure a consistent application in the field of private law. Unfortunately, our exploration suggests that such thorough legal reasoning is not happening yet in practice.

According to the principle of independence of the judiciary under the separation of powers, the government cannot intervene in judicial matters by giving directions to judges on how human rights must be applied in certain cases. The Supreme Court, however, can provide direction in the form of internal guidelines and *yurisprudensi*. The Indonesian Supreme Court has issued Supreme Court regulations pertaining to human rights - the most notable being the Guideline on Adjudication of Cases involving Women. Since 2012, moreover, the Supreme Court has taken the initiative to designate the results of the plenary meeting of the Supreme Court's chambers as "guidelines" and publish them as a Supreme Court Circular. As shown above, the guidelines include legal issues on human rights. However, the circulars are neithervery detailed, nor contain the context and legal reasoning behind the norm created. Therefore, the guidelines provide little direction on how the weighing process between human rights and other interests in civil law cases ought to take place. The circulars do not explain how the offered legal normsrelate to relevant *yurisprudensi*, either. Another issue is that *yurisprudensi* itself is neither well-developed in Indonesia, nor consistently applied by judges.

By making *yurisprudensi* increasingly accessible and issuing internal circulars, the Indonesian Supreme Court has made efforts to provide more guidance to judges on how to integrate human rights norms into civil law cases. Yet, we recommend that in the future, these guidelines - whether in the form of *yurisprudensi*, Supreme Court Regulations or Supreme Court Circulars - describe the legal issue, the legal context of the legal issue, the offered solution and the legal reasoning behind the offered solution into more detail. This would greatly enhance the probability that lower court judges understand how to weigh the limitation of human rights with other private and public interests in civil law cases and will create more legal unity in Indonesia.

Received: August 1, 2022
Modified: September 30, 2022
Accepted: November 1, 2022